

## The Model Penal Code Second: Might “Film Schools” Be in Need of a Remake?

Douglas A. Berman\*

In a galaxy far, far away—a typical law school classroom—the quality of discussion of criminal codes and doctrines might fairly be described as in disastrous condition. Indeed, it is probably overly generous to characterize the typical law school criminal law course as being about *modern* criminal codes and doctrines at all, at least if one assumes that, at a minimum, such a course should review the most frequently applied criminal offenses, discuss pressing modern controversies, and provide insights into the most fundamental doctrinal and practical issues facing criminal lawyers. By generally failing to discuss the modern dynamics of criminal law doctrine and practice—such as the centrality of drug and property crimes and the significance of plea bargaining and sentencing—what exists today in most law schools is, to paraphrase my co-Managing Editor’s quote from Sandy Kadish, a substantive criminal law *course* that is often archaic, incomplete and perhaps unjustifiable.<sup>1</sup>

Though it is unfair to blame the original drafters of the American Law Institute’s (ALI) Model Penal Code (MPC) for this state of affairs, I think it is fair to suggest that the failure of the ALI to revise the MPC significantly contributes to it. As Judge and Professor Gerard Lynch aptly highlights in this Commentary Symposium, the MPC still serves “three major functions”: “scholarly compendium of the best thinking of its era about criminal law, practical reform project, and criminal law textbook.”<sup>2</sup> The original MPC retains important historical value as a compendium of post-war scholarly thinking about criminal law, and its impact as a practical reform project remains profound. However, because the fundamental issues and concerns of criminal law doctrine and practice have shifted so dramatically in the last 40 years, the original MPC’s continued use as a criminal law textbook operates, in my view, as a considerable disservice to criminal law academics and students, and ultimately to the entire field of criminal justice.

My co-Managing Editor employs a lovely movie metaphor in his introduction, and I will happily carry on his technique to illuminate my concerns about the failure to revise the MPC, given its continued preeminence in criminal law classrooms. But, as my first six words were designed to foreshadow, I want to use *Star Wars* rather than

---

\* Associate Professor of Law, Michael E. Moritz College of Law, The Ohio State University.

<sup>1</sup> Readers should know from the outset that I plead guilty to my own charges. I teach first-year criminal law in a traditional way, and it is my own nagging concerns about the inappropriateness of my pedagogy which largely inspires this Commentary.

<sup>2</sup> Gerard E. Lynch, *Revising the Model Penal Code: Keeping It Real*, 1 OHIO ST. J. CRIM. L. 219, 220 (2003).

*Casablanca* or *To Kill a Mockingbird* as my classic movie exemplar.<sup>3</sup>

*Star Wars* is utilized, I would guess, as a teaching tool in film schools (although it could not possibly have as prevalent and central a role as does the MPC in most criminal law classes). Using *Star Wars* as a teaching tool seems quite appropriate since it likely represents a compendium of the best special effects of its era and remains a brilliant popular entertainment project. But the original *Star Wars* surely cannot still be relied upon to teach modern film students about modern techniques in special effects. The remarkable changes in movie-making over the last quarter-century no doubt require that film school professors employ a more modern “text” for properly instructing future screenwriters, directors and movie technicians.

Similarly, though the original MPC will always have teaching value as a window on post-war criminal law perspectives and as an amazingly successful practical reform project, the MPC should not still be relied upon to teach modern law students about modern doctrines of criminal law. The remarkable changes in criminal law over the last four decades require that law school professors employ a more modern “text” for properly instructing future legislators, judges and criminal law practitioners.<sup>4</sup>

My co-Managing Editor identifies seven major social or legal changes over the last four decades which, he concedes, could justify revising the MPC.<sup>5</sup> And I can add to his insightful list at least five more consequential changes in the field of criminal justice since the MPC was approved by the ALI.

First, the development and application of criminal law has become highly “politicized” by legislators and executive officials, a reality which clearly accounts in part for the degradation of MPC-inspired reforms highlighted by Professors Paul Robinson and Michael Cahill.<sup>6</sup> Second, the investigation and prosecution of criminal offenses has been “constitutionalized” by judicial decisions, a reality which itself may account in part for the ever-broadening reach of criminal offenses.<sup>7</sup> Third, the

---

<sup>3</sup> I cannot resist using this footnote to suggest that the different choices we have made concerning classic movies probably bespeaks a difference in ages rather than a difference in tastes.

<sup>4</sup> There are, of course, timeless elements of *Star Wars* and the MPC that are as fresh and as worthy of study today as when these classics were first created. The basic plot and the cast of characters in *Star Wars*, like the *actus reus* and *mens rea* provisions of the general part of the MPC, do not look or feel especially dated, and they merit continued appreciation and examination even though some imperfections might be identified. Cf. Kenneth W. Simons, *Should the Model Penal Code's Mens Rea Provisions be Amended?*, 1 OHIO ST. J. CRIM. L. 179 (2003).

<sup>5</sup> To summarize, Professor Dressler mentions: (1) changed social norms regarding sexual relations, (2) the development of new offenses such as “hate crime” legislation, (3) the waging of the “war on drugs,” (4) modern technological advances requiring new responses to technologically sophisticated wrongdoers, (5) declining faith in rehabilitation as a sentencing philosophy, (6) a renaissance in criminal law scholarship, and (7) the degradation of MPC-inspired statutory reforms.

<sup>6</sup> See Paul H. Robinson & Michael T. Cahill, *Can a Model Penal Code Second Save the States from Themselves?*, 1 OHIO ST. J. CRIM. L. 169 (2003).

<sup>7</sup> See William J. Stuntz, *The Uneasy Relationship Between Criminal Procedure and Criminal Justice*, 107 YALE L.J. 1 (1997) (suggesting that establishment of constitutional restrictions on how crimes are investigated and prosecuted has encouraged legislators to broaden the scope and number of criminal offenses).

sentencing of criminal offenders has been "legalized" by legislatures and commissions through the enactment of mandatory sentencing statutes and sentencing guidelines, a reality which is only in part addressed through the ALI's on-going revision of the MPC's sentencing provisions.<sup>8</sup> Fourth, the treatment of wrongdoing has been "civilized" by the broad use of sanctions like forfeiture and involuntary civil commitment, a reality which further blurs the line between criminal and civil law that so concerned the MPC drafters.<sup>9</sup> Fifth, the scale of punishments, prison populations and the economic costs of our justice systems have been "super-sized," a reality which has profound consequences not only for the administration of criminal justice but also for other governmental activities and all of society.<sup>10</sup>

To return to our movie metaphor, I would suggest that these realities have transformed criminal law since the MPC's adoption as much as sound, technicolor and computer-generated special effects have transformed movie-making since the silent-film, black-and-white era. But, of course, as my co-Managing Editor rightly contends, even profound changes in criminal law or movie-making do not alone make a case for revising classics from a previous era. The beauty and brilliance of a movie like Charlie Chaplin's *The Gold Rush* is not diminished because it is a silent, black-and-white film.<sup>11</sup>

But here is where the movie metaphor requires a reality-check: though a great but dated movie does no real harm, a great but dated law or legal idea surely can. And, to return to my main theme, the harms from failing to update the MPC extend not only to criminal law's development in states, but also to criminal law's discussion in schools.

The harm to criminal law reform efforts is itself considerable, as lawmakers must respond to modern issues and problems without the thoughtful, studied and comprehensive guidance that the American Law Institute provided two generations ago. But the harm in criminal law classrooms may be even more far-reaching and of greater long-term consequence, as professors and students fail to discuss pressing modern problems because they are focused primarily on concerns that are two generations old.

Let me clarify and amplify my pedagogical concerns: the front-line realities of modern criminal law doctrine and practice have become quite grim and messy, and yet study of the original MPC can suggest that criminal law doctrine and practice is

---

<sup>8</sup> In a lecture delivered as the drafting of the original MPC was nearing completion, Herbert Wechsler highlighted the important links between those parts of the criminal code that define crimes and those parts that establish a sentencing scheme. See Herbert Wechsler, *Sentencing, Corrections, and The Model Penal Code*, 109 U. PA. L. REV. 465, 468-70 (1961).

<sup>9</sup> See, e.g., Carol S. Steiker, *Punishment and Procedure: Punishment Theory and the Criminal-Civil Procedural Divide*, 85 GEO. L.J. 775 (1997) (reviewing evidence of, and concerns about, the modern "destabilization of the criminal-civil distinction").

<sup>10</sup> See J. C. Oleson, *The Punitive Coma*, 90 CAL. L. REV. 829, 833-49 (2002) (documenting the staggering rise in prison populations and the costs associated with the criminal justice system in recent decades).

<sup>11</sup> Indeed, I shudder when imagining a misguided effort to "colorize" and add special effects to *The Gold Rush* or to do a full remake with, say, Robert Downey Jr. in Chaplin's role.

quite enlightened and orderly. The MPC—and our teaching of it—trumpets the foundational concepts of *actus reus* and *mens rea*; yet the act requirement is often functionally eclipsed in a world in which conspiracy and possession offenses are staples, and the import of mental states is often functionally eclipsed in a world in which most sentencing factors are strict liability elements.<sup>12</sup> The MPC—or perhaps more particularly our teaching of it—suggests that homicides and other serious offenses are the central concern of the criminal justice system; yet modern criminal dockets are clogged with *60 times* more *felony* drug and property cases than homicide cases.<sup>13</sup> The MPC—and especially our usual methods for teaching it—suggests that many cases raise legal and factual claims and defenses that are resolved at trials where burdens of proof and precise offense elements are scrupulously considered; yet such matters very rarely occupy real criminal courts as judges spend the bulk of their time processing and sentencing the 19 out of every 20 defendants whose convictions are secured through guilty pleas.<sup>14</sup> And of course the MPC could not discuss—and I fear our teaching still fails to discuss—the enormous economic and personal costs and consequences of making mass incarceration a defining element of the modern American criminal justice system.<sup>15</sup>

Put succinctly, the modern realities of the criminal justice system have made many components and concerns of the original MPC seem increasingly academic and almost naively optimistic. This is an especially disquieting evolution because, in my view, what made the original MPC so brilliant—and ultimately so important and successful—was its ability to be pragmatic and realistic while also being principled and righteous. In today's world, though the MPC's principles still look fresh, its realism looks very dated. Consequently, while the original MPC can still be used to teach modern law students about fundamental principles of criminal law, no longer can it effectively illuminate the many modern challenges which now impede the application of these principles in practice.

In closing, I probably should concede that my core concerns may center more on criminal procedure than on substantive criminal law, and center more on how we teach these matters than on how the original MPC deals with these matters. However, others have recently stressed the mistake of overemphasizing a divide between

---

<sup>12</sup> See generally Jack B. Weinstein & Fred A. Bernstein, *The Denigration of Mens Rea in Drug Sentencing*, 7 FED. SENTENCING REP. 121 (1994).

<sup>13</sup> See Bureau of Justice Statistics, U.S. Dep't of Justice, Sourcebook of Criminal Justice Statistics 2001, tbl. 5.42 (2002) (reporting that, in state courts in 1998, there were less than 10,000 murder and non-negligent manslaughter convictions, but more than 300,000 felony drug conviction and nearly 300,000 felony property offenses).

<sup>14</sup> See *id.*, tbl. 5.44 (reporting that 94% of all felony convictions in state courts result from guilty pleas). Cf. Douglas Husak, *Is the Criminal Law Important?*, 1 OHIO ST. J. CRIM. L. 261 (2003) (forcefully questioning “the relevance of what most of us teach in our courses in criminal law,” because the modern realities of over-criminalization and discretionary enforcement entail that the “*real* criminal law . . . is in the hands of police and prosecutors”).

<sup>15</sup> See generally INVISIBLE PUNISHMENT: THE COLLATERAL CONSEQUENCES OF MASS INCARCERATION (Marc Mauer & Meda Chesney-Lind eds. 2003).

criminal procedure and substantive criminal law,<sup>16</sup> and my chief goal in this Commentary is to stress the connection between what appears in the MPC and what we do in the classroom. The MPC once set agendas for some legislators, today it still sets agendas for many law professors and students. I do not mean to argue that these agendas are inappropriate, but I do mean to suggest that they are—perhaps dangerously—incomplete.

A final return to our movie metaphor can assist in making one final point. The all-time great movies—from *The Gold Rush* to *Casablanca* to *To Kill a Mockingbird* to *Star Wars*—not only provide enduring entertainment, but also improve our cultural landscape. (Indeed, it is for this reason that my co-Managing Editor is so rightly chary about new versions of the classics, since unwise and unnecessary movie remakes can often tarnish rather than improve our cultural landscape.) The original MPC deserves to be canonized—in my co-Managing Editor's words, it is a "wonderful gift to criminal law jurisprudence"—because it not only provides enduring wisdom, but also once dramatically improved our criminal law landscape. But, unlike him, I do not fear the potential harms from an effort to produce a MPC Second because, in my view, the modern criminal law landscape has already been badly tarnished by a host of disconcerting criminal justice developments. Indeed, because I view the modern criminal law landscape to be as unruly today as when the original MPC was first developed, I now hope the ALI might, like the proverbial Western hero in a white hat, ride into town with a MPC Second to bring renewed order. Of course, I readily recognize that any MPC Second would surely not achieve the success of the original—how could it?—and the entire project is fraught with risks. But, there can be little question that any effort to revise or update the MPC—especially when led by an organization with the prestige and importance of the ALI—would at the very least have profound teaching value for law professors and law students as well as the entire field of criminal justice.

---

<sup>16</sup> See Stuntz, *supra* note 7; Stephanos Bibas, *The Real-World Shift in Criminal Procedure*, 93 J. CRIM. L. & CRIMINOLOGY 789 (2003).

