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Gerard E. Lynch
Columbia Law School, glynch@law.columbia.edu

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Towards A Model Penal Code, Second (Federal?): The Challenge of the Special Part

Gerard E. Lynch

The Model Penal Code is among the most successful academic law reform projects ever attempted. In the first two decades after its completion in 1962, more than two-thirds of the states undertook to enact new codifications of their criminal law, and virtually all of those used the Model Penal Code as a starting point.¹ The Model Penal Code was influential in a variety of different ways. First, the very notion of a systematic codification of criminal law received a dramatic boost from the Model Penal Code. Apart from the degree to which any particular state recodification resembled the Model Penal Code, the Code provided the impetus for undertaking new codifications in the first place, where many jurisdictions had previously been content with relatively loosely organized compilations of the accumulated criminal statutes passed over the years, many of which simply embodied or assumed traditional common law rules. Second, the specific form of codification developed in the Model Penal Code was powerfully influential. The new state codes typically followed the Model Penal Code's strategy of beginning with sections that combined definitional functions with presumptive rules addressing the "general part" of the criminal law, followed by specific statutes defining particular crimes. Third, the particular resolutions for specific traditional criminal law issues adopted by the Model Penal Code were often quite influential. Although some of the Code's

formulations (e.g., the modified felony-murder "presumption") found few followers, many others were broadly adopted either in state codes (e.g., the definitions of mental culpability terms), in judicial elaboration of common law standards or non-Code statutes (e.g., the widespread use of the "substantial step" test in federal court definitions of attempt or even in constitutional law (e.g., the Supreme Court's near-incorporation of the Model Penal Code standard for use of deadly force in making an arrest into the Fourth Amendment definition of a "reasonable" seizure of the person).

Now, as we celebrate the 35th anniversary of the final promulgation of the Model Penal Code, the wave of codifications stimulated by the Code has long since crested. But the Code's influence lives on. Most American law students who study substantive criminal law learn it in a course that places heavy emphasis on the Code as a teaching tool and as the most enlightened single embodiment of the common law approach to the subject. Courts continue to refer to the Model Penal Code and its commentaries as persuasive authority. And the principled but utilitarian approach that underlies the Code's solutions dominates the thinking of judges as they try to make sense of the many issues presented in determining the boundaries of criminal law.

I think it is fair to say, however, that the continuing influence of the Model Penal Code today is far greater with respect to the "general part" of the criminal law than with regard to the "special part." Within the codes that were adopted under the Model Penal Code's influence in the 1960s and 1970s, legislatures

3. Id. § 2.02.
have made relatively few changes in the sections embodying general principles of law or interpretive rules. Courts continue to cite the Model Penal Code on the definition of attempt, the nature of justification, or the relevance of mistake. Because the spirit of the times is more vindictive and less liberal than that of the period in which the Model Penal Code was drafted, courts and legislatures may take a more conservative or prosecution approach to some of these issues than the positions supported by the Code, but the Model Penal Code approach to any given issue is still likely to be a persuasive authority, or a starting point for analysis, even where that position is not ultimately adopted. And while academic commentators continue to pore over the traditional criminal law issues, and often propose criticisms or modifications of the Model Penal Code responses to those issues, few would disagree that the particular positions taken by the Model Penal Code remain the conventional wisdom on a great many subjects, and have stood the test of time as an honorable and intelligent effort over all.

The Model Penal Code is a significantly less potent guide to the “special part” of the criminal law today. Congress (proud possessor of the most important unreconstructed penal law in the country) and state legislatures have poured out new criminal statutes undreamed of by the drafters of the Model Penal Code: both reformed and unreformed codes have been extended over the last two decades by prohibitions on racketeering,6 money laundering,7 carjacking,8 computer crime,9 domestic violence10 and stalking,11 hate

crimes and on and on through long lists of behaviors that apparently did not exist in the 1950s, did not trouble the drafters of the Model Penal Code, or were thought not to require special statutory attention. Statutes defining traditional crimes have often been extensively reworked since the enactment of the Code: the law of rape is perhaps the most obvious and dramatic example of a traditional crime for which the statutory law of many American jurisdictions today is completely different from the mid-century consensus embodied in the Model Penal Code, and for the most part adopted without great controversy in the early post-Model Penal Code state codifications. Most dramatic (and, I will argue below, most fundamental) of all, the sentencing provisions of the Model Penal Code, which might be seen as the critical practical test of what actually happens to violators of penal prohibitions, now seem terribly quaint, and more than any other portion of the Code, are completely inconsistent with the conventional wisdom of the present day.

This essay addresses some of the challenges that would face the drafters of a new version of the Model Penal Code, and especially a new federal penal code, in light of the ideological changes that have occurred since the original Code was finalized.

I. THE CENTRALITY OF SENTENCING

An examination of the principal casebooks and treatises on substantive criminal law would not suggest that sentencing is a terribly important subject. Academics specializing in criminal law devote much more attention to the purposes of the criminal law in


general, and to the principles that govern the line between criminality and non-criminality, than they do to questions of the degrees of crime, or to the treatment of particular offenders. The only area in which grading is featured in the typical law school course in substantive criminal law, and the area in which Anglo-American law has given the greatest attention to the subject, is that of homicide. Even there, however, the specific practical consequences for individual defendants are rarely addressed. We lovingly analyze the standards by which a particular instance of violent death should be classified as murder or manslaughter, but (except for the looming availability of capital punishment) the student is rarely even informed what the potential sentencing consequences of either verdict would be, let alone how the court would approach the imposition of a specific prison sentence for a particular offender within whatever statutory maximum might ultimately apply.

There are several different reasons for this inattention. One is that, until very recently, there was little or no "law" governing sentencing, so there was little to teach in a regime that primarily concerned itself with teaching students about the content and policy implications of legal rules. The distinction between murder and manslaughter was and is governed by an elaborate body of intricately detailed rules (common law and later statutory).\(^5\) Students and their professors can spend a lot of intellectually-satisfying energy understanding the historical development of those rules (what was meant by "benefit of clergy?"); the content of the subtle distinctions they drew (if "spouse caught in adultery" was "legally adequate provocation" but "mere words" were not, what then of a verbal report of adultery?); the procedural underpinnings of

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each rule (how does the broader mitigation provision of the Model Penal Code affect the distribution of functions between judge and jury?); and the moral and policy implications of different versions of the rule (should the adequacy of provocation be judged from the standpoint of a reasonable person, from that of the defendant, or from that of a reasonable person under the circumstances as they appeared to the defendant?). But until very recently, no similar questions could be asked about whether the defendant, convicted of manslaughter, should be sentenced to the statutory maximum prison term or to probation. One could discuss the wisdom of different possible outcomes, and even give reasons for and against them, but one could not identify any legal rule governing the decision, because there was none.

Any claim that sentencing issues were not discussed because they were lacking in practical or intellectual interest, however, was always deeply misleading. First of all, from a practical standpoint, sentencing has always been the critical issue for criminal lawyers' clients. In a world in which the great majority of criminal defendants are convicted, and the great majority of those convicted are convicted by guilty plea, the line between guilty and not guilty (especially when considered in the abstract as a matter of legal principle, rather than as a mundane factual question of what the evidence reveals about "who done it?") matters far less than where the case will be placed on the continuum of possible punishments. But even from an academic standpoint, the absence of "law" governing sentencing did not mean that sentencing was intellectually unimportant, but rather that the issues surrounding the subject were submerged. And indeed, the failure to discuss those issues obscured the fact that the very structure of the issues we did discuss was crucially affected by certain covert presuppositions about how sentencing would be approached.
Take, for example, the felony murder rule—a long-standing object of close attention from criminal law scholars. The rule provides an opportunity for scholars and law students to engage critically with fundamental questions of culpability. Suppose that a bank robber, in effecting his hasty getaway in a stolen car, accidentally hits a pedestrian. If the pedestrian is killed, the classic felony murder rule applies and the defendant is guilty of murder, even if he had no intention to kill anyone. If the accident was unavoidable, or was primarily caused by the pedestrian's negligence, we ask ourselves whether it is fair to lay the death to the robber's account. To what extent should results count in determining punishment? Is it fair to hold someone accountable for a consequence as to which the actor bears no mental culpability, or at least as to which he may not even have been negligent? If the actor was reckless or negligent, should that degree of culpability govern his punishment for the death, or should his guilt of a separate serious crime somehow aggravate the homicide to the same level as an intentional killing? We ponder these issues deeply, as we should. The Model Penal Code, following the apparent majority view among academic commentators, rejected the felony murder rule in principle (though in an ill-fated pragmatic concession, adopted an unusual "presumption" of extreme recklessness in the case of several serious felonies16). Most states continue to apply some version of the rule.

But felony murder's importance as a locus for discussing our views of culpability is, it seems to me, largely an artifact of its place as a legal rule that determines a significant sentencing outcome. Because application of the rule, at common law, classified an offense as murder, it determined the applicability of capital punishment to the defendant; even today, the classification as murder is a critical step, in jurisprud-

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16. See Model Penal Code § 210.2(1)(b) and commentary at 29-42.
tions with capital punishment, for determining the "death-eligibility" of the offender. The dramatic sentencing outcome makes the issue important; the fact that it is a legal rule rather than a factor consulted in the exercise of the court's discretion makes it a subject of discussion in judicial opinions and in classrooms.

Essentially the same intellectual issues, however, arise at the sentencing stages of ordinary cases. Suppose that the pedestrian in our example had been paralyzed, but survived. No legal rule would turn the accidental injury into a separate crime of aggravated assault, because the injury occurred in the course of a robbery, as the felony murder rule would turn an accidental death into murder. Yet, within the (generally extremely expansive) limits of the maximum sentence for armed robbery, a judge in a jurisdiction that applied traditional twentieth-century sentencing rules could, in her sole discretion, have taken the pedestrian's tragic injury into account in setting the sentence to be served by the robber. For that matter, even if the felony murder rule had been abolished in the jurisdiction, the judge could similarly take account of an accidental death in setting the robbery sentence. Absent capital punishment, the consequences to the defendant would in many cases be essentially identical to the outcome under a felony-murder rule: if the judge thought a 20-year sentence was, on balance, the appropriate punishment, given the total harm caused by the perpetrator and his personal characteristics, she would likely impose that very sentence, whether under a felony murder rubric or as an "aggravated" case of armed robbery.

Operationally and morally, the unintended consequence of the defendant's act thus has the same consequences for the defendant's punishment, and raises the same issues, whether that consequence is treated as an element of a separately-defined aggravated offense occupying its own position in the penal code, or as a "sentencing factor" weighed by the court in as-
signing a sentence within broad sentencing discretion left to the courts by the legislature.

Indeed, one imagines that—again, assuming the absence of capital punishment—the felony murder rule would attract much less attention, even as a legal rule, if it were reformulated as the definition of a separate offense of "robbery in the first degree" with the effect of increasing the maximum prison term to be imposed on the robber. In New York, for example, simple robbery ("forcible stealing") is defined as a class D felony; the offense is upgraded to a class C felony when, among other possible aggravating circumstances, the robber causes physical injury to the victim or another non-participant; and to a class B felony when the injury caused is "serious." No mental culpability with respect to those injuries is specifically required. Statutes of this kind have received little attention from scholars, though in principle they are similar to felony murder statutes. A further aggravating step, within the robbery rubric, where the perpetrator causes death, would be a perfectly natural extension of these apparently uncontroversial statutes. Had the law taken this path, and foregone the capital consequences and the lurid label of "murder," one doubts whether the fairness of the outcome would have been as central a concern of criminal law scholarship as the felony-murder rule has been.

Sentencing, in short, matters, not only to those whose fate is decided under our criminal law rules, but also to the intellectual structure of the issues we consider important. Where sentencing issues have

17. N.Y. Penal Law §160.00 (McKinney 1988).
18. Id. §160.05.
19. Id. §160.10.
20. Id. §160.15.
21. See, e.g., People v. Parker, 468 N.Y.S.2d 731 (4th Dep't 1983). The Model Penal Code, however, consistent with its principles, aggravates the offense only where the actor, in the course of the robbery, "purposely inflicts or attempts to inflict serious bodily injury." Model Penal Code § 222.1(2).
dramatic consequences, and where those issues are made part of the legal code defining crimes, we take their moral consequences extremely seriously. Where the consequences are less severe, but where grading considerations are nevertheless made part of the definitions of offenses, we have traditionally given them less intense scrutiny, but the issues remain visible for statutory drafting choices. But where the grading issues have been relegated to the black hole of broad and unreviewable judicial sentencing discretion, we have chosen not to think about the underlying issues of principle very much at all.

II. THE EFFECT OF SENTENCING PROCEDURES ON SUBSTANTIVE CRIMINAL LAW: THE EXAMPLE OF THE MODEL PENAL CODE

Let us return briefly to the example of aggravated robbery discussed above. The New York Penal Law creates several grades of robbery, depending (inter alia) on the type of injury, if any, inflicted by the robber on the victim, a bystander, or a police officer, without any reference to the mental culpability of the robber with respect to such injury. The Model Penal Code, in contrast, bases its grading distinction not on the actual degree of injury inflicted, but (primarily) on the robber's state of mind: aggravation occurs not when the robber inflicts injury, but (essentially) when he intends it. A robber who accidentally (i.e., non-culpably) inflicts even a grievous harm on a victim is guilty only of simple robbery; but one who attempts to inflict serious injury is guilty of the aggravated offense even if he fails to inflict any physical damage at all.22

In substantial part, this is a difference in principle. The Model Penal Code's outcome is consistent with a large number of provisions of the Code that

22. See notes 17-21 and accompanying text.
emphasize mental culpability in determining crimi-
nality, including the (partial) rejection of the felony
murder rule, the easy imposition of attempt liability,
and the parity of punishment (for all offenses but
murder) for completed crimes and attempts. Equally
consistently, in each of these cases the New York Pe-
nal Code's drafters modified the Model Penal Code
provisions in the direction of a greater emphasis on
harmful results rather than on blameworthy states of
mind.

But I would like to call attention to another factor
that is operating here. Note that the New York Code
defines three separate degrees of robbery, while the
Model Penal Code defines only two. This too is con-
sistent with a general tendency in each document. The
Model Penal Code defines only three grades of felonies
altogether, with ordinary maximum prison terms of
five years, ten years, and life. These terms, moreover,
were indeterminate, in two senses: (1) the judge was
authorized to impose sentences less than the maxi-
mum, and (2) while the judge could limit the punish-
ment by fixing the maximum term for any offender,
the actual length of time served short of that maxi-
mum would be determined in most cases by the parole
authorities. The New York Penal Law, by contrast,
originally established five categories of felonies.
While the prison terms attached to these categories

23. See note 16 and accompanying text.
24. Model Penal Code § 5.01, with particular reference to § 5.01(2).
25. Id. § 5.05(1).
26. See, e.g., N.Y. Penal Law § 125.25(3) (McKinney 1998) (adopting
felony murder rule); § 110.00 (McKinney 1998) (less expansive defini-
tion of attempt); § 110.05 (McKinney 1998) (grading most attempts as
lesser crimes than the corresponding completed offense).
27. Compare N.Y. Penal Law §§ 160.05, 160.10, 160.15 with Model
Penal Code § 222.1(2).
29. Id. § 6.06.
30. Id.
31. The basic outline of this structure is preserved in N.Y. Penal
Law § 70.00(2) (McKinney 1998).
were also indeterminate and parolable, the greater number of categories gave the legislature a greater ability to graduate offenses according to a variety of criteria of seriousness.

Moreover, as the years passed, the legislature adapted the code by adopting still more categories of offenses. Class A felonies were subdivided into classes A-I and A-II;\(^3\) classes B through E were subdivided into "violent" and "non-violent" sub-classes, with different sentencing consequences attaching to each category.\(^4\) Today there are at least ten classes of felonies under New York law, compared to the Model Penal Code’s three.\(^5\)

Of course, the greater refinement of the classification scheme has been a product of a movement to restrict judicial sentencing discretion by creating narrower categories of offenses, with various mandatory sentencing consequences. In effect, the legislature has taken back to itself, to a greater degree than had been the case when the Penal Code was initially revised, the task of deciding what factors should bear on sentencing, and to what degree. This political development emphasizes the degree to which the grading of offenses within a penal code depends on the sentencing philosophy of its drafters. The special part of the Model Penal Code, in particular, was quite self-consciously drafted in light of its sentencing provisions, which in turn were based on the sentencing philosophy of the times.

As the late Professor Frank Remington has pointed out, when the Model Penal Code project was first proposed to the American Law Institute (ALI), Herbert Wechsler specifically emphasized that the

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32. Id. § 70.00(3)(a).
33. Id. § 70.02.
34. Even this accounting omits the bewildering variety of sentencing provisions further specifying expanded punishments, as to various of these categories, depending on the prior criminal record of the offender. See id. §§ 70.04, 70.06, 70.08, 70.10.
project of penal code reform and simplification was possible and desirable precisely because so “much of what we think of as the substantive law of crime consists actually of drawing discriminations that have ultimately treatment or penalty consequences... [Once that is understood,] one immediately perceives at least the possibility... of a much simpler penal code.0 5

The point of Professor Wechsler's observation was that the distinctions of the substantive criminal law are in large part about the treatment of offenders, and that the definition of crimes, particularly insofar as it concerns the special part of the penal law, with its differentiations of different types and degrees of crime, is largely a matter of drawing a line between two different stages of criminal law and procedure: the guilt phase and the sentencing phase.36

If one assumes the existence and desirability of broad judicial sentencing discretion—as Wechsler and his colleagues manifestly did, working at a time when indeterminate sentencing, judicial discretion to tailor the sentence to the offender, and the rehabilitationist penological ideal that drove both practices, held unchallenged dominance over American law—then it makes sense to streamline the categories of offenses. Major levels of culpability, defined in very broad strokes, should be formally distinguished in the penal code. But most of the finer gradations in culpability would not need to be reflected in the code. They concerned only (only!) the “treatment or penalty consequences” of crime, and so could be expected to be outweighed by those factors concerning the individual’s background and amenability to rehabilitation that


would dominate judicial and administrative decisions about the necessary length of incarceration.

Given such assumptions, it might make sense to distinguish, broadly, between a robber who attempts to inflict serious injury and one who hopes only to steal some property and get away without hurting anyone. Such categories make moral sense, and it is reasonable to assume that the former offender was a more hardened and dangerous case who might well need a longer spell of "correction" or would more urgently need incapacitative confinement to protect the public while his treatment went on. Of course, one could imagine a vast number of other distinctions that might be relevant to ranking the offensiveness of individual acts of robbery: was a weapon carried?; if so, of what kind?; was the weapon displayed or held in reserve—or actually used?; did more than one robber participate?; how much money or property was stolen?; was the victim especially vulnerable, and was that vulnerability actively exploited?; was injury actually inflicted on anyone, and if so, how serious was it? These distinctions, however, could safely be left to the sentencing discretion of the judge. Within the very broad confines left by the ten-year maximum sentence made available for the basic offense of robbery, there was plenty of room for the court to reflect in the particular sentence imposed both the moral seriousness of the specific instance of forcible theft involved and the more or less hardened or depraved character of the offender that such variations could reveal. The entire goal of simplifying the penal code counseled against multiplying different types of offenses based on factors that made only a small difference to the culpability of the offender. (What would the Code’s framers have made of a separate crime of "computer fraud"?)

The Code drafters’ commitment to rehabilitationist sentencing and judicial discretion, then, is manifest not only in the specific sentencing provisions of the Code, which explicitly adopt the indeterminate
sentencing model prevalent at the time it was drafted, but also in the very structure of the Code's substantive definitions of particular crimes. If it had been thought desirable to control judicial discretion more rigidly, or to define more precisely the penalties attaching to different acts, the goal of a more rational penal code would still have made sense, but there would have been little call for a "simpler" penal code. If matters going to the "treatment or penalty consequences" of criminal acts were to be determined by the legislature, on the basis of general rules, rather than by judges, as a matter of selecting an appropriate correctional sentence, then a great many more "discriminations that have ultimately treatment or penalty consequences" would have been written directly into the penal code itself.

III. THE MOVEMENT TO GREATER SPECIFICITY

As the reception of the Code shows, legislatures have always had a tendency to write into the penal law more such distinctions than were strictly necessary under the rehabilitative ideal. Even when California's penal code essentially provided for indeterminate (and indiscriminate) sentences of one year to life for all felonies, the legislature did not do away with the traditional labels distinguishing different felonies: robbery was still a separate crime, even though it might not make any difference to your sentence whether your crime was called robbery or larceny. And as the influential New York Penal Law showed, legislatures could happily adopt the general rehabilitative sentencing philosophy of the Model Penal Code, enthusiastically endorse its streamlined and rationalized sets of definitions—and still decide that three degrees of felonious larceny were better than one, or that multiple levels of statutory rape based on the varia-
tions in the parties' ages were a desirable innovation. But with the waning of the rehabilitationist ideal, the Code's categories came under much more pressure. With judicial discretion under attack as too arbitrary and too lenient to offenders, with rehabilitation viewed as both "soft on crime" and unworkable, and with retributionist sentencing based on "just deserts" seen both as a philosophical corrective and as a means of controlling liberal judges in an era of rising crime rates, legislatures adopted a far more aggressive approach to defining crimes. Mandatory minimum sentences were called for—but if the legislature was going to mandate a lengthy sentence of imprisonment for some offenders, it would have to define which ones. Broad, relaxed definitions of crimes that were appropriate when judges were trusted to set an appropriate level of punishment became less attractive when harsh mandatory terms were on the cards—even politicians eager to assure the public that they were as "tough on crime" as possible could (usually) see that not everyone who fell within a broad definition of "robber" or "drug dealer" required an unmitigated ten- or twenty-year sentence. And so the categories of crime increased, and narrower, graduated definitions of crime became more common, as the movement away from judicial discretion and toward more certain and severe penalties took hold.

Such mandatory sentencing regimes, however, could take a variety of forms. The most traditional form involved simply writing into the penal law a new distinction, creating new degrees of crimes, with mandatory sentences of different levels provided for the different degrees. New York's famed "Rockefeller drug laws" took this form.

Creating a multitude of newly subdivided crimes, however, is in direct tension with the goal of the

38. See N.Y. Penal Law §§ 220.18, 220.21 (McKinney 1989), § 70.00.3(a) (McKinney 1998).
drafters of the Model Penal Code to create a simplified criminal code. While legislatures have preferred a somewhat more nuanced treatment of crimes than the Code provided, they have generally respected the goal that penal codes not be loaded down with dozens of overlapping offenses, or with minutely detailed statutory rankings of degrees of offenses. While the accretion over the years of novel offenses has somewhat cluttered the elegance of the freshly-minted Model Penal Code-influenced reformed penal codes of the 1960s and 1970s, the skeleton of the Code usually remains visible under the accumulated bulk. Drafters of a new edition of the Model Penal Code, even if they adopted the legislative preference for greater detail and the now-dominant penological emphasis on retribution and restricted judicial discretion, would presumably still want to limit the extent to which a multiplicity of highly-specific offenses obscured the clarity of the penal code, for citizens and law-enforcement officials alike.

There are significant procedural consequences, moreover, to writing into the penal code "discriminations that have ultimately treatment or penalty consequences." When we define murder and manslaughter as separate crimes, the prosecution must prove the facts distinguishing the more serious crime from the less serious to the satisfaction of the jury, beyond a reasonable doubt, before the heavier sentence can be imposed. The same may be true when we divide grand larceny or sale of controlled substances into degrees, with differing maximum or mandatory minimum penalties for each version of the

39. Title 18 of the United States Code remains the great counterexample of the unreformed Code, whose chaos seems to feed on itself, inviting steady growth in every direction. For all its lack of elegance, however, it is possible that the very ungainliness of federal criminal law has been less discouraging (for good or ill) to creativity and innovation than the Model Penal Code-based codes, which by their very form promote a feeling of closure and completeness.
offense. If writing an aggravating factor with a mandatory penalty into the penal code decreases the likelihood that a misguided judge will ignore or underemphasize such a factor in imposing a discretionary sentence, the procedural burdens associated with proving additional elements of crimes may dissuade prosecutors from insisting on charging the higher degree of offense, or encourage defendants to go to trial on issues that, under a more general definition of the offense, would be relevant only to sentencing.

The very clarity and simplicity of Model Penal Code-based penal codes probably facilitated legislative adoption of additional, more nuanced definitions of crimes. Where a code was already constructed according to a principle that attempted to separate and define different categories of crime, and provide for punishment according to a broadly schematized hierarchy of harms and punishments, a structure was already in place that facilitated the further subdivision of crimes and punishments. When the legislature identified a factor that it believed should be recognized in every case as requiring a higher punishment,

40. See People v. Ryan, 82 N.Y.2d 497 (1993). In Ryan, the New York Court of Appeals held that statutes penalizing by escalating sentences the “knowing” possession of increasing amounts of controlled substances required proof that the defendant knew the weight in question. Although this holding was eventually overruled by statute, 1995 N.Y. Laws ch. 75; see William C. Donnino, Supplementary Practice Commentaries to N.Y. Penal Law art. 220 (1998 Supp.) at 1-4, the actual amount of narcotics possessed continues to be an element of the various degrees of narcotics possession offenses. Under federal law, by contrast, it has been held that the amounts of narcotics triggering mandatory minimum sentences are not offense elements, but merely sentencing factors. See, e.g., United States v. DeSimone, 119 F.3d 217 (2d Cir. 1997).

41. The nature of the burden depends heavily on the amenability of the aggravating factor to easy proof. If, for example, the legislature creates an enhanced offense for crimes committed against the elderly, the procedural consequences are likely to be slight; in most cases, the age of the victim will be readily established. A statute creating an aggravated offense for bias crimes is more problematic; the intent of the offender is generally a more contestable issue.
it was usually a simple enough matter to create an aggravated form of an existing offense, that raised the grade of the crime to the next higher level in an existing scheme, or permitted the introduction of a new intermediate classification. The basic structure of the Code was thus preserved, if in a more elaborated form.

When the same political and philosophical pressures for controlling discretion operated on the Congress, however, such simple amendment was not a broadly available option. Some crimes could be subdivided in an ad hoc way, of course. When savings and loan officials seemed to have committed fraud on a massive scale, Congress created an enhanced penalty for mail and wire frauds involving banks.42 Concerned that penalties for fraud on government programs were too slight for fraud involving large financial gain, Congress created a new crime, with enhanced penalties, where the fraud concerned a contract worth over $1,000,000.43 Moreover, Congress has stratified various drug distribution offenses based on the amounts sold, and has frequently adjusted the mandatory minimum sentences applicable to them.44

But the very incoherence and randomness of the unrevised federal criminal “code” effectively prevents Congress from efficiently micro-managing the sentencing provisions of its sprawling mass of overlapping, inconsistent criminal statutes. Accordingly, when Congress moved in a major way to control judicial sentencing discretion, it opted for a more comprehensive plan, creating a separate administrative agency, the United States Sentencing Commission, which was charged with the task of creating comprehensive sentencing guidelines to limit the discretion of the courts and to identify factors appropriately to be taken into

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44. For the current set of penalty gradations for distributing various drugs, see 21 U.S.C.A. § 841(b) (West 1981 & Supp. 1998).
account by judges in imposing sentences. 46

Faced in turn with the daunting task of creating guidelines to match the welter of federal penal statutes, the Commission in effect elected to organize and codify federal criminal law by essentially disregarding the specific statutes creating the offenses on which sentences would be imposed, and instead creating its own classification of offenses, with the same guidelines applying to various federal statutes that the Commission felt addressed similar kinds of harms. Thus, for example, while Congress had created a variety of fraud statutes, with miscellaneous sentencing provisions, the Commission imposed the same sentencing structure on all offenses involving fraud or deceit, and applied its own calculus of aggravating factors to determine the specific sentence to be applied. 46

The substantive distinction between legislative enactments carving an offense into different degrees with different punishment structures, and sentencing guidelines subdividing a single legislatively-defined crime (or a group of related crimes) according to regulations identifying aggravating and mitigating circumstances, is of course a slim one. In each case, the regulatory structure attempts to identify the factors that justify more severe or more lenient treatment for different degrees of wrongdoing in a related area, in order to specify the punishment that ought to be imposed on those who violate the rules. As is well known by now, however, the courts, led by the United States Supreme Court, have generally held that the procedural consequences of the two methods of hierarchizing punishments are dramatically different. Relying in large part on case law decided under the regime of wide open discretionary sentencing in furtherance of a rehabilitationist philosophy, the courts have generally concluded that “mere” sentencing factors, going

only to the appropriate sentence to be imposed within a legislatively-defined maximum for the offense of conviction, need only be established by a preponderance of the evidence, rather than by proof beyond a reasonable doubt, and can be found by a judge, rather than by a jury. Statutory elements of the offense of conviction, of course, continue to be subject to requirements of jury determination beyond a reasonable doubt.

The reduced procedural scrutiny accorded to sentencing factors (as compared to offense elements) has attracted the most attention in the context of the Federal Sentencing Guidelines, where fairly rigid regulations define precise increments of punishment attached to specific aggravating factors based on facts determined by the court. It is noteworthy, however, that the first constitutional decision by the Supreme Court endorsing reduced procedural standards for sentencing factors dealt not with the guidelines, but with a state statute providing a mandatory sentencing enhancement where a firearm was "visibly possessed" during certain offenses. The Court's holding in *McMillan v. Pennsylvania* thus opens up the possibility that legislatures adopting ad hoc modifications of the penal code may limit the procedural implications of mandatory sentencing directives they adopt, so long as they distinguish the facts on which enhanced sentences turn as "sentencing factors" rather than as elements of separately-defined offenses. Legislatures thus may take advantage of the procedural flexibility of the guidelines regime without adopting a comprehensive sentencing reform in the guidelines mode.

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47. The Supreme Court has left open a circuit conflict about whether, in extreme circumstances, conduct that would dramatically increase punishment must be proved by clear and convincing evidence. *United States v. Watts*, 519 U.S. 148 (1997).
50. Since these words were written, a narrow majority of the Supreme Court has found that Congress availed itself of this flexibility by
IV. THE CHALLENGE OF PENAL CODE REFORM IN A GUIDELINES ERA

These developments in penal and sentencing law have dramatic consequences for any effort to revise the Model Penal Code for the next generation, or to codify and reform federal criminal law. One may well believe that the retreat from judicial discretion, and the parallel move away from rehabilitation and toward retribution as the dominant penal philosophy, represent a mistaken course. But while I am sympathetic to that view, I think it is fair to predict that reform proposals based on the sentencing philosophy that underlay the Model Penal Code would have little chance of adoption today. Indeed, while I would guess that the Code's philosophy has more adherents among law professors and judges than among legislators, a codification that did not provide in some way for more specific controls on sentencing based on considerably narrower classifications of offense behavior than those in the Model Penal Code would not command a consensus of any representative body of legal academics, judges and practitioners like the ALI in the first place. As I suggested earlier, a codification for the 21st century might very well adopt a large part of the "general part" of the Model Penal Code, but the "special part" defining offenses would have to take substantial account of the change of sentencing philosophy of the last quarter of this century.

More specifically, it seems to me that the challenge of the special part of any federal code plan, or any "Model Penal Code 2d" addressed to state legisla-

creating dramatically increased penalties (20-year rather than 2-year maximum prison terms) for certain categories of immigration offenders, not by defining separate offenses, but simply by specifying a "sentencing factor" that need not be charged in the indictment, or found by a jury beyond a reasonable doubt, but can simply be determined by a judge at sentencing. Almendarez-Torres v. United States, 118 S. Ct. 1219 (1998).
tures, is precisely to draw the line between those factors that ought to be part of a more nuanced and graduated set of penalties built into the penal code itself, and those factors that should be left to judicial determination—whether or not subject to some sort of guidelines—and that are therefore specifically not included in the penal code. In effect, the challenge is to distinguish between those facts bearing on seriousness of offense and punishment that should be treated as “elements of the offense” and those that can be treated as mere “sentencing factors.”

Let me first address a preliminary objection from the left. It might well be argued that this distinction is itself spurious, and that any fact that makes a material difference in punishment should be required to be proved, to the satisfaction of a jury, beyond a reasonable doubt. Any rule short of this, one could contend, will invite legislatures to lower the burden of proof in criminal cases by broadening the definitions of offenses, and relegating the myriad of factors that have traditionally distinguished less serious from more serious offenses to the sentencing stage, to be determined by reduced procedural standards. Such an outcome, the argument would go, will significantly erode the procedural protections of the Bill of Rights, not by repeal but by evasion.

There is, of course, something substantial to this concern. I would accept a distinction between offense elements and sentencing factors, however, both because I must, under current law, and because I think that at some level the distinction is necessary and sound. First, as a matter of constitutional law, the argument that any fact leading to increased punishment must be proved at a jury trial beyond a reasonable doubt has simply failed. The Supreme Court’s recent cases make perfectly plain that sentencing guideline schemes may permissibly tie punishment increments to facts that are proven subject to reduced procedural
standards.\textsuperscript{51}

More importantly, however, it seems to me that these decisions—at least at the level of abstract principle—must be correct. During the age of broad judicial sentencing discretion, judges frequently made sentencing decisions on the basis of facts that they determined for themselves, on less than proof beyond a reasonable doubt, without eliciting very much concern from civil libertarians.\textsuperscript{52} True, at least some such decisions were based on very "soft" facts, such as general determinations of a defendant’s character, that may have required less rigid evidentiary standards than the determination of the more concrete factors relating to the offense itself characteristic of the present age of guidelines. But too much should not be made of this distinction. The sentence in any number of traditional discretionary situations depended quite directly on judicial findings of specific contested facts: was the gun displayed a real gun or a toy?; was this particular co-conspirator aware of all the criminal activities of his fellows, or only of some of them?; was the defendant’s participation in this particular drug sale an isolated act or part of a regular course of dealing? Whether because such facts were directly relevant to the judge’s retributionist assessment of how serious the particular offense was (within the spectrum of conduct covered by the statute of conviction), or because they bore on a determination of how much rehabilitation the offender’s character was likely to need, the sentence would be higher or lower, in some specific degree determined by the judge, based on the judge’s factual conclusions.

It seems to me that such determinations are, as a matter of principle, neither more nor less acceptable when the weight to be given them is fixed by a sentencing commission than when an individual judge is

\textsuperscript{51} See, e.g. McMillan, 477 U.S. at 79, Almendarez-Torres, 118 S. Ct. at 1219.

free to accord them such weight as she thinks fit. If it was acceptable for a judge, operating under the Model Penal Code's sentencing policy, to decide that the defendant before him was a Mafia member who committed the assault on orders of a crime boss, rather than, as he contended, just an acquaintance of the victim who acted out of anger, and to allow that fact to influence the degree of punishment or "correction" required for the defendant, it is difficult for me to see why the fact must be proved beyond a reasonable doubt to a jury once an institutional mechanism is in place to insist that the few judges who would not have regarded this fact as relevant on their own take it into account nevertheless. Whether the fact is made relevant by an individual judge's sentencing philosophy or a generally-agreed sentencing scheme to which all judges are expected to adhere does not, in itself, dictate the procedural safeguards that are necessary in finding the fact.

And whatever the degree of precision our penal codes were to attain, there would always be some morally relevant factual variation within the offenses defined. Criminal offenses, like other forms of human activity, are infinitely varied in their physical and mental characteristics, and in the contexts in which they occur. Even the federal guidelines, much derided for the mechanical precision with which they attempt to chart variations in criminal conduct, leave room—at the higher reaches, substantial room—for discretion, and fail to account for all the minute degrees of good and evil within any given classification of crime. Unless we were satisfied to lump together, for mandatorily-identical punishment, large numbers of offenders whose acts vary in morally-relevant ways, there will always be some facts not captured in the definition of the offense or the corresponding guideline that will be relevant to the precise degree of punishment, that will be subject to contest, and that must be decided by a judge outside the setting of a trial.
The problem, I would submit, is not that the distinction between sentencing factors and offense elements is illegitimate; the problem, rather, is one of identifying what factors are sufficiently important morally, and accordingly will have sufficiently serious sentencing consequences, that they ought to be included in the penal code as elements of offenses, and subject to the procedural safeguards traditionally attaching to such elements.

Resolving this problem is, inevitably, primarily a task for the legislature. The Supreme Court has suggested that there may be constitutional limits to the legislature's ability to redefine at least such factors as have traditionally been utilized to distinguish different crimes as sentencing factors rather than offense elements. It is difficult to see, however, how judicially-manageable standards for imposing such limits can be developed. The Court has frequently stated that the power to define crimes ordinarily belongs to the legislature. More importantly, its few ventures into creating constitutional limits on the substantive criminal law have regularly proven abortive. The examples are familiar. In Robinson v. California, the Court seemed to suggest that the constitution required a voluntary act for criminal liability, but promptly retreated. In Lambert v. California, the Court seemed to suggest constitutional limits to strict liability offenses, at least with respect to omissions. But as Justice Frankfurter predicted in dissent, the case has been barren of progeny. Most relevant of all, the Court in Mullaney v. Wilbur seemed prepared to mount a defense of the requirement of proof beyond a

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57. Id. at 232.
reasonable doubt against state efforts to shift the burden of proof by redefining traditional elements of crimes as affirmative defenses, but in *Patterson v. New York*, the Court largely abandoned that effort as well, leaving it to legislatures to decide how to structure elements and defenses in ways that would permit differences in punishment to turn on facts that were not proved by the prosecution beyond a reasonable doubt. In *Patterson*, as in *McMillan*, the Court noted that there may be limits beyond which the legislature could not go, but those limits have not yet been tested.

About the only limitation that would have a reasonable chance of judicial enforcement in the present judicial climate is one of tradition. As in the area of substantive due process, the Court might be prepared to find implicit in the Constitution practices that have a long and settled history reaching back to the common law. If a legislature were to abolish the crimes of murder and manslaughter, and replace them with a generic crime of homicide, leaving it to the sentencing judge to determine the actual sentence under guidelines providing different sentences depending, inter alia, on whether the death was caused intentionally, recklessly or negligently, whether there was provocation, and whether the defendant was engaged in a felony, the Court might find an evasion of the constitutional requirement of proof beyond a reasonable doubt. But most gradations of crimes do not have such deep and accepted roots in the common law.

It would presumably be constitutional, then, for a legislature to return to the simplicity of the Model Penal Code with respect to the definitions of crimes, creating only a few broad categories of felonies with broad sentencing ranges for each, and defining par-

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60. See note 53 and accompanying text.
ticular crimes in a very general way, covering very di-
verse forms of wrongdoing. (Presumably, in the cur-
rent political climate, those categories would be likely
to carry harsher maximum punishments than those
provided by the Model Penal Code—perhaps ten
years, 25 years, and life imprisonment instead of the
Code's five, ten and life). But instead of the Code's
sentencing regime, with its presumption in favor of
the least deprivation of liberty consistent with the
goals of the Code, and its broad judicial discretion, the
legislature could substitute a federal-guidelines-style
sentencing regime, in which the sorts of distinctions
found attractive by legislatures reacting to the Model
Penal Code (grades of larceny depending on amount
stolen, grades of robbery depending on weapons used
or physical injuries inflicted, grades of statutory rape
based on the age differentials of the parties, grades of
narcotics distribution according to amounts sold) are
relegated instead to mandatory or near-mandatory
guidelines regimes, with the relevant facts to be de-
termined in non-jury sentencing proceedings under a
reduced standard of proof.

But assuming such a regime would be constitu-
tional, the drafters of a Model Penal Code, Sec-
ond—and any legislative body undertaking a related
criminal law reform—would have to consider whether
such an approach would be wise. As pointed out
above, the simplification and reduction of categories
that marked the Model Penal Code's approach to
drafting the definitions of particular crimes was inti-
mately linked to the sentencing philosophy prevalent
at the time of its drafting. Even if the same approach
could constitutionally be adapted to the different pe-
nal attitudes dominant today, and even if there were
widespread agreement that some factors bearing on
the degree of punishment can properly be relegated to
a second-tier regulatory code, with a second-tier sys-
tem of fact-finding, a properly-constructed penal code
for a retributionist era should, in my view, be more
sensitive to the distinction between critical classifica-
tions of moral conduct that should be reflected on the
surface of the penal code, and lesser gradations of
guilt.

The difference, ultimately, is one of degree. There
will of course be differences of opinion about whether
a particular distinction is so important that it ought to
be treated as an offense element, and these differences
will not be resolvable according to some formula—if
they were, they would be more susceptible to policing
by the Supreme Court as a matter of constitutional
law. But such disputes should not obscure the fact
that an important principle is at stake. There is a dif-
ference between concluding in good faith that a par-
ticular culpability factor is sufficiently minor to be
treated as a sentencing factor and yielding to the
temptation to channel as many factors as possible into
the sentencing process, to promote efficiency, mini-
mize trial issues, and maximize the chances of impos-
ing the highest possible punishment.

V. DISTINGUISHING OFFENSE ELEMENTS FROM
SENTENCING FACTORS: A FUNCTIONAL APPROACH

How should we determine what factors ought to
be treated as offense elements? That is, of course,
precisely the challenge that a new Model Penal Code,
or a new federal Code revision, would have to answer.
I would tentatively propose a functional test, at least
as a framework for analysis. The appropriateness of
treating a factor as an offense element or a sentencing
factor has to be judged on the basis of what is at stake
in the distinction. At least four important conse-
quences suggest themselves. Two are substantive: the
moral significance of the factor and the degree of
punishment attendant on the factor. And two are pro-
cedural or institutional: the method of fact-finding
and the law-making institution responsible for de-
termining the significance of the factor.
A. Sending Moral Messages

The penal code, as Professor Meir Dan-Cohen has famously pointed out, is addressed to at least two different audiences. It issues some directives to the population at large (don’t do x), and other directives to government officials (if someone does x, punish her with consequence y). There are some tensions between the two types of rule. We might want to tell the citizens not to do x, but if we also want to tell the judges to go easy on people who do, we may undermine the power of that directive.

When it speaks to the people at large, the penal code is largely concerned with setting out the basic moral rules governing the society. By defining conduct as criminal, we locate that conduct beyond the bounds of morally acceptable behavior, and impose a fundamental condemnation on it. The gradations of crimes also play an important part in that moral instruction. A criminal code that simply listed indiscriminately all the things that we forbid would not tell us everything we want to know about our society’s moral code. We also want to know, at least in a general way, how these various offenses rank in the eyes of the com-


63. Those who see the criminal law as an instrument for reducing crime, or serving other consequentialist values, tend to emphasize the importance of the criminal law’s instructions to the officials charged with enforcing it: what behavior are we trying to alter, what punishments or other treatments will enable us best to do that, what should government officials do to implement those strategies. The definitions of particular crimes will be important to the extent that they define what conduct needs control, and limit to particular situations the tendency of officials to restrict liberty.

Retributionists, on the other hand, tend to emphasize the penal code’s instructions to the citizens; the criminal code is viewed primarily as a statement of society’s fundamental moral judgments about different kinds of conduct. In an era of increased attention to the retributionist view, the substantive content of particular definitions of criminal conduct may take on more importance than the technology of crime control and sentencing.
munity. That we prohibit certain conduct tells us something about what we value; that we condemn some conduct more than others tells us something about the hierarchy of our values.

The grading of different offenses is thus an important function of the penal code. And if the code is where we can read our most important moral values, it must be legible, in some basic way, by the people. Title 18 of the United States Code is a bad penal code (among other reasons) because its jumble of miscellaneous prohibitions does not intelligibly encode for the people what kinds of acts we are trying to prohibit, how those acts relate to each other, the values we hold important, and how we rank the offenses in moral seriousness. But just as it is wrong to have a code that contains prohibitions that are too many and too specific to allow legibility, it would be equally wrong to reduce the penal code to a mere handful of extremely broad injunctions (Don't harm others' persons or property), with the details of the ranking left to a separate code of minutely-detailed sentencing directives. That would leave us with two equally unsatisfying volumes: one that did nothing to give form to our values, and another that failed to distinguish the important from the trivial.

The unsurprising conclusion is that the more moral importance a distinction carries, the more important it is to treat that distinction as an offense element that is part of the penal code. The less moral weight a distinction bears, the more permissible it is to relegate it to the sentencing stage (whether as part of a code of sentencing guidelines or as an item to be considered by judges as part of their discretion.)

Unsurprisingly, most of the traditional distinctions that have been made in the common law and statutory definitions of crime meet this test. Robbery, for example, can be seen as nothing more than an ag-
gravitated form of larceny. It would be easy, and, I think, constitutionally permissible, for a legislature to abolish the crime of robbery, and relegate the additional element of force to the sentencing stage, perhaps with instructions to the courts or any sentencing commission to treat the use of force in the course of a larceny as a substantial aggravating factor in imposing punishments. But the traditional treatment of robbery as a separate crime would appear to be rooted in a fairly deep and widely-shared intuition that the difference between the mugger and the shoplifter or embezzler is not merely a difference in degree, but one of kind. Someone who resorts to force rather than subterfuge to obtain property has crossed a significant moral line, by committing a crime of violence against the person. Robbery is generally perceived not simply as a special, somewhat worse, way of stealing, but as a different type and level of wrongdoing altogether. The task of the penal code in describing our values by labeling and ranking wrongs is furthered by defining robbery as a separate offense.

Dividing robbery into degrees based on, for example, the use of a weapon presents a closer issue. Is it important to label differentially the offenses of robbing with a gun and of robbing by bare-handed physical force? Most states do, in one form or another, make this distinction part of the penal code. The Model Penal Code does not, reserving its higher category of robbery for cases involving imposition of serious injury. Federal law varies.

64. See, e.g., N.Y. Penal Law § 160.00 ("Robbery is forcible stealing.").
65. See, e.g., N.Y. Penal Law § 160.10(2)(b) (use of weapon aggravates robbery to second degree), § 160.15(4) (use of loaded firearm aggravates crime to first degree).
66. Model Penal Code § 222.1(2) (robbery offense aggravated if actor attempts to kill, or attempts to or does inflict serious injury).
The question can be usefully clarified by asking what paradigmatic crimes we are imagining when we think of armed robbery. The difference between the mugger who knocks down an elderly woman and steals her purse and the one who demands the purse at knife point may seem one of degree—and contestable degree at that: most people, I’d guess, would find the fear created by the threat of deadly force implicit in the knife a significant aggravating factor, but it can certainly be argued that a polite transaction at knife point is less terrifying, and imposes less actual damage, than a surprise violent physical assault. But if we are comparing the purse-snatcher to the hold-up artist robbing the convenience store, gas station or bank with a firearm, I at least begin to perceive a significant leap in public danger and moral degradation. My own inclination would be to recognize at least some form of aggravated robbery, short of the extremely limited category provided by the Model Penal Code, as a separate, more serious crime, and to make the use of a weapon at least one of the factors that would mark the separate category. But in the end, reasonable judgments can certainly differ, and only the legislature can decide the essentially political question of public values involved. My purpose here is not to argue for any particular resolution to this question, but only to suggest a way of thinking about the problem by focusing on the extent to which we see qualitative moral differences between categories of offense rather than simply minor differences in degree of moral guilt within such categories.

Differences in mental culpability will often mark significant degrees of moral wrongdoing that should

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1998. The mere possession of a firearm in connection with certain crimes is treated as a sentencing factor by the guidelines, see, e.g., U.S.S.G. §§ 2A6.2(b)(1)(C), 2B3.1(b)(2)(C), 2D1.1(b)(1), but the use or carrying of a firearm in connection with a drug or violent crime is treated as a separate offense, with its own mandatory, consecutive sentence. 18 U.S.C.A. § 924(c) (West 1976 & Supp. 1998).
be recognized on the surface of a penal code. The classic divisions of homicide mark the importance we attach to distinguishing intentional from reckless or negligent wrongdoing, and the murder/manslaughter distinction suggests that even intentional acts can be further subdivided into morally significant subcategories depending on the subjective emotions and motivations involved. We could, of course, reflect those differences at the punishment stage, directing officials to aggravate or mitigate some “base offense level” for a generalized offense of unlawfully causing death. But this, it seems to me, would be wrong, because lumping reckless drivers with Mafia hit-men, or bar-room brawlers with careless wrecking-ball crews, under a single penal label confuses distinctions that are important to us, not only as measures of punishment, but also as indicators of the community’s moral standards.

Other distinctions that have commonly been made in the penal law seem less significant as moral boundaries. Many statutes classify similar conduct into separate crimes by dividers that are frankly matters of degree: for example, larceny may be divided into different felonies (and misdemeanors) according to the amount stolen,68 and narcotics offenses may be classified according to amounts possessed or distributed.69 Within those categories, sentencing judges have commonly taken quantities further into account as a sentencing factor, and the federal guidelines fetishize quantitative factors in the narcotics, fraud, theft and tax evasion tables.70

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68. See, e.g., N.Y. Penal Law §§ 155.25, 155.30, 155.35, 155.40, 1555.42 (McKinney 1988) (creating crimes of petit larceny and four degrees of grand larceny, depending, inter alia, on the value of the property stolen).
69. See, e.g., N.Y. Penal Law §§ 220.03, 220.06, 220.09, 220.16, 220.18, 220.21 (McKinney 1988) (creating crimes of possession of a controlled substance in the seventh, fifth, fourth, third, second and first degrees depending on the type and amount of drug possessed).
70. U.S.S.G. §§ 2B1.1(b) (larceny table, creates 21 separate offense
To the extent that the numbers are morally important at all (and it seems to me they are far less important than they are apparently thought to be by the United States Sentencing Commission), these distinctions may fairly be relegated to the sentencing stage. A thief is a thief, one might well conclude, and the amount stolen is more an artifact of ambient conditions than a measure of the culprit's moral status: a grand embezzler is usually just a petty embezzler who had access to a larger or less carefully-protected till. The fact that the bigger crook inflicted more harm might justify a larger punishment, but it does not create a different moral category.

But this view does not seem conclusively right. At some point, differences in degree become differences in kind. There is a moral difference between swiping the spare change and cleaning out the account. Moreover, differences in degree may be rough proxies for more elusive differences in kind. It is plausible to maintain that the drug importer dealing in large quantities of narcotics is a more harmful or evil figure than the low-level retail salesman employed by his organization. This is a more complex difference than simply one of quantity, but (at least when measured in single transactions rather than in cumulative sales) a quantitative measure may capture the distinction pretty well in the average case. Quantitative distinctions, thus, will sometimes be appropriate subjects for the penal code, depending on why we think they are rele-

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levels based on amount), 2D1.1(c) (drug quantity table, 17 different levels based on type/amount of drug), 2F1.1(b) (fraud table, 19 levels based on amount of loss caused by fraud), 2T4.1 (tax table, 21 levels based on revenue loss).

71. Of course, where we decide to use quantitative distinctions as proxies, we should be careful to consider whether a more direct definition of the distinction we think morally relevant is practicable. And we should be far more careful than the federal guidelines are to insure that cumulating the quantities involved in a series of petty transactions does not lead to a confusion of the serious violator with the repetitive petty offender. See, e.g., United States v. Lara, 47 F.3d 60 (2d Cir. 1995).
vant, and how important they are to defining moral categories.

The examples set forth above are perhaps so traditional or straightforward that I will appear to be belaboring the obvious. But an examination of some more controversial or unsettled issues confirms the importance of the penal code as an arena for moral definition. Take, for example, the question of "bias crimes." Should we create a special, aggravated category of crime for offenses motivated by bias?

The fierce political controversy over this issue seems to me almost entirely about the importance of criminal law as a definer of moral values. There is almost certainly no need to increase the statutory maximum penalty for any category of crime to provide sufficient punishment for bias attackers. In the present harsh penal climate, statutory maximum penalties for just about all crimes are high enough to accommodate appropriate punishment for the most aggravated examples of each statutory offense. It is likely, moreover, that in any jurisdiction where community values could generate the political momentum necessary to pass such a statute, the same values would make it extremely likely that discriminatory motivations would be counted by most judges or by sentencing commissioners as significant aggravating circumstances.

Nevertheless, proponents of a special crime for bias attacks seek explicit political recognition that our society condemns, as a special species of unacceptable behavior, singling out a victim for the infliction of harm on the basis of criteria that deny that person's equality because of some group characteristic.72 Inclu-

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72. Whether or not creation of a separate offense of this kind is desirable, I have never quite grasped the argument that doing so is constitutionally problematic. Our civil rights laws are premised on the moral view that it is wrong to deny a person certain benefits (jobs, housing, etc.) based on that person's membership in a disfavored group. Whether or not it would be wise to do so, it surely would not violate ei-
sion of biased motivation as a sentencing factor does not have quite the same significance, in this regard, as a proclamation of social value. From the standpoint of punishment, we may arrive at the same sentence whether we regard a racially-motivated assault as a violation of the victim’s general right to bodily security, aggravated by the attacker’s motive, or as a violation of the victim’s right to equal respect, aggravated by a physical assault. But the recognition of the right to equal respect as a separate subject of protection of the ordinary criminal law can really only be accomplished by identifying the violation as a crime. Inclusion of bias motivation as a sentencing factor, indeed, need not reflect a moral evaluation of the act at all, but could be premised on such utilitarian considerations as the likelihood of recidivism or the fear caused in the community in such cases. For these reasons, or because of the lesser visibility of sentencing determinations, use of bias as a sentencing factor seems to be, as a practical matter, less controversial than the enactment of separate bias-crime penal statutes.\footnote{73}{Interestingly enough, due to the vagaries of federal jurisdiction, current federal law in effect treats bias crimes both as a separate category of crime and as an aggravator of other crimes. Specific statutes penalize at least some bias assaults that are designed to interfere with a victim’s civil rights, see, e.g., 18 U.S.C.A. §§ 242, 245 (West 1969 & Supp. 1998), and the sentencing guidelines applicable to those offenses, while recognizing an intrinsic harm to the civil rights violation itself, aggravate the penalty depending on the (physical) seriousness of the act. U.S.S.G. § 2H1.1. The sentencing guidelines also, however, provide for an aggravation of \textit{any} offense where the victim was selected because the First Amendment or the principle against punishing thought-crimes to impose criminal sanctions on willful violators of these laws. If singling out someone black (or Jewish, or gay) for firing imposes a moral harm that is recognizable in law, I don’t understand why singling out a person for assault or property vandalism that is already criminal doesn’t impose \textit{two} separate harms, which can appropriately be punished cumulatively. In any case, the argument in the text does not turn on whether bias crime statutes are desirable or even constitutional, but is limited to the significance of creating separate statutes of this kind as opposed to treating biased motivation as an aggravating sentencing factor, assuming arguendo that the factor is a desirable or at least permissible moral consideration in punishment.}
Once again, my point is not to resolve these issues, or to claim that there is a single correct answer that courts could impose by striking down statutes that shift morally significant distinctions that ought to be in the penal code into the sentencing stage. My intention rather is to illuminate some of the reasons that could be considered by a conscientious drafter of penal laws in determining the appropriate breadth of definitions of crime. The definition of our moral standards seems to me an important function of penal codes, and important moral distinctions should be made in the code, and not in mere sentencing regulations.

B. Punishment

It is perhaps equally obvious, and is closely related to the previous point, that a factor relevant to punishment should be included in the penal code, rather than relegated to sentencing guidelines or left to individual discretion, as the punitive consequences attributable to that factor increase. Penal codes in the era of indeterminate sentencing tended to recognize the importance of punishment by specifying different maximum prison terms for different crimes. Since the actual time to be served would primarily depend on judgments of character and reformation made by the sentencing judges and parole authorities, and would be based on a wide variety of factors not limited to those bearing on the seriousness of the offense, there was little need to subdivide degrees of crime based on anything other than the maximum punishment allowed.

The advent of more nuanced, more retributionist sentencing schemes changes that calculus. Where the legislature has decreed not merely a maximum punishment, but also a mandatory minimum term of im-
prisonment, the result has most often, appropriately enough, been a subdivision of crimes into separate categories defined by the factors that make the mandatory minimum, as well as any increased maximum penalty, available.

What has been less clearly recognized is that the imposition of discretion-limiting guideline regimes also calls for some revision in the content of penal codes. Once the legislature has decided to limit judicial sentencing discretion by creating a system of guidelines that ties particular increments of punishment to specific facts, it has, through the medium of the sentencing commission, created a de facto series of subclasses of crimes.

As noted above, I do not regard this in itself as problematic. But my argument for the acceptability of this kind of regulation is based on a judgment about proportion and degree. The use of administrative sentencing commissions raises separation of powers concerns, both for the potential delegation of the hardest core of the legislative function—the definition of crimes—to an agency, and for the possible usurpation of a traditional judicial function—imposing judgment in particular cases—by the legislature and its administrative creature. The line between individual judgment and general definition is neither hard-and-fast nor easy to draw. In general, however, it makes good sense, as well as good constitutional law, to assume that the legislature ought to determine the basic parameters of punishment, and that the function of the sentencing commission is to impose some uniformity on the more detailed exercises in judgment that are essentially left to the case-by-case decisions of judges.

This understanding only makes sense, however, if the basic punitive decisions are made by the legislature, and the commission's role is seen as assessing the significance of factors that can plausibly be regarded as details. Where legislative definitions of crime are excessively vague, and the sentencing
authority is left to create sub-categories with dramatically different consequences, something has gone awry.

The federal guidelines can be tested against this principle. Of course, the chaos of the crime definitions and penalty provisions of the federal "code" put the entire exercise of guideline creation at odds with my principle as ideally conceived, because it was left to the Sentencing Commission to decide the basic punishment level for most offenses with very little guidance from Congress. Since the penalty provisions of federal criminal legislation create a hodgepodge of penalties that are often out of proportion to each other, the Commission was left to set the basic levels of punishment based on its own conception of what was appropriate, guided (to the extent it chose to be) by the existing pattern of punishments imposed by the courts.

A concrete example will make the point clearer. The assault guidelines set basic offense levels of 6 and 15 (for a first offender, 0-6 months and 18-24 months respectively) for "minor" and "aggravated" assault. These categories are not defined by any statute, and apply across a considerable variety of separate criminal statutes with varying statutory maximum penalty terms. This is an example of the federal penal code's fundamental inconsistency with my preferred principle; the legislature has not determined the basic categories of culpability and the basic ranges of punishment.

Once the basic punishment levels are set, however, for most offenses the specific aggravating and mitigating circumstances vary the base amounts by a relatively small proportion. In other words, the basic level of punishment is determined by whether the offender fits a category determined by the legislature (or that should be determined by the legislature in a well-

74. U.S.S.G. §§ 2A2.2 and 2A2.3.
ordered code); the factors that move the defendant up or down from that base are fairly seen as matters of detail.

Taking the "aggravated assault" guideline as an example, the adjustments made for more specific sentencing factors add two through six levels to the base offense level of 15. These adjustments are hardly trivial—a six-level addition doubles the minimum guideline sentence for a first offender, from 18 to 37 months. Moreover, the additional factors can be cumulated (though the guideline places some limits on the possible cumulation.)\(^7\) The assault guidelines seem to me to approach the limit of what can fairly be regarded as appropriate aggravation of punishment by sentencing guidelines within a basic framework set by the legislature. In most cases, the basic punishment is primarily determined by the basic offense category, and the aggravation, while not insignificant, does not radically alter the level of punishment assessed; in the (presumably relatively few cases) in which the maximum aggravation is present, one could reasonably question whether the Commission has not increased the punishment to a level that is of a different order of magnitude than the basic offense level. At this point, one begins to question whether such dramatic differences of punishment should not be assessed and imposed as part of a more accountable political process.

In some cases, moreover, the guidelines go well beyond what would seem desirable in this regard. The basic fraud and larceny guidelines allow radically different punishments based on factors that have no statutory basis. The base offense level for defendants convicted of mail fraud is only 6, which permits a probationary sentence. Depending solely on the amount of money involved in the fraud, however, the penalty can be enhanced by as much as 18 levels (requiring a prison term of 51-63 months), and a number of other

\(^7\) Id. § 2A2.2(b)(3).
adjustments are available on other grounds.\textsuperscript{76}

Of course, under the prior regime of judicial discretion and indeterminate sentences, judges had the power to impose sentences that varied far more than these amounts, without even the accountability built into the guidelines' explicit statements of the weights being given to various factors. This discretion may equally have been excessive; one beneficial effect of guidelines systems has been to bring the kinds of sentencing decisions that were being made by judges out of the closet and to make explicit that at least some of these decisions involved the determination of which aggravating or mitigating factors required major distinctions in punishment—a determination that certainly ought not be left to the varying individual perceptions of different judges, and one that has too significant an impact on individual defendants to be relegated to a second-string legislative body and a second-class fact-finding process. So long as the sentencing process purported to be primarily about individualized treatment of offenders, the extent to which differences in punishment were in fact allowed to turn on retributionist determinations of appropriate levels of punishment remained hidden, perhaps even from the sentences themselves. (And, to the extent sentencing decisions really were based primarily on rehabilitationist/incapacitative treatment considerations, broad sentencing discretion and widely disparate treatment of offenders had a rationale that did not require narrow legislative classification of offenses). My point here is not to argue for judicial discretion as against guidelines (or vice versa), but rather to argue that where dramatic punishment consequences are

\textsuperscript{76} See generally id. § 2F1.1 Theoretically, such additional adjustments relating solely to the nature of the fraudulent conduct (without reference to generally-applicable enhancements like role in the offense or vulnerable victim) could add ten additional levels, bringing the maximum available sentencing range for fraud to 34 (151-188 months imprisonment).
made to turn on retributionist judgments about the seriousness of misconduct, at some point the determination of the appropriate categories of punishment should not be delegated. It is not responsible lawmaking to say: Some frauds should be punished by probation and others by a decade in prison, based solely on the seriousness of the conduct, and we'll leave it to somebody else to figure out which are which.

Once again, I do not mean to insist on any specific limits to the amount or proportion of increased punishment that ought to call for legislative rather than administrative judgment. My point is only that beyond some point the sheer quantity of a punitive enhancement independently calls for incorporation into the penal code, and/or suggests that a difference in the moral quality of the crime is being recognized.

C. Procedural Protections

Of course, to the person being punished, it may matter little whether the punishment being imposed reflects a moral or a practical judgment, or whether the provision requiring the punishment forms part of a penal code or a sentencing guideline or even a judge’s individual sentencing philosophy. It does matter to that person, however, and crucially, what factfinding process, and what degree of certainty, are required before that punishment can be imposed. The question of procedural fairness to the accused is closely linked to the substantive question of the amount of additional punishment that turns on the particular sentencing factor.

Historically, the functional corollary of a factor’s inclusion in the penal code as part of the definition of a crime has been the requirement that that fact be proved beyond a reasonable doubt to the satisfaction of a jury after a trial under formal rules of evidence; those facts that are “merely” factors bearing on the
judge's discretionary sentencing authority (or the application of administrative guidelines that substitute for or direct that discretion) need only be proved by a preponderance of the evidence to the sentencing judge, in a hearing at which the rules of evidence (and even constitutional exclusionary rules) may not apply.

In one sense, then, the question of how much of a moral difference, or how much of a difference in punishment, is necessary to call for placing a factor in the definition of a crime rather than in a sentencing guideline can be answered in procedural terms: when the difference in moral stigma or in tangible punishment is so great that fairness requires the degree of certainty associated with the traditional procedural safeguards of the criminal process.

Once again, this is not a standard that the Supreme Court has felt comfortable applying as a matter of constitutional law. Deference to the legislature's line-drawing in such matters has been customary, and is, for the most part, correct. Since the decision is ultimately one of degree and judgment, rather than of clear conceptual distinction, the courts should generally defer to the political process.

It is not too much to expect, however, that legislatures and the commissions that advise them attempt to apply this standard in good faith. In the ad hoc, session-by-session law-making process, with the political winds blowing in favor of whatever legislation promises to lock up the most defendants the fastest, the pressures to create rules that minimize the burden of proof or short-cut time-consuming and expensive jury trials may be irresistible. Any given incursion on traditional divisions of authority between judge and jury or legislature and judiciary may be read simply as a desirable "get-tough-on-crime" measure. But that dynamic forms an important part of the justification for periodic comprehensive penal code reform, that attempts to put order into the random, politically expedient, and sometimes ill-advised innovations in crimi-
nal law that develop over time, especially in times when the fear of crime governs the process. A second, principled look at such innovations will often reveal them to have been compromises of principle, not even for genuine expediency but for mere gestures in the direction of severity.

However useful such a new look at our penal codes generally might be, there is a particular need for review at the federal level. Since the failure of the comprehensive federal penal code reform proposed by the Brown Commission, there has been an explosion of federal criminal law, a revolution in sentencing procedure, and a host of innovative new criminal statutes and forms of procedure. But among the many urgent reasons why a reformed federal code may be in order, a clearer and more principled division between those classifications of crime that ought to be incorporated in a code and those that can be left to the sentencing process is especially significant. To revert to the example of the assault guidelines, the critical punitive distinctions between aggravated and minor assault that determine dramatic differences in the basic punishment for the crime need not be established before a jury at trial or proved beyond a reasonable doubt, because legally they are treated as sentencing factors.\textsuperscript{77} Similarly, the dramatic differences in punishment that the fraud guidelines permit between minor and aggravated instances of fraud turn on factual findings that a jury has not made.\textsuperscript{78} Indeed, it has been held that even factors that are enacted by Congress, and that support the imposition of mandatory minimum sentences under the narcotics laws, are merely sentencing factors rather than elements of the offense to be proved at trial.\textsuperscript{79} Whether or not the Supreme Court upholds such incursions into traditional criminal procedure as permissible under the Consti-

\textsuperscript{77} See U.S.S.G. §§ 2A 2.2, 2A 2.3.

\textsuperscript{78} See id. § 2F 1.1.

\textsuperscript{79} See, e.g., DeSimone, 119 F.3d at 217.
tution, and whether or not these decisions represent a correct interpretation of the existing controlled substances laws, I would submit that relegating facts that result in dramatic differences in actual punishment, or that require imposition of a substantial mandatory minimum sentence, to a non-jury fact-finding process, is an abuse of the sensible distinction between offense elements and sentencing factors. As a matter of procedural fairness, factual determinations that carry such extreme consequences for defendants ought properly to be made based on the more stringent procedures that commonly are provided for offense elements and not provided in the case of sentencing factors.  

This, once again, is primarily a political judgment (albeit one with due process overtones), over which disagreement is certainly possible. But two propositions that are implicated in that judgment are not, I think, fairly debatable. First, the nature of the fact-finding process to be applied in each case is a centrally-relevant factor in determining which elements that bear on punishment should be treated as part of the definition of the offense. And second, in many of the cases we’ve been discussing, especially on the fed-

80. For this reason, the Supreme Court’s recent decision in Almendarez-Torres, 118 S. Ct 1219, is deeply regrettable. In Almendarez-Torres, the Court interpreted a statute that increased the maximum penalty for re-entry after deportation from two years to twenty years where the initial deportation followed conviction for an aggravated felony. See 8 U.S.C.A. § 1326 (b)(2) (West 1970 & Supp. 1998). The Court decided that Congress intended the “aggravated felony” element to be treated as a mere “sentencing element,” rather than constituting the distinguishing element of a separate crime, and consequently that its presence or absence can be determined at sentencing. I think the Court was terribly wrong to conclude, absent crystal clear instructions from Congress, that the legislature intended to turn a tenfold increase in the statutorily-mandated maximum sentence on a factor that need not be proved beyond reasonable doubt to a jury. Under the principles advanced in this essay, Congress clearly should treat such a dramatic sentencing consequence as an offense element, and the Court should have presumed that Congress so intended, absent a completely unambiguous expression of contrary intent. See id. at 1233 (Scalia, J., dissenting).
eral level, there has never been a genuine legislative effort to determine, systematically and consistently, how the line between offense elements and sentencing factors should be drawn.

D. The Role of the Legislature

This last observation brings me to my final point. One critical, and often-overlooked, issue in determining what factors should be treated as offense elements derives from notions of institutional role. (I would be inclined to use the term "separation of powers" here, but I do not necessarily mean to imply a binding constitutional principle). In the modern American tradition, where common law crimes have been all-but unheard of, defining the elements of crimes has been a function for the legislature. No one would suggest that the courts, or a sentencing commission, have the power to redefine the elements of offenses that have been defined by the legislature. The micro-management of sentencing, on the other hand, has been seen as a judicial function.

As noted earlier, I tend to believe that there are good reasons for preserving significant sentencing discretion for judges, and my own inclination would be to soften the constraints of guideline sentencing regimes. But in defining sentencing as a judicial function, I don't mean to foreclose, as a matter of principle, even a very detailed administrative sentencing code like the federal guidelines. The professed purpose of the guideline system is to reduce disparity in sentencing among individual judges, and not to transfer control of the details of sentencing from the judicial branch to the legislature. (Indeed, the Sentencing Reform Act provides that the United States Sentencing Commission is located "in the judicial branch" of government —in symbolic (not "merely" symbolic) recognition of

this very point).

Whether sentencing decisions are left to individual judges’ discretion or guided, to a greater or lesser degree, by some form of regulation, there remains a significant distinction between the kinds of penal policy questions that ought to be decided by the legislature and the ones that are appropriately left to a different level of authority. Some things ought to be decided by the legislature, at a high level of generality, visibility and accountability; other matters ought not be decided by the legislature, because they descend to a level of individualization, refinement and implementation that is best not addressed in terms of a political process. The legislature defines crimes, but—to take the extreme instance of the judicial function—it may not pass bills of attainder mandating the punishment to be imposed in individual cases. For similar reasons, legislative micro-management of sentencing is not a good idea; such matters are not typically issues of broad political principle, but of the detailed application of general rules to particular cases.

As a constitutional principle, this division of functions can only be policed at the extremes. The legislature surely has the power to pass a code resembling the Federal Sentencing Guidelines, rather than to delegate that task to an administrative or judicial agency. Notably, however, Congress did not do that, and no legislature would be likely to do so. The task is too complex, and requires too much routine monitoring and revision, to be effectively performed by a legislative body. Because the Sentencing Commission is, in principle, constantly reviewing every individual sentence imposed by a judge, and in turn refining its own rules to further guide the judges’ task, its work is more closely associated with the judicial than with the legislative function. And this is the more so, the more the Commission attempts to control judicial discretion by regulating in greater detail.

Even an advocate of such close control of the ju-
dicial function must recognize that this kind of control is ultimately administrative and implementational in nature. As the level of sentencing detail rises, the ability of the legislature to monitor the regulations decreases, and legislative interventions come closer and closer to dictating results in particular cases. The value of an independent judiciary in applying politically-determined principles in a neutral way to individual cases may survive a sentencing commission that tries to impose consistency on the actions of hundreds of individual judicial officers, but it will be more deeply threatened when political forces choose to tinker on an ad hoc basis with the minutiae of sentencing.

This analysis suggests a broad political rule of thumb: if a policy decision is important enough to be specifically addressed by the legislature, it presumably should be treated as an element of the offense, rather than as a sentencing factor. Such decisions ought not to be fobbed off to a less accountable, less visible agency, or left to the varied opinions of individual judges. Both implicit and explicit in the arguments above is the proposition that determining society's fundamental moral values, and determining at least the larger parameters of the imposition of serious punishment on offenders, are matters for determination in a political forum, based on open and serious debate. To leave these critical decisions to judges was wrong—not because it allowed too much judicial discretion over sentencing but because it potentially left the wrong kinds of issues to the courts. It is one thing to leave to judges a determination of how much incarceration is necessary to rehabilitate an individual offender, if the legislature determines that rehabilitation of offenders is the principal goal of criminal law. It is quite another thing to allow judges to decide each for her- or himself whether drug selling is more serious than defense contract fraud or vice versa. Leaving such issues to judges would be wrong even if
all the judges agreed, so that no sentencing disparity resulted. Nor would the problem be avoided by leaving the decision to a commission of judges (or others), who could impose their views on all their colleagues. Making these determinations is precisely what we pay legislators to do, and they should do it.

The converse rule seems equally valid: the legislature ought to resist the temptation to issue specific directives to the sentencing agency, for reasons similar to, though less strong than, the reasons it is not permitted to direct judges as to the sentences to be imposed in a particular case. If a factor is sufficiently important for the legislature to address its sentencing significance in legislation, it presumably belongs in the code, to mark a major moral category and be addressed by jurors at trial. But if a factor is sufficiently minor to be left to sentencing-phase judicial resolution, its precise impact on sentencing should be left for determination by the judges, or by the sentencing commission.

These standards again may not be susceptible to intellectually pure application, or to judicial enforcement as a matter of separation of powers. But it is reasonably clear that Congress has failed this test, too. If the courts are to be believed, Congress has written into law mandatory minimum sentencing provisions that it has not intended to treat as elements of separate offenses, but simply as sentencing instructions. And Congress has enacted specific directives to
the Sentencing Commission to tinker with its guidelines in quite specific ways, in response to perceived political demands. On the other hand, Congress has been content to allow the Commission in effect to superimpose on the uneven quilt of statutory definitions a virtual penal code of its own, making fundamental distinctions and classifications that Congress has not seen fit to write into statutory law.

But this dismal record should not persuade us that Congress cannot do better. Already by the 1960s, the piecemeal nature of criminal legislation had necessitated a systematic review of federal criminal law. Since that time, fundamental changes in our conception of sentencing law—as well as an unusually active period of ad hoc criminal legislation occasioned by public concern about crime—have both further disrupted the consistency of federal law and deprived the primary model for penal code reform of much of its utility as a guide to reform. A systematic revision of federal criminal law today would require a new look at the proper division of authority between Congress and the Sentencing Commission, just as a more generally-applicable Model Penal Code 2d would need to revisit fundamental questions of the special part of the criminal law in light of changed sentencing philosophies.

It is, in the end, fundamentally up to the legislature to determine what our values are, what basic punishments should apply to violations of those val-

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ues, and when the consequences of the classifications thus drawn are sufficiently significant that only the traditional procedural protections of the criminal process are sufficient to determine where an offender falls within them. These are questions that are hard to address, however, in the absence of a comprehensive examination of criminal law. The potential for recalling the legislature to this fundamental role is an important potential benefit of a project to create a Model Penal Code, Second (and/or a Model Federal Penal Code.)

VI. CONCLUSION

While the “general part” of the Model Penal Code has stood up well to the passage of time, the “special part” is in need of serious re-thinking before it could serve as a model for a legislature—and still more so for Congress—today. This is partly because of the considerable creative effort of legislatures since 1962, but is principally the result of a dramatic change since that time in sentencing philosophy. That change not only rejects the philosophy underlying the sentencing article of the Model Penal Code itself, but also undermines the assumptions behind its substantive definitions of crimes.

A legislature that seeks to control judicial sentencing discretion and mandate “just deserts” sentencing through a combination of mandatory minimum sentences, abolition of parole, and sentencing guidelines needs to devote serious attention to questions the drafters of the Model Penal Code never had to address. In particular the division of responsibility between the legislature and the sentencing commission in defining the factors differentiating offenses, and between the trial (jury) and sentencing (judge) processes in determining the presence of those factors in particular cases, are questions that cannot be ignored in the drafting of a penal code consistent with the domi-
nant sentencing philosophy of the present moment.

I have argued in this essay that factors that are thought to mark a significant moral distinction between categories of conduct, and/or that determine significant increases in punishment, ought to be defined by the legislature, written into the penal code as elements of distinct offenses, and proved at trial beyond a reasonable doubt. Less significant sentencing factors, on the other hand, not only can but should be left to the sentencing commission or to the discretion of individual judges, and should not be micromanaged by the legislature.

These are rough common-sensical distinctions. No doubt, additional thought and research can refine them further. But the project is an important one. Moreover, it is increasingly urgent. As the example of federal criminal law shows, ad hoc imposition of the sentencing rules of the late twentieth century on a set of penal statutes drafted on the assumption of an entirely different sentencing philosophy leads to procedural unfairness, blurs the functions of the different branches of government, and produces unjust results in particular cases.

There may be little practical need for revisiting the principal contribution of the Model Penal Code—its organization and rationalization of the general part of Anglo-American criminal law. That is perhaps to be expected; the general part deals with questions that are, if not eternal, at least for the ages, and the Code's effort to resolve those questions was sufficiently successful that a mere 35 years is unlikely to have revolutionized our understanding of them. But the special part of a criminal code is more transitory, responding to the perceived threats to public order of a particular time, and our time has been one especially worried about crime. A Model Penal Code 2d, or a Model Federal Code, written for the early 21st century, would have to take a very different approach to the special part.