

Prototype Theory and the Classification of Offenses in a Revised Model Penal Code: A General Approach to the Special Part

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Ask the man (or woman) in the street what the criminal law is all about and you are likely to hear about murder and manslaughter, or rape and robbery. You are likely, in other words, to hear about the concepts that make up the criminal law's "special part." But ask a criminal law scholar what he or she considers most important, or interesting, in the criminal law, and chances are you will hear about "general part" concepts such as culpability, acts and omissions, and justification and excuse. Indeed, many criminal law scholars view the special part with a certain condescension. Characterized as it is by frequently changing, jurisdiction-specific provisions, the special part seems to many undeserving of systematic analysis.

Nowhere is this antipathy to the special part clearer than in connection with the Model Penal Code. Herbert Wechsler himself, the Code's Chief Reporter, seems to have viewed Part II (the special part) of the Code as inherently local and transitory.¹ Perhaps partly as a result, the most influential part of the Code, in state legislatures and court decisions,² as well as that most engaging to scholars,³ has

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1. See Herbert Wechsler, *The Challenge of a Model Penal Code*, 65 *Harv. L. Rev.* 1097, 1132 (1952) (suggesting that the Special Part is governed by "variations in social conditions and public attitudes from state to state").

2. See Gerard E. Lynch, *Towards a Model Penal Code, Second (Federal?): The Challenge of the Special Part*, 2 *Buff. Crim. L. Rev.* 297, 298-99 (1998).

3. See, e.g., Symposium, *The 25th Anniversary of the Model Penal Code*, 19 *Rutgers L.J.* 519 (1988) (containing articles on mistake of fact, culpability, corporate liability, excuses, attempts, and justification); Herbert L. Packer, *The Model Penal Code and Beyond*, 63 *Colum. L. Rev.* 594 (1963) (focusing on general

been Part I (the general part).

This is not to say that the special part of the criminal law has been wholly ignored by the commentators. There is, to be sure, a substantial body of literature concerning individual crimes—including insightful works on rape,⁴ homicide,⁵ and theft.⁶ The same is true with respect to specific offenses in the Model Penal Code.⁷ While all of these works deal with the relationship between various specific offenses and the general part, however, what is most lacking is an attempt to show how the various provisions of the special part relate *to each other*. Instead, as Markus Dubber has put it, “the special part of American penal law is treated as a mere grab bag of unconnected offense definitions.”⁸

The tendency to treat the special part as little more than a collection of unrelated and transitory provisions is regrettable. As I have suggested elsewhere, nothing is more universal in criminal law than the prohibition on socially harmful and morally wrongful acts such as murder, rape, and theft—precisely the kinds of concepts that comprise the special part.⁹ And, indeed, the scholarly tide

part); Paul H. Robinson & Jane A. Grall, *Element Analysis in Defining Liability: The Model Penal Code and Beyond*, 35 *Stan. L. Rev.* 681 (1983) (focusing on culpability provisions of Part I).

4. See, e.g., Susan Estrich, *Real Rape* (1987); Stephen J. Schulhofer, *Unwanted Sex* (1998).

5. See, e.g., Samuel H. Pillsbury, *Judging Evil: Rethinking the Law of Murder and Manslaughter* (1998).

6. See George P. Fletcher, *Rethinking Criminal Law* 3-113 (1978); Jerome Hall, *Theft, Law and Society* (2d ed. 1952).

7. See, e.g., Paul Marcus, *Book Review, The Model Penal Code and Commentaries*, 73 *J. Crim. L. & Criminology* 811 (1982); Louis B. Schwartz, *Morals Offenses and the Model Penal Code*, 63 *Colum. L. Rev.* 669 (1963); Herbert Wechsler, *Codification of the Criminal Law in the United States: The Model Penal Code*, 68 *Colum. L. Rev.* 1425 (1968) [hereinafter Wechsler, *Codification of Criminal Law*]; Franklin E. Zimring and Gordon Hawkins, *Murder, the Model Code, and the Multiple Agendas of Reform*, 19 *Rutgers L.J.* 773 (1988).

8. Markus Dirk Dubber, *Reforming American Penal Law*, 90 *J. Crim. L. & Criminology* 49, 56 (1999).

9. See Stuart P. Green, *The Universal Grammar of Criminal Law*, 98 *Mich. L. Rev.* 2104 (2000) (reviewing George P. Fletcher, *Basic Concepts of Criminal Law* (1998)).

may now be beginning to turn. Recent works by Joel Feinberg,¹⁰ Paul Robinson,¹¹ and Gerard Lynch¹² have demonstrated that attention to the special part need not mean a narrow focus on one or two specific offenses. Instead, it is possible to find overarching and foundational principles that link the various offenses in some coherent and unified manner. It is possible, in other words, to approach the special part of the criminal law in *general* terms.

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This article seeks to develop a general approach to the special part by focusing on the classification of offenses. Part I begins by examining a collection of concepts in cognitive science that help explain the mental process of classification. In contrast to the traditional or classical theory of classification (which held that things are in the same category if and only if they have certain properties in common), the modern prototype theory of classification seeks to show that categories frequently involve stereotypes, fuzzy boundaries, and family-like resemblances; that some category members can be more central than others; and that the most basic and familiar categories are often found in the middle of a general-to-specific hierarchy. Part I then attempts to show how

10. Joel Feinberg, *The Moral Limits of the Criminal Law* (published as four separate volumes: *Harm to Others* (1984), *Offense to Others* (1985), *Harm to Self* (1986), and *Harmless Wrongdoing* (1988)).

11. Paul H. Robinson, *Structure and Function in Criminal Law* (1997) [hereinafter Robinson, *Structure and Function*]; Paul H. Robinson, et al., *Making Criminal Codes Functional: A Code of Conduct and a Code of Adjudication*, 86 *J. Crim. L. & Criminology* 304 (1996) [hereinafter Robinson, *Making Criminal Codes Functional*]; Paul H. Robinson, *A Functional Analysis of Criminal Law*, 88 *Nw. U. L. Rev.* 857 (1994) [hereinafter Robinson, *Functional Analysis*]; Paul H. Robinson, *Rules of Conduct and Principles of Adjudication*, 57 *U. Chi. L. Rev.* 729 (1990) [hereinafter Robinson, *Rules of Conduct*]. These works are discussed *infra* notes 53-56, 128, and accompanying text.

12. Lynch, *supra* note 2 (arguing that dramatic changes in sentencing laws that have occurred since the promulgation of the Model Penal Code in 1962 should affect our approach to the special part of both a new federal penal code and a revised version of the Model Penal Code).

criminal offense classifications, despite their superficial resemblance to the classical theory, do in fact reflect the principles of the prototype theory. Indeed, the definition of most offenses, consisting of a disjunctive list of elements (*e.g.*, rape involves *either* force or threat, impairment of the victim's self-control, *or* an underage victim) is itself a form of family resemblance categorization. For most offenses, there is no single set of common, shared characteristics. Moreover, as in other kinds of classification, our most commonly used and easily identified criminal law categories tend to be somewhere in the middle of a general-to-specific hierarchy: *e.g.*, *murder*, rather than homicide or second degree murder; *burglary*, rather than felony or aggravated burglary.

Part II then turns to the classification of offenses in a revised Model Penal Code. We begin with a brief discussion of three background issues: first, who is the audience to which a revised Model Penal Code should be addressed; second, to what extent should the Code seek to be prescriptive rather than merely descriptive or explanatory; and third, what exactly is the doctrinal and moral significance of classification in the criminal law? We then consider the kinds of structural principles that ought to underlie the revision of the Code's special part. The particular focus here is on both gaps in coverage (*i.e.*, conduct that, for one reason or another, is not covered in the Code) and overlaps (*i.e.*, places where more than one Code provision applies to the same conduct). In the course of this discussion, we will consider questions such as: How should a revised Code treat recently-created offenses such as computer crimes, carjacking, vehicular homicide, racketeering, and money laundering? How should a revised Code deal with offenses involving narcotics, firearms, alcohol, gambling, the environment, and other regulatory matters, which were left out of the original Code? How can the Code be revised to eliminate possible redundancies or overlaps in coverage involving matters such as theft and reckless endangerment? Throughout this discussion, my hope is to explore various issues raised by

the prospective revision of the Code by using the analytical tools provided by the prototype theory of classification. Among other things, I reject the suggestion made by scholars such as Paul Robinson that criminal codes should abandon traditional common law categories such as robbery and burglary, and prosecute defendants instead for the constituent offenses into which those crimes can be broken down (in the case of robbery, theft, and assault; in the case of burglary, trespass, and attempt to commit a felony, such as theft). I argue that common law offense classifications of this sort have a value that transcends the sum of their parts, largely as a result of the moral, linguistic, and social meanings that have become attached to such labels.

I. PROTOTYPE CLASSIFICATION AND THE CRIMINAL LAW

Classification is fundamental to human reasoning. Whenever we see or think about something as a *kind* of thing (*e.g.*, a plant, an animal, a number), we are engaged in a process of categorization.¹³ Every time we use language, we make use of linguistic categories. Classification allows us to order our world. Without classification, our mental life would be virtually unintelligible.

The traditional, Aristotelian, or classical view of classification was based on the notion of similarity or resemblance. Categories were, according to George Lakoff, "assumed to be abstract containers, with things either inside or outside the category. Things were assumed to be in the same category if and only if they had certain properties in common. And the properties they had in common were taken as defining the category."¹⁴

In recent years, however, significant doubts have been raised about the validity and comprehensiveness of the classical theory of classification. Recent work in cognitive

13. See George Lakoff, *Women, Fire, and Dangerous Things* 5-6 (1987).

14. *Id.* at 6.

science—a field which draws on psychology, linguistics, philosophy of mind, anthropology, and computer science—has led to a rethinking of classification theory.¹⁵ Mere similarity or resemblance is now thought to be insufficient to explain what we do when we categorize. Similarity is recognized as being highly relative and context-dependent. Our judgment of what is similar depends on the kinds of properties, relations, and categories we have already learned—thereby suggesting that similarity depends at least as much on categorization as categorization depends on similarity.¹⁶ In place of similarity or common properties, cognitive science has argued that classification is based in large part on the notion of “family resemblances” or “prototypes.”

The following section describes several key concepts in the prototype theory, which will then be applied in the subsequent analysis of criminal law classification.

A. Key Concepts in the Prototype Theory of Classification

Cognitive Economy. The “first principle” of the prototype theory of classification is that of cognitive economy—“the almost common-sense notion that, as an organism, what one wishes to gain from one’s categories is a great deal of information about the environment while conserving finite resources as much as possible.”¹⁷ The more specific the category, the easier it will be to predict the properties of its members. Yet more categories will also

15. See e.g., *Categorization by Humans and Machines* (Glenn V. Nakamura & Douglas L. Medin eds., 1993); *Cognition and Categorization* (Eleanor Rosch & Barbara B. Lloyd eds., 1978); William K. Estes, *Classification and Cognition* (1994); Lakoff, *supra* note 13; Steven Pinker, *How the Mind Works* 126-29, 306-12 (1997); *Similarity and Analogical Reasoning* 21 (Stella Vosniadou & Andrew Ortony eds., 1989); Edward E. Smith & Douglas L. Medin, *Categories and Concepts* (1981).

16. See Lance J. Rips, *Similarity, Typicality, and Categorization*, in *Similarity and Analogical Reasoning* 22 (Stella Vosniadou & Andrew Ortony eds., 1989) (citing G.L. Murphy & D.L. Medin, *The Role of Theories in Conceptual Coherence*, 92 *Psychol. Rev.* 289 (1985)).

17. Eleanor Rosch, *Principles of Categorization*, in Rosch & Lloyd, *supra* note 15, at 28. See also *infra* note 29 (quoting similar analysis by Arthur Allen Leff).

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mean a larger number of classifications and, ultimately, a greater expenditure of cognitive effort. As the psychologist Eleanor Rosch has put it:

On the one hand, it would appear to the organism's advantage to have as many properties as possible predictable from knowing any one property, a principle that would lead to the formation of large numbers of categories with as fine discriminations between categories as possible. On the other hand, one purpose of categorization is to reduce the infinite differences among stimuli to behaviorally and cognitively usable proportions. It is to the organism's advantage not to differentiate one stimulus from others when that differentiation is irrelevant to the purposes at hand.¹⁸

In short, for classification to be cognitively efficient, categories must be both specific enough to reflect all essential information and general enough not to overwhelm the classificatory consumer with irrelevancies.

Family Resemblance. Under the classical model, categories were thought to have clear boundaries and be defined by common properties. But, following Wittgenstein, advocates of the prototype theory have pointed out that many categories have "fuzzy" boundaries and do not readily fit into this model. Consider Wittgenstein's famous example of the category *game*.¹⁹ Some games involve competition and strategizing (like chess and capture-the-flag). Others involve merely amusement (like ring-around-the-rosy). With categories of this sort, it seems impossible to find any single collection of properties that all members (and only those members) share. Instead, categories like *game* seem to consist of a collection of members who share what Wittgenstein called "family resemblances."²⁰ Just as family members may

18. Id. at 28-29.

19. See Ludwig Wittgenstein, *Philosophical Investigations* §§ 66-71 (G.E.M. Anscombe trans., 3d. ed. 1968).

20. See id.

resemble each other in a variety of different traits (say, hair or eye color, facial features, or physical stature), what defines the category of *games* is not some single well-defined collection of common properties, but rather a collection of different resemblances, a whole series of similarities and relationships shared by the class.

Central and Non-Central Members. According to the classical theory, membership in categories is regarded as uniform. No one member is more typical or more central than any other member. For example, no member of the category *square* is more “square-like” than any other. The prototype theory challenges this view, suggesting that, in many categories, some members may be “better examples” than others. A classic example—suggested (in a slightly different context) by the linguist Charles Fillmore—is the category *bachelor*.²¹ Although the Pope clearly meets the definition of “unmarried adult male,” he is obviously not as central an example of the category bachelor as, say, former presidential advisor and man-about-town, George Stephanopoulos. The category of bachelor, therefore, is not uniform in its membership. If one were looking for exemplars of the category bachelor, one would certainly do better pointing to George than to John Paul II.

Basic Level Categorization. The traditional theory of classification tended to assume that categories were organized in a hierarchy, from the most general to the most specific. Prototype theory suggests that, in addition, categories are organized so that cognitively “basic” categories are “in the middle” of a general-to-specific hierarchy. For example, as psychologist Roger Brown explained, “the dime in my pocket is not only a *dime*. It is also *money*, a *metal object*, a *thing*, and, moving to subordinates, it is a 1952 dime, in fact, a *particular 1952*

21. See Charles Fillmore, Towards a Descriptive Framework for Spatial Deixis, in *Speech, Place, and Action: Studies in Deixis and Related Topics* 31 (Robert J. Jarvella & Wolfgang Klein eds., 1982), cited in Lakoff, *supra* note 13, at 70.

dime with a unique pattern of scratches, discolorations, and smooth places.”²² “While a dime *can* be called a *coin* or *money* or a *1952 dime*, we somehow feel that *dime* is its real name.”²³ According to empirical research in cognitive psychology, the basic level tends to be the level with the shortest and most frequently used category names, the level at which subjects are fastest at identifying category members, the first level to enter the lexicon of a language, and the level at which most of our knowledge is organized.²⁴

B. Applying Prototype Theory to the Classification of (Criminal) Law

The significance of classification in law has long been recognized by American legal scholars, including such giants as Oliver Wendell Holmes²⁵ and Roscoe Pound.²⁶ It was not until Arthur Allen Leff, however, that legal academia began to take account of the modern prototype

22. Roger Brown, How Shall a Thing Be Called, 65 Psychol. Rev. 14, 21 (1958), quoted in Lakoff, supra note 13, at 31.

23. Roger Brown, Soc. Psychol. 320 (1965), quoted in Lakoff, supra note 13, at 31.

24. See Eleanor Rosch, et al., Basic Objects in Natural Categories, 7 Cognitive Psychol. 573 (1976); see also Lakoff, supra note 13, at 46-47.

25. Holmes' first major law review article was Codes, and the Arrangement of the Law, 5 Am. L. Rev. 1 (1870), reprinted in 44 Harv. L. Rev. 725 (1931), in which he argued that the best kind of legal classification was the product of the collective wisdom of common law courts rather than legislative codification. Holmes was deeply skeptical of the notion, developed in European civil law jurisprudence, that the law could be arranged “scientifically.” Instead, he thought, classification should continue to evolve and change as the common law develops. *Id.* at 4.

26. See Roscoe Pound, Classification of Law, 37 Harv. L. Rev. 933 (1924). Surveying the history of various classification efforts on the Continent, Pound expressed skepticism about “the extravagant expectations as to what may be accomplished through classification of law” and concluded that all prior efforts at “analytical” classification had failed. *Id.* at 938. The best that could be hoped for from classificatory schemes, he thought, was:

a shaping and developing of traditional systematic conceptions and traditional systematic categories in order to organize the body of legal precepts so that they may be: (1) Stated effectively with a minimum of repetition, overlapping, and potential conflict, (2) administered effectively, (3) taught effectively, and (4) developed effectively for new situations.

Id. at 944.

theory.

In a brief section of a characteristically witty and insightful 1970 article, *Contract as Thing*,²⁷ Leff not only showed how to apply prototype theory to law, but also anticipated many of the arguments that prototype theory itself would make during the next thirty or so years of its development. Depicting the “excursion into the arid country of legal classification” as a “a trip which may turn out, like a fourteen-day tour of Europe, simultaneously superficial and tedious,”²⁸ Leff proceeded to question the adequacy of the classical similarity theory, embrace the idea of family resemblances, promote the idea of “intellectual and operational efficiency” as the justification for categorizing, and recognize the importance of “aesthetics” in classification.²⁹ He then applied these insights in an attempt to get at the essence of what constitutes a *contract*.³⁰

27. Arthur Allen Leff, *Contract as Thing*, 19 Am. U. L. Rev. 131 (1970).

28. *Id.* at 132.

29. *Id.* at 132-34. For example, in the following passage, which obviously anticipates the argument later made by Eleanor Rosch, see *supra* note 17 and accompanying text, Leff makes vivid the case for cognitive efficiency:

[T]here is a very sharp limitation upon the number of classificatory criteria one can formally use. Let us say you are classifying bugs. Your criterion for classifying is to count legs; more than six legs to one pile, six or fewer to another. At that point you will have just two classes. If you add to the process another criterion, say blackness versus color, you will produce four classes, (1) black-6 or less; (2) black-more than 6; (3) not black-6 or less; (4) not black-6 or less. Choosing three criteria will create eight sub-classes, four will make 16, five will produce 32 and ten will get you 1024. To put things briefly, things can pretty quickly get out of hand when great refinement of classification is attempted. Thus in practical reason it would be common to classify phenomena into relatively crude categories, that is, group them on the basis of relatively few family resemblances.

Id. at 133.

30. See *id.* at 137-55. Other scholars have used the insights of prototype theory to explore a wide range of legal contexts in which classification issues arise. See Neal R. Feigenson, *The Rhetoric of Torts: How Advocates Help Jurors Think About Causation, Reasonableness, and Responsibility*, 47 *Hastings L.J.* 61 (1995); Jay M. Feinman, *The Jurisprudence of Classification*, 41 *Stan. L. Rev.* 661 (1989) (offering history of classification theory in law, developing general theory of “paradigmatic” classification, and applying principles to categories of tort and contract law); Adam J. Hirsch, *Inheritance and Inconsistency*, 57 *Ohio St. L.J.* 1058 (1996) (using paradigm theory to explore structural inconsistency in the law

Here, of course, our task is to apply the prototype theory to the classification of *criminal law*.³¹ In particular, we need to ask, what relevance does the prototype theory have to the *codification* of criminal law.

At first glance, the answer may seem to be not much. While the prototype theory helps explain the workings of fuzzy categories like *game* and *bachelor* and even *contract* and *tort*, it is harder to see what it has to do with categories like *murder*, *felony*, and *crime against the person*. One might think that—unlike the former categories, which either inhere in some deeply rooted linguistic practice, or else emerge from an amorphous process like the common law—criminal law classifications are (or should be) precisely those that are (a) defined by some particular set of necessary and sufficient conditions (which we call *elements*), and (b) created in a rational deliberative process by legislatures and law reform groups like the ALI. Indeed, one might think that we should draft our criminal provisions so as to maximize the degree to which they reflect principles of the classical, rather than prototype, theory.³² What I want to suggest here, however, is that even in the codification of criminal offenses, prototype effects are inevitable, and that we should do our best to exploit these effects, rather than resist them.

of law of wills and inheritance of property); Steven L. Winter, *The Metaphor of Standing and the Problems of Self-Governance*, 40 *Stan. L. Rev.* 1371 (1988) (using cognitive theory to explore issues in constitutional doctrine of standing); Steven L. Winter, *Transcendental Nonsense, Metaphoric Reasoning, and the Cognitive Stakes for Law*, 137 *U. Pa. L. Rev.* 1105 (1989) (using cognitive theory to address legal reasoning generally).

31. I am aware of only a handful of instances in which prototype theory has been used to examine issues in substantive criminal law. See Martha Chamallas, *Introduction to Feminist Legal Theory* 222-35 (1999) (discussing prototypes of rape); Tim Brennan, *Classification: An Overview of Selected Methodological Issues*, in *Prediction and Classification: Criminal Justice Decision Making* (Don M. Gottfredson & Michael Tonry eds., 1987) (using prototype theory to address issues concerning prediction of criminal behavior); Michael Tonry, *Prediction and Classification: Legal and Ethical Issues*, in *Prediction and Classification: Criminal Justice Decision Making* (Don M. Gottfredson & Michael Tonry eds., 1987) (similar).

32. Such a view seems to be embraced by Paul Robinson, see *infra* note 128 and accompanying text.

Let us return, then, to the principles of prototype theory mentioned earlier to see what application they might have to the criminal law:

Cognitive Economy. Although somewhat abstract in its formulation, Rosch (and Leff's) basic idea is obviously applicable to the classification of crimes. The more specific we are in identifying and classifying criminal offenses, the more information such classifications give us. Imagine a person considering the possibility of engaging in some business practice of questionable legality. Faced with narrow Model Penal Code offense definitions like Theft by Failure to Make Required Disposition of Funds Received³³ and Compensating Public Servant for Assisting Private Interests in Relation to Matters Before Him,³⁴ she is likely to have a good idea of at least certain kinds of conduct that are prohibited. Confronted with more general offense definitions like Theft by Deception³⁵ and Bribery in Official and Political Matters,³⁶ she may be less sure. Narrower offense definitions may also ease the task of the jury. But greater specificity also has its costs. The more specific we make offenses, the greater the likelihood of both "gaps" and "redundancy" in our criminal codes (two problems that are discussed below).³⁷ Moreover, the greater the number of offenses, the more complicated the Code becomes and the greater the amount of cognitive resources that must be expended on it.

Family Resemblance. To what extent do criminal offense categories reflect the family resemblance/prototype model of classification rather than the classical, clear boundary/common property model? Given the principle of

33. Model Penal Code § 223.8 (Official Draft and Revised Comments 1985) (Theft by Failure to Make Required Disposition of Funds Received).

34. *Id.* § 240.6 (Compensating Public Servant for Assisting Private Interests in Relation to Matters Before Him).

35. *Id.* § 223.3 (Theft by Unlawful Taking or Disposition).

36. *Id.* § 240.1 (Bribery in Official and Political Matters).

37. See *infra* notes 85-128 and accompanying text.

legality—the so-called first principle of Anglo-American criminal law³⁸—one might think that sharp boundaries and common properties would be a requirement. But the reality is much more complicated.

Under the classical model of classification, necessary and sufficient conditions are usually conjunctive. For example, a thing is a *square* if and only if it: (a) is a closed figure; (b) with four sides; (c) each of which is equal in length; *and* (d) has four equal angles. By contrast, the necessary and sufficient conditions that describe most criminal offenses are typically *disjunctive*. For example, for a *rape* to be committed under the Model Penal Code, a male must have sexual intercourse with a female not his wife, and he must *either* (a) compel the victim to submit by force or threat, (b) substantially have impaired the victim's power to appraise or control her conduct through drugs or similar means, (c) perpetrate the act on a victim who is unconscious, *or* (d) perpetrate the act on a victim who is less than ten years old.³⁹

The four elements of rape each refer to quite different circumstances. Whereas every square will have the same group of common properties, there is no single, well-defined collection of common properties that can be said to define the crime of rape. Rather, like Wittgenstein's category of *game*, the category *rape* involves a collection of differing resemblances, a cluster of correlated features, a series of similarities and relationships shared by the class.⁴⁰ Although all rapes under the Code will involve an act of sexual intercourse between a male and a female not his wife (a common feature that is obviously not limited to rape, just as the generic feature of amusement is not limited to the category *game*), some will involve force or

38. See Herbert L. Packer, *The Limits of the Criminal Sanction* 79-80 (1968).

39. Model Penal Code § 213.1 (Official Draft and Revised Comments 1985) (Rape and Related Offenses). By using rape as an example, I do not of course mean to imply that the Model Penal Code's rape provisions, particularly the spousal immunity rule, are not badly in need of revision. See generally Schulhofer, *supra* note 4, at 20-24.

40. See Rips, *supra* note 16.

threat, some an impairing of the victim's judgment, some an unconscious victim, and others an underage victim.⁴¹ The point is that, even to the extent that criminal offenses consist of clear boundaries and well-defined members, those boundaries themselves reflect "fuzzy" family resemblances rather than a single collection of common traits.

Central and Non-Central Members. To what extent, if any, are members of some criminal offense categories "better examples," or more "central," than other members? In some technical sense, perhaps, criminal offenses do exhibit uniformity: A loving son who intentionally kills his desperately ill father in order to save him from further suffering⁴² is as guilty of murder as a stepfather who inflicts unspeakable cruelty on his six-year old stepson in the process of killing him.⁴³ So long as the elements of the offense (purposefully or knowingly causing the death of another human being⁴⁴) are satisfied (and no defense applies), both defendants are equally liable for murder (although, of course, in some jurisdictions, the grade of the offense may differ).

Once again, however, things are considerably more complicated. The mercy killing may well satisfy the *elements* of murder, but such application is likely to leave us troubled, precisely because mercy killing does not seem particularly "murder-like." We conceive of the

41. Again, it should be clear that I am not objecting to the argument, made by Schulhofer and others, that the Model Penal Code's approach to rape is too narrow because it eliminates from the definition of the offense all mention of the victim's consent. I do not doubt that the Code's provisions on rape are flawed and badly in need of redrafting. Nor do I disagree with feminist scholars who have argued that society often, and wrongly, stereotypes rape as involving acts by violent strangers. E.g., Chamallas, *supra* note 31, at 222-26. Rather, I am making the narrower point that the term "rape" is, in its most basic sense, understood to refer to cases of intercourse involving force or threat, rather than, say, an underage victim.

42. E.g. *State v. Forrest*, 362 S.E.2d 252 (N.C. 1987).

43. E.g. *State v. Sepulvado*, 655 So. 2d 623 (La. 1995).

44. Model Penal Code § 210.2 (Official Draft and Revised Comments 1985) (Murder).

classification *murder* as encompassing a certain kind of stereotypical conduct in which the person who commits the act is not concerned with the welfare of the victim, but, rather, affirmatively wants to cause harm. The concept of murder reflects a particular moral construct, into which mercy killing fits uneasily.⁴⁵ Like the concept of *bachelor*, which applies to Pope John Paul II only in some uncomfortable technical sense, the concept of *murder* is understood within the context of certain background moral and linguistic assumptions. Similarly, although a man who has sexual intercourse with a female not his wife is guilty of rape whether he has compelled her to submit by force or threat or whether she is underage, it seems likely that intercourse through force or threat would be viewed as a more *central* example of rape.

Basic Level Categorization. The Model Penal Code offers an elaborate scheme of offense classification which distinguishes, in increasing order of specificity, among: (a) crimes and violations;⁴⁶ (b) felonies, misdemeanors, and petty misdemeanors;⁴⁷ (c) broad offense categories such as offenses involving danger to the person, offenses against property, and offenses against public order and decency;⁴⁸ (d) specific offenses such as criminal homicide and robbery;⁴⁹ (e) more narrowly graded offenses, such as murder, manslaughter, and negligent homicide; and (f) in some cases, even more specific offense gradations, such as reckless manslaughter and heat of passion manslaughter.⁵⁰ In addition, the Code distinguishes between those criminal

45. Cf. Pillsbury, *supra* note 5, at 105 (stating that the mercy killing decision in Forrest is "morally doubtful": "The defendant's act was wrong, but his motive made his action morally distinguishable from most homicides. Forrest may have killed because of an appreciation of his father and the value of his father's life.").

46. Model Penal Code § 1.04(5) (Official Draft and Revised Comments 1985) (Classes of Crime; Violations).

47. *Id.* § 1.04(1).

48. *Id.* Part II (Definition of Specific Crimes).

49. *Id.*

50. *Id.* § 210.2-210.3 (Homicide).

offenses committed by act and those by omission.⁵¹

Like other forms of classification, criminal offense classification seems to reflect the tendency to place cognitively “basic” categories “in the middle” of general-to-specific hierarchies. For example, it seems clear that specific offense categories such as murder and rape are more basic than both more general offense categories such as “offenses involving danger to the person” and more specific categories such as second degree murder and aggravated rape. Concepts and labels such as murder and rape are almost certainly more commonly used and more easily recognized. In some cases, the more basic category will be the more serious crime—*e.g.*, burglary is more basic than criminal trespass, kidnapping more basic than false imprisonment, and false swearing more basic than perjury. In other cases, the more basic category will be less serious—*e.g.*, arson is more basic than aggravated arson and robbery more basic than armed robbery.

This is not to say that less basic categories play no useful purpose. On the contrary. Police detectives are assigned to the “homicide” desk precisely because they deal with cases that are as likely to be manslaughter as murder. Courts need to know whether a defendant has been charged with a “serious” crime or “felony” in order to determine whether she is entitled to a jury trial and appointed counsel, respectively.⁵² In all of these cases, broader, non-basic classifications serve an important function. Likewise, responsive verdicts, whether they involve lesser included offenses like false imprisonment, or aggravated offenses like aggravated burglary, give juries the opportunity to assign a more precise level of criminal culpability than is possible under the basic category alone. The point is simply that, as a conceptual matter, such offenses are almost always defined *in relation to* some more basic offense category.

51. *Id.* § 2.01(1) (Requirement of Voluntary Act).

52. See *Duncan v. Louisiana*, 391 U.S. 145 (1968) (right to jury trial applies in all cases involving “serious” crimes); *Gideon v. Wainwright*, 372 U.S. 335 (1963) (right to appointed counsel applies in all felony cases).

II. CLASSIFICATION OF OFFENSES AND THE REVISION OF THE CODE'S SPECIAL PART

In the preceding section, we saw that classification of criminal offenses, like other forms of classification, reflects deeply rooted cognitive, linguistic, and cultural tendencies. In this section, I argue that, for a system of classification to be effective, it needs to take account of such tendencies. That is, we cannot expect to design our classification system *a priori* through an act of legislative will, and then hope that it will fit the substantive criminal law. Rather, we should design a system of criminal law classification so that it is directly responsive to the demands of linguistic usage and social meaning.

A. Three Preliminary Issues

Before we can consider the nuts and bolts of Code revision, it will be useful to consider three preliminary issues: First, at what "audience" should the provisions of a revised Model Penal Code be aimed? Second, to what extent should a revised Code seek to reform the law, rather than simply describe or explain it? Third, what is the broader doctrinal and moral significance of classification?

1. To Whom Should the Model Penal Code be Addressed?

As Paul Robinson has shown in a series of influential articles, a traditional criminal code like the Model Penal Code serves at least two distinct functions:

It announces the law's commands to those whose conduct it seeks to influence. It also defines the rules to be used in deciding whether a breach of the law's commands will result in criminal liability and, if so, the grade or degree of liability. In serving the first function, the code addresses all members of the public. In performing the second function, it

addresses lawyers, judges, jurors, and others who play a role in the adjudication process.⁵³

Robinson has suggested that these separate functions are so divergent, in fact, that it is unrealistic to think that a single, unified set of provisions can serve both. Different audiences, he says, require different documents. The public needs a document that is simple, accessible, and clear. The adjudicators need a document that, though clear, can account for the great complexity of our substantive criminal law.⁵⁴ In response, Robinson and his co-authors have developed a complementary pair of innovative documents: an accessible Draft Code of Conduct that is addressed to the general public, and a more complex Draft Code of Adjudication that is addressed to judges, lawyers, and juries.⁵⁵

Robinson's proposed approach obviously deserves serious consideration by anyone interested in the possibility of revising the Model Penal Code. For purposes of the current discussion, however, I will assume that a revised Code would continue to integrate the rule-announcing and case-deciding functions into a single document. I base this assumption on three considerations.

First, regardless of whether we allow the public to have access to both codes (as Robinson suggests⁵⁶), or attempt to maintain "acoustic separation" by prohibiting public access to the code of adjudication (as Meir Dan-Cohen has suggested⁵⁷), a system based on separate codes

53. Robinson, *Making Criminal Codes Functional*, supra note 11, at 304. The argument and its implications are developed in Robinson, *Structure and Function*, supra note 11; see also Robinson, *Functional Analysis*, supra note 11; Robinson, *Rules of Conduct*, supra note 11. The idea that criminal codes serve these different functions was first developed in Meir Dan-Cohen, *Decision Rules and Conduct Rules: On Acoustic Separation in Criminal Law*, 97 *Harv. L. Rev.* 625, 634-36, 667-78 (1984); see also Peter Alldridge, *Rules for Courts and Rules for Citizens*, 10 *Oxford J. Leg. Stud.* 487 (1990).

54. Robinson, *Making Criminal Codes Functional*, supra note 11, at 304-05.

55. *Id.* at 334-65.

56. See Robinson, *Structure and Function*, supra note 11, at 207-08; Robinson, *Making Criminal Codes Functional*, supra note 11, at 332-33.

57. See Dan-Cohen, supra note 53, at 634-36, 667-78.

is bound to create inequalities in the administration of criminal justice. It seems inevitable that, under a two-code system, more sophisticated members of the public (*e.g.*, those with legal training or access to legal counsel) would determine their conduct with reference to both the code of conduct and the more complex code of decision (which would presumably include a fuller account of defenses than in the code of conduct); whereas less sophisticated members of the public would rely, at most, on the code of conduct. The result would be an exacerbation of a problem that already plagues our criminal justice system—namely, an inequality of treatment based on wealth and education.

Second, there is also a more abstract problem with the two-code approach. In addition to announcing rules and providing principles for deciding cases, criminal codes embody and articulate moral rules—functions that transcend any particular audience. Yet the more we strip down the code of conduct so that it can be understood by the layman, the less able it is to account for moral complexity.⁵⁸ And simply moving the complex parts into a separate code of adjudication will not solve the problem, because the moral authority of the system presupposes that the same document should both articulate those principles and bind the citizenry.

Third, even if these hurdles could be overcome, I believe that the radicalness of a dual-code scheme might prove counterproductive to law reform efforts. The current Model Penal Code is essentially a modular document. State legislatures are free to pick and choose which offense definitions they want to adopt and modify for use in their own codes. The dual-code approach would require that states either throw out their old codes and begin again, or continue to rely on an unreconstructed circa-1962 code without the benefit of subsequent ALI revision.

Nevertheless, while I believe a Model Penal Code (Second) should consist of a single integrated document, I

58. Gerard Lynch makes what I understand to be a similar point, see Lynch, *supra* note 2, at 327.

do not mean to minimize the importance of the Robinson/Dan-Cohen approach. The recognition of separate conduct-influencing and case-deciding functions is a profoundly important step in our understanding of the criminal law. In the context of the discussion here, it reminds us that what constitutes “family resemblance” or “basic level categorization” to a judge or prosecutor may mean something quite different to a layman. At the very least, the multiple-audience model cautions that every Code provision must be evaluated in terms of how it will be received by each of these separate constituencies.

2. To What Extent Should the Code Seek to Reform the Law, Rather Than Simply Describe or Explain It?

The fact that the American Law Institute chose to call the product of its ambitious criminal law reform project a “model code” rather than a “restatement” (the term it had used, and continues to use, in every other area of the law) is no accident.⁵⁹ The Code differs from the Restatements in several significant ways. First, and most obviously, the provisions of the Code are ready for “off the shelf” enactment by state legislatures, something that could never happen with the Restatements, which are written in non-statutory form.⁶⁰

Second, unlike the Restatements, the Model Penal Code’s special part is far too selective to provide a comprehensive picture of American substantive criminal

59. For a historical account of the codification and restatement movements in the United States, see Nathan M. Crystal, *Codification and the Rise of the Restatement Movement*, 54 Wash. L. Rev. 239 (1979). Although the idea seems somewhat quaint now, one author has described continued “skepticism” among some observers about the very idea of codifying the criminal law. See Frank J. Remington, *The Future of the Substantive Criminal Law Codification Movement—Theoretical and Practical Concerns*, 19 Rutgers L.J. 867, 869-72 (1988).

60. As if to emphasize its “off-the-shelf” quality, the Code often speaks in terms of “this State.” E.g., Model Penal Code § 1.04(7) (Official Draft and Revised Comments 1985) (“An offense defined by any statute of this State other than this Code shall be classified”); id § 1.03(1) (“Except as otherwise provided in this Section, a person may be convicted under the law of this State”).

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law. As I describe below, the Code includes no provisions at all regarding numerous matters that are regularly dealt with by state criminal law, including narcotics, alcoholic beverages, firearms, gambling, the environment, and other regulatory matters. And even in those areas in which it does contain proposed legislation, the Code makes no attempt to describe all of the considerable variation that exists among the states. Indeed, according to Wechsler, the Institute abandoned its original plan to produce a restatement precisely because it found far too much variation in state law to make the restatement method useful.⁶¹

Third, and closely related, is the fact that, whereas restatements are supposed to be primarily descriptive or explanatory,⁶² the Model Penal Code obviously reflects a prescriptive, or normative, approach to the law.⁶³ Moreover, this preference for saying what the law should be over what it is is the result of more than simply the logistical difficulties posed by the descriptive Restatement approach. The framers of the Model Penal Code were presented with a body of law that was uniquely in need of reform, and decided to use the opportunity to effect just that.

61. Wechsler, *Codification of Criminal Law*, supra note 7, at 1425-26. Whether there really was more variation in state criminal law than in other areas is, I think, far from certain.

62. The reality is probably more complex, however, at least in the case of some of the Restatements. See, e.g., Symeon C. Symeonides, *The Judicial Acceptance of the Second Conflicts Restatement: A Mixed Blessing*, 56 *Md. L. Rev.* 1248, 1269-77 (1997) (describing complex and varied purposes of Restatement 2d of Conflicts).

63. For a consideration of the difference between producing a restatement and a codification of criminal law in the context of recent British experience, see Celia Wells, *Restatement or Reform*, 1986 *Crim. L. Rev.* 314; cf. Francis Bennion, *The Technique of Codification*, 1986 *Crim. L. Rev.* 295, 298 (quoting *The Law Commission: Eighteenth Annual Report 1982-83* (LAW COM No. 131), para. 2.26 (emphasis added by original)):

Lately, the Law Commission has largely abandoned its earlier, somewhat naive belief that the law should be reformed before it is codified. Nowadays the task of codification "is seen primarily as the restating of the *present* law in a coherent and consistent manner coupled with the suggestion of *limited* reforms where the law is seen to be defective."

Early on in the project, Wechsler mentioned the possibility of creating an “ideal penal code properly regardful of realities but free, as legislative commissions rarely are, to take account of long range values as distinguished from immediate political demands.”⁶⁴ And, in several cases, the framers did in fact take a fairly radical approach to reform—as in their eliminating felony murder liability⁶⁵ and limiting liability for strict liability crimes to administrative fines rather than true criminal penalties.⁶⁶

Yet the framers knew that if they wanted their model code to avoid the sorry fate that had befallen the codes of Livingston and Stephen,⁶⁷ they would have to find a way to make the Code politically palatable to state legislatures. Thus, on certain sensitive issues they trod carefully—one might even say timidly—refusing, for example, to take a position on whether the death penalty should be abolished.⁶⁸ (Of course, in some instances, the failure to take a position reflected nothing more than a lack of consensus among the framers, rather than any specific concern with avoiding controversy.)

But the fact that the framers of the original Model Penal Code felt constrained in this way does not necessarily mean that the authors of a second generation Code should likewise feel constrained. Much of the spade work has already been done. The Code has established its credibility with state legislatures. It can afford to take

64. Herbert Wechsler, *A Thoughtful Code of Substantive Law*, 45 *J. Crim. L. Criminology & Police Sci.* 524, 525 (1955).

65. Model Penal Code § 210.2 cmt. at 29-42 (Official Draft and Revised Comments 1985).

66. See *id.* § 2.05(2)(a).

67. For a useful account of those failures, see Sanford H. Kadish, *Codifiers of the Criminal Law: Wechsler's Predecessors*, 78 *Colum. L. Rev.* 1098 (1978).

68. The Commentary states that the Institute:
takes no position on the question whether the death penalty should be retained or abolished. In recognition, however, of the fact that it will be continued in any event in at least some jurisdictions, the Model Code does express a view on the crimes for which it should be used and the procedures that should govern its imposition.

Model Penal Code § 210, explanatory note, at 119 (Official Draft and Revised Comments 1985).

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controversial positions. Absent some radical change in design or direction (such as Paul Robinson's scheme, discussed above), the revision of the Model Penal Code should provide an opportunity to correct and refine, and address issues left unresolved in, the original product.

3. What is the Doctrinal and Moral Significance of Classification in Criminal Law?

As described above, Part II of the Model Penal Code distinguishes offenses according to an elaborate scheme of classification that encompasses a wide range of categories, such as crimes and violations, felonies and misdemeanors, offenses against property, homicide, sexual offenses, and heat of passion manslaughter. (Of course, classifications such as justification and excuse, act and omission, and attempt and conspiracy also play a crucial role in the organization of the *general* part.)

The category under which a particular offense is classified is important for at least two reasons. First, it can have significant practical consequences. Whether a crime is classified as an offense "involving danger to the person" or an offense "against property," for example, is relevant to determining matters such as whether a police officer is authorized to shoot a fleeing felon,⁶⁹ whether a defendant can be extradited,⁷⁰ which evidentiary standard a prosecutor should follow in deciding whether to charge a suspect,⁷¹ whether a life sentence for a habitual offender will be considered unconstitutionally disproportionate,⁷² and whether an attorney has an ethical obligation to disclose a confidence regarding the possible future

69. See H. Richard Uviller, *Seizure by Gunshot: The Riddle of the Fleeing Felon*, 14 N.Y.U. Rev. L. & Soc. Change 705, 706 (1986).

70. See John T. Soma, *Transnational Extradition for Computer Crimes: Are New Treaties and Laws Needed?*, 34 Harv. J. on Legis. 317, 320 (1997).

71. See Wash. Rev. Code § 9.94A.440(2) (1994) (charging guidelines set lower evidentiary standard for crimes against persons than for crimes against property).

72. See *Solem v. Helm*, 463 U.S. 277 (1983).

commission of a crime.⁷³ Similarly, categorizing some harmful event as an act rather than omission has significant doctrinal consequences, since an omission is criminal only if there is a duty to act.⁷⁴ Moreover, even the decision to consider some statutory element an "offense" element rather than part of an "affirmative defense" has crucial implications concerning, for example, the allocation of burdens of proof and persuasion.⁷⁵

Second, classification can provide a window into the deeper moral and social content of specific offenses. Consider the classification of rape, robbery, and abortion, respectively. Rape was once commonly classified as a "morals offense." Today, it is almost always classified as an offense against the person,⁷⁶ a change that obviously indicates an evolution in society's views of that crime.⁷⁷ Robbery and abortion could both plausibly be classified as offenses against the person as well, but neither generally is. The Code classifies robbery as a crime against property⁷⁸ and abortion as a crime against the family.⁷⁹ Both classifications tell us something significant (and perhaps surprising) about how our criminal justice system views such offenses.

73. See Stephen Gillers, Model Rule 1.13(c) Gives the Wrong Answer to the Question of Corporate Counsel Disclosure, 1 *Geo. J. Legal Ethics* 289, 302 (1987) (Model Rule 1.6(b)(1) excludes "crimes against property" from list of future crimes about which lawyer must disclose confidences).

74. See Model Penal Code § 2.01(3) (Official Draft and Revised Comments 1985); *Barber v. Superior Court*, 195 Cal. Rptr. 484 (Cal. Ct. App. 1983).

75. See George P. Fletcher, *Basic Concepts of Criminal Law* 93-110 (1998).

76. See Model Penal Code § 213.1 (Official Draft and Revised Comments 1985) (Rape and Related Offenses).

77. See, e.g., Cynthia Ann Wicktom, Focusing on the Offender's Forceful Conduct: A Proposal for the Redefinition of Rape Laws, 56 *Geo. Wash. L. Rev.* 399, 414 (1988); Amy Jo Everhart, Note, Predicting the Effect of Italy's Long-Awaited Rape Law Reform on "The Land of Machismo," 31 *Vand. J. Transnat'l L.* 671, 686-91 (1998).

78. Model Penal Code § 222 (Official Draft and Revised Comments 1985).

79. *Id.* § 230.3 (Abortion). Cf. La. Rev. Stat. § 14:32.5 (feticide, "the killing of an unborn child," is classified as Offense Against the Person).

B. First Principles of Classification

The Model Penal Code has precious little to say about the organizing principles that underlie the special part. In comparison to the elaborate exegesis on general part concepts such as culpability⁸⁰ such reticence is striking.⁸¹

George Fletcher has noted the failure of the Code's drafters to consult European scholarship.⁸² But the framers did more than just fail to consult European *criminal* law. They also failed to consider European learning on codification generally. Indeed, the near silence of the Code and Commentary on matters of classificatory *structure* stands in marked contrast to the literature surrounding European efforts at codification in the civil realm, which reflects an almost obsessive concern with structural first principles.⁸³

I do not mean to imply, of course, that all of the structural rules developed in connection with the codification of the civil law will apply directly to the codification of criminal law. The criminal law's principle of legality and rules against vagueness and overbreadth, in particular, would seem to prohibit both the

80. Model Penal Code § 2.02 cmt. at 229-52 (Official Draft and Revised Comments 1985).

81. The Commentary to section 1.02(1) contains only a brief discussion of "a number of specific factors . . . which are believed to be the principal objectives of the definitional process." Id. § 1.02 cmt. at 14. These factors are preventing defined conduct, subjecting offenders to public control, protecting conduct without fault from condemnation, providing fair warning, and differentiating serious and minor offenses. Id. at 16-21.

82. George P. Fletcher, *Dogmas of the Model Penal Code*, 2 *Buff. Crim. L. Rev.* 1, 11 (1998).

83. For a sampling of this literature, see Arthur Taylor von Mehren & James Russell Gordley, *The Civil Law System* 81-95 (2d ed. 1977); Alexandre Alvarez, *Methods for Scientific Codification*, in *Science of Legal Method* (Ernest Bruncken & Layton B. Register trans., 1917, reprinted 1969); Jean Louis Bergel, *Principal Features and Methods of Codification*, 48 *La. L. Rev.* 1073 (1988); Ernst Freund, *Scientific Method in Legislative Drafting*, in *Science of Legal Method* (Ernest Bruncken & Layton B. Register trans., 1917, reprinted 1969); François Gény, *The Legislative Technic of Modern Civil Codes*, in *Science of Legal Method* (Ernest Bruncken & Layton B. Register trans., 1917, reprinted 1969); Ferdinand Fairfax Stone, *A Primer on Codification*, 24 *Tul. L. Rev.* 303 (1955); Symposium, *Codification in the Twenty-First Century*, 31 *U.C. Davis L. Rev.* 655 (1998).

characteristically civilian use of analogical reasoning in interpreting statutes and the principle that code provisions should be written at a high enough level of abstraction that amendment will seldom be necessary to deal with novel technologies and social problems.⁸⁴

Nevertheless, there are obviously some structural concerns that are common to both civil and criminal law. In what follows, we focus on two kinds of structural issues that seem particularly relevant to the revision of the Model Penal Code: First, how should the Code deal with gaps in coverage—*i.e.*, conduct that for one reason or another is not currently covered? Second, how should the Code deal with classificatory redundancies—*i.e.*, conduct to which more than one provision apparently applies?

1. Bridging Gaps in Coverage: How Should New Offenses Be Classified?

The commentary on civil law codification reflects an overriding concern with the avoidance of gaps. Under the civilian conception, a code should apply to every conceivable kind of private dispute that might occur. Indeed, the unprovided-for case is regarded as a virtually fatal flaw.⁸⁵

Although gaps in the criminal law may be viewed as a less serious a problem than gaps in the civil law, they are nonetheless a cause for concern. Imagine a perpetrator who is contemplating the possibility of engaging in socially harmful conduct that, she believes, has not yet been criminalized. If she is confident in her judgment regarding the lack of criminalization, then she is unlikely to be deterred in her choice of action. Moreover, if the perpetrator does choose to engage in such conduct, it is likely that, under the principle of legality, she will go

84. See sources cited *supra* note 83.

85. See, e.g., Bergel, *supra* note 83, at 1081-82 ("A code must state rules sufficiently broad to regulate all the situations of a certain type which may arise.") (quoting R. David, *Les Grands Systèmes de Droit Contemporains* 70 (8th ed. 1982)).

unpunished.

In what follows, I want to discuss two distinct kinds of gaps that occur in the Code. The first is conduct that was not considered criminal at the time of its drafting. The second is conduct that *was* generally considered criminal at the time of the drafting, but for one reason or another was not included in the Code. (A third kind of gap—conduct that was intended to be covered, but which the Code *inadvertently* omits—is not explicitly considered here.)

a. Conduct that Was Not Yet Considered Criminal at the Time the Code Was Drafted

In the more than thirty five years since the Model Penal Code was promulgated, there have been numerous offenses that—under state or federal law—have been criminalized for the first time. Crimes such as computer fraud and unlawful accessing, carjacking and vehicular homicide, and money laundering and racketeering simply did not exist at the time the Code was being drafted. One obvious issue that needs to be considered, then, is whether such offenses should be contained in a revised Model Penal Code.

For present purposes, we can frame the issue solely as a structural one: Assuming that we were to include such offenses in a revised Code, should we do so by incorporating amended new provisions in already existing articles, or by creating entirely new criminal offense articles?

Computer Crimes. Computer crimes can be divided into two main categories. The first are traditional crimes (such as fraud, theft, extortion, gambling, and obscenity) that happen to be committed by means of a computer.⁸⁶ The second are novel, technologically specific offenses that are less obviously analogous to older, non-computer crimes (an example is gaining intentional access to a computer

86. See, e.g., Computer Fraud and Abuse Act of 1986, 18 U.S.C. § 1030 (1994).

without authorization and thereby causing damage).⁸⁷ The distinction is, to put it another way, between offenses that involve the creation of “old-fashioned” criminal harms through new technologies and offenses that involve the creation of previously unknown kinds of harm.

Congress and the state legislatures have typically dealt with both categories of computer crimes by creating entirely new statutes rather than by amending existing provisions.⁸⁸ But applying the classificatory principles discussed earlier helps us to see why such an approach should be questioned. Let us imagine some offense *A*. In deciding whether creation of a new computer crime *A* is justified, we would need to consider: (a) the extent to which there is a family resemblance between computer fraud crime *A* and more traditional forms of crime *A*; (b) whether it would be cognitively efficient to classify computer crime *A* outside the traditional category of *A*-type offenses; and (c) the degree to which computer crime *A* would be regarded as a non-central case of crime *A*.

The mere fact that fraud, theft, extortion, gambling, or obscenity are committed by means of a computer rather than by some more traditional technology is probably not

87. On the distinction between these two kinds of computer crimes, see Joseph M. Olivenbaum, CTRL-ALT-DEL: Rethinking Federal Computer Crime Legislation, 27 Seton Hall L. Rev. 574, 575 (1997); Sheri A. Dillon et al., Note, Computer Crimes, 35 Am. Crim. L. Rev. 503, 504 (1998). For an example of such supposedly novel, technologically specific crimes, see *id.* at 504 n.4:

Eugene Kashpureff, operator of a domain-name registry called AlterNIC (which owned rarely used domains such as .sex and .web), was able to exploit a security weakness in Name Servers (a hierarchical group of databases that translate common addresses, such as <http://www.ll.georgetown.edu>, into usable, Internet protocol numbers, such as 141.161.38.179) to intercept and reroute World Wide Web traffic intended for pages under InterNIC domain name servers (.com, .net, .org, .edu, .gov, and .mil) to pages under his own AlterNIC domains.

88. See Olivenbaum, *supra* note 87, at 575 (“the distinction between familiar crimes accomplished by means of new electronic technology, and ‘new’ crimes made possible only by technology, has been unnecessarily and confusingly blurred by recent federal computer crime legislation”); see generally 1 Sarah N. Welling et al., Federal Criminal Law and Related Actions: Crimes, Forfeiture, the False Claims Act and RICO 235-41 (1998); Stephan P. Heymann, Legislating Computer Crime, 34 Harv. J. on Legis. 373 (1997).

enough to justify the creation of a new offense. For example, both the traditional offense of fraud and its computerized version involve the same “purposely obtain[ing] property of another by deception.”⁸⁹ The harm to the victim and invasion of protected interests are virtually indistinguishable in the two offenses (although, presumably, the *scale* of the harm might differ—certain acts of computer fraud may have the potential to harm a tremendous number of victims in a brief period of time). In such cases, the better approach is simply to amend existing provisions to make clear that such provisions apply to computers and computer-related intangible property.⁹⁰ The same could be said of computer extortion, gambling, and obscenity.

A harder question is posed by apparently more technologically specific crimes, such as the federal Computer Fraud and Abuse Act of 1986,⁹¹ which makes it a crime to intentionally access a computer without authorization and as a result of such conduct cause damage. Some scholars have suggested that such offenses are really just computer age versions of traditional crimes against property, like criminal trespass and vandalism, and that already existing legislation can easily be amended to cover such conduct.⁹²

The validity of such an approach seems to me questionable. The category *trespass* has always

89. See Model Penal Code § 223.3 (Official Draft and Revised Comments 1985) (Theft by Deception).

90. In fact, this is the approach that several states have followed. See Robin K. Kutz, Note, Computer Crime in Virginia: A Critical Examination of the Criminal Offenses in the Virginia Computer Crimes Act, 27 Wm. & Mary L. Rev. 783, 790 (1986) (describing such legislation in Ohio and Massachusetts).

91. 18 U.S.C. § 1030(a)(5) (1994).

92. See, e.g., Olivenbaum, *supra* note 87, at 578 (“most ‘computer crimes’ correspond quite closely to older crimes, notably trespass or larceny. Simply by redefining ‘property,’ or broadening other statutory language, legislatures can bring ‘computer crimes’ under those existing statutory prohibitions”). It is also worth noting the existence of terms such as “cyberstalking,” “network joyriding,” and “computer burglary”—each of which expressly tracks the traditional language of crime. See Catherine Thérèse Clarke, From CrimiNet to Cyber-Perp: Toward an Inclusive Approach to Policing the Evolving Criminal Mens Rea on the Internet, 75 Or. L. Rev. 191, 205 (1996).

encompassed encroachments onto real property.⁹³ Linguistically, the analogy between it and crimes like unauthorized computer accessing is strained. Family resemblance is minimal. The two crimes are more like distant cousins than brothers. Under the principles of prototype theory, the better alternative would be to create an entirely new crime.

Carjacking and Vehicular Homicide. Like computer crimes, post-Code crimes like carjacking and vehicular homicide reflect the increased hazards of modern technologies. No one can doubt that the conduct involved in carjacking (the intentional taking of a motor vehicle by force or intimidation⁹⁴) and vehicular homicide (the killing of a human being caused by an offender's operation of a motor vehicle when the offender is under the influence of alcohol or other controlled substances⁹⁵) deserves to be criminalized. As before, though, the question is whether the Code should assimilate such offenses by amending already existing articles (robbery, in the case of carjacking; and manslaughter or negligent homicide, in the case of vehicular homicide) or, instead, create entirely new statutory provisions, as has been done by Congress and many state legislatures.

Once again, the answer turns on the relationship between "basic" or "central" categories such as robbery, manslaughter, and negligent homicide, and arguably "non-central" category members such as carjacking and vehicular homicide. In neither case, it seems to me, are entirely new provisions necessary. The fact that the object of the robbery, or the means used to commit the homicide, is a *vehicle* (rather than, say, a gun or a knife) has little or

93. See, e.g., Model Penal Code § 221.2 (Official Draft and Revised Comments 1985) (Criminal Trespass) ("A person commits an offense if, knowing that he is not licensed or privileged to do so, he enters or surreptitiously remains in any building or occupied structure, or separately secured or occupied portion thereof.").

94. E.g., 18 U.S.C. § 2119 (1994).

95. E.g., La. Rev. Stat. Ann. § 32.1 (West 1997).

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no effect on either the core identity or the moral content of the robbery or homicide. Here, the family resemblance between old and new crimes is strong. To create new, specialized offense categories would be to introduce unnecessary cognitive inefficiencies.

Racketeering and Money Laundering. A final pair of post-1962 crimes that would need to be considered for inclusion in a revised Code are racketeering⁹⁶ and money laundering.⁹⁷ Unlike carjacking and vehicular homicide, no obvious analogies to previously existing Code categories suggest themselves. In both cases, it would seem, entirely new classifications are necessary. Indeed, viewed all by itself, racketeering (as defined in the federal RICO statute) takes the idea of prototype classification to almost absurd lengths. In its current form, RICO criminalizes so wide a range of loosely related conduct that it seriously strains the notion of family resemblance.⁹⁸ There may well be serious questions as to whether a revised Model Penal Code should want to criminalize the conduct contained in these statutes. But, assuming it does, it would surely have to create at least two, and possibly more, entirely new statutory provisions to do so.

96. See Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. §§ 1961-68 (1994).

97. See 31 U.S.C. §§ 5322-24 (1994). For critical discussion of the money laundering statutes, see, e.g., John K. Villa, A Critical View of Bank Secrecy Enforcement and the Money Laundering Statutes, 37 Cath. U. L. Rev. 489 (1988); Sarah N. Welling, Smurfs, Money Laundering, and the Federal Criminal Law: The Crime of Structuring Transactions, 41 Fla. L. Rev. 287 (1989).

98. For criticism of RICO's extraordinary breadth of coverage, see Gerard E. Lynch, RICO: The Crime of Being a Criminal, (pts. I – IV), 87 Colum. L. Rev. 661, 920 (1987); see also Pamela H. Bucy & Steven T. Marshall, An Overview of RICO, 51 Ala. L. Rev. 283 (1990).

b. Conduct That Was Considered Criminal in 1962, But Is Nevertheless Not Covered by the Model Penal Code.

To what extent should a revised Code include offenses that *were* generally viewed as criminal (in state or federal statutes) at the time the Model Penal Code was promulgated, but which did not, for one reason or another, find their way into the Code? In particular, is there any plausible reason why the Code should continue to omit offenses involving narcotics, firearms, alcohol, gambling, environmental offenses, and a wide range of other regulatory crimes?

The framers' rationale for excluding such offenses the first time around is, to say the least, unimpressive. According to Professor Wechsler, such offenses were omitted "either due to lack of time or in the view that they are better treated in a regulatory statute placed outside the Penal Code."⁹⁹ The Proposed Official Draft notes in similarly laconic language, "a higher priority on limited time and resources was accorded to branches of the penal law which have not received close legislative scrutiny."¹⁰⁰

The omission of drug offenses—which now account for more than half of all arrests made in the United States—is particularly significant.¹⁰¹ Most observers of the criminal justice system agree that our current drug laws are badly flawed.¹⁰² A revised Code could choose to make a "frontal attack"¹⁰³ on state drug law and call for substantial legalization, or it could suggest more modest reforms. But for the Code to continue to ignore the question of drug (and

99. Wechsler, *Codification of Criminal Law*, *supra* note 7, at 1429.

100. Model Penal Code (Proposed Official Draft 1962), at 241 (Additional Articles).

101. See Bureau of Justice Statistics, U.S. Dep't of Justice, *Sourcebook of Criminal Justice Statistics* 333 tbl. 4.6 (1997).

102. See, e.g., James Ostrowski, *The Moral and Practical Case for Drug Legalization*, 18 *Hofstra L. Rev.* 607 (1990).

103. Cf. Model Penal Code § 2.05 cmt. at 282 (Official Draft and Revised Comments 1985) ("This section makes a frontal attack on absolute or strict liability in the penal law.").

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firearm) crime entirely would be to waste an important opportunity for change.

As for environmental and other kinds of regulatory crimes, we need to examine Wechsler's assumption that they are better dealt with outside the Code. As we shall now see, several factors point to the conclusion that regulatory offenses are so different from Code offenses that they should be codified outside the Code. Several factors suggest the contrary.

First, unlike Code offenses, regulatory offense provisions often, though not always, apply to a relatively narrow group of potential defendants—typically, firms and individuals who are working in certain regulated industries. Second, regulatory offense provisions are often enforced by specialized agencies, rather than by officials with general jurisdiction. Third, most such crimes are statutory in origin, whereas most current Code offenses originated in the common law.¹⁰⁴

On the other hand, there are two factors suggesting that the similarity between regulatory crimes and current Code offenses is actually quite strong. First, both kinds of crimes have similar punishments and are prosecuted under identical procedures. Second, as I have argued elsewhere, the empirical evidence indicates that many regulatory offenses (such as knowingly polluting a public water supply, recklessly selling or distributing adulterated food or medicines, and carrying a gun without a permit) are viewed as no less serious than more traditional Code offenses (such as assault, theft, and trespass).¹⁰⁵

In the end, the best argument for continuing to exclude regulatory offenses from the Model Penal Code is probably a practical one. The fact is that many such crimes are enormously complex. Separating out the penal part of most

104. See Stuart P. Green, *Why It's a Crime to Tear the Tag Off a Mattress: Overcriminalization and the Moral Content of Regulatory Offenses*, 46 *Emory L.J.* 1533, 1544-45 (1997) [hereinafter Green, *Overcriminalization and the Moral Content of Regulatory Offenses*].

105. See *id.* at 1564-66.

regulatory statutes would prove difficult.¹⁰⁶ If regulatory offenses were to be incorporated into the Code in anything like their current form, they would dwarf the more traditional offenses.¹⁰⁷ Instead, as an alternative to full scale incorporation, we should consider something like the unified approach to regulatory offenses suggested by Section 1006 of the 1971 proposed Federal Criminal Code, which would have made it a crime to willfully violate regulatory statutes defined outside the Code.¹⁰⁸

2. Eliminating Redundancies and Omitting Obsolete Provisions

In this section, we turn from a consideration of provisions that might be *added* to the Code to a consideration of provisions that should be *omitted* or reorganized. One obvious class of candidates for omission are provisions prohibiting conduct that, owing to post-1962 changes in social mores or constitutional developments, would now arguably be viewed as inappropriate for criminal sanction—offenses such as abortion,¹⁰⁹ obscenity,¹¹⁰ and prostitution.¹¹¹ However, such substantive changes lie

106. As the Proposed Official Draft put it: “[I]n legislation dealing with narcotics, liquor, tax evasion, and the like, penal provisions have been so intermingled with regulatory and procedural provisions that the task of segregating one group from another presents special difficulty for model legislation.” Model Penal Code (Proposed Official Draft 1962), at 241 (Additional Articles).

107. Cf. Bennion, *supra* note 63, at 301 (quoting The Law Commission (England) 1985 Report, para. 2.10):

There are several thousand of offences and a code that contained all of them would be impossibly bulky We are convinced that the governing principle should be that of convenience of the users of the legislation—that an offence should be incorporated in Part II only if the balance of convenience so dictates.

108. See Final Report of the National Commission on Reform of Federal Criminal Law: A Proposed New Federal Criminal Code § 1006, at 74-76 (1971) (never adopted).

109. See Model Penal Code § 230.3 (Official Draft and Revised Comments 1985).

110. See *id.* § 251.4.

111. See *id.* § 251.2.

somewhat outside the scope of my discussion here. Instead, I want to focus on the possibility of omitting certain provisions because of various *structural* defects, particularly redundancies, in the Code.

Redundancy occurs when the same conduct is covered by more than one provision of the code. A somewhat comical example is provided by Louisiana law, which allows one who steals a crawfish to be prosecuted under at least three distinct provisions of the state's criminal code: basic Theft,¹¹² Theft of Animals,¹¹³ and (believe it or not) Theft of Crawfish.¹¹⁴ Federal criminal law, as well, is notorious for its numerous instances of duplicative and overlapping provisions—including, according to one recent count, 232 separate federal statutes pertaining to theft and fraud, 99 pertaining to forgery and counterfeiting, 215 pertaining to false statements, and 96 pertaining to property destruction.¹¹⁵ Such duplication is problematic in at least three ways: it is confusing, it may lead to unfair multiple prosecutions and the potential for double jeopardy problems, and it is structurally inelegant.

To its credit, the Model Penal Code has eliminated much of this sort of obvious redundancy. At least two, somewhat more subtle, areas of overlap remain, however.¹¹⁶ The first is in the Code's Theft provisions. Theft law has always held the potential for codificatory pitfalls, being susceptible both to gaps (theft-like conduct that falls between common law offenses such as larceny and embezzlement) and redundancies (theft-like conduct that

112. See La. Rev. Stat. Ann. § 67 (West 1997) (defining theft as the "misappropriation or taking of anything of value which belongs to another").

113. See id. § 67.2 (misappropriation or taking of any animal which belongs to another).

114. See id. § 67.5 (taking commercial crawfish from crawfish farm except with consent of owner)

115. See Ronald L. Gainer, Federal Criminal Code Reform: Past and Future, 2 Buff. Crim. L. Rev. 45, 62 (1998). I have previously dealt with the issue of overlapping statutes involving self-defense and defense of premises. See Stuart P. Green, Castles and Carjackers: Proportionality and The Use of Deadly Force in Defense of Dwellings and Vehicles, 1999 U. Ill. L. Rev. 1, 10-11.

116. See Robinson, Making Criminal Codes Functional, *supra* note 11, at 308-10.

satisfies the elements of more than one such offense). Indeed, one of the most significant innovations in the special part is the consolidation of traditional common law theft offenses so as to minimize the potential for gaps and redundancy.¹¹⁷ It is doubtful, however, that such consolidation goes far enough. In addition to the general theft provision of Section 223.2,¹¹⁸ the Code retains separate, specialized provisions for offenses such as obtaining property by deception,¹¹⁹ theft of services,¹²⁰ theft of lost property,¹²¹ failure to make required disposition of funds received,¹²² and unauthorized use of credit cards¹²³—all conduct that either is or, with only slight revision, could be, covered by the general language of Section 223.2. In assessing the value of maintaining such distinctions, we would need to consider the degree to which cognitive economy is compromised.

A second kind of overlap occurs when the same conduct can be treated under more than one provision, depending only on what kind of harm occurs. For example, reckless endangerment,¹²⁴ assault,¹²⁵ and involuntary manslaughter¹²⁶ all involve essentially the same conduct. They differ only in the kind of harm caused (being placed in danger of death or serious bodily injury, suffering bodily injury, or being killed, respectively). Although the fortuity of the outcome presumably has at least some bearing on the level of desert that should be ascribed to the defendant (and therefore the grade of punishment that should apply),¹²⁷ redundancy-reducing consolidation of offenses is

117. See Model Penal Code § 223.1 cmt. (Official Draft and Revised Comments 1985) (Consolidation of Theft Offenses).

118. *Id.* § 223.2 (Theft by Unlawful Taking or Disposition).

119. *Id.* § 223.3 (Theft by Deception).

120. *Id.* § 223.7 (Theft of Services).

121. *Id.* § 223.5 (Theft of Property Lost, Mislaid, or Delivered by Mistake).

122. *Id.* § 223.8 (Theft by Failure to Make Required Disposition of Funds Received).

123. *Id.* § 224.6 (Credit Cards).

124. *Id.* § 211.2 (Recklessly Endangering Another Person).

125. *Id.* § 211.1 (Assault).

126. *Id.* § 210.3 (Manslaughter).

127. See Green, *Overcriminalization and the Moral Content of Regulatory*

nevertheless possible.

Finally, it has been suggested by Paul Robinson that we go even further in eliminating redundancies in our criminal codes by abolishing traditional compound common law offenses such as robbery and burglary, and instead prosecute offenders for the constituent offenses into which such crimes can be broken down. For example, robbery could be prosecuted as theft and assault; and burglary as trespass and attempt to commit another substantive offense, such as theft.¹²⁸ In short, Robinson seems to think that if we are serious about achieving a more rational, elegant, and comprehensible criminal code, we ought to be willing to part with familiar common law offense categories.

Although I am obviously sympathetic to the notion of eliminating redundancies in the code, it seems to me that Robinson's proposal goes too far. The fact is that robbery and burglary are *not* ultimately reducible to their constitutive elements (theft and assault, and trespass and attempt to commit a felony, respectively). Both common law crimes are *greater* than the sum of their parts. As I have argued throughout this paper, such crimes reflect a totality of social, moral, and linguistic meanings that transcend the mere sum of their elements.

Of course, a similar line of reasoning might be advanced in response to my argument (made earlier) that the Code need not create entirely new provisions for crimes such as carjacking, computer fraud, and vehicular homicide. That is, one might think that, to the extent that newfangled offenses such as these have *already* acquired social and linguistic meanings that transcend older and more "basic" offenses such as robbery, fraud, and homicide, the enactment of entirely new code provisions would be justified.

This argument, though sound in its reasoning, is invalid in its premises. While recognizing that reasonable

Offenses, supra note 104 nn. 45-46 and accompanying text.

128. See Robinson, Making Criminal Codes Functional, supra note 11, at 309-10.

minds may differ on such questions, it seems to me that recently created compound crimes such as carjacking, computer fraud, and vehicular homicide simply do not carry the same weight of meaning as traditional compound crimes like robbery and burglary. Perhaps someday they will, but not yet. In any event, the more general, methodological point remains. Codification of crime is neither a purely abstract nor mechanical exercise. There is little point to designing a logically rigorous and structurally elegant code that fails to reflect the way people actually *use* and *understand* the labels we apply to crime. In the end, a criminal code must speak—and listen—to the people.

CONCLUSION

The prospective revision of the Model Penal Code offers an auspicious occasion to reconsider our approach to the special part of the criminal law, which has changed in many ways since the Code was promulgated more than thirty five years ago. But thoughtful revision of the special part requires more than simply pondering the fate of individual offenses involving drugs, computer fraud, carjacking, racketeering, abortion, regulatory matters, and the like. It requires us to think hard about the underlying principles that make the special part a unified whole.

This essay has focused on the process of classification as one of the keys to thinking about the special part. Classification in criminal law yields significant doctrinal consequences as well as deeper moral meanings. How we classify crimes—*e.g.*, whether an offense is “against the person” or “against property”—says a lot about how we regard the moral content of such conduct. Classification also reflects deeply embedded linguistic practices. The concepts developed in the prototype theory, including cognitive economy, family resemblance, central and non-central members, and basic level categorization, remind us that effective classification is as much an empirical process as it is an *a priori* one. Forcing a crime like unauthorized

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access of computers into the mold of trespass is as likely to produce cognitive “dissonance” and inefficiency as severing carjacking from its close cousin, armed robbery.

No questions in criminal law are more important or universal than “what kinds of conduct should be criminalized” and the closely related, “*how* should such conduct be criminalized.” Together, these two questions define the essence of the special part. As we contemplate the revision of the Model Penal Code, we need to find ways to ensure that our answers make sense.