

## The Model Penal Code: Is It Like a Classic Movie in Need of a Remake?

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Once upon a time, before 1962, state criminal codes were in disastrous condition. Indeed, it is probably overly generous to characterize the statutory systems then in place as “codes,” at least if one assumes that, at a minimum, a criminal code should set out with reasonable clarity all of the criminal offenses recognized in the jurisdiction, define critical statutory terms, avoid overlapping and contradictory statutory provisions, set out a comprehensive system of defenses and rules of accountability, and provide a rational and just sentencing system.<sup>1</sup> In short, what existed in 1962 was “a substantive criminal law that was often archaic, inconsistent, unfair, and unprincipled.”<sup>2</sup>

In 1962, along came the American Law Institute’s Model Penal Code (MPC), which Judge and Professor Gerard Lynch aptly describes in this Commentary Symposium as “one of the great intellectual accomplishments of American legal scholarship of the mid-twentieth century.”<sup>3</sup> Judge Lynch rightly describes the MPC as “one of the most successful law reform projects of American history.”<sup>4</sup> Virtually every criminal law practitioner old enough to remember the pre-Code era and every scholar of substantive criminal law of any age, understands the impact (almost all positive) the MPC has had on American substantive criminal law in all but the few hinterland states (such as California) that seem to live in a parallel universe untouched by the Code.

For me, the MPC drafters’ work on mental state categories is their greatest gift to the American criminal law. Even Professor Ken Simons, in his critique of this portion of the Code, concedes, as he must, that these provisions “are a dramatic improvement

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<sup>1</sup> See Paul H. Robinson et al., *The Five Worst (and Five Best) American Criminal Codes*, 95 NW. U. L. REV. 1, 1 (2000).

<sup>2</sup> Sanford H. Kadish, *Fifty Years of Criminal Law: An Opinionated Review*, 87 CAL. L. REV. 943, 947 (1999).

<sup>3</sup> Gerard E. Lynch, *Revising the Model Penal Code: Keeping It Real*, 1 OHIO ST. J. CRIM. L. 219, 219 (2003).

<sup>4</sup> *Id.* at 220.

over prior law.”<sup>5</sup> In my view, if Model Penal Code Section 2.02 (General Requirements of Culpability) was the only creative Code provision—which, of course, it isn’t—the American Law Institute (ALI) could justifiably be proud of its work.

So, then, why would some people (let’s be specific: many academics) be talking so wistfully about a Model Penal Code Second? One answer might be that the Code is now more than four decades old, and *any* criminal code that old is going to show its age. But, perhaps because I am now in my fifties, I refuse to find that explanation acceptable. Is the 1962 movie *To Kill a Mockingbird* no longer worth seeing and appreciating because it, like the MPC, is forty years old? For that matter, is the two decades older classic film *Casablanca* in need of a remake? The adjective “classic” answers my question.

A great deal, however, has occurred in the last four decades that arguably renders the MPC dated. After all, not *every* good 1962 movie has stood the test of time.<sup>6</sup> Let me suggest just a few examples of post-MPC events that *might* justify the need for a revised Code. First, social norms regarding sexual relations have evolved since 1962.

We are far more tolerant of consensual sexual activity, and less tolerant of nonconsensual sexual relations, than we were when the Code was adopted. Rape law, in particular, has changed dramatically (and those changes are not done yet) without any help from the ALI in just the past decade or two.<sup>7</sup> When I teach the subject in my criminal law class, students are stunned by the MPC rape provisions. How could a code that they found so sensible and progressive on matters they had studied earlier in the semester be so “backward” in the rape area? The answer, of course, is that the Code was mildly *progressive* by the standards of its time, but sexual norms have changed so much that, as Professor Deborah Denno amply demonstrates,<sup>8</sup> we can reasonably expect that the sexual-offenses provisions of any MPC Second would look dramatically different—and almost surely better—than those in the original MPC.

Second, another profound shift in social norms has resulted in the advent of new statutory crimes. For example, many states have enacted “hate crime” legislation. The MPC is silent in this regard. Third, the “war on drugs” was far from the minds of virtually everyone in the Eisenhower and Kennedy years when the ALI was producing an MPC essentially devoid of drug offenses.<sup>9</sup> Fourth, the post-MPC advent of computers and the Internet have put pressure on lawmakers to keep up with the

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<sup>5</sup> Kenneth W. Simons, *Should the Model Penal Code’s Mens Rea Provisions Be Amended?*, 1 OHIO ST. J. CRIM. L. 179, 204 (2003).

<sup>6</sup> For me, *The Birdman of Alcatraz* (1962) is in that “dated” category.

<sup>7</sup> For a somewhat contrarian view, and review, of where we now are in this area, see Joshua Dressler, *Where We Have Been and Where We Might Be Going: Some Cautionary Reflections on Rape Law Reform*, 46 CLEV. ST. L. REV. 409 (1998).

<sup>8</sup> Deborah W. Denno, *Why the Model Penal Code’s Sexual Offense Provisions Should Be Pulled and Replaced*, 1 OHIO ST. J. CRIM. L. 207 (2003).

<sup>9</sup> The Code *does* include a violation—an offense carrying no jail time, except for a third-time offender within a period of one year—for “public drunkenness” and “drug incapacitation.” MODEL PENAL CODE § 250.5 (1980).

activities of technologically sophisticated wrongdoers.

Fifth, the 1960s liberal faith in penal rehabilitation, exemplified by the Code's sentencing provisions, has given way to cynicism and fatigue. We fear or loathe criminals as we did *not* in the more idealistic 1960s, which means that, sadly, we want longer and determinate prison sentences today, based either on assaultive retributive<sup>10</sup> or give-up-on-criminals-and-throw-away-the-key principles.

Sixth, the past four decades have seen what I consider to be a renaissance in criminal law scholarship, which means that the MPC has undergone thoughtful scrutiny and criticism, particularly from adherents of a just-deserts philosophy of criminal theory not favored by the primary forces behind the original Code.<sup>11</sup>

Finally for current purposes, the statutory reforms inspired by the MPC have been followed, sadly but predictably, by what Professors Paul Robinson and Michael Cahill describe in their essay<sup>12</sup> as a “degradation” process: legislatures have responded to pressures from lobbyists and the general public to enact what the authors nicely describe as “designer offenses and crimes *du jour*”—offenses defined with non-Code terminology and punishing conduct already adequately handled by existing MPC provisions. The effect of such legislation has been to undermine the coherence and comparative clarity of many MPC-inspired codes. An MPC Second, therefore, could “stimulate state criminal code reform that will help states crawl out from under the decades of *ad hoc* amendments that are increasingly making the codes dysfunctional.”<sup>13</sup>

All of this *seemingly* (notice the italics) argues for the need for an MPC Second, in which each and every aspect of the Code would be open to reformulation. The ALI, however, is not currently inclined to launch such a venture. Instead, it has approved a project to consider revisions of just one portion of the Code—the articles on sentencing.<sup>14</sup> The core of the MPC will remain untouched for the foreseeable future. And, perhaps, the ALI's reticence is wise. After all, do we *really* want someone to remake *To Kill a Mockingbird* or (worse heresy) produce *Casablanca*?

Yes, the MPC is not perfect. Yes, we can all think of ways we might improve one part of it or another. But, as Judge Lynch reminds us, any effort to revise the

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<sup>10</sup> By assaultive retribution, I mean the vengeance-based hate-the-criminal philosophy of James Stephen, 2 James Fitzjames Stephen, A HISTORY OF THE CRIMINAL LAW OF ENGLAND 81 (1883) (“The criminal law thus proceeds upon the principle that it is morally right to hate criminals . . .”), as distinguished from what may be termed “protective retribution,” which views punishment as a means of expressing respect for wrongdoers and ensuring that their human dignity is respected. *E.g.*, Herbert Morris, *Persons and Punishment*, 52 MONIST 475 (1968).

<sup>11</sup> As Kent Greenawalt makes clear in his contribution, *A Few Reflections on the Model Penal Code Commentaries*, 1 OHIO ST. J. CRIM. L. 241, 241 and n.3 (2003), the most significant force behind the Code was Herbert Wechsler, a utilitarian, albeit one with a “highly nuanced” vision of that philosophy.

<sup>12</sup> Paul H. Robinson & Michael T. Cahill, *Can a Model Penal Code Second Save the States From Themselves?*, 1 OHIO ST. J. CRIM. L. 169, 170 (2003).

<sup>13</sup> *Id.* at 177.

<sup>14</sup> Professor Kevin R. Reitz is Reporter for the revisions. Preliminary Draft No. 1 was circulated on August 28, 2002.

Code ought to be inspired by the wish to “promote the reform of the nation’s *actual* criminal codes, as adopted by the state legislatures and Congress,”<sup>15</sup> rather than simply to create a new *model* penal code. And, some of Lynch’s observations convince me that an MPC Second is not the best way to bring about such reform.

Lynch reminds us that we—especially the legal academy, the primary advocates of a new Code—are a far more intellectually and sociologically diverse group than the academy and ALI involved in the Code-drafting process of the 1950s. Given this desirable diversity, it seems inconceivable to me that one could bring together from within the ranks of the ALI a genuinely representative group of academics, judges, and practitioners capable of drafting an entirely new, internally consistent MPC2.

Moreover, there is a risk in an MPC Second project: it makes everything fair game for change. I would not want to have a constitutional convention called in order to rid our Constitution of its embarrassing features (such as its recognition of slavery), because I would not want to give the new framers the freedom to rethink or rewrite those parts of the Constitution I treasure. Can anyone be confident that the new ALI product will be as good as the original? Even if it turned out that I was happy with the finished product, my view of a “better” MPC might not be yours. (The dialogue in *Casablanca* I find dated feels perfectly right to my wife.)

This is not to suggest, of course, that the ALI and criminal law scholars should not work for law reform. We should. But, the fact is that the ALI can do more good—or cause less damage—if it takes on smaller projects. Let the ALI and other legal bodies recommend new sexual offense provisions. Let the ALI consider whether hate crime statutes are desirable and provide its insight to lawmakers. Let it decide whether the problems confronting battered spouses and children justify further expansions of self-defense law.<sup>16</sup> Let the ALI consider whether its “extreme mental or emotional disturbance” manslaughter provision<sup>17</sup> goes too far, as many feminists suggest.<sup>18</sup> And so on. All of these are hot button issues, and we can safely assume that the answers the ALI would offer on these specific issues will not please everyone (or, even, *nearly* everyone), but at least these are more manageable individual projects than an MPC Second.

The one and currently only Model Penal Code, whatever its blemishes, omissions, or even embarrassments in light of twenty-first century social attitudes and intellectual thought is a wonderful gift to criminal law jurisprudence. Like a classic movie, I submit it would be a mistake to produce a sequel.

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<sup>15</sup> Lynch, *supra* note 3, at 219.

<sup>16</sup> I would answer that question in the negative. Joshua Dressler, *Battered Women Who Kill Their Sleeping Tormenters: Reflections on Maintaining Respect for Human Life while Killing Moral Monsters*, in CRIMINAL LAW THEORY: DOCTRINES OF THE GENERAL PART 259 (2002).

<sup>17</sup> MODEL PENAL CODE § 210.3(1)(b) (2002).

<sup>18</sup> E.g., Victoria Nourse, *Passion’s Progress: Modern Law Reform and the Provocation Defense*, 106 YALE L.J. 1331 (1997). But see Joshua Dressler, *Why Keep the Provocation Defense?: Some Reflections on a Difficult Subject*, 86 MINN. L. REV. 959 (2002) (generally defending the MPC provision).

That being said, perhaps I am wrong. I suppose there are a few great remakes of classic movies (although I am at a loss to think of one). My co-Managing Editor disagrees (see his reply Introduction that immediately follows). The essays that follow give you a chance to decide for yourself whether the goal of a better, more contemporary MPC is worth the effort.