

# Offense Grading and Multiple Liability: New Challenges for a Model Penal Code Second

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## I. INTRODUCTION

Contributors to the Symposium on revising the Model Penal Code in the previous issue of the *Ohio State Journal of Criminal Law* discussed deficiencies in the original Code and focused on specific rules or offenses that may merit revision or elimination.<sup>1</sup> But another, perhaps even more important, reform agenda would target the significant issues about which the Code provides little, if any, guidance. This Commentary does not discuss the Model Penal Code's errors so much as its omissions, focusing on two issues that, in my view, the original Code did not sufficiently address.

Though the Model Penal Code does an excellent job setting out culpability rules and defining specific offenses and defenses, it falls short in establishing rules for assigning a specific amount of punishment once an offense has been committed. As Part II of this Commentary discusses, the Code's grading scheme for individual offenses is crude, and the Code generally pays little attention to the question of how to allocate the liability-assignment function between grading and sentencing rules. Part III notes that the Code's scheme for imposing liability on more than one offense is practically undeveloped, and it offers some tentative recommendations for improvement in that area.

These two issues are related to, but are by no means fully addressed by, the American Law Institute's (ALI) current project to revise the Code's sentencing structure.<sup>2</sup> Though that project is highly welcome and likely to develop

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<sup>1</sup> See *Commentary Symposium: Model Penal Code Second: Good or Bad Idea?*, 1 OHIO ST. J. CRIM. L. 155 (2003).

<sup>2</sup> See generally AMERICAN LAW INSTITUTE, MODEL PENAL CODE: SENTENCING, PLAN FOR REVISION (2002), reprinted in 6 BUFF. CRIM. L. REV. 525 (2002) [hereinafter *MPC Sentencing Revision Plan*].

significant reforms, full resolution of the grading and multiple-offense issues discussed here is beyond even its suitably lofty ambitions. Because both issues operate along the intersection of two different functions of a criminal code—regulating the *imposition* of liability, and regulating the *extent* of liability when imposed—each necessitates an analysis of the interplay between those two functions. Addressing one function *in vacuo* cannot resolve the grading and multiple-offense problems; indeed, such an approach is troublesome precisely because it tends to obscure their very existence.

The original Code's organization, however, partitions the two functions of defining liability and establishing punishment,<sup>3</sup> and the Code's drafters generally addressed them in isolation.<sup>4</sup> The ALI's roadmap *Sentencing Revision Plan* points out and criticizes this feature of the original Code,<sup>5</sup> and is not alone in doing so.<sup>6</sup> Yet the sentencing reform project's inherent limitations of scope force it to maintain and perpetuate that troublesome differentiation. The project is designed to leave undisturbed the original Code's Special Part,<sup>7</sup> and the *Plan* even hints that the final proposals will effectively amount to a stand-alone document bearing only a circumstantial relationship to the rest of the Code.<sup>8</sup>

The best means of addressing the relation between offense-defining and offense-punishing rules would be a full revision, considering at once the total array of purposes that the Code, and each of its parts, must satisfy. The second-best option for these purposes would probably not be to deal with sentencing rules first, but rather to reconsider the Special Part with an eye toward the impact of offense

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<sup>3</sup> See *id.* at 530 (“The two subjects [of defining liability rules and establishing punishment once liability has been found], thus loosely classified, are segregated nearly entirely in the Code’s organization.”).

<sup>4</sup> See *id.* at 530 n.4 (“There is evidence . . . that the distinction between guilt determinations and decisions about penalty consequences was clearly drawn in the minds of the Code’s original drafters.”).

<sup>5</sup> See *id.* (“These are crude categorizations that ignore many interrelationships between crime definitions and punishment consequences.”).

<sup>6</sup> See Gerard E. Lynch, *Towards a Model Penal Code, Second (Federal?): The Challenge of the Special Part*, 2 BUFF. CRIM. L. REV. 297, 309–11 (1998) (noting that MPC effectively segregated categories of offense-definition and sentence-determination and arguing that special parts of criminal codes should incorporate greater consideration of penalty consequences), cited in *MPC Sentencing Revision Plan*, *supra* note 2, at 530 n.4.

<sup>7</sup> See *MPC Sentencing Revision Plan*, *supra* note 2, at 530 (expressing hope that after the project, Code readers will be able to “collate areas of new drafting with areas left untouched” and noting that “it should be possible to rework the sentencing and corrections articles without greatly disturbing the ‘general’ and ‘special’ parts of the existing Code, which include the Code’s best known and most influential provisions”). See generally *id.* at 529–32 (setting out plan to concentrate revisions centrally, if not exclusively, on “sentencing and corrections” articles of Code, while leaving “liability” articles intact); *id.* at 604–09 (excluding all of Special Part, except § 210.6 (relating to capital punishment for murder), from list of provisions that are “candidates for amendment”).

<sup>8</sup> See *id.* at 528 n.3 (“[T]he same subject matters might be addressed in a wholly-new ‘Model Sentencing Act’ or ‘Model Sentencing and Corrections Act.’”).

definitions and grades at sentencing.<sup>9</sup> After all, as the experience of sentencing reform at the federal level instructs, failure to first address the underlying weaknesses of a code's Special Part will likely make the sentencing-reform project harder and the resulting product worse; such sentencing reforms have struggled to do through guidelines what the code could and should have done in defining and grading offenses.

## II. THE INEFFECTIVE-GRADING PROBLEM

Although the Model Penal Code made major strides in articulating general principles and defining specific offenses, the Code comes up short in assigning specific ranges of liability for offenses. The potential availability of more specific sentencing guidelines does not eliminate a criminal code's primary role in establishing the general range of punishment due for an offense by specifying its *grade*: that is, its relative seriousness compared to other offenses. Grading provides a first approximation of an appropriate punishment that is then refined in the sentencing process. Grading also categorically excludes other possible punishments deemed inappropriate.

The Code's advances in defining offenses are partially undermined by its failure to guide or cabin judicial discretion over the amount of punishment to be imposed for the crime. Clear, precise rules for determining what offense has been committed are of little value if the consequences of that determination differ little, or not at all, from the consequences of imposing liability for an entirely different offense. In fact, a code with few grading categories will undermine seemingly clear and precise offense rules by eliminating any incentive for judges and juries to take pains in distinguishing varying levels of harm or culpability among offenses, because no available grading distinctions would capture and reflect the offense distinction.

At the most fundamental level, examining the sophistication of a grading scheme serves only as a proxy for a more thorough review of the appropriateness of a criminal code's specific grading determinations. Even so, the overall scheme itself merits attention, for a system of grading categories has practical value in forcing the legislature to consider the relative seriousness of an offense *vis-à-vis* other offenses when assigning grades. Obviously, having fewer grading categories means that legislative determinations, and an adjudicator's subsequent punishment measures, will become more inexact (and inaccurate).

The significance of grading, and the limits of relying on sentencing rules, are highlighted by the recent landmark case of *Apprendi v. New Jersey*<sup>10</sup> and its progeny. This line of cases has reaffirmed that an offense's elements, to which the relevant grade applies, must be proved to the jury beyond a reasonable doubt,

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<sup>9</sup> *Cf. id.* at 625 (noting the "downside of fashioning a sentencing structure within the relatively broad grading framework of the original Code").

<sup>10</sup> 530 U.S. 466 (2000).

while sentencing factors may be, and often are, satisfied through proof to the judge by a preponderance of the evidence. Accordingly, establishing the offense committed, and thereby establishing the general range of liability as determined by the offense's grade, provides the only available means for the jury to express itself on the issue of the seriousness of a defendant's offense. Specific sentencing guidelines pick up the slack of wide, loose offense grades to define a precise level of liability for any given offender. Consequently, determining liability using guidelines, rather than offense grades, effectively shifts authority away from the more traditional democratic institutions—the legislature, which defines offenses, and the jury, which must be satisfied beyond a reasonable doubt that a defendant has committed one—toward prosecutors and judges.

The Model Penal Code defines only five offense grades: first-degree felony, second-degree felony, third-degree felony, misdemeanor, and petty misdemeanor.<sup>11</sup> In contrast, current state codes commonly recognize twice as many grades, which itself serves as an indication of how flawed even the Code-based states found the Code's grading approach.<sup>12</sup> Even ten categories of offenses are far fewer than the number of grades a code might reasonably employ to distinguish cases of different seriousness. The United States Sentencing Guidelines, for example, recognize forty-three levels of offense severity;<sup>13</sup> though such complexity (especially as reflected in those Guidelines) is not always necessary or even desirable, it highlights the feasibility of refining the current Code's grading scheme.

By placing the full range of offenses into only five categories, the Code drastically curtails the potential, and proper, role of grading in the liability-assigning process. Even if the offense grades carried specified minimum sentences—and under the Code, they do not—the range between the maximum and minimum sentences would have to be enormous to include the wide range of offenses covered by each of the five grades. Beyond the importance of establishing a specific sentence range, the grading of an offense can also provide an important public statement of the offense's relative seriousness. But with only three grades of felonies and two grades of misdemeanors, each grade is sure to include offenses of different seriousness. A project to revise the Model Penal Code would offer a chance to thoughtfully assess the relative seriousness of each offense and impose an appropriate corresponding grade.

In the age of *Apprendi*, the importance of taking grading seriously has become even more apparent, for that case underscores the consequences of defining offense elements and sentencing factors. Yet *Apprendi*, as well as much of the scholarly

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<sup>11</sup> See MODEL PENAL CODE art. 6 (1985).

<sup>12</sup> See, e.g., ARIZ. REV. STAT. § 13-601 (1989) (10 grades of offense); COLO. REV. STAT. §§ 18-1-105, 18-1-106, 18-1-107 (1986) (10 grades); DEL. CODE ANN. tit. 11, §§ 4201, 4202, 4203 (1994) (10 grades); 730 ILL. COMP. STAT. ANN. 5/5-5-1 (West 1993) (11 grades); NEB. REV. STAT. §§ 28-105, 28-106 (1995) (15 grades); N.Y. PENAL LAW §§ 55.05, 55.10(3) (McKinney 1998) (10 grades); OHIO REV. CODE ANN. § 2901.02 (West 1998) (12 grades); S.D. CODIFIED LAWS §§ 22-6-1, 22-6-2, 22-6-7 (Michie 1978) (10 grades); VA. CODE ANN. § 18.2-9 (Michie 1996) (10 grades).

<sup>13</sup> See U.S. SENTENCING GUIDELINES MANUAL § 5A (2003).

commentary on the subject,<sup>14</sup> focuses attention on the constitutional issues and leaves underdeveloped the underlying normative question: which factual issues bearing on criminal liability *should* be defined as offense elements, and which are more suitable for resolution by the court as sentencing factors? Under *Apprendi*'s constitutional rules, legislatures retain considerable discretion to define offenses and sentencing factors, and thus frequently will be free to define a given fact either as an element or as a sentencing factor. What legislatures still need are substantive criteria to help them decide among constitutionally permissible options.

Although the current ALI sentencing-reform project recognizes the issues *Apprendi* raises and laudably seeks to address them, the cabined focus of that project allows only a partial resolution. The *Plan* recognizes that a revised Code must not only achieve constitutional conformity with *Apprendi*, but “[m]ore important still, [it] must confront issues raised by *Apprendi* on a prudential, subconstitutional level.”<sup>15</sup> At the same time, the *Plan* rather incongruously asserts that after the sentencing project is complete, “[i]t will likely be possible to retain the basic grading schema of the original Code.”<sup>16</sup> But if the project does not confront the original Code’s grading system, it cannot confront the most significant “prudential, subconstitutional” issue *Apprendi* raises: the issue of how best to distribute punishment-assigning power between the court and the jury.<sup>17</sup> It

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<sup>14</sup> See, e.g., Nancy J. King & Susan R. Klein, *Essential Elements*, 54 VAND. L. REV. 1467 (2001); cf. Susan N. Herman, *The Tail That Wagged the Dog: Bifurcated Fact-Finding under the Federal Sentencing Guidelines and the Limits of Due Process*, 66 S. CAL. L. REV. 289, 299 (1992) (“There has been surprisingly little scholarly discussion about which issues should be decided at sentencing instead of at trial.”).

Some commentary, however, has begun to explore the underlying substantive issues. See, e.g., Kyron Huigens, *Solving the Apprendi Puzzle*, 90 GEO. L.J. 387, 389, 392 (2002) (putting forward “principled basis on which to distinguish a jury’s determination of facts in support of punishment from a judge’s determination of facts in support of punishment” and “appeal[ing] to the fundamental requirements of just punishment in order to restore both the due process right to proof beyond a reasonable doubt and the Sixth Amendment jury right”).

<sup>15</sup> *MPC Sentencing Revision Plan*, *supra* note 2, at 531; see also *id.* at 637 (suggesting that “a redraft could treat *Apprendi* as an invitation to revisit fundamental issues of factfinding relevant to punishment,” though listing only one candidate for such re-evaluation: the facts necessary to impose an extended term of confinement under the MPC); cf. *id.* at 667 (“It is an understatement to say that a revised Model Penal Code must give more attention than the original Code to the twin issues of (1) segregating ‘sentencing facts’ and ‘trial facts’ and (2) process at sentencing.”).

<sup>16</sup> *Id.* at 531; see also *id.* at 622–26; *id.* at 667 (“Section 7.07 by itself cannot settle the question of which facts ought to be determined at sentencing. Such policy decisions must also be advanced in the definitions of substantive crimes, [among other places.]”) (emphasis added).

<sup>17</sup> Although my discussion focuses on the issue of who, judge or jury, might best serve as decisionmaker for specific issues, there are also various other procedural, political, and practical factors at stake in the allocation of issues between grading and sentencing. For example, offense elements are subject to proof beyond a reasonable doubt, whereas the evidentiary burden for sentencing factors may be lower; the due process and evidentiary rules that apply at sentencing may also be looser than, or otherwise different from, those that apply at trial. See, e.g., Herman, *supra* note 14, at 289–92 (noting procedural distinctions between trial and sentencing in federal system).

is difficult to see how a revision could undertake, much less accomplish, the project of reallocating that power if it modifies only the rules governing the sentencing judge's authority *after* a jury's conviction vote, while leaving unaltered the significance of that vote for purposes of determining an offender's punishment.

Expanding the project to re-examine the relations between offense definition, offense grading, and sentencing rules would enable a fuller evaluation of the proper roles of judge and jury. Indeed, such a project could also weigh, and make policy decisions based on, the impact of the Code's structure on other institutional players; for example, prosecutors' power may be affected as much or more by the definition and grade of offenses—and even the *quantity* of available offenses—as by the applicable sentencing rules.<sup>18</sup>

The time has come for serious reconsideration of how we should allocate decisionmaking authority among the relevant institutional players. But because the existing Code tends to define offenses broadly and has relatively few offense grades, it provides little guidance on these matters. A complete Code revision would enable drafters to revisit the question of offense definition with the significance of the grading-versus-sentencing issue in stark relief. Such a project could generate, at the very least, a useful debate about how to distribute the punishment-assigning role between jury and judge, and the resulting Code could provide a template for how to implement the chosen distributive theory.

### III. THE MULTIPLE-OFFENSE-LIABILITY PROBLEM

No state has yet enacted a clear and comprehensive statute that sets out in detail an underlying basis or practical method for punishing multiple offenses. The Model Penal Code is no different. The problem of imposing multiple liability involves two distinct issues. The first concerns whether and when a given offender may be convicted of two different crimes (an issue complicated when the two crimes are based on the same or overlapping conduct). Second, where multiple liability is appropriate, the question arises as to how much total liability should be imposed for the offenses.

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My focus on the allocation of authority between judge and jury is not intended to minimize or ignore these other critical ramifications of the grading-versus-sentencing decision.

A thorough analysis of the proper allocations of issues between grading and sentencing would obviously need to be alert to all of these factors. Although I am interested in developing such an analysis, limitations of space preclude me from doing so here. For purposes of this Commentary, I seek only to highlight the issue, not to resolve it.

<sup>18</sup> Cf. *MPC Sentencing Revision Plan*, *supra* note 2, at 534 n.11 (“A related question is whether a revised Code should reach into the relatively uncharted territory of the regulation of prosecutorial charging discretion and the plea bargaining process, on the theory that choices made at these stages are forms of sentencing discretion. There is much to be said for the view that sentencing reforms risk unintended consequences if they regulate the discretionary authority of judges and other official decisionmakers, yet attempt no parallel regulation of the authority of prosecutors.”).

A. *Establishing Multiple Liability: When Is It Proper?*

Instead of attempting to set out fundamental principles concerning multiple liability, the Model Penal Code, like most legislative efforts, ultimately leans on the notion of an “included offense.”<sup>19</sup> The “included offense” concept—an idea borrowed from double jeopardy law, which itself is murky, if not incoherent—has not proven useful or clear as a guide to determining when multiple liability is appropriate. Accordingly, in states whose codes are based on the Model Penal Code, decisions regarding the propriety of imposing multiple liability have effectively been delegated to the courts, with predictably unpredictable results. This issue is far too critical to allow *ad hoc* decisionmaking rather than at least trying to provide legislative guidelines or an explanation of suitable criteria.

The significance of this “liability-determination” issue is obscured by the manner in which most states’ existing sentencing schemes deal with the “liability-imposition” issue. As a practical matter, both issues can effectively be swept under the rug at once: because nearly all states allow—and frequently require—concurrent sentences for most multiple offenses, a court can often enter additional convictions that have no practical consequence in terms of the defendant’s total punishment. But if we take seriously the project of imposing additional liability for all the distinct harms (and only the distinct harms) a defendant has caused, we also need to take care in describing the conditions under which multiple liability is, or is not, allowed.

Consider the case where an offense has both a “base offense” and an aggravating factor (say, causing physical injury) that increases the offense’s grade, and there is another offense that specifically prohibits the aggravating factor (causing injury). The second offense and the aggravated form of the first offense (considered as a whole) may each require something that the other does not—thus, neither is technically an included offense of the other. Even so, using the same harm to satisfy both the aggravating factor and the second offense may amount to double counting of a single harm.

On the other hand, there may also be cases where one offense is an included offense of another, but each offense represents a distinct harm or wrongful act under the facts of the case. One recurring and difficult issue for the courts under included-offense analysis has been whether there can be liability for two offenses where one includes efforts toward the other: for example, burglary, which requires an intent to commit a felony, and the subsequent felony. Because the purpose of a distinct burglary offense is to punish the intrusion itself, which represents an independent harm from the later felony, it would seem to make sense that the later felony should not be discounted or merged into the burglary offense. The same is true of robbery, which punishes the discrete harm of intimidation and fear that exists separately from the attendant theft.

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<sup>19</sup> See MODEL PENAL CODE § 1.07(1), (4) (1985).

Developing a more coherent and more just approach than the inadequate included-offense analysis requires facing squarely the challenge of determining what is, and what is not, a distinct harm meriting separate liability. Consider the following possibility:

*Conviction When the Defendant Satisfies the Requirements of More than One Offense or Grade.*

(1) Limitations on Conviction for Multiple Related Offenses. The trier of fact may find a defendant guilty of any offense, or grade of an offense, for which he satisfies the requirements for liability, but the court shall not enter a judgment of conviction for more than one of any two offenses if:

- (a) the two offenses are based on the same conduct and:
  - (i) the harm or wrong of one offense is:
    - (A) entirely accounted for by the other offense, or
    - (B) of the same kind, but lesser degree, than that of the other offense; or
  - (ii) the two offenses differ only in that:
    - (A) one is defined to prohibit a designated kind of conduct generally and another to prohibit a specific instance of such conduct, or
    - (B) one requires a lesser kind of culpability than the other; or
  - (iii) the offenses are defined as a continuing course of conduct and the defendant's course of conduct was uninterrupted, unless the law provides that specific periods of such conduct constitute separate offenses[.]<sup>20</sup>

In many respects, this provision is similar to the Model Penal Code's provision. There is one key difference, however. In addition to dealing with the particular ways in which the *conduct* involved in one offense might merely duplicate or overlap with that of the other offense, the provision asks whether the *gravamen* of one offense duplicates that of another.

The provision above does not refer to the concept of an "included offense." Today the included-offense concept is used for two different purposes: first, it

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<sup>20</sup> Proposed ILL. CRIM. CODE § 254(1)(a) (2003); *see also* proposed KY. PENAL CODE § 502.254(1)(a) (2003), *available at* <http://www.law.upenn.edu/fac/phrobins/kentucky/> (similar provision). Subsequent subsections 254(1)(b)–(e), not reproduced here, address distinct and somewhat more well-settled prohibitions on multiple liability, as in precluding punishment for both an inchoate offense and the subsequent completed offense.

specifies when the jury may be instructed on an offense that was not specifically charged; second, it defines a rule limiting entry of conviction for multiple offenses. Yet these two purposes are conceptually distinct. The notion of an included offense may well be useful in the context of jury instructions, but as discussed above, it is unhelpful in resolving the question of when multiple liability should be allowed.

The provision above could be implemented without reference to the particular facts of specific cases. Like the included-offense issue, the rules in the proposed provision would present issues of law<sup>21</sup> regarding how defined offenses relate to each other—specifically, whether their relation is such that multiple liability is appropriate, or whether imposing liability for one offense would needlessly and improperly duplicate liability already imposed by a conviction for another offense. Accordingly, a court’s finding regarding the appropriateness of multiple convictions for two separate offenses could be binding on all future cases involving those same offenses, thereby enhancing predictability, stability, and evenhandedness in the imposition of multiple liability.

Critically, because the provision’s rules would apply only when two offenses are “based on the same conduct,” any bar on multiple convictions would govern only subsequent cases where those two offenses were again based on the same conduct. Multiple convictions for the two offenses would remain acceptable where they are not both based on the same conduct. More broadly, and significantly, the provision would not in any way limit convictions for related offenses arising out of different conduct. For example, subsection (1)(a)(i)(A) would preclude assault liability where the bodily harm involved consists solely of sexual penetration that is accounted for by a sexual assault conviction. Multiple liability would be appropriate, however, where the bodily harm involved is independent of the sexual penetration, such as where the defendant beats the victim to facilitate, or in the course of, a sexual assault.

Subsection (1)(a) of the provision imposes additional requirements, however, so that multiple convictions are not barred for *all* situations where the same conduct constitutes multiple offenses. Subsection (1)(a)(i)(A) precludes liability for two offenses arising out of the same conduct where one offense is concerned with a harm or wrong that is “entirely accounted for by” the other offense. Rather than considering the theoretical possibility of committing one offense without committing another, the proposed standard calls for a consideration of the relevant offenses’ purposes.

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<sup>21</sup> In some instances, the court might withhold jury instructions for an offense because the multiple-liability provision would preclude a conviction anyway. To avoid the risk of a reversal requiring a new trial, however, the court would probably prefer, in the usual case, to postpone such determinations until after the jury has returned its verdicts.

B. *Imposing Multiple Liability: How Much Is Proper?*

Even after a new Code has developed rules for determining *whether* to assign liability for multiple offenses, the question of *how much* liability to assign remains. As noted above, courts typically impose concurrent sentences for multiple offenses of conviction, but that system has the obvious and pervasive flaw of trivializing, to the point of complete irrelevance, every offense other than the most serious one. A sensible liability scheme should require, or at least allow, some additional punishment for each such harm—although perhaps incrementally reduced punishment instead of the equally crude alternative of full consecutive sentences for each offense. There should be no “free” violations, but neither should there be double-counting of any violation because of technically separate, but truly overlapping, offenses.

As to this second question—not whether to impose liability, but how much to impose—sentencing reform by itself may make (and to some extent, has already made<sup>22</sup>) a significant contribution. The current Model Penal Code sentencing-reform project seems poised to confront this issue seriously, although the preliminary *Plan* for the project hints at a continuing reliance on the concurrent-consecutive dichotomy.<sup>23</sup>

We must not, however, consider sentencing to be the entire problem here, nor sentencing rules the exclusive (or the best) means of resolving the problem. As mentioned earlier, the full and proper consideration of multiple-liability issues requires that we simultaneously confront the questions of how offenses are punished and how they are *defined*. The question of how much to punish multiple offenses should arise only after a comprehensive consideration of the conceptually prior question of when we should hold that multiple offenses have even occurred, rather than just one of the offenses or, perhaps, an entirely different, better-defined single offense. Our attention to the relationship between offenses will be diminished if we accept as given current offense definitions and the basic rules for deciding when multiple convictions may be imposed—as, significantly, the ALI’s sentencing-reform project does.<sup>24</sup>

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<sup>22</sup> For example, modern sentencing guideline systems, such as the United States Sentencing Guidelines, often have elaborate schemes for “grouping” related offenses to arrive at a combined punishment level seeking to account for all of, and only, the independent discrete harms an offender’s conduct causes. *See, e.g.*, U.S. SENTENCING GUIDELINES MANUAL §§ 3D1.1–3D1.5 (2003). A full examination of the accomplishments and inadequacies of such schemes is beyond the scope of this Commentary. In any case, to a certain extent the schemes are only as good as the underlying offense definitions that determine when multiple offenses exist to be “grouped,” and the grades (and constraints such as mandatory minimum or consecutive sentences) attaching to each.

<sup>23</sup> *See MPC Sentencing Revision Plan, supra* note 2, at 663 (stating that “an updated Code should seek to provide greater guidance to trial judges on the choice between concurrent and consecutive punishments”).

<sup>24</sup> *See id.* at 663 (excluding from the list of provisions that are “candidates for amendment” MPC § 1.07 (Method of Prosecution When Conduct Constitutes More Than One Offense)).

Even as to sentencing in particular, a change of perspective is in order. We should address the multiple-liability issue in the context of a scheme that looks beyond the present consecutive-concurrent dichotomy, rather than by defining sentencing rules predicated on that dichotomy.<sup>25</sup> One possible approach is to draft a provision like the following:

*Authorized Sentence for Multiple Offenses.*

When a defendant is being sentenced for more than one offense, the cumulative authorized sentence for all of the offenses of which he has been convicted is equal to:

- (1) the sentence for the most serious offense,
- (2) plus one-half the sentence for the next most serious offense,
- (3) plus one-quarter the sentence for the next most serious offense,
- (4) plus one-eighth the sentence for the next most serious offense,
- (5) continuing in like manner for all offenses for which the defendant has been convicted, thereby causing each additional offense to increase the total authorized cumulative sentence, but by a decreasing increment.<sup>26</sup>

Although the specific mathematical progression of the proposed provision's scheme is certainly open to debate or further refinement, its general mechanism for sentencing multiple convictions provides fairer punishment than the crude consecutive-concurrent dichotomy on which most current sentencing schemes rely. Such an intermediate approach to sentencing for multiple offenses ensures that each additional offense leads to some increase in overall punishment while avoiding raw aggregation of offenses into an unduly severe cumulative sentence.

I do not mean to suggest that either of the proposed provisions set out in this Part is perfect or fully addresses the problems I have raised. Perhaps they are best seen merely as a starting point for consideration and debate. That, indeed, is why I suggest that such issues, and the resulting provisions, are ideal subjects for the extended process of proposal, discussion, and modification that a project to revise the entire Model Penal Code would entail.

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<sup>25</sup> Here again, existing sentencing reform has already made strides, moving beyond the historical concurrent-consecutive limitations. For example, the federal Sentencing Guidelines enable "partially consecutive" sentences for grouped offenses, *see* U.S. SENTENCING GUIDELINES MANUAL § 5G1.2(d) (2003), though this option was apparently available to federal judges (albeit rarely employed) even prior to the Guidelines. *See, e.g.,* United States v. Mizrachi, 48 F.3d 651, 654 n.1 (2d Cir. 1995) (noting availability of option prior to Guidelines).

<sup>26</sup> Proposed ILL. CRIM. CODE § 906 (2003); *see also* proposed KY. PENAL CODE § 509.906 (2003), available at <http://www.law.upenn.edu/fac/phrobins/kentucky/> (similar provision).

#### IV. CONCLUSION

The original Model Penal Code represented an enormous step forward in determining and articulating the underlying rules that should guide assignment of criminal liability, and in defining individual criminal offenses. Two major issues that it failed to address fully—the relationship between offense definitions and sentencing rules, and the relationship between individual offenses when liability for more than one offense is allowed under their definitions—are among the most under-theorized areas in substantive criminal law. Both of these issues relate as much, if not more, to *how* (and how much) we criminalize offenses than to *what* acts and actors merit liability, and each is likely to benefit from the careful, deliberative drafting process that would attend efforts to revise the Model Penal Code.