

Summer 2010

The Modern Irrationalities of American Criminal Codes: An Empirical Study of Offense Grading

Paul H. Robinson

Thomas Gaeta

Matthew Majarian

Megan Schultz

Follow this and additional works at: <https://scholarlycommons.law.northwestern.edu/jclc>

 Part of the [Criminal Law Commons](#), [Criminology Commons](#), and the [Criminology and Criminal Justice Commons](#)

Recommended Citation

Paul H. Robinson, Thomas Gaeta, Matthew Majarian, Megan Schultz, The Modern Irrationalities of American Criminal Codes: An Empirical Study of Offense Grading, 100 J. Crim. L. & Criminology 709 (2010)

This Symposium is brought to you for free and open access by Northwestern University School of Law Scholarly Commons. It has been accepted for inclusion in Journal of Criminal Law and Criminology by an authorized editor of Northwestern University School of Law Scholarly Commons.

THE MODERN IRRATIONALITIES OF AMERICAN CRIMINAL CODES: AN EMPIRICAL STUDY OF OFFENSE GRADING

PAUL H. ROBINSON,^{*} THOMAS GAETA,^{**} MATTHEW
MAJARIAN, MEGAN SCHULTZ & DOUGLAS M. WECK^{***}

The Model Penal Code made great advances in clarity and legality, moving most of the states from a mix of common law and ad hoc statutes to the modern American form of a comprehensive, succinct code that has served as a model around the world.

Yet the decades since the wave of Model Code-based codifications have seen a steady degradation of American codes brought on by a relentless and accelerating rate of criminal law amendments that ignore the style, format, and content of the existing codes. The most damaging aspect of this trend is the exponentially increasing number of offense grading irrationalities found in most modern American codes.

This Article documents the practical and prudential importance of getting offense grading right—that is, having the grade of each offense or suboffense reflect its relative seriousness in relation to all other offenses—and then illustrates just how wrong things have gone, using a case study of offense grading in Pennsylvania, one of the better modern American codes.

The critique of Pennsylvania does not rely upon the value judgments of the authors, but rather upon an empirical study of the judgments of Pennsylvania residents regarding the relative seriousness of more than a

^{*} Colin S. Diver Professor of Law, University of Pennsylvania. The authors thank Alberto Medrano, Phontip Tanompongphandh, and Katherine Zlock for their help in developing the *Report on Offense Grading in Pennsylvania* for the Pennsylvania Legislature by the University of Pennsylvania Criminal Law Research Group, from which the empirical study reported here is drawn. The Report is available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1527149. Also to be thanked is the University of Pennsylvania Law School for its financial support of the data collection for the study.

^{**} J.D., Northwestern University School of Law, 2010.

^{***} Members of the Classes of 2010 or 2011 of the University of Pennsylvania Law School.

hundred existing Pennsylvania offenses. The results suggest a startling conflict between the law's grading judgments and those of the community it governs, as well as a variety of kinds of logical irrationalities and internal inconsistencies.

The process by which these grading irrationalities have been and continue to be created is examined, and solutions for fixing and, perhaps, avoiding these problems in the future, are explored.

I. INTRODUCTION

The last one hundred years have seen a dramatic shift in the state of American criminal law, from a primarily common law system to one governed by comprehensive criminal codes that provide a statutory rule to govern all aspects of the liability and grading decision. That development has not only enormously advanced the legality interests of fair notice and uniformity in application, but also has shifted criminalization authority from individual judges to the legislature.

Prior to the adoption of the Model Penal Code (MPC) and its subsequent influence on American criminal law, the criminal codes of most states were essentially collections of ad hoc statutory enactments, often triggered by a political need to address a "crime du jour" from recent headlines.¹ In 1955, Herbert Wechsler, Chief Reporter for the Model Code, described in this *Journal* the state of American criminal law in these terms:

As our statutes stand at present, they are disorganized and often accidental in their coverage, a medley of enactment and of common law, far more important in their gloss than in their text even in cases where the text is fairly full, a combination of the old and of the new that only history explains. Often a larger, integrative impulse is reflected in the traffic law than in provisions dealing with the major crimes for which the major sanctions are employed.²

Attempts had been made to codify the criminal law, most notably via the work of Edward Livingston and David Dudley Field.³ Livingston sought to draft criminal codes for the federal government and the state of Louisiana; his efforts were designed to rationalize the criminal law in the utilitarian tradition of Jeremy Bentham.⁴ Strikingly, his codes left the judiciary as little discretion as possible, instead attempting to provide

¹ Paul H. Robinson & Markus D. Dubber, *The American Model Penal Code: A Brief Overview*, 10 NEW CRIM. L. REV. 319, 323 (2007).

² Herbert Wechsler, *American Law Institute: II. A Thoughtful Code of Substantive Law*, 45 J. CRIM. L., CRIMINOLOGY & POLICE SCI. 524, 526 (1955).

³ Robinson & Dubber, *supra* note 1, at 321; *see also* Sanford H. Kadish, *The Model Penal Code's Historical Antecedents*, 19 RUTGERS L.J. 521, 534-35 (1988).

⁴ Robinson & Dubber, *supra* note 1, at 321.

exhaustively detailed rules.⁵ Despite its lofty goals, neither of Livingston's codes was ever passed.⁶

Unlike Livingston, Field made little attempt to reform the law, instead focusing on reducing the existing common law to more accessible statutes.⁷ His meticulous consolidation of the common law of New York was well received and adopted by the state in 1881.⁸ By compiling the state's common law into statutory form, Field's code also became an accessible model for lawmaking in recently established jurisdictions and was adopted by many new Western states.⁹ After the adoption of Field's code, the movement towards codification of criminal law all but ceased in the United States until the mid-twentieth century.¹⁰

While plans were in the making before World War II, it was not until 1951 that the American Law Institute (ALI) launched the Model Penal Code project.¹¹ Surveying the muddled and irrational state of existing law, the ALI opted to create a new model code rather than issue a restatement, the latter being its normal practice.¹² The Model Code was crafted to be a pragmatic replacement for the existing chaos, a "thoughtful code of substantive law."¹³ It brought the best of both Field's and Livingston's efforts, combining the ambitions of Livingston's drafts and the pragmatism of Field's quickly adopted codes.¹⁴ The Model Code achieved unprecedented success: in the two decades after its promulgation, more than two-thirds of the states adopted some or all of the MPC's provisions.¹⁵ Even in jurisdictions that did not adopt the Code, courts regularly use it as persuasive authority.¹⁶

Although states overwhelmingly followed the ALI approach to codification and drastically improved their criminal codes, an examination of the current state of American criminal codes suggests that it is time for a second wave of criminal law codification. Among its many benefits over the hodgepodge that preceded it, the Model Code was crafted holistically,

⁵ Kadish, *supra* note 3, at 525.

⁶ *Id.* at 526.

⁷ Robinson & Dubber, *supra* note 1, at 322.

⁸ *Id.*

⁹ Kadish, *supra* note 3, at 537.

¹⁰ *Id.* One exception was the enactment of the Louisiana Penal Code in 1942. *Id.*

¹¹ Robinson & Dubber, *supra* note 1, at 322.

¹² *Id.* at 323.

¹³ Wechsler, *supra* note 2.

¹⁴ Robinson & Dubber, *supra* note 1, at 322.

¹⁵ Herbert Wechsler, *Foreword to MODEL PENAL CODE* (1985).

¹⁶ Sanford H. Kadish, *Fifty Years of Criminal Law: An Opinionated Review*, 87 CALIF. L. REV. 943, 949 (1999).

defining related offenses as a group that worked together to complement rather than to overlap one another. In the past three decades, however, legislatures have introduced a proliferation of new offenses that often overlap with prior existing laws and sometimes grade the same conduct at different levels of offense seriousness.¹⁷ Redundant offenses, even when they are graded the same as the prior offense, crowd the criminal code and decrease the code's ability to tell average citizens what the criminal law commands.¹⁸ Many of these new offenses even undermine the general provisions within modern codes.¹⁹ For example, general provisions commonly set definitions for the terms used for specific offenses, ensuring that important culpability levels and other concepts are used consistently throughout the code—yet new offenses commonly use undefined terms or introduce conflicting definitions.²⁰ Worse still, the proliferation of offenses is not limited to the state's criminal code alone. It is common practice to create new, serious offenses scattered through chapters outside the criminal code.²¹ As a result, criminal codes no longer provide an accessible source from which one can find a clear statement of the conduct that is criminal.

These degradations in the state of criminal codes do not just affect citizens' ability to know the law. The inconsistencies introduced by the proliferation of unnecessary offenses lead to mistakes by lawyers, judges, and law enforcement.²² These mistakes can be costly and can lead to disparate treatment of offenders. In addition to causing mistakes, the trend of having overlapping offenses also undermines the rule of law by shifting authority to set the general level of punishment, as statutorily set by the grading of an offense, away from the legislature and into the hands of prosecutors and police, who can pick and choose among the multiple and overlapping related offenses that may apply.²³ Even judges who try to interpret laws according to legislative prerogative may find their task

¹⁷ Paul H. Robinson & Michael T. Cahill, *The Accelerating Degradation of American Criminal Codes*, 56 HASTINGS L.J. 633, 636-37 (2005).

¹⁸ *Id.* at 638.

¹⁹ *Id.* at 640.

²⁰ *Id.* For instance, the official comments to 18 PA. CONS. STAT. ANN. § 302 (West 1998), which defines culpability levels, state that the purpose of the section was to replace “wilfully” and “maliciously,” which were used in common law but had no settled meaning. Nonetheless both terms appear throughout Pennsylvania's criminal code. *See, e.g.*, 18 PA. CONS. STAT. ANN. § 3305 (West Supp. 2010); 18 PA. CONS. STAT. ANN. § 3929.1 (West Supp. 2010); 18 PA. CONS. STAT. ANN. § 5511 (West Supp. 2010) (defining the required culpability for various offenses as “willfully and maliciously”).

²¹ *See, e.g.*, 35 PA. CONS. STAT. ANN. § 780-113 (West Supp. 2010) (outlining dozens of drug-related offenses of varying grades, the majority of which are never referenced in Pennsylvania's criminal code).

²² *See* Robinson & Cahill, *supra* note 17, at 638-39.

²³ *See id.* at 639.

impossible, as interpretive canons mandate that any overlap in offenses be read so that nothing is rendered superfluous. The task may require the court to distort the meaning of one provision in order to give meaning to the existence of another.

However, the single most detrimental effect in the increasing degradation of American criminal codes is its effect on the grading of offenses. As will become clear in Part III, modern codes have become a bundle of grading irrationalities and inconsistencies.

To illustrate our examination of codes generally as well as to make our proposals more concrete, we take as a case study the Commonwealth of Pennsylvania. We look to Pennsylvania not because its code is particularly bad, but rather because it is quite typical. Indeed, overall, it is better than most American criminal codes. A study of state criminal codes,²⁴ conducted in 2000, concluded that Pennsylvania's was the nineteenth-best criminal code in the nation, relying on an objective grading system that took into account comprehensiveness in stating rules of conduct, effectiveness in communicating those rules, accessibility of the rules of adjudication, accuracy in imposing liability, and accuracy in grading liability and punishment. The Code rates below average in grading, however.²⁵

Grading problems are not unique to Pennsylvania. In general, the 2000 study's authors found that American criminal codes are quite comprehensive, more so than they are qualitatively appropriate.²⁶ This is an encouraging sign—at the very least, American legislatures have (on average) done a good job of ensuring that most criminal conduct is, in fact, criminalized by statute. More problematic, however, is the grading of such conduct within the codes once the criminalization decision has been made. The grading problems discussed below are emblematic of American criminal codes generally—even the very best. As Part V discusses, these problems are, in large part, the predictable result of the unchecked political process at work for crime legislation, a dynamic common to every state.

²⁴ See Paul H. Robinson, Michael T. Cahill & Usman Mohammad, *The Five Worst (and Five Best) American Criminal Codes*, 95 NW. U. L. REV. 1, 60 (2000) (noting that Pennsylvania's criminal code ranks nineteenth).

²⁵ Though all of the five categories are significant in the larger picture of criminal code effectiveness, the last mentioned—accuracy in grading liability and punishment—is most affected by grading irrationalities. Pennsylvania's criminal code was at its weakest in this category. *Id.* While Pennsylvania was above-average in most of the other categories, it was tied for thirty-fourth out of fifty-two here. *Id.* at 51. Thus, at the time of this 2000 study, the Pennsylvania Crimes Code was below average in both consistency in grading and in recognizing appropriate distinctions between crimes. *Id.*

²⁶ *Id.* at 62.

II. WHY SHOULD WE CARE ABOUT GETTING OFFENSE GRADES RIGHT?

As will become clear, the biggest problems facing American criminal codes are the commonplace irrationalities present in offense grading. One may ask, however, whether we should care at all. Why is proper offense grading important?

A. OFFENSE GRADES THAT CONFLICT WITH COMMUNITY VIEWS UNDERMINE THE CRIMINAL LAW'S MORAL CREDIBILITY AND, THEREBY, ITS ABILITY TO FIGHT CRIME

If a society cares about doing justice, as all societies should, it ought to take care to insure that the proper level of punishment is imposed on each offender—that is, that each criminal receives neither too much nor too little punishment for his or her crime. Doing justice has independent deontological benefit and requires no further justification. It is the mark of a civilized society.

Recent social science research suggests that a criminal justice system's reputation for doing justice also has value beyond any deontological justification. A reputation for doing justice has important practical value in fighting crime. If the system's liability and punishment rules—such as those expressed by offense grades—track the shared intuitions of justice of the community it governs, the resulting moral credibility of the system promotes cooperation, acquiescence, the powerful social influences of stigmatization and condemnation, and the criminal law's ability to shape society and internalize norms. Where the law's offense grading judgments conflict with the community's lay intuitions of justice, they undercut these benefits. A criminal justice system seen as unjust promotes resistance and subversion, loses the power of stigmatization and condemnation, and undermines the law's ability to shape the powerful forces of social norms.²⁷

B. OFFENSE GRADES TELL CITIZENS THE RELATIVE IMPORTANCE OF CONFLICTING DUTIES

In addition, the proper grading of offenses is essential because it signals the legislature's judgments as to the relative seriousness of different offenses. Those judgments are vital information for a variety of reasons. First, offense grades tell citizens how careful they must be to avoid one offense over another. Speeding is less serious than is risking a catastrophe;

²⁷ For a discussion of the literature, see PAUL H. ROBINSON, DISTRIBUTIVE PRINCIPLES OF CRIMINAL LAW: WHO SHOULD BE PUNISHED HOW MUCH? 135-212 (2008); Paul H. Robinson & John M. Darley, *Intuitions of Justice: Implications for Criminal Law and Justice Policy*, 81 S. CAL L. REV. 1 (2007); Paul H. Robinson, Geoff P. Goodwin & Michael Reisig, *The Disutility of Injustice* (forthcoming 2010), available at <http://ssrn.com/abstract=1470905>.

thus it follows that a citizen ought to pay relatively more attention to avoiding the latter than the former.²⁸ And when a citizen is faced with conflicting duties, the relative grades of offenses can tell him or her which duty ought to take priority. Faced with an emergency requiring a choice between two bad outcomes, the law tells citizens to “avoid the greater harm or evil,”²⁹ but it is the *legislature’s* assessment of the relative seriousness of the harms or evils—as reflected in its grading of the relevant offenses—to which citizens must give deference. This avoids a reliance on individual citizens’ judgments, providing uniformity and giving force to the legislature’s appraisals.

To illustrate, consider that animals are judged to be entitled to a life free from cruelty, and cruelty to animals is therefore criminalized.³⁰ Should a person feel entitled to use force to take pets from a cruel owner if it seems necessary to protect his animals from imminent harm? Pennsylvania law grades robbery with any amount of force, however slight, as a felony of the third degree and grades cruelty to animals as only a summary offense, the lowest criminal grade available.³¹ This relative grading makes it clear to individuals that they may not use force in such a situation, irrespective of any personal moral judgment to the contrary, by ensuring that the defense of justification applies only in accordance with the legislature’s analysis.

C. OFFENSE GRADES EXPRESS THE LEGISLATURE’S VALUES, AVOIDING DELEGATION OF SUCH VALUE JUDGMENTS TO INDIVIDUAL JUDGES

Even more important, however, is the role that offense grading plays in ensuring that the relative seriousness of offenses is defined by legislative judgment, rather than delegating this important task to the discretion of individual sentencing judges. Assessments of proper offense grade are classic expressions of societal values, which are properly set by the most democratic branch of government and the one charged with collectively making such value judgments—the legislature. Such value judgments ought never to be left to the ad hoc discretion of any individual, even one as well-regarded as a judge. The grade given to an offense sets the maximum

²⁸ 18 PA. CONS. STAT. ANN. § 3302 (West Supp. 2010).

²⁹ See, e.g., 18 PA. CONS. STAT. ANN. § 503 (West 1998) (stating that “[c]onduct which the actor believes to be necessary to avoid a harm or evil to himself or to another is justifiable if: (1) the harm or evil sought to be avoided by such conduct is greater than that sought to be prevented by the law defining the offense charged . . .”).

³⁰ 18 PA. CONS. STAT. ANN. § 5511(c) (West Supp. 2010).

³¹ Compare 18 PA. CONS. STAT. ANN. § 3701(b) (West 2000), with § 5511(c). This example is similar to a recent Pennsylvania case involving theft of a dog. See *Commonwealth v. Grimes*, 982 A.2d 559 (Pa. Super. Ct. 2009).

sentence to be imposed for that offense, providing a hard limit to sentencing discretion. Where offenses are graded too highly, judges are effectively empowered to determine for themselves the relative seriousness of offenses.

For example, an offense graded as a felony of the first degree may be punished as harshly as other first degree felonies or, at the discretion of the sentencing judge, given a lesser sentence. Whereas a full consideration of the proper grade for that offense would lead the legislature to grade it as a felony of the third degree, the failure to properly set that offense's grade leaves the imposition of an appropriate sentence entirely to the discretion of individual judges. In such situations, sentencing judges may individually determine the "proper" grade for that offense, setting punishments far exceeding those the legislature would deem appropriate. Admittedly, judicial discretion is needed to properly weigh the myriad of complex mitigations and excuses that might reduce an offender's deserved punishment below that statutory maximum, but judges ought to remain bound by the maximum limit on punishment that flows from the legislature's grading judgment.

D. OFFENSE GRADES ASSURE A FIXED RULE FOR ALL OFFENDERS

An additional reason to prefer the judgment of the legislature to that of the judiciary is that the former is the only branch whose rules can be applied uniformly to all offenders. The exercise of individual judicial discretion is necessarily ad hoc; reliance upon judicial value judgments inevitably invites differing judgments for different offenders. However, a central part of doing justice is treating similarly situated offenders in a similar fashion. An offender's punishment ought to depend upon what his or her acts, level of culpability, and capacities are during the commission of the offense. Punishment ought not to depend upon who happens to be assigned as a sentencing judge and that judge's personal value judgments. Yet, when an offense grade is set so high as to provide no practical limit on judges' discretion, it has the effect of leaving the judgment of relative seriousness of the offense to individual judges. Improperly high offense grades effectively allow each sentencing judge to decide for himself or herself the relative seriousness of the offense at hand, based upon personal values that may not coincide with those of either the legislature or other judges. (The existence of voluntary sentencing guidelines does little to solve the problem.³²) Beyond subverting the legislative responsibility to set

³² The presence of sentencing guidelines in Pennsylvania does not fix the problem of inappropriately graded offenses, as trial judges are free to impose any term up to the statutory maximum, regardless of the suggested guideline range. *Sentencing*, Pennsylvania Commission on Sentencing, June 28, 2010, <http://pcs.la.psu.edu/guidelines/sentencing>. A judge with idiosyncratic views of the offense at hand could disregard the guidelines entirely

offense grades, such unchecked discretion makes it possible for individuals found guilty of the same offenses under the same circumstances to be punished with greatly differing sentences.³³

E. IMPROPER OFFENSE GRADES MAY BE COSTLY AND INEFFICIENT

In addition to encouraging injustice and crime-control problems, improper grading of offenses can lead to inefficient spending. A rational punishment system allocates its punishment expenditures to punish more serious offenses more than less serious offenses. Prison is expensive.³⁴ In a world of finite resources, funds spent on less serious offenses are not available to punish more serious offenses. For the legislature to exercise control over prison spending and to insure the most efficient use of its punishment expenditures, the law must properly identify through its grading the true relative seriousness of different offenses.

Further, to the extent that a criminal law with greater moral credibility within the governed community has greater crime-control effectiveness, for the reasons summarized in the first point above, a rational punishment system will also produce financial savings by reducing the costs of crime and the costs of catching, prosecuting, and punishing offenders.

and give a sentence that is too low or too high based on his own, rather than the legislature's, views of the seriousness of the crime. In addition, when offenses are graded too low, judges lack the authority to award an appropriate punishment for the conduct at hand. An offense graded too high can similarly result in inappropriate punishment, as the judge is given discretion to award sentences that are more serious than the offense warrants.

³³ Such non-uniformity of sentences may also negatively affect compliance with the law by reducing the public perception of the legal system as legitimate—the compliance with legitimate authority is seen as an obligation associated with citizenship. See Tom R. Tyler & John M. Darley, *Building a Law-Abiding Society: Taking Public Views About Morality and the Legitimacy of Legal Authorities into Account when Formulating Substantive Law*, 28 HOEFLER L. REV. 707, 716-17 (2000). This perception that the law is legitimate and ought to be obeyed is founded, in part, on the view that legal decision-making is fair and neutral—a difficult hurdle when similar defendants may be given dramatically differing sentences. See Tom R. Tyler, *Legitimacy and Criminal Justice: The Benefits of Self-Regulation*, 7 OHIO ST. J. CRIM. L. 307, 319 (2009). The considered grading of criminal offenses may be of particular importance to a legislature focusing on improving compliance through increase in legitimacy.

³⁴ The average cost of incarceration in 2008 was approximately \$100 per prisoner per day. See PEW CTR. ON THE STATES, 1 IN 31: THE LONG REACH OF AMERICAN CORRECTIONS—PENNSYLVANIA (2009). In all, the Commonwealth spent over \$1.6 billion on prison costs, approximately 6.7% of all Commonwealth spending. *Id.*

III. EXAMPLES OF OFFENSE GRADING IRRATIONALITIES AND INCONSISTENCIES IN CURRENT PENNSYLVANIA LAW

When the Pennsylvania Legislature enacted the modern Crimes Code in 1972, it succinctly set out all of the conduct that was to be criminalized in the definitions of 282 offenses and suboffenses.³⁵ Each offense was categorized into one of eight grading categories—degrees of felonies, degrees of misdemeanors, and summary offenses—that distinguished offenses according to their level of seriousness.³⁶ Today's Pennsylvania Crimes Code contains more than twice as many offenses and suboffenses—636 in total. Further, there are now 1,648 sections of Pennsylvania law outside of the Crimes Code that define criminal offenses.³⁷ Unfortunately, the substantial legislative activity over the past thirty-seven years has included the enactment and grading of offenses with little attention paid to the then-existing Code, resulting in a system of offenses marked by duplication and by irrational and contradictory grading differences.

To demonstrate the seriousness of the resulting grading problems, we offer examples of five different sorts: the improper grade problem, the mandatory minimum problem, the problem of inconsistent grades among similar offenses, the problem of failing to distinguish conduct of significantly different seriousness contained within a single offense grade, and the problem of inconsistent use of grading factors among analogous offenses. The appendices include additional illustrations of each problem type. In what follows, the references to conflicts between an offense's seriousness and the judgments of Pennsylvania residents are based on the survey described in Part IV.

³⁵ Crimes Code (1972), P.L. 1482, No. 334 (codified as amended at 18 PA. CONS. STAT. ANN. §§ 2101-7661 (West 1998 & Supp. 2009)). By "suboffense," we mean a course of defined conduct with an offense grade different from that of other conduct defined in the same code section. In other words, a criminal code might have three suboffenses of robbery or five suboffenses of theft depending upon the number of different grades of the offense that it recognizes. Within Title 18, each separate grade for conduct is counted as a separate offense.

³⁶ 18 PA. CONS. STAT. ANN. § 106 (West 1998).

³⁷ See generally 18 PA. CONS. STAT. (2009). To determine the number of criminal law sections outside of the Crimes Code, the entirety of the Pennsylvania Code was searched for criminal offenses. Each criminal section outside of Title 18 is counted in this figure. The number of amendments was obtained through examination of legislative histories as reported in the Westlaw database of Pennsylvania Statutes Annotated. Included in the amendment count are any instances where a statute section was added, passed, or otherwise affected by legislative action. For an illustration of the timing of amendments to Title 18, see note 136 *infra*.

A. THE IMPROPER GRADE PROBLEM

The most common grading problem is simply setting the grade of an offense at a level that is inappropriate as compared to the relative seriousness of other offenses, according to citizen's judgments of relative seriousness. For example:

A pawn shop owner's buying a stereo that he knows is stolen, intending to sell it,³⁸ is graded by the Pennsylvania survey participants as being of equivalent seriousness as taking property of another valued between \$50 and \$200 (a second degree misdemeanor), which has a maximum sentence of *two years*.³⁹ Yet, under current law the buying-stolen-property offense is graded as a first degree felony, which has a maximum sentence of *twenty years*.⁴⁰

Making a duplicate copy of a purchased Beatles CD and selling the copy to a friend for one dollar⁴¹ is graded by the Pennsylvania survey participants the same as committing acts to annoy another person with no legitimate purpose (a summary offense), which has a maximum sentence of *ninety days*.⁴² Yet, under current law, the duplication offense is a first degree misdemeanor, which has a maximum sentence of *five years*.⁴³

Reading another's email without permission⁴⁴ is graded by the Pennsylvania survey participants the same as taking property from another valued under \$50 (a third degree misdemeanor), which has a maximum sentence of *one year*.⁴⁵ Yet, under current law, the reading-another's-email offense is a third degree felony, which has a maximum sentence of *seven years*.⁴⁶

Breaking into a pharmaceutical company's labs in order to release animals used for testing⁴⁷ is graded by the Pennsylvania survey participants the same as taking property from another by force without causing injury (a third degree felony), which has a maximum sentence of *seven years*.⁴⁸ Yet, under current law, the animal-release

³⁸ 18 PA. CONS. STAT. ANN. § 5111(a) (West Supp. 2010).

³⁹ Mean=3.21, Mode=3, SD=1.290, $p<0.005$; 18 PA. CONS. STAT. ANN. § 3902 (West 1983); 18 PA. CONS. STAT. ANN. § 3903(b)(1) (West Supp. 2010).

⁴⁰ § 5111(a)-(b).

⁴¹ 18 PA. CONS. STAT. ANN. § 4116(b) (West Supp. 2010).

⁴² Mean=1.18, Mode=0, SD=1.146, $p<0.005$; 18 PA. CONS. STAT. ANN. § 5503(a)-(b) (West Supp. 2010).

⁴³ § 4116(b).

⁴⁴ 18 PA. CONS. STAT. ANN. § 7613 (West Supp. 2010).

⁴⁵ Mean=1.46, Mode=1, SD=1.424, $p<0.005$; 18 PA. CONS. STAT. ANN. § 3902 (West 1983); 18 PA. CONS. STAT. ANN. § 3903(b)(2) (West Supp. 2010).

⁴⁶ § 7613.

⁴⁷ 18 PA. CONS. STAT. ANN. § 3311(a)(2) (West Supp. 2010).

⁴⁸ Mean=3.64, Mode=3, SD=1.187, $p<0.005$; 18 PA. CONS. STAT. ANN. § 3701(a)(1)(v)-(b) (West Supp. 2010).

break-in offense is a first degree felony which has a maximum sentence of *twenty years*.⁴⁹

Hiring a prostitute for another person⁵⁰ is graded by the Pennsylvania survey participants the same as taking property from another valued under \$50 (a third degree misdemeanor), which has a maximum sentence of *one year*.⁵¹ Yet, under current law, the prostitution offense is a second degree misdemeanor, which has a maximum sentence of *three years*.⁵²

Deleting non-valuable data from someone's computer without their permission⁵³ is graded by the Pennsylvania survey participants the same as taking property from another valued under \$50 (a third degree misdemeanor), which has a maximum sentence of *one year*.⁵⁴ Yet, under current law, the deleting-data offense is a third degree felony, which has a maximum sentence of *seven years*.⁵⁵

In some instances, the current law's grading is improper in the opposite direction, leaving an offense with a grade that is lower than Pennsylvania residents think is appropriate.

Keeping an adult as a slave⁵⁶ is graded by the Pennsylvania survey participants the same as knowingly causing injury that risks death or leads to permanent impairment (a first degree felony), which has a maximum sentence of *twenty years*.⁵⁷ Yet, under current law the offense is a first degree misdemeanor, which has a maximum sentence of *five years*.⁵⁸

Appendix A provides additional examples of these kinds of systemic problems in the current Pennsylvania law.⁵⁹

⁴⁹ § 3311(a)(2)-(b).

⁵⁰ 18 PA. CONS. STAT. ANN. § 5902(b)(4)-(8) (West Supp. 2010).

⁵¹ Mean=2.40, Mode=0, SD=2.009, $p<0.005$; 18 PA. CONS. STAT. ANN. § 3902 (West 1983); 18 PA. CONS. STAT. ANN. § 3903(b)(2) (West Supp. 2010).

⁵² § 5902.

⁵³ 18 PA. CONS. STAT. ANN. § 7615 (West Supp. 2010).

⁵⁴ Mean=1.56, Mode=1, SD=1.398, $p<0.005$; § 3902; § 3903(b)(2).

⁵⁵ § 7615.

⁵⁶ 18 PA. CONS. STAT. ANN. § 2902(a)(2) (West Supp. 2010) (defining unlawful restraint as knowingly "hold[ing] another in a condition of involuntary servitude").

⁵⁷ Mean=7.13, Mode=7, SD=1.374, $p<0.005$; 18 PA. CONS. STAT. ANN. § 2702(a)(1)-(b) (West Supp. 2010).

⁵⁸ § 2902(b).

⁵⁹ One might argue that many of the survey items are cases in which the maximum of the offense does not apply and that the case presented would be a more mitigated form of the offense calling for a more mitigated sentence than the maximum. But, of course, that is true as well of the "milestone offense" to which the subjects compared it. Each milestone offense presumably includes more aggravated forms, which will deserve a sentence nearer to the maximum, and more mitigated forms, which will deserve a much lower sentence. The subjects were asked to compare each offense to the milestone offense to which it most properly compares, with each side of that comparison being an offense that could be more or less aggravated.

B. THE MANDATORY MINIMUM PROBLEM

There are good reasons to be broadly skeptical about mandatory minimum sentences. They often subvert the criminal law's obligation to give punishment according to an offender's blameworthiness, because they prevent the system from taking into account factors that make the offense at hand significantly less blameworthy than the paradigm instance of the offense. If one believes in the value of doing justice, then one must be as concerned with over-punishment as with under-punishment. Mandatory minimums can often lead to over-punishment, especially in cases where facts differ from the typical case.

Admittedly, there are reasons to be concerned about the improper exercise of judicial discretion that imposes less punishment than an offender deserves. This concern is a primary motivation behind the imposition of mandatory minimum sentences.⁶⁰ However, such concerns can be addressed by a coherent sentencing guideline system, without the need for the sledgehammer of mandatory minimums. If there is concern that current sentencing guidelines fail to sufficiently control the exercise of sentencing discretion, the proper response is to give future sentencing guidelines more teeth than they bear in their current, purely voluntary form, not to eliminate all discretion by enacting mandatory minimums.

However, even if one were to see some value in having mandatory minimums for some offenses, the minimums contained in current law often produce serious distortions in the grading system, as illustrated by the examples below and in Appendix B. While the grading problems discussed in Part III.A above *allow* judges to impose improper levels of punishment, these mandatory minimums commonly *demand* that a judge impose an improper level of punishment. For example:

Pennsylvania residents graded a gun store owner requesting a background check on a customer to satisfy personal curiosity, after having already been convicted of the same offense in the past⁶¹ as being similar in seriousness to the theft of property valued between \$50 and \$200 (a second degree misdemeanor), which has a maximum punishment of *two years*.⁶² Yet, current law sets the mandatory minimum for the background-check offense at *five years*,⁶³ requiring every instance of the offense to be over-punished.

Pennsylvania residents graded a person, ordered to be on a sex offender registry (for engaging in oral sex with his fifteen-year-old girlfriend), who failed to verify his

⁶⁰ See Erik Luna & Paul G. Cassell, *Mandatory Minimalism*, 32 CARDOZO L. REV. 1, 11 (2010).

⁶¹ 18 PA. CONS. STAT. ANN. § 6111(g)(3) (West Supp. 2010).

⁶² Mean=3.93, Mode=3, SD=1.670, $p<0.005$; 18 PA. CONS. STAT. ANN. § 3902 (West 1983); 18 PA. CONS. STAT. ANN. § 3903(b)(2) (West Supp. 2010).

⁶³ § 6111(h)(1).

address with the state police⁶⁴ as being similar in seriousness to taking property from another valued under \$50 (a third degree misdemeanor), which has a maximum sentence of *one year*.⁶⁵ Yet, current law sets the mandatory minimum for the address-verification offense at *three years*,⁶⁶ requiring every instance of the offense to be over-punished.

Pennsylvania residents graded luring a child into a motor vehicle, after already having been convicted once for the same offense,⁶⁷ as being similar in seriousness to engaging in sexual intercourse without consent, but not by force (a second degree felony), which has a maximum sentence of *ten years*.⁶⁸ Yet, current law sets the mandatory minimum for the child-luring offense at *twenty-five years*,⁶⁹ requiring every instance of the offense to be over-punished.

In each of the above instances, the mandatory minimum sentence *requires* exacting an amount of punishment exceeding the maximum grade that the Pennsylvania residents saw as most appropriate for the offense. Additional examples are provided in Appendix B.

C. THE PROBLEM OF INCONSISTENT GRADES AMONG SIMILAR OFFENSES

A similar problem occurs when a new offense is created without taking account of the grades assigned to related offenses in existing law. For example:

Failing to provide reasonable care to an infant at its birth is graded by current law as a third degree felony, carrying a maximum sentence of *seven years*,⁷⁰ while the same person failing to provide reasonable care to the same child at any time after its birth is graded by current law as a first degree misdemeanor, carrying a maximum sentence of *five years*.⁷¹ It is hard to see why the maximum punishment for the same lack-of-reasonable-care conduct should become two years less after the child is born.

Sometimes a new offense is simply a specific instance of a more general preexisting offense. Enacting such an unnecessary law is problematic, first, because it improperly allows liability and punishment for multiple offenses when the offender's conduct is a single harm or evil.⁷² In

⁶⁴ 18 PA. CONS. STAT. ANN. § 4915(a)(2) (West Supp. 2010).

⁶⁵ Mean=2.46, Mode=1, SD=1.997, $p<0.005$; § 3902; § 3903(b)(2).

⁶⁶ 42 PA. CONS. STAT. ANN. § 9718.3 (West Supp. 2010).

⁶⁷ 42 PA. CONS. STAT. ANN. § 9718.2 (West 2007).

⁶⁸ Mean=6.26, Mode=6, SD=1.609, $p<0.005$; 18 PA. CONS. STAT. ANN. § 3124.1 (West 2000).

⁶⁹ § 9718.2.

⁷⁰ 18 PA. CONS. STAT. ANN. § 3212(b) (West 2000).

⁷¹ 18 PA. CONS. STAT. ANN. § 4304(a)-(b) (West Supp. 2010).

⁷² Title 18 does not contain a provision barring conviction under multiple sections even if one offense is included in the other. This makes it possible for a person to be convicted of multiple offenses that criminalize essentially the same conduct. The Model Penal Code

addition, however, a serious grading problem can occur: the grades of the two offenses are often different, even though there is no reasonable basis for grading such overlapping crimes differently. For example:

Agricultural vandalism⁷³ is a specific instance of the general offense of criminal mischief.⁷⁴ Yet committing agricultural vandalism by destroying up to \$500 worth of crops on a farm is punished with up to *one year* in prison, while the general offense of criminal mischief for destroying up to \$500 of property, such as produce at a farmers' market, is punished with a maximum of *ninety days*, with no apparent reason why the damage in the field should be subject to four times the punishment for the same damage at the stand.

Unauthorized administration of an intoxicant with the intent to rape⁷⁵ is a specific instance of the offense of attempted rape.⁷⁶ Yet the former is punishable by up to *seven years*, while the latter carries a maximum sentence of *twenty years*—nearly three times the penalty. It seems hard to imagine why the intoxicant form of attempted rape deserves such a discount in available punishment.

Throwing an object into an occupied vehicle⁷⁷ is a specific instance of the more general offense of reckless endangerment.⁷⁸ Yet, the specific, throwing offense has a maximum penalty of *five years*, while the more general reckless endangerment offense has a maximum penalty of *two years*.⁷⁹ It is unclear why the throwing-an-object form of reckless endangerment should be punishable two-and-a-half times more harshly than any other form that creates the same danger to people.

prevents this in Section 1.07. Although the Pennsylvania Code is based upon the Model Penal Code, it did not adopt this provision. The Pennsylvania Supreme Court has fashioned a rule to partially fill the gap:

[I]f a person commits one act of criminal violence, and the act is the only basis upon which he may be convicted of another crime, the act will merge into the other crime. If, however, the actor commits multiple acts beyond that which is necessary to establish the bare elements of the additional crime, then the actor will be guilty of multiple crimes which do not merge for sentencing purposes.

Commonwealth v. Anderson, 650 A.2d 20, 24 (Pa. 1994). This has been interpreted to require courts to compare the elements of the offenses. If both offenses require proof of at least one element that the other offense does not, the offenses are not greater- and lesser-included offenses. *Commonwealth v. Johnson*, 874 A.2d 66, 70 (Pa. Super. Ct. 2005). If the elements of one offense are all included in the elements of the greater offense and the greater offense has at least one additional element, then the offenses merge. *Id.* The rule tracks part of Model Penal Code Section 1.07: "[a]n offense is so included when . . . it is established by proof of the same or less than all the facts required to establish the commission of the offense charged . . ." MODEL PENAL CODE § 1.07(4)(a).

⁷³ 18 PA. CONS. STAT. ANN. § 3309 (West Supp. 2010).

⁷⁴ 18 PA. CONS. STAT. ANN. § 3304 (West Supp. 2010).

⁷⁵ 18 PA. CONS. STAT. ANN. § 2714 (West 2000).

⁷⁶ 18 PA. CONS. STAT. ANN. § 3121(a)(4) (West Supp. 2010); 18 PA. CONS. STAT. ANN. § 905(a) (West 1998).

⁷⁷ 18 PA. CONS. STAT. ANN. § 2707(a) (West 2000).

⁷⁸ 18 PA. CONS. STAT. ANN. § 2705 (West 2000).

⁷⁹ *Id.*

The offense of stealing another's motor vehicle in his presence⁸⁰ is a specific instance of the offense of robbery.⁸¹ Yet the former is given a maximum penalty of *twenty years*, while the latter carries a maximum penalty of *ten years*, with no apparent reason why the more specific offense should have a maximum penalty twice that of the more general offense.

Additional examples are provided in Appendix C.

D. THE PROBLEM OF FAILING TO DISTINGUISH CONDUCT OF SIGNIFICANTLY DIFFERENT SERIOUSNESS CONTAINED WITHIN A SINGLE OFFENSE GRADE

Despite the need for proper grading, it is common, in the ad hoc crimes amendment process, for the definition of a new crime to ignore the importance of distinguishing the grades of materially different conduct. Such statutes adopt an overbroad offense definition, including conduct of very different degrees of seriousness but applying the same grade to all conduct covered.

Such overly broad laws commonly create grading inconsistencies. In order to provide a sufficiently high grade to punish the most serious conduct within the broad offense, the grade must be set quite high. But that high grade is then also applicable to the much less serious conduct included in the same offense definition. By failing to enact a more nuanced grading scheme, the legislature provides no guidance as to its judgment of the relative seriousness of conduct included in the broad offense. Consequently, individual sentencing judges must determine the relative seriousness of an offender's conduct ad hoc. For example:

The offense of false imprisonment of a minor is defined so broadly as to include both chaining a fourteen-year-old to a wall for a month and illegally locking a seventeen-year-old in her room for a half an hour.⁸² Under current law, both courses of conduct are graded as a second degree felony, carrying a maximum sentence of ten years, but the Pennsylvania survey participants graded the first as a first degree felony, carrying a maximum sentence of *twenty years*,⁸³ and the second as a third degree misdemeanor, carrying a maximum of *one year*.⁸⁴

⁸⁰ 18 PA. CONS. STAT. ANN. § 3702 (West 2000).

⁸¹ 18 PA. CONS. STAT. ANN. § 3701(a)(1)(v) (West 2000).

⁸² 18 PA. CONS. STAT. ANN. § 2903 (West Supp. 2010). In *Appeal of T.G.*, 836 A.2d 1003 (Pa. Super. Ct. 2003), the court held that evidence that a fourteen-year-old took a six-year-old inside her house, pulled her hair, and kept her inside for less than half an hour when she was crying to leave was sufficient for a finding of false imprisonment.

⁸³ Mean=7.22, Mode=7, SD=1.143.

⁸⁴ Mean=2.17, Mode=0, SD=1.143, $p<0.005$.

Notice that the ten-year maximum sentence provided by statute is higher than is appropriate for the latter conduct but not high enough, in the residents' view, for the former.

The offense of committing a second sex offense is defined so broadly as to include both a second conviction for raping another by force and a second conviction for displaying obscene materials in public.⁸⁵ Under current law, both courses of conduct are graded as a felony, carrying a minimum sentence of twenty-five years,⁸⁶ but the Pennsylvania survey participants graded the first as a first degree felony, carrying a maximum sentence of *twenty years*,⁸⁷ and the second as a second degree misdemeanor, carrying a maximum sentence of *two years*.⁸⁸

The offense of distributing child pornography is defined so broadly as to include both distributing material depicting a man actually having sex with a six-year-old boy, and distributing material depicting an eighteen-year-old female pretending to have sex with a seventeen-year-old male.⁸⁹ Under current law, both courses of conduct are graded as a third degree felony, carrying a maximum sentence of seven years,⁹⁰ but the Pennsylvania survey participants graded the first as a second degree felony, carrying a maximum sentence of *ten years*,⁹¹ and the second a second degree misdemeanor, carrying a maximum sentence of *two years*.⁹²

The offense of theft of trade secrets is defined so broadly as to include both accessing a graduate student's computer without permission to look at her research notes and stealing a formula worth \$5,000,000 from a pharmaceutical company.⁹³ Under current law, both courses of conduct are graded as a second degree felony,⁹⁴ carrying a maximum sentence of ten years, but the Pennsylvania survey participants graded the first as a third degree misdemeanor, carrying a maximum sentence of *one year*,⁹⁵ and the second as a third degree felony, carrying a maximum sentence of *ten years*.⁹⁶

The offense of commercial bribery and breach of duty to act disinterestedly is defined so broadly as to include both an employee soliciting a \$10 bribe to give an undeserved discount to a customer, as well as an employee accepting a \$10,000 bribe to award a large contract to an undeserving contractor.⁹⁷ Under current law, both courses of conduct are graded as a second degree misdemeanor, carrying a maximum sentence of

⁸⁵ 42 PA. CONS. STAT. ANN. § 9718.2 (West 2007).

⁸⁶ *Id.*

⁸⁷ Mean=7.36, Mode=7, SD=0.795.

⁸⁸ Mean=3.10, Mode=3, SD=1.805, $p<0.005$.

⁸⁹ 18 PA. CONS. STAT. ANN. § 6312(c) (West Supp. 2010).

⁹⁰ *Id.*

⁹¹ Mean=5.57, Mode=6, SD=1.937.

⁹² Mean=2.70, Mode=3, SD=2.046, $p<0.005$.

⁹³ 18 PA. CONS. STAT. ANN. § 3930(a) (West Supp. 2010).

⁹⁴ *Id.*

⁹⁵ Mean=2.29, Mode=1, SD=1.735.

⁹⁶ Mean=5.58, Mode=5, SD=1.373, $p<0.005$.

⁹⁷ 18 PA. CONS. STAT. ANN. § 4108(a) (West 1983).

two years,⁹⁸ but the Pennsylvania survey participants graded the first as third degree misdemeanor, carrying a maximum sentence of *one year*,⁹⁹ and the second as a third degree felony, carrying a maximum sentence of *seven years*.¹⁰⁰

Additional examples are given in Appendix D.

E. THE PROBLEM OF INCONSISTENT USE OF GRADING FACTORS AMONG ANALOGOUS OFFENSES

Another sort of problem is the inconsistent use of grading factors among analogous offenses. This problem arises in two types of situations. In the first type, two analogous offenses use different grading distinctions for no apparent reason. For example:

The general offense of theft makes grading distinctions according to the value of the property stolen: below \$50 (third degree misdemeanor), \$50-\$199.99 (second degree misdemeanor), \$200-\$2,000 (first degree misdemeanor), and \$2,000-plus (third degree felony).¹⁰¹ In contrast, the similar offense of library or museum theft also makes grading distinctions according to the value of the property stolen, but uses different monetary cutoffs and makes fewer distinctions: \$0-\$149.99 (summary offense) and \$150-plus (third degree misdemeanor).¹⁰² As a result:

Stealing property valued at \$40 is punishable with a maximum of *one year* if stolen from an individual, but is punishable by a maximum of *ninety days* if stolen from a library.

Stealing a rare book valued at \$3,000 is punishable by up to *seven years* if stolen from an individual, but only *one year* if stolen from a library.

There seems little justification for such substantial differences in punishment.

The general offense of theft makes grading distinctions according to the value of the property stolen, as noted above.¹⁰³ In contrast, the similar offense of retail theft also makes grading distinctions, but based upon different sets of distinctions for the value of property stolen: below \$149.99 (summary offense), \$150-\$1,999.99 (first degree misdemeanor), and above \$2,000 (third degree felony).¹⁰⁴ As a result:

Stealing property valued at \$125 from a store is punished with a maximum of *ninety days*, while stealing the same article from an individual is punished with up to *two years*.

⁹⁸ *Id.*

⁹⁹ Mean=1.80, Mode=2, SD=1.095.

¹⁰⁰ Mean=4.65, Mode=5, SD=1.307, $p<0.005$.

¹⁰¹ 18 PA. CONS. STAT. ANN. § 3902 (West 1983); 18 PA. CONS. STAT. ANN. § 3903 (West Supp. 2010).

¹⁰² 18 PA. CONS. STAT. ANN. § 3929.1(b) (West Supp. 2010).

¹⁰³ §§ 3902-3903.

¹⁰⁴ § 3929.

Stealing property valued at \$175 from a store is punished with up to *five years*, while stealing the same article from an individual is punished with a maximum of only *two years*.

It seems hard to see why the harm that comes from theft should be valued so much lower when the victim is a person rather than a company, especially when the actual resulting suffering may be quite a bit higher for the person than for the company.

In a second, more egregious type of situation, a set of grading distinctions used in one offense is *not* used at all in an analogous offense, although logic would seem to make the distinctions applicable to both. For example:

Various assault provisions make grading distinctions based upon the amount of harm inflicted and risk caused: causing bodily injury (a second degree misdemeanor),¹⁰⁵ causing bodily injury with a deadly weapon (a second degree felony),¹⁰⁶ causing serious bodily injury (a first degree felony).¹⁰⁷ In contrast, for the related offenses of arson endangering persons¹⁰⁸ and causing a catastrophe,¹⁰⁹ the Code provides no grading distinctions based on the extent of the resulting harm. As a result:

A person who transports toxic waste in a way that puts in danger others at his work site will be liable for the *same level offense* (third degree felony) as a person who mishandles chemicals in a nuclear reactor, thereby putting in danger his entire metropolitan area.

A person who purposely starts a fire that burns three acres of pasture will be liable for the *same level offense* (first degree felony) as a person who starts a forest fire that burns three hundred acres and destroys forty homes.

The offense of intimidating a witness to obstruct justice makes grading distinctions according to the grade of the original offense charged: obstructing less than a second degree felony is a third degree felony, obstructing a second degree felony is a second degree felony, and obstructing a murder or felony of the first degree is a first degree felony.¹¹⁰ Similarly, the offenses of failing to appear for a required court date¹¹¹ and flight to avoid apprehension¹¹² are graded in light of the underlying offense charged.

In contrast, the offense of tampering with evidence to undercut an investigation,¹¹³ which can likewise include varying degrees of harm depending on the seriousness of the offense being investigated, *makes no grading distinctions*. As a result,

¹⁰⁵ 18 PA. CONS. STAT. ANN. § 2701(a) (West Supp. 2010).

¹⁰⁶ 18 PA. CONS. STAT. ANN. § 2702(a)(4), (b) (West Supp. 2010).

¹⁰⁷ § 2702(a)(1), (b).

¹⁰⁸ 18 PA. CONS. STAT. ANN. § 3301(a) (West Supp. 2010).

¹⁰⁹ 18 PA. CONS. STAT. ANN. § 3302(a) (West Supp. 2010).

¹¹⁰ 18 PA. CONS. STAT. ANN. § 4952(b)(1) (West Supp. 2010).

¹¹¹ 18 PA. CONS. STAT. ANN. § 5124 (West 1983).

¹¹² 18 PA. CONS. STAT. ANN. § 5126 (West Supp. 2010).

¹¹³ 18 PA. CONS. STAT. ANN. § 4910 (West 1983).

whether the underlying offense is murder or petty theft, the tampering offense is graded as a second degree misdemeanor.¹¹⁴

Other examples are given in Appendix E. To produce a comprehensive list of offenses with these kinds of grading problems, one would need to undertake a full review of Pennsylvania's criminal laws.

IV. A SURVEY OF PENNSYLVANIA RESIDENTS' GRADING JUDGMENTS

Throughout the previous Part, we have referred to the judgments of Pennsylvania residents as presented in a survey. The methodology of that survey is presented here. We solicited 237 Pennsylvania residents to participate in a short web survey.¹¹⁵ We also solicited 124 respondents from Amazon.com's Mechanical Turk, and we paid them for their participation.¹¹⁶ Finally, we solicited 113 respondents who served as unpaid volunteers through public notices, local newspapers, and from Craigslist.com and other community Internet sites in communities throughout Pennsylvania.¹¹⁷

The subject pool had a broad demographic distribution: 24.3% were aged between fifteen and twenty-four (most of these were probably at the high end of the range because the survey was available only to "non-students"), 31.9% between twenty-five and thirty-four, 17.4% between thirty-five and forty-four, 15.7% between forty-five and fifty-four, 9.4% between fifty-five and sixty-four, and 1.3% over sixty-five. The subject pool had slightly more females with 42.7% male and 57.3% female. The subject pool was educationally diverse, with 1.8% of subjects reporting they had not graduated from high school, 13.3% having a high school diploma or GED, 26.1% having some college experience, 10.1% having a two-year college degree, 34.4% having a four-year college degree, 7.8% having a master's degree, and 6.4% having a professional degree.

¹¹⁴ *Id.*

¹¹⁵ This study was not designed to take the place of a comprehensive polling instrument. It was necessarily limited by both time and funding constraints.

¹¹⁶ Mechanical Turk is a service operated by Amazon.com and designed to provide a low-cost pool of labor to complete online tasks. This system coordinates a large pool of paid volunteers who perform paid tasks over the Internet, including many other tasks besides surveys, for a wide range of requesters. "Requesters" (those needing work to be completed) prepay Amazon.com and then set a price per task completed. The task is then released to the "workers" who submit their work for approval and payment by the requester. Subjects recruited from Mechanical Turk were paid between \$0.65 and \$1.50.

¹¹⁷ The most commonly used site, Craigslist.org, is a free, online, classified-advertising site. It offers community-specific advertising in Pennsylvania for Altoona-Johnstown, Cumberland Valley, Erie, Harrisburg, Lancaster, Lehigh Valley, Meadville, Philadelphia, Pittsburgh, the Poconos, Reading, Scranton, State College, Twin Tiers, Wilkes-Barre, Williamsport, and York.

The residences of subjects were spread across the Commonwealth, with 13.9% in the Pittsburgh metropolitan and suburban area, 7.2% in the western part of the state surrounding Pittsburgh, 13% in west-central Pennsylvania in an area containing Erie and College Park, 13.9% in mid-central Pennsylvania including Williamsport, Harrisburg, and Lancaster, 16.3% in northeast Pennsylvania including Scranton, Wilkes-Barre, and Allentown, and 35.6% in the Philadelphia area.

The subject pool had some racial diversity, although it was primarily Caucasian, making it generally representative of the Commonwealth.¹¹⁸ Of the respondents, 2.7% identified themselves as African-American, 2.3% as Asian-American, 3.2% as Hispanic, 1.4% as Native American, 88.7% as white, and 1.8% chose “other.”

Regarding marital status, 37.4% of the subjects were married, 15.1% were divorced or separated, 46.4% were single, and 0.9% were widowed. Regarding income, 11.2% of our respondents reported a household income below \$20,000, 38.3% reported below \$40,000, 59.3% reported below \$60,000, 71% reported below \$80,000, 77% reported below \$100,000, and 10.3% reported at or above \$100,000. An additional 12.6% chose not to disclose their income.

Subjects were given a table of what might be called “milestone” offenses taken from the existing Pennsylvania Crimes Code. All milestone offenses are reprinted in Table 1 below. The milestones were designed to present examples of the common kinds of offenses found in each of the various grading categories used in current Pennsylvania law. Included are basic offenses against the person (homicide, rape, robbery, assault, endangerment, harassment), offenses against property (theft, burglary), and offenses against public order (disorderly conduct, criminal mischief). The milestones thereby spanned the entire continuum of offense seriousness, from imprisonment for a maximum of ninety days (summary offenses) to punishment by life imprisonment or death (a “super” category used for some murder offenses). These offenses were presented in a vertically-stacked table, in order of seriousness. Each offense grade was given a number label so that subjects would not be influenced by the grade level’s name. As such, the least serious grading level (summary offenses) was

¹¹⁸ According to the U.S. Census Bureau’s 2006-2008 American Community Survey, the population of Pennsylvania is 83.8% white, 10.3% black or African-American, 0.1% American Indian or Alaska Native, 2.4% Asian American, 4.6% Hispanic or Latino, and 3.4% some other race or two or more races. U.S. CENSUS BUREAU, PENNSYLVANIA—FACT SHEET, http://factfinder.census.gov/servlet/ACSSAFFacts?_event=Search&_lang=en&_sse=on&geo_id=04000US42&_state=04000US42 (last visited Jun. 26, 2010). Our participants slightly over represented white Pennsylvanians and Native Americans and under-represented black and Hispanic residents.

presented at the bottom of the chart and numbered 1. The most serious level (the life imprisonment or death “super” category) was presented at the top, and numbered 9. Each row of the table contained the level number in one column and that category’s milestone offenses, with definitions, in another.

Subjects were first presented with a comprehensive set of instructions, asking them to verify their Pennsylvania residence and to complete a demonstration question designed to introduce them to the survey’s look and feel. Each participant was then given a series of test offenses, also drawn from current law, and was asked to compare the seriousness of those offenses to the milestone offenses presented in the table. Questions were randomized such that any particular question could appear at any point in the survey, though a question could not be presented to any single subject more than one time. For each test offense, subjects were prompted to choose which milestone offenses were most similar to the seriousness of the test offense presented, and were also given the option of selecting “No Criminal Punishment.” Because the subjects were not likely to be lawyers or have familiarity with the Crimes Code or legal language generally, the abstract terms of an offense were sometimes translated into concrete facts that would allow them to understand the offense.¹¹⁹ In case these translations remained unclear, respondents were able to note that they did not understand the test offense without selecting a seriousness level.

Providing concrete examples of an offense also was sometimes necessary to ensure that different subjects created the same “mental picture” of each offense. Studies on similar research methodologies suggest that subjects perform their comparative judgment by creating in their minds a short imagination of the offense. To the extent that the offense description provided to them is too abstract, different subjects fill in different facts to complete their “story,” and these individual additions by each subject understandably can produce different judgments about offense seriousness.

¹¹⁹ Where this was done, the illustrative facts sought to present a common instance of the offense rather than an unusually severe or unusually trivial instance. However, the situations we chose did not always illustrate the *most* common instance of the offense.

Deviating from the most common instance of the offense was necessary at times, especially when testing offenses that we believed Pennsylvania residents might find overly broad (those listed in Appendix D). In testing these offenses, we gave two examples of conduct that we believed could be prosecuted under the offense. For each offense tested, we created one example showing conduct exhibiting the least amount of blameworthiness or resulting harm that could be reasonably prosecuted under the offense, and one example showing conduct exhibiting the most amount of blameworthiness or resulting harm that could reasonably be prosecuted under the offense. Even in coming up with these examples, which were intended to flush out overly broad offenses, we stayed within the boundaries of what we believed to be the reasonable and possible applications of the offense.

Table 1.*Milestone Offenses from the Pennsylvania Crimes Code*¹²⁰

(9) [super grade]	Murder of the First Degree: Intentionally killing another person.
(8) [super grade]	Murder of the Third Degree: Reckless killing with extreme indifference to the value of human life (an example would be causing a death by shooting a firearm into a crowd of people, disregarding the risk that it may kill someone).
(7) 1st Degree Felony	Aggravated Assault: Knowingly causing injury that risks death or leads to permanent impairment. Rape: Engaging in sexual intercourse by force.
(6) 2nd Degree Felony	Burglary: Entering a house without permission in order to commit a crime. Robbery with Injury: Inflicting bodily injury on a person while committing a theft. Sexual Assault: Engaging in sexual intercourse without consent, but not by force.
(5) 3rd Degree Felony	Shooting into a House (Reckless Endangerment): Discharging a firearm into an occupied structure, without causing any injuries. Robbery: Taking property from another by force, without causing injury. Theft of more than \$2,000: Taking property of another valued over \$2,000.
(4) 1st Degree Misdemeanor	Stalking: Repeatedly following another with the intent to cause substantial emotional distress. Theft of \$2,000: Taking property of another valued between \$200 and \$2,000.
(3) 2nd Degree Misdemeanor	Simple Assault: Recklessly causing bodily injury to another. Theft of \$200: Taking property of another valued between \$50 and \$200. Criminal Mischief: Intentionally causing property damage of more than \$1,000.
(2) 3rd Degree Misdemeanor	Theft of less than \$50: Taking property of another valued under \$50.
(1) Summary Offense	Harassment: Repeatedly committing acts that serve no legitimate purpose, intending to annoy another person. Disorderly Conduct: Creating an annoyance by noise or threatening behavior.

¹²⁰ The punishment by law for each grade of offense is as follows:

	<i>Code Designated Grade</i>	<i>Max Punishment</i>
	[Super-felony level]	Death or life
	[Super-felony level]	40 years
F1	First degree felony	20 years
F2	Second degree felony	10 years
F3	Third degree felony	7 years
M1	First degree misdemeanor	5 years
M2	Second degree misdemeanor	2 years
M3	Third degree misdemeanor	1 year
S	Summary offense	90 days

Different subjects, in essence, can end up comparing different stories. Our methodology attempted to minimize the problem by providing some details. In all cases, the details were written in ways that conformed to the parameters of the Crimes Code provision governing the test offense.

In addition to the test offenses, subjects were presented with two screening questions. The “test offense” presented by the manipulation questions duplicated one present on the milestone chart, thus allowing us to identify subjects who were not appropriately comparing test offenses to milestones. For each manipulation check question, points were assigned based on how close to the appropriate milestone level the subject’s answer was. For a correct answer, a subject received no points. If, for example, the proper answer was level 5, and the subject answered level 1, he would receive 4 points. Each completed survey thus received a score that aggregated the points from wrong manipulation check answers and from failure to follow directions on the demonstration question.

This score was taken into consideration when deciding whether to exclude a data point based on evidence that the subject did not understand the survey or was not taking it seriously. A score over 5 warranted close scrutiny, though no data points were excluded solely because of a high score (other factors such as response patterns, overuse of the “do not understand” answer, and inexplicably wide variation from common intuitions were considered when necessary; a high score, though not dispositive, was strong evidence in support of exclusion). Subjects were also excluded if they failed to identify Pennsylvania as their state of residence or if, having reported Pennsylvania residency, a check of their IP address showed that the computer on which they completed the study was located outside of the state. In these cases, subjects were contacted via Mechanical Turk and were asked to explain their location. Most did not respond and were thus excluded; some did and their explanations were taken into account in the exclusion decision. In general, subjects who reported residence in a Pennsylvania hometown and said that they were out of state for the holidays or for some other plausible reason were included, as long as their responses had no other indicia of invalidity.

In all, each paid subject categorized a minimum of 55 and a maximum of 108 test offenses against the milestone offenses.¹²¹ In all, the online

¹²¹ In the first phase of the Mechanical Turk portion of the study, subjects were only required to complete fifty-five test questions and were given an opportunity to categorize an additional fifty-five offenses if they chose. The survey was presented in this fashion to ensure that respondents were required to devote no more time to the survey than they preferred. After the first two weeks of data collection, however, it was found that over 85% of participants were completing the entire survey. Because our initial Mechanical Turk advertisement specified one price for the required portion of the survey and another as the

surveys collected between 176 and 207 valid responses for each test offense in the survey.¹²² The residents' grading judgments reported in Part III and Appendices A through E are based upon the average of the subjects' grading judgments. The mean responses, the modes, and standard deviations are reported in the notes.¹²³ Each set of responses was also tested for statistical significance using a one sample t-test; these results are reported in the notes as well. All entries reported in the text and appendices were found to be significant at the $p < 0.05$ level (comparing the mean survey response to the current grade provided under Pennsylvania law), indicating that the reported survey findings are unlikely to be the result of chance. Responses reported in Part III.D and Appendix D, examining suboffenses covered by the same statute, were also tested using a paired t-test to check the mean grades for paired suboffenses for statistical significance. In each instance, results presented were significant at $p < 0.05$ (indicating a low likelihood that the findings occurred by chance). Additionally, a one-way analysis of variance (ANOVA) test was performed on each entry for each demographic category (age, sex, location, race, level of education, income, and marital status). No pattern of statistically significant differences was observed arising from demographic differences.

"bonus" for full completion, some workers were confused as to how much they could earn. Upon requiring completion of all questions for payment (and offering full payment), we saw a substantial increase in response rate. Note, however, that volunteer participants were never required to finish any number of questions, because enforcement of the requirement would be impossible; thus volunteers completed between 5 and 108 questions.

¹²² All responses other than "I do not understand the test offense" were included in the analysis.

¹²³ The conversion of average scores to criminal grades followed the table below:

Value on Milestone Offense Table	Mean Values in this Range Were Treated as Indicating Subject Preference for this Offense Grade
9	8.50-9.00	Murder of the First Degree
8	7.50-8.49	Murder of the Third Degree
7	6.50-7.49	First Degree Felony
6	5.50-6.49	Second Degree Felony
5	4.50-5.49	Third Degree Felony
4	3.50-4.49	First Degree Misdemeanor
3	2.50-3.49	Second Degree Misdemeanor
2	1.50-2.49	Third Degree Misdemeanor
1	0.50-1.49	Summary Offense
0	0.00-0.49	No Punishment

This table is based upon the numeric levels used in Milestone Offense Table, reproduced in Appendix G below, and the corresponding grades found in Table 1. This table reflects normal rounding conventions applied to the mean scores.

While the survey results are significant, they are not, in our view, a sufficient basis for setting offense grades. The study is meant primarily as a demonstration of how a legislature might collect and analyze such data to guide their grading judgments, as well as demonstrating that the Pennsylvania Crimes Code's gradations are ripe for improvement. A study using a larger sample of Pennsylvania residents and more random sampling methods would be necessary for the legislature to rely upon it as a basis for specific legislative judgments.

V. HOW DID THESE GRADING PROBLEMS COME ABOUT?

The Legislature's Crimes Code of 1972 contained a well thought out assessment of the relative grades of the 282 different offenses and suboffenses contained therein. However, there have been 2,331 offense-related legislative amendments since then¹²⁴—amendments to offense-containing sections now appearing both inside and out of the Crimes Code—and those amendments have seriously degraded the original Code, producing a body of law riddled with grading irrationalities and internal inconsistencies.

The grading problems described in Part III are in large part a product of the ad hoc nature common to criminal law legislation, with significant exacerbation by the natural political dynamics of crime legislation—what has been called the “crime du jour” problem.¹²⁵ These forces are not unique to Pennsylvania, but rather are typical of most (if not all) American jurisdictions.¹²⁶

When a criminal code is first created, a natural part of the codification process is to sort all offenses and suboffenses into one of the standard offense grading categories—degrees of felonies, degrees of misdemeanors,

¹²⁴ This number includes amendments both to Title 18 and criminal statutes outside that title. The number of amendments was obtained through careful examination of legislative histories as reported in the Westlaw database of Pennsylvania Statutes Annotated. Included in the amendment count are any instances where a statute was added, passed, or otherwise affected by legislative action. For an illustration of the timing of amendments to Title 18, see note 136 *infra*.

¹²⁵ See Robinson & Cahill, *supra* note 17 (discussing degradation of the American Criminal code, the politics that drives degradation, and how criminal codes can be improved).

¹²⁶ See *id.* The authors frequently cite examples of degradation in their respective work on the Illinois and Kentucky codes. Like Pennsylvania, both states adopted model codes in the 1960s but have since experienced a proliferation of criminal law amendments both within and without the code. See also Robinson et al., *supra* note 24 (ranking the five best and the five worst criminal codes using a quantitative scoring system measuring the codes' effectiveness in announcing rules of conduct and its ability to adjudicate by being comprehensible, in alignment with its community's sense of justice, and consistent in grading). Pennsylvania fell in neither the top five nor the bottom five.

summary offenses—according to the degree of relative seriousness of each offense as compared to other offenses. This is, of course, one of the central purposes of having a criminal code: to set *legislative* choices regarding the relative seriousness rather than to leave such value judgments to the discretion of individual judges. When crime legislation is taken up in piecemeal fashion, however, it is common for the focus to be on the contours and scope of the conduct at hand, and utilize offense grading simply as a means to apply a particular amount of punishment. This focus neglects consideration of how the new offense or grade relates to the other offenses in existing law, and leads to the types of grading discrepancies discussed in Part III, above.

This unfortunately narrow focus is particularly common when the legislative activity is in response to a problem of the day that has caught the attention of the news media or is pressed by an interest group to solve a particular problem. Where some upsetting crime in the news triggers legislative action, it is natural for legislators to think that the provoking event occurred under current law, so current law needs to be changed to avoid such a crime in the future. The problem with this line of thought is that the provoking event often has nothing to do with the law, and cannot be avoided in the future by anything that the legislators can do to the criminal law. Sometimes, it is simply the case that bad people do bad things, and sadly, other bad people may do similar bad things in the future. If there is anything to be done to reduce the likelihood of such a crime in the future, it commonly is a reform needed in some other branch of government, such as a change in the allocation of police resources (or in changes in other aspects of society, unrelated to criminal justice).

Nonetheless, when faced with events upsetting to constituents, legislators commonly feel a need to do something—if only to show constituents that they are responsive to the situations about which there is concern.¹²⁷ Such legislative responsiveness is a quality that citizens understandably prize, and it is no surprise that legislators react as they do. Unfortunately, amendments and additions to the criminal law are often unhelpful and, worse, may hurt the cause of fighting crime and doing justice. In many instances, the criminal justice system would be better off without such legislation or, at the very least, with legislation better attuned to the larger need for a rational and coherent criminal code. More often than not, such “crime du jour” legislation ends up undermining the criminal code rather than improving it.

¹²⁷ See William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505, 531-532 (2001).

For example, in 1982 the legislature created the broad new offense of institutional vandalism that, among other proscribed conduct, made the desecration of a historic burial place a second degree misdemeanor.¹²⁸ This aspect of the legislation was hardly necessary: such conduct was already criminalized under the offense of desecration, theft, or sale of venerated objects,¹²⁹ which was similarly graded as a second degree misdemeanor. Then, in 1988, the legislature amended the institutional vandalism offense, changing the grade of the offense from a second degree misdemeanor to a third degree felony,¹³⁰ yet no similar grading change was made to the overlapping offense of desecration, theft, or sale of venerated objects. As the number of overlapping offenses increases, the likelihood of such accidental grading irrationalities increases correspondingly.

Another example concerns rape. Under Section 905, attempted conduct is graded the same as the completed conduct would be.¹³¹ Thus, administering an intoxicant with the intention of committing rape, which would be prosecuted as attempted rape under Section 3121 of the original Crimes Code, is a first degree felony. In 1997, the legislature amended Section 3121 to impose additional punishment on an offender who commits rape, or attempted rape, by administering intoxicating drugs to their unknowing victims.¹³² At the same time, the legislature also passed Section 2714, criminalizing the intentional administration of intoxicants to a person

¹²⁸ 18 PA. CONS. STAT. ANN. § 3307(a)(2), (b) (West Supp. 2010) (defining institutional vandalism as follows: “[a] person commits the offense of institutional vandalism if he knowingly desecrates, as defined in Section 5509 . . . any cemetery, mortuary, or other facility used for the purpose of burial or memorializing the dead Grading—An offense under this section is a felony of the third degree if the actor causes pecuniary loss in excess of \$5,000. . . . Otherwise, institutional vandalism is a misdemeanor of the second degree”).

¹²⁹ 18 PA. CONS. STAT. ANN. § 5509(a)(1) (West Supp. 2010) (defining desecration, theft, or sale of venerated objects as follows: “[a] person commits a misdemeanor of the second degree if he . . . intentionally desecrates any public monument or structure, or place of worship or burial . . .”).

¹³⁰ § 3307(b) (defining the gradation of institutional vandalism as follows: “[a]n offense under this section is a felony of the third degree *if the act is one of desecration as defined in section 5509 . . . or if the actor causes pecuniary loss in excess of \$5,000*”) (emphasis added).

¹³¹ 18 PA. CONS. STAT. ANN. § 905(a) (West 1998) (defining gradation of criminal attempt, solicitation, and conspiracy as follows: “[e]xcept as otherwise provided in this title, attempt, solicitation and conspiracy are crimes of the same grade and degree as the most serious offense which is attempted or solicited . . .”).

¹³² 18 PA. CONS. STAT. ANN. § 3121(b) (West Supp. 2010) (defining additional penalties for rape as follows: “[i]n addition to the penalty provided for subsection (a), a person may be sentenced to an additional term not to exceed ten years’ confinement . . . where the person engages in sexual intercourse . . . and has substantially impaired the complainant’s power to appraise or control his or her conduct by administering . . . any substance for the purpose of preventing resistance . . .”).

with the intent to commit rape, and making it a third degree felony.¹³³ It is unclear why it might be desirable for the Crimes Code to include this new offense as a third degree felony when the same conduct was already criminalized as a first degree felony. Again, indifference to existing law when fashioning amendments often creates problems, not solutions.

Beyond the problem of unnecessary offenses that commonly overlap and have inconsistent offense grades with existing offenses, the ad hoc “crime du jour” dynamic tends to distort the grading judgment of the relative seriousness of the new offense as compared to other offenses. When people are worked up about the offense conduct at hand, it is natural for that concern to temporarily exaggerate the relative seriousness of such conduct as against other conduct not now in the limelight. However, when the heat dissipates and attention moves on to the next “crime du jour,” the law is left with a distortion in its grading scheme. These distortions accumulate over time, making it increasingly difficult to get the relative grading right. Should the latest new offense be graded according to the older standard of relative seriousness that existed before the latest distortion, or graded according to the new standard set by the most recent exaggerated grading?

The extent of the problem is becoming worse with the accelerating rate of criminal law legislation in the Commonwealth. Since the Crimes Code was enacted in 1972, there have been 797 amendments to the Crimes Code, and another 1,532 crimes-related amendments to titles outside of that Code!¹³⁴ That is an average of twenty-two per year to the Crimes Code, and an additional forty-one annually outside that title.¹³⁵ More troubling is that the rate of criminal law-related amendments is continually

¹³³ 18 PA. CONS. STAT. ANN. § 2714 (West 2000) (defining unauthorized administration of intoxicant as follows: “[a] person commits a felony of the third degree when, with intent to commit an offense under section 3121(a)(4) . . . he or she substantially impairs the complainant’s power to appraise or control his or her conduct by administering, without the knowledge of the complainant, drugs or other intoxicants”).

¹³⁴ See Crimes Code, P.L. 1482, No. 334 (codified as amended at 18 PA. CONS. STAT. ANN. §§ 2101-7661 (West 1998 & Supp. 2010)); *supra* note 124.

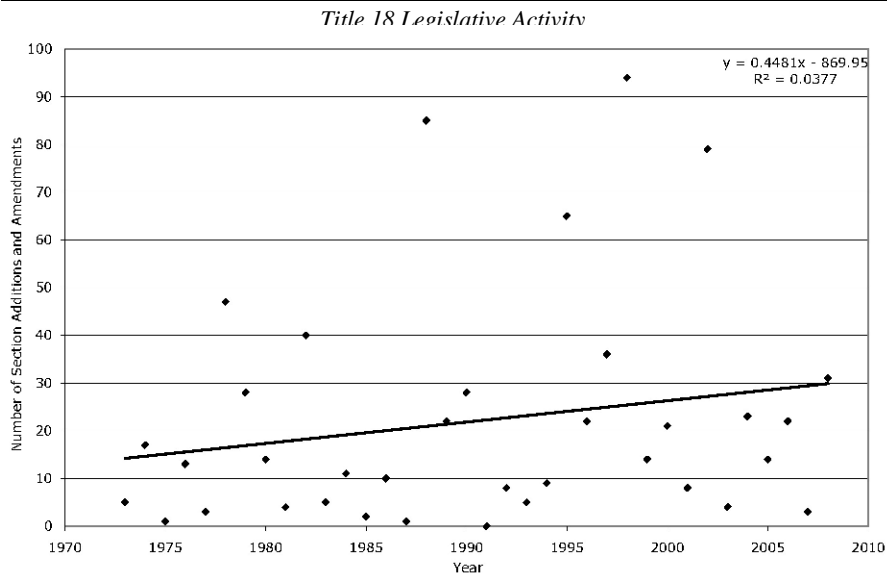
¹³⁵ See *supra* note 124.

increasing,¹³⁶ suggesting that the problems from ad hoc crime legislation will get increasingly worse. How can those problems be fixed, and how can they be avoided in the future?

VI. HOW CAN THESE PROBLEMS BE FIXED?

Ideally, the best way to deal with the problems described in Part III would be to recodify a state's criminal law into a code that eliminates unnecessary and duplicative offenses and that resets the grades of all offenses in a way that reflects each offense's relative seriousness in relation to all others. Recent recodification efforts suggest that the 636 offenses contained in the current Pennsylvania Criminal Code could be consolidated into a crimes code of equal coverage but with greater clarity and simplicity, with far fewer offenses, much like the original Crimes Code of 1972 did with 282 offenses and suboffenses.¹³⁷ Such recodification could be

¹³⁶ The below scatter plot measures the number of criminal law amendments and additions by the Pennsylvania legislature to Title 18 from 1973, the year following the passage of Pennsylvania's Criminal Code, until 2008. The regression line shows the trend of accelerating amendment during the period. The annual rate of amendments to Title 18 has nearly doubled since 1973.



Line equation: $y=0.4481x-869.95$. $R^2=0.0377$. See *id.* for the methodology used to determine the number of amendments.

¹³⁷ In 2003, Kentucky sought to revise its penal code, which had increased by hundreds of offenses since the state had adopted a new code in 1974. The Kentucky Penal Code Revision Project was able to consolidate the offenses into a clear, comprehensible, and rational statement of Kentucky criminal law that retained policy decisions of the current

accomplished without any purpose to change the legislative judgments embodied in existing law, but rather simply to recast those judgments into a rational, coherent code. Existing law would need to be changed only to the extent that it is internally inconsistent, requiring recodifiers to choose between the conflicting positions—preferably selecting the one that best captures present legislative values.

In many states, such a recodification project is not currently politically feasible, although the political appeal of such recodification may increase with time as the acceleration of ad hoc criminal law amendments has the cumulative effect of rendering the existing code increasingly complex, overlapping, and irrational.¹³⁸ A more modest approach would be simply to fix the kinds of irrationalities and inconsistencies that one identifies through a comprehensive empirical study of a state's criminal code. To do this, the legislature would simply need to reexamine the grading of existing offenses, preferably informed by the relative grading judgments of its residents. In addition, a grading reform program could do the following:

- Review all mandatory minimums prescribed by law, especially those revealed by the empirical study as being in conflict with community views. The project would want to ask in each instance:
 - (1) What indication exists to suggest that judges are so likely to abuse their sentencing discretion (and to go outside of the sentencing guidelines) that a mandatory minimum sentence is necessary? Abolishing mandatory minimums, and simultaneously enacting sentencing guidelines with more teeth, might be a better way for the legislature to control sentencing discretion.
 - (2) If a mandatory minimum is thought to be necessary, at what level should it be set? One would want to avoid setting it so high as to require sentences in excess of the relative seriousness of the offense as compared to other offenses. This requires considering not only the seriousness of the paradigm case of the offense, but also the mitigated instances of the offense that might arise. Caring about justice being

code but reduced its size to close to 1974 levels. See CRIMINAL JUSTICE COUNCIL, FINAL REPORT OF THE KENTUCKY PENAL CODE REVISION PROJECT (2003), available at <http://www.law.upenn.edu/fac/phrobins/kentucky/KYFinalReportVol1.pdf> & <http://www.law.upenn.edu/fac/phrobins/kentucky/KYFinalReportVol2.pdf>. Illinois undertook a similar recodification effort and found that many sections of the new code were able to state Illinois law in less than 10% of the words than were used in the then-current code. ILL. CRIMINAL CODE REWRITE & REFORM COMM'N, FINAL REPORT (2003), available at <http://www.law.upenn.edu/fac/phrobins/illinois/IL%20final%20report%20Vol1.pdf> & <http://www.law.upenn.edu/fac/phrobins/illinois/IL%20final%20report%20Vol2.pdf>.

¹³⁸ For a detailed discussion of political obstacles facing penal code reform and ways to overcome them, see Robinson & Cahill, *supra* note 17, at 645-52.

done requires not only insuring that offenders get the punishment they deserve but also that they get no more punishment than they deserve.

- Abolish overlapping offenses where possible. The most egregious examples of this—in which specific and general offenses of the same seriousness are graded differently—can be revealed by the empirical study. In evaluating overlapping offenses, it should be determined whether there is a logical reason for the current grading differences. Ideally, all specific offenses should be abolished as unnecessary if the conduct is already covered by a more general offense and deserves a similar grading. Refinements of general offenses could be made, if needed, to make clear that some specific conduct is indeed included in the general offense.
- Review current crime definitions to insure that only conduct of the same degree of seriousness is included within the same grade of the offense. Where an offense includes conduct of importantly different degrees of seriousness, the offense definition should define suboffenses of different grades. Here, too, a survey of state residents could help to resolve whether different courses of conduct contained within a single offense require creation of separate suboffenses with different offense grades.
- Review current crime definitions to insure that grading distinctions appropriate for one offense are used, and used in a similar way, in all offenses of analogous harms for which the same grading distinctions logically apply.
- Integrate into the criminal code all serious offenses and sentence enhancements now contained in other titles. This is important not only to give fair notice of the conduct that is criminal—how can residents know what is criminal if the definitions are scattered through many titles of current law?—but also is important to increase the likelihood that future efforts to amend current law will be made with a full awareness of what the current law already provides, a task that becomes quite difficult even for the most diligent legislator if the offenses are scattered across many titles.¹³⁹
- Repeal offenses that punish conduct that residents find insufficiently blameworthy to deserve the condemnation of criminal conviction. To avoid diluting the condemnation carried by a criminal conviction,

¹³⁹ This is a common problem in many, if not most, states. *See id.* at 636 (discussing instances of serious crimes occurring outside the criminal codes in Illinois and Kentucky).

liability ought to be limited to the conduct that, in the view of the community as a whole, deserves criminal condemnation.¹⁴⁰

VII. HOW CAN SUCH GRADING IRRATIONALITIES AND INCONSISTENCIES BE AVOIDED IN THE FUTURE?

Even if one successfully recodified current law to avoid its present irrationalities and internal inconsistencies, producing a shorter, clearer criminal code, it is likely that the dynamics causing the code's degradation over the past several decades would still be present and would restart the process of degradation, just as occurred after the enactment of the original code. While a recodification effort would certainly bring an improvement over the present situation, it is useful to consider how the degradation problem might be averted in the future so as to avoid the need for regular recodification projects.

We discuss several proposals below, including both more minimalist and more ambitious approaches. Each of these proposals requires atypical legislative procedures (although there is some precedent for some items) but such atypicality may be necessary, as the legislation of the criminal law is singular in its political dynamics. There are few other sorts of legislation that allow for political consequences as immediate and difficult to overcome as the threat of being labeled "soft on crime" in subsequent elections. The common result of such pressure is good legislators voting for bad bills in record numbers.

The general approach suggested would encourage greater public disclosure and debate on criminal legislation. By making more public the strengths and weaknesses of a crime bill, the hope would be to allow more thoughtful and responsible debate and voting by legislators.

A. REQUIRE CRIME BILLS TO CONTAIN AN "EXISTING CRIMES COMPARISON STATEMENT"

Either through the establishment of a legislative practice or the creation of a formal procedural rule, require that: (1) legislation proposing a new offense must include a description of related offenses in existing law, as well as an analysis demonstrating that those offenses do not already criminalize the conduct involved in the proposed law, and (2) legislation

¹⁴⁰ Examples of this problem might be seen in archaic criminal codes, such as 18 PA. CONS. STAT. ANN. § 7361 (West 2000) (prohibiting any "worldly employment or business whatsoever" on Sunday); 18 PA. CONS. STAT. ANN. § 7104(a) (West 2000) (prohibiting fortune-telling); and 18 PA. CONS. STAT. ANN. § 7105 (West 2000) (prohibiting pool rooms to be open on Sundays). One might consider, in addition, the offenses in the survey that many Pennsylvania residents rated as "no punishment," such as the sale of goods manufactured by convicts in another state—i.e. those having a mode of 0.

proposing a new offense or a change to the grading of an existing offense must include a description of the grades of any similar existing offenses, as well as a showing that the proposed offense grade does not conflict with the grades of those similar existing offenses.¹⁴¹

B. REQUIRE A PUBLIC CRITIQUE OF EACH “EXISTING CRIMES
COMPARISON STATEMENT” BY EACH JUDICIARY COMMITTEE
BEFORE A VOTE ON ANY CRIME BILL

One might require that the judiciary committees of each legislative chamber issue a statement critiquing the Existing Crimes Comparison Statement offered for each crime bill prior to a vote on that bill. This would either deter bill sponsors from making unsustainable claims in support of their bill, or expose the weakness of their claims before a vote, thereby giving public political justification for voting against a bad bill.

C. ESTABLISH A STANDING CRIMINAL LAW REVISION COMMISSION
(THAT WOULD, AMONG OTHER THINGS, ISSUE A CRITIQUE
BEFORE A VOTE ON ANY CRIME BILL)

Empanelling a nonpartisan commission to review criminal legislation could help alleviate many of the pressures leading to the degradation of a state’s criminal code. The greatest attraction of a Standing Criminal Law Revision Commission is that it could foster a long-term expertise on the state’s criminal law, alongside providing regular comment on crime bills. Such a commission could provide apolitical assessments of the code’s true needs, avoiding the political dynamics of “crime du jour.” A central theme here is the need to step back from the heat of this dynamic and consider the larger picture of the criminal code’s needs and its internal integrity. A Standing Commission, existing apart from the legislature, could provide the needed distance and perspective to offer and encourage needed reforms while discouraging reforms that degrade the code.

D. CREATE A CRIMES CODE OFFICIAL COMMENTARY AS A
PERMANENT, UPDATED DOCUMENT

While the proposals above may serve to discourage unnecessary “crime du jour” bills that unnecessarily complicate the state’s criminal law and introduce grading irrationalities, they do not address the legislators’ need to demonstrate to constituents that they are aware of and able to respond to crime problems. Because their constituents’ perception of crime

¹⁴¹ This could be accomplished by demonstrating either that the proposed grade is the same as those for existing offenses or that the conduct in the proposed legislation is of a different level of seriousness than that covered by existing law.

problems is heavily influenced by the media and current events, this is all too often accomplished by addressing the “crime du jour” with a new law. Although amending the criminal code is likely a poor method of effective crime control, legislators require some mechanism by which to show their concern for the crime problems perceived by their constituents.

One possible mechanism might be the creation of an official commentary to the criminal code. Any code reform project would inevitably do so, but such a commentary might also be given a permanent official status, such that there is legal significance to future amendments to the commentary itself without requiring an amendment to the code proper. Thus, when a perceived crime problem generates a need for legislative action, rather than pressing a new, unnecessary criminal offense or a distortion in the grading of existing crimes, a legislator could direct an amendment of the official commentary to “clarify” any ambiguity in the substance or application of the existing law. For example, rather than creating a new, redundant offense to address a “crime du jour,” the commentary might instead be amended, adding language to make it clear that the existing law does indeed criminalize the conduct of present concern.¹⁴² The official commentary might make it clear, for example, that the conduct of throwing an object into a roadway¹⁴³ really is included in and prohibited by the existing offense of “recklessly endangering another person,”¹⁴⁴ or that destroying crops or farm equipment¹⁴⁵ really is an instance of the existing offense of criminal mischief,¹⁴⁶ or that carjacking¹⁴⁷

¹⁴² A similar but related problem occurs with the passage of broad offenses that encompass preexisting specific crimes. In the 1972 code, the legislature adopted a broad, Model Penal Code-based offense for reckless endangerment and stated in an official comment that “[t]his section consolidates the various provisions which penalize reckless behavior.” 18 PA. CONS. STAT. ANN. § 2705 (West 2000). Despite this commentary, the legislature concurrently reenacted existing specific prohibitions. These prohibitions included disposing of a refrigerator in a place accessible to children, 18 PA. CONS. STAT. ANN. § 6502 (West 2000), allowing a light to dangerously interfere with train signals, 18 PA. CONS. STAT. ANN. § 6909 (West 2000), and the sale of gasoline in a glass container, 18 PA. CONS. STAT. ANN. § 7305 (West 2000). In each case, the older, specific statute provides for a lower grade than the broad statute, effectively giving a prosecutor the ability to determine the grade of many courses of conduct by choosing which statute to prosecute.

The adoption of a binding official commentary would address both types of problems. Legislatures would be empowered to amend the commentary to ensure that new conducts were included in the existing statutory framework without adding unnecessary complexity to the code. At the same time, the legislature would be able to eliminate archaic or specific code sections while ensuring that the conduct they prohibit is still enumerated in the code.

¹⁴³ 18 PA. CONS. STAT. ANN. § 2707 (West 2000).

¹⁴⁴ § 2705.

¹⁴⁵ 18 PA. CONS. STAT. ANN. § 3309(a) (West Supp. 2010).

¹⁴⁶ 18 PA. CONS. STAT. ANN. § 3304(a)(5) (2009) (West Supp. 2010).

really is an instance of the existing offense of robbery with a threat of serious bodily injury.¹⁴⁸

The official commentary and its amendments would not have illusory power. They could serve as a standing statement of legislative intent, providing the meaning to the language defining offenses and obliging the courts to take into account legislative judgments in their interpretation of offense definitions by addressing any ambiguities in the code.¹⁴⁹

VII. CONCLUSION

We concede that some of the above proposals call for an ambitious reform program, but the reputation of the criminal law is well worth the investment. As noted above in Part II, its reputation for doing justice—no more, no less—has both ethical and practical crime-control importance. A rational grading scheme tracks the community's shared intuitions of justice, avoids the problems of resistance and subversion, gains the power of stigmatization and condemnation, and promotes the law's important ability to shape the powerful forces of social norms. At the same time, a thoughtful practice of rational grading avoids improper delegation to sentencing judges to make ad hoc judgments on societal values that should be made only by the legislature. Further, by creating a system of rational grading distinctions, the legislature insures that all offenders will be judged by the same rule, rather than by a rule that changes with the assigned sentencing judge. Finally, rational grading also holds a great potential to reduce inefficient punishment expenditures, in which money is spent

¹⁴⁷ 18 PA. CONS. STAT. ANN. § 3702 (West 2000). This law was originally passed in 1993.

¹⁴⁸ 18 PA. CONS. STAT. ANN. § 3701(a)(1)(ii) (West 2000). Two decades after passing the Crimes Code, the legislature enacted a new statute, which provided that theft of a motor vehicle in the presence of its owner shall be graded as a first degree felony. This specific statute addressed conduct already barred under the generic robbery statute and provided the same grade as the prior law would for most situations. *Id.* at § 3701(a)(1)(ii), (b) (grading robbery with a threat of serious bodily injury as a first degree felony). In the paradigmatic carjacking scenario, where an offender threatens the driver of a vehicle to facilitate the theft of the vehicle, the generic robbery statute would provide a grade of first degree felony. *Id.* at § 3701(b). Despite being of the same grade, the specific offense is problematic for two reasons: first, a subsequent change in grade for either of the statutes could introduce a discrepancy; and second, the specific offense allows for fewer nuances in grading. While the generic robbery statute makes grading distinctions based upon the severity of threats or injuries occurring during a robbery, the specific statute does not. An offender stealing a car from its occupant without making any threats of injury or further criminal conduct is graded the same as one who does.

¹⁴⁹ For further discussion of the use of an official commentary, see Robinson & Cahill, *supra* note 17, at 654-55.

punishing less serious offenses that should be spent punishing more serious offenses.¹⁵⁰

¹⁵⁰ *See supra* Part I.

APPENDIX A. EXAMPLES OF THE IMPROPER GRADE PROBLEM

1. *Examples of Offenses Graded Too High as Compared to Grading of Pennsylvania Residents*

Carrying on the subway a bookbag that says “BOMB” on it as part of a Halloween costume, disregarding the risk that others could become alarmed, when a person on the subway does become alarmed,¹⁵¹ is graded by Pennsylvania survey participants the same as taking property of another valued between \$50 and \$200, a third degree misdemeanor, which has a maximum sentence of *one year*,¹⁵² but under current law the offense is graded as a third degree felony, which has a maximum sentence of *seven years*.¹⁵³

A son shredding his father’s will because it contains information that would embarrass his family (where the father died owning nothing of value, so the will has no financial effect),¹⁵⁴ is graded by the Pennsylvania survey participants the same as taking property of another valued under \$50, a third degree misdemeanor, which has a maximum sentence of *one year*,¹⁵⁵ but under current law the offense is graded as a third degree felony, which has a maximum sentence of *seven years*.¹⁵⁶

Taking one’s nephew camping without telling his parents first, believing that they would not worry,¹⁵⁷ is graded by the Pennsylvania survey participants the same as taking property of another valued under \$50, a third degree misdemeanor, which has a maximum sentence of *one year*,¹⁵⁸ but under current law the offense is graded as a third degree felony, which has a maximum sentence of *seven years*.¹⁵⁹

Trespassing in a building¹⁶⁰ is graded by the Pennsylvania survey participants the same as taking property of another valued under \$50, a third degree misdemeanor, which has a maximum sentence of *one year*,¹⁶¹ but

¹⁵¹ 18 PA. CONS. STAT. ANN. § 5516(a) (West Supp. 2010).

¹⁵² Mean=1.87, Mode=1, SD=1.756, $p<0.005$; 18 PA. CONS. STAT. ANN. § 3902 (West 1983); 18 PA. CONS. STAT. ANN. § 3903(a)(1), (b) (West Supp. 2010).

¹⁵³ § 5516(a).

¹⁵⁴ 18 PA. CONS. STAT. ANN. § 4101 (West Supp. 2010).

¹⁵⁵ Mean=1.73, Mode=0, SD=1.581, $p<0.005$; § 3902; § 3903(b)(2).

¹⁵⁶ § 4101(c).

¹⁵⁷ 18 PA. CONS. STAT. ANN. § 2904 (West 2000).

¹⁵⁸ Mean=2.01, Mode=0, SD=1.999, $p<0.005$; § 3902; § 3903(b)(2).

¹⁵⁹ § 2904(c).

¹⁶⁰ 18 PA. CONS. STAT. ANN. § 3503(a)(1)(i) (West Supp. 2010).

¹⁶¹ Mean=1.92, Mode=1, SD=1.393 (*see* App. F, item A30); § 3902; § 3903(b)(2).

under current law the offense is graded as a third degree felony, which has a maximum sentence of *seven years*.¹⁶²

Having consensual sexual intercourse with a close family member¹⁶³ is graded by the Pennsylvania survey participants the same as taking property of another valued between \$50 and \$200, a second degree misdemeanor, which has a maximum sentence of *two years*,¹⁶⁴ but under current law the offense is graded as a second degree felony, which has a maximum sentence of *ten years*.¹⁶⁵

Stealing ten ounces of anhydrous ammonia from a farmer¹⁶⁶ is graded by the Pennsylvania survey participants the same as taking of property of another valued between \$50 and \$200, a second degree misdemeanor, which has a maximum sentence of *two years*,¹⁶⁷ but under current law the offense is graded as a second degree felony, which has a maximum sentence of *ten years*.¹⁶⁸

A parent violating a custody order by taking his or her child to a beach in New Jersey¹⁶⁹ is graded by the Pennsylvania survey participants the same as taking property of another valued under \$50, a third degree misdemeanor, which has a maximum sentence of *one year*,¹⁷⁰ but under current law the offense is graded as a third degree felony, which has a maximum sentence of *seven years*.¹⁷¹

Making an unauthorized copy of a computer program worth \$2,500¹⁷² is graded by the Pennsylvania survey participants the same as taking property of another valued between \$200 and \$2,000, a first degree misdemeanor, which has a maximum sentence of *five years*,¹⁷³ but under current law the offense is graded as a second degree felony, which has a maximum sentence of *ten years*.¹⁷⁴

Sending an advertisement email containing explicit adult content without including the term “ADV-ADULT” in the subject line¹⁷⁵ is graded

¹⁶² § 3503(a)(1)(i).

¹⁶³ 18 PA. CONS. STAT. ANN. § 4302 (West Supp. 2010).

¹⁶⁴ Mean=2.92, Mode=0, SD=2.747, $p<0.005$; § 3902; § 3903(b)(1).

¹⁶⁵ § 4302.

¹⁶⁶ § 3903(a)(4).

¹⁶⁷ Mean=3.07, Mode=2, SD=1.861, $p<0.005$; § 3902; § 3903(b)(1).

¹⁶⁸ § 3903(a)(4).

¹⁶⁹ 18 PA. CONS. STAT. ANN. § 2904(a), (c)(1) (West 2000).

¹⁷⁰ Mean=2.48, Mode=1, SD=1.717, $p<0.005$; § 3902; § 3903(b)(2).

¹⁷¹ 18 PA. CONS. STAT. ANN. § 2904(c) (West Supp. 2010).

¹⁷² 18 PA. CONS. STAT. ANN. § 7614 (West Supp. 2010).

¹⁷³ Mean=3.53, Mode=5, SD=1.845, $p<0.005$; § 3902; § 3903(b).

¹⁷⁴ § 7614(a).

¹⁷⁵ 18 PA. CONS. STAT. ANN. § 5903(a)(1) (West Supp. 2010).

by the Pennsylvania survey participants the same as taking property of another valued under \$50, a third degree misdemeanor, which has a maximum sentence of *one year*,¹⁷⁶ but under current law the offense is graded as a first degree misdemeanor, which has a maximum sentence of *five years*.¹⁷⁷

Entering into a professional sports contract with a student athlete before the student's eligibility for collegiate athletics (such as NCAA eligibility) expires¹⁷⁸ is graded by the Pennsylvania survey participants the same as taking property of another valued under \$50, a third degree misdemeanor, which has a maximum sentence of *one year*,¹⁷⁹ but under current law the offense is graded as a first degree misdemeanor, which has a maximum sentence of *five years*.¹⁸⁰

Displaying an obscene image in public¹⁸¹ is graded by the Pennsylvania survey participants the same as taking property of another valued under \$50, a third degree misdemeanor, which has a maximum sentence of *one year*,¹⁸² but under current law the offense is graded as a first degree misdemeanor, which has a maximum sentence of *five years*.¹⁸³

Maliciously exposing an animal to an infectious disease, although the animal does not become ill,¹⁸⁴ is graded by Pennsylvania survey participants the same as repeatedly following another with the intent to cause substantial emotional distress, a first degree misdemeanor, which has a maximum sentence of *five years*,¹⁸⁵ but under current law the offense is graded as a second degree felony, which has a maximum sentence of *ten years*.¹⁸⁶

Operating an otherwise-legal mortgage business without a license¹⁸⁷ is graded by the Pennsylvania survey participants the same as taking property of another valued between \$50 and \$200, a second degree misdemeanor, which has a maximum sentence of *two years*,¹⁸⁸ but under current law the

¹⁷⁶ Mean=1.75, Mode=1, SD=1.569, $p<0.005$; § 3902; § 3903(b)(2).

¹⁷⁷ § 5903(a)(1).

¹⁷⁸ 18 PA. CONS. STAT. ANN. § 7107 (West 2000).

¹⁷⁹ Mean=1.87, Mode=0, SD=1.595, $p<0.005$; § 3902; § 3903(b)(2).

¹⁸⁰ § 7107.

¹⁸¹ § 5903(a)(1).

¹⁸² Mean=1.93, Mode=1, SD=1.513, $p<0.005$; § 3902; § 3903(b)(2).

¹⁸³ § 5903(a)(1).

¹⁸⁴ 18 PA. CONS. STAT. ANN. § 5511.3(a) (West Supp. 2010).

¹⁸⁵ Mean=3.84, Mode=3, SD=2.108, $p<0.005$; 18 PA. CONS. STAT. ANN. § 2709.1(a)(1)-(c) (West Supp. 2010).

¹⁸⁶ § 5511.3(a).

¹⁸⁷ 18 PA. CONS. STAT. ANN. § 7331 (West Supp. 2010).

¹⁸⁸ Mean=3.03, Mode=3, SD=1.749, $p<0.005$; 18 PA. CONS. STAT. ANN. § 3902 (West 1983); 18 PA. CONS. STAT. ANN. § 3903(b) (West Supp. 2010).

offense is graded as a third degree felony, which has a maximum sentence of *seven years*.¹⁸⁹

Knowingly possessing a device designed to be used in an illegal wiretap¹⁹⁰ is graded by Pennsylvania survey participants the same as taking property of another valued between \$50 and \$200, a second degree misdemeanor, which has a maximum sentence of *two years*,¹⁹¹ but under current law the offense is graded as a third degree felony, which has a maximum sentence of *seven years*.¹⁹²

Admitting a minor to a pornographic movie without his parents' consent despite knowing that he is underage, after having already been convicted of the same offense in the past,¹⁹³ is graded by the Pennsylvania survey participants the same as taking property of another valued between \$200 and \$2,000, a first degree misdemeanor, which has a maximum sentence of *five years*,¹⁹⁴ but under current law the offense is graded as a second degree felony, which has a maximum sentence of *ten years*.¹⁹⁵

Admitting a minor to a sexually explicit show despite knowing that he is underage¹⁹⁶ is graded by the Pennsylvania survey participants the same as recklessly causing bodily injury to another, a second degree misdemeanor, which has a maximum sentence of *two years*,¹⁹⁷ but under current law the offense is graded as a third degree felony, which has a maximum sentence of *seven years*.¹⁹⁸

Threatening to stab a person if he does not give up his wallet, without actually stabbing him,¹⁹⁹ is graded by the Pennsylvania survey participants the same as taking property from another by force, without causing injury, a third degree felony, which has a maximum sentence of *seven years*,²⁰⁰ but under current law the offense is graded as a first degree felony, which has a maximum sentence of *twenty years*.²⁰¹

¹⁸⁹ § 7331.

¹⁹⁰ 18 PA. CONS. STAT. ANN. § 5705(1) (West 2000).

¹⁹¹ Mean=2.93, Mode=3, SD=1.731, $p<0.005$; § 3902; § 3903(b).

¹⁹² § 5705(1).

¹⁹³ 18 PA. CONS. STAT. ANN. § 5903(d) (West Supp. 2010).

¹⁹⁴ Mean=4.06, Mode=4, SD=2.036, $p<0.005$; § 3902; § 3903(b).

¹⁹⁵ § 5903(d).

¹⁹⁶ *Id.*

¹⁹⁷ Mean=3.12, Mode=1, SD=2.173, $p<0.005$; 18 PA. CONS. STAT. ANN. § 2701 (West Supp. 2010).

¹⁹⁸ § 5903(d).

¹⁹⁹ 18 PA. CONS. STAT. ANN. § 3701(a)(1)(ii) (West 2000).

²⁰⁰ Mean=5.06, Mode=5, SD=1.462, $p<0.005$; *Id.* at § 3701.

²⁰¹ § 3701(a)(1)(ii).

Recording a conversation with a spouse and running it through lie-detection software to determine if they were lying about infidelity²⁰² is graded by the Pennsylvania survey participants the same as committing acts to annoy another person, with no legitimate purpose, a summary offense, which has a maximum penalty of *ninety days*,²⁰³ but under current law the offense is graded as a second degree misdemeanor, which has a maximum sentence of *two years*.²⁰⁴

Operating a camcorder in a theater without the theater owner's consent, having been convicted for committing the same offense previously,²⁰⁵ is graded by the Pennsylvania survey participants the same as taking property of another valued between \$50 and \$200, a second degree misdemeanor, which has a maximum sentence of *two years*,²⁰⁶ but under current law the offense is graded as a third degree felony which has a maximum sentence of *seven years*.²⁰⁷

Dealing ten grams of cocaine (approximately 100 lines), having been convicted of drug dealing in the past,²⁰⁸ is graded by the Pennsylvania survey participants the same as taking property of another by force, a third degree felony, which has a maximum sentence of *seven years*,²⁰⁹ but under current law the offense is graded as a first degree felony, which has a maximum sentence of *twenty years*.²¹⁰

Providing a fake address for privacy reasons when purchasing a gun²¹¹ is graded by the Pennsylvania survey participants the same as taking property of another valued between \$50 and \$200, a second degree misdemeanor, which has a maximum sentence of *two years*,²¹² but under current law the offense is graded as a third degree felony, which has a maximum sentence of *seven years*.²¹³

²⁰² 18 PA. CONS. STAT. ANN. § 7507 (West 2000).

²⁰³ Mean=1.06, Mode=0, SD=1.474, $p<0.005$; 18 PA. CONS. STAT. ANN. § 2709(a), (c) (West Supp. 2010).

²⁰⁴ § 7507.

²⁰⁵ 18 PA. CONS. STAT. ANN. § 4116 (West Supp. 2010).

²⁰⁶ Mean=2.86, Mode=3, SD=1.404, $p<0.005$; 18 PA. CONS. STAT. ANN. § 3902 (West 1983); 18 PA. CONS. STAT. ANN. § 3903(b) (West Supp. 2010).

²⁰⁷ § 4116.

²⁰⁸ 18 PA. CONS. STAT. ANN. § 7508(a)(3)(ii) (West Supp. 2010); 35 PA. CONS. STAT. ANN. §§ 780-113(a)(14), (a)(30), (a)(37), (f)(1.1), 780-115(a) (West 2000).

²⁰⁹ Mean=5.15, Mode=5, SD=1.976, $p<0.005$; 18 PA. CONS. STAT. ANN. § 3701 (West 2000).

²¹⁰ §§ 780-113 (a)(14), (a)(30), (a)(37), (f)(1.1), 780-115(a).

²¹¹ 18 PA. CONS. STAT. ANN. § 6111(g)(4) (West Supp. 2010).

²¹² Mean=3.27, Mode=3, SD=1.886, $p<0.005$; 18 PA. CONS. STAT. ANN. § 3902 (West 1983); 18 PA. CONS. STAT. ANN. § 3903(b) (West Supp. 2010).

²¹³ § 6111(g)(4).

Dealing ten grams of methamphetamine (approximately forty quarter-gram doses), having been convicted of drug dealing in the past,²¹⁴ is graded by the Pennsylvania survey participants the same as taking property of another by force, a third degree felony, which has a maximum sentence of *seven years*,²¹⁵ but under current law the offense is graded as a first degree felony, which has a maximum sentence of *twenty years*.²¹⁶

Confirming a neighbor's story to an insurance investigator despite knowing that the neighbor has filed a false claim²¹⁷ is graded by the Pennsylvania survey participants the same as taking property of another between \$50 and \$200, a second degree misdemeanor, which has a maximum sentence of *two years*,²¹⁸ but under current law the offense is graded as a third degree felony, which has a maximum sentence of *seven years*.²¹⁹

Remaining on school grounds after a lawful order to leave²²⁰ is graded by the Pennsylvania survey participants the same as taking property of another valued under \$50, a third degree misdemeanor, which has a maximum sentence of *one year*,²²¹ but under current law the offense is graded as a first degree misdemeanor, which has a maximum sentence of *five years*.²²²

Selling a seventeen-year-old a starter pistol only capable of firing blanks²²³ is graded by the Pennsylvania survey participants the same as taking property of another valued under \$50, a third degree misdemeanor, which has a maximum sentence of *one year*,²²⁴ but under current law the offense is graded as a first degree misdemeanor, which has a maximum sentence of *five years*.²²⁵

An adult encouraging a minor to smoke despite knowing that he is underage²²⁶ is graded by the Pennsylvania survey participants the same as

²¹⁴ 18 PA. CONS. STAT. ANN. § 7508(a)(4)(ii) (West Supp. 2010); §§ 780-113 (a)(14), (a)(30), (a)(37), (f)(1.1), 780-115(a).

²¹⁵ Mean=5.18, Mode=5, SD=1.861, $p<0.005$; 18 PA. CONS. STAT. ANN. § 3701 (West 2000).

²¹⁶ §§ 780-113 (a)(14), (a)(30), (a)(37), (f)(1.1), 780-115(a).

²¹⁷ 18 PA. CONS. STAT. ANN. § 4117(a)(2) (West Supp. 2010).

²¹⁸ Mean=3.35, Mode=4, SD=1.624, $p<0.005$; 18 PA. CONS. STAT. ANN. § 3902 (West 1983); 18 PA. CONS. STAT. ANN. § 3903(b) (West Supp. 2010).

²¹⁹ § 4117(a)(2).

²²⁰ 18 PA. CONS. STAT. ANN. § 3503(b)(1)(v) (West Supp. 2010).

²²¹ Mean=2.19, Mode=1, SD=1.447, $p<0.005$; § 3902; § 3903(b).

²²² § 3503(b)(1)(v).

²²³ 18 PA. CONS. STAT. ANN. § 6303 (West 2000).

²²⁴ Mean=2.25, Mode=0, SD=2.037, $p<0.005$; § 3902; § 3903(b).

²²⁵ § 6303.

²²⁶ 18 PA. CONS. STAT. ANN. § 6301(a)(1) (West 2000).

taking property of another valued under \$50, a third degree misdemeanor, which has a maximum sentence of *one year*,²²⁷ but under current law the offense is graded as a first degree misdemeanor, which has a maximum sentence of *five years*.²²⁸

Falsifying a diploma in order to obtain a job²²⁹ is graded by the Pennsylvania survey participants the same as taking property of another valued under \$50, a third degree misdemeanor, which has a maximum sentence of *one year*,²³⁰ but under current law the offense is graded as a first degree misdemeanor, which has a maximum sentence of *five years*.²³¹

Giving pornography to a minor despite knowing that he is underage²³² is graded by the Pennsylvania survey participants the same as taking property of another valued between \$200 and \$2,000, a first degree misdemeanor, which has a maximum sentence of *five years*,²³³ but under current law the offense is graded as a third degree felony, which has a maximum sentence of *seven years*.²³⁴

Three people causing an annoyance in public, and failing to disperse when told to by a police officer,²³⁵ is graded by the Pennsylvania survey participants the same as committing acts to annoy another person, with no legitimate purpose, a summary offense, which has a maximum sentence of *ninety days*,²³⁶ but under current law the offense is graded as a second degree misdemeanor, which has a maximum sentence of *two years*.²³⁷

A pediatrician paying a school nurse to recommend the pediatrician to parents²³⁸ is graded by the Pennsylvania survey participants the same as taking property of another valued between \$50 and \$200, a second degree misdemeanor, which has a maximum sentence of *two years*,²³⁹ but under current law the offense is graded as a first degree misdemeanor, which has a maximum sentence of *five years*.²⁴⁰

²²⁷ Mean=2.40, Mode=1, SD=1.894, $p<0.005$; § 3902; § 3903(b).

²²⁸ § 6301(a)(1).

²²⁹ 18 PA. CONS. STAT. ANN. § 4104(a) (West 1983).

²³⁰ Mean=2.34, Mode=3, SD=1.614, $p<0.005$; § 3902; § 3903(b).

²³¹ § 4104(a).

²³² 18 PA. CONS. STAT. ANN. § 5903(c) (West Supp. 2010).

²³³ Mean=3.54, Mode=3, SD=2.108, $p<0.005$; § 3902; § 3903(b).

²³⁴ 18 PA. CONS. STAT. ANN. § 3701(a)(1)(v) (West 2000).

²³⁵ 18 PA. CONS. STAT. ANN. § 5502 (West 2000).

²³⁶ Mean=1.40, Mode=1, SD=0.869, $p<0.005$; 18 PA. CONS. STAT. ANN. § 2709(a), (c) (West Supp. 2010).

²³⁷ 18 PA. CONS. STAT. ANN. § 2701(a), (b) (West Supp. 2010).

²³⁸ 18 PA. CONS. STAT. ANN. § 4117(b)(2) (West Supp. 2010).

²³⁹ Mean=2.58, Mode=3, SD=1.714, $p<0.005$; 18 PA. CONS. STAT. ANN. § 3902 (West 1983); 18 PA. CONS. STAT. ANN. § 3903(b) (West Supp. 2010).

²⁴⁰ § 4117(b)(2).

Streaking at a kids' tee-ball game²⁴¹ is graded by the Pennsylvania survey participants the same as taking property of another valued between \$50 and \$200, a second degree misdemeanor, which has a maximum sentence of *two years*,²⁴² but under current law the offense is graded as a first degree misdemeanor, which has a maximum sentence of *five years*.²⁴³

Selling goods manufactured by prisoners incarcerated in another state²⁴⁴ is graded by the Pennsylvania survey participants the same as creating an annoyance by noise or threatening behavior, a summary offense, which has a maximum sentence of *ninety days*,²⁴⁵ but under current law the offense is graded as a second degree misdemeanor, which has a maximum sentence of *two years*.²⁴⁶

Unlawfully selling \$1,200 worth of food stamps²⁴⁷ is graded by the Pennsylvania survey participants the same as taking property of another valued between \$50 and \$200, a second degree misdemeanor, which has a maximum sentence of *two years*,²⁴⁸ but under current law the offense is graded as a third degree felony which has a maximum sentence of *seven years*.²⁴⁹

A seventeen-year-old having sex with a twelve-year-old²⁵⁰ is graded by the Pennsylvania survey participants the same as inflicting bodily injury in the course of committing a theft, a second degree felony, which has a maximum sentence of *ten years*,²⁵¹ but under current law the offense is graded as a special felony which has a maximum sentence of *forty years*.²⁵²

Desecrating an historic burial site²⁵³ is graded by Pennsylvania survey participants the same as taking the property of another valued between \$200 and \$2,000, a first degree misdemeanor, which has a maximum sentence of

²⁴¹ 18 PA. CONS. STAT. ANN. § 3127 (West 2000).

²⁴² Mean=2.51, Mode=1, SD=2.012, $p<0.005$; § 3902; § 3903(a)(1), (b).

²⁴³ § 3127.

²⁴⁴ 18 PA. CONS. STAT. ANN. § 7307 (West 2000).

²⁴⁵ Mean=1.37, Mode=0, SD=1.668, $p<0.005$; 18 PA. CONS. STAT. ANN. § 5503(a)-(b) (West 2000).

²⁴⁶ § 7307.

²⁴⁷ 18 PA. CONS. STAT. ANN. § 7313(a)-(b) (West Supp. 2000).

²⁴⁸ Mean=3.21; Mode=4, SD=1.319, $p<0.005$; § 3902; § 3903(b).

²⁴⁹ § 7313(a)-(b).

²⁵⁰ 18 PA. CONS. STAT. ANN. § 3121(c), (e)(1) (West Supp. 2010); 42 PA. CONS. STAT. ANN. § 9718 (West 2007).

²⁵¹ Mean=5.64, Mode=6, SD=1.831, $p<0.005$; 18 PA. CONS. STAT. ANN. § 3701(a)(1)(iv) (West 2000).

²⁵² § 3121(c), (e)(1); § 9718.

²⁵³ 18 PA. CONS. STAT. ANN. § 3307(a)(2) (West Supp. 2010).

five years,²⁵⁴ but under current law the offense is graded as a third degree felony, which has a maximum sentence of *seven years*.²⁵⁵

Giving a cellular phone to a prison inmate, when the rules of the prison prohibit inmates having phones,²⁵⁶ is graded by Pennsylvania survey participants the same as taking property of another between \$50 and \$200, a second degree misdemeanor, which has a maximum sentence of *two years*,²⁵⁷ but under current law the offense is graded as a first degree misdemeanor, which has a maximum sentence of *five years*.²⁵⁸

Exhibiting a deformed person as part of a circus sideshow²⁵⁹ is graded by the Pennsylvania survey participants the same as taking property of another valued under \$50, a third degree misdemeanor, which has a maximum sentence of *one year*,²⁶⁰ but under current law the offense is graded as a second degree misdemeanor which has as maximum sentence of *two years*.²⁶¹

Carrying a gun without a license, despite being eligible to get a license,²⁶² is graded by the Pennsylvania survey participants the same as taking property of another valued between \$50 and \$200, a second degree misdemeanor, which has a maximum sentence of *two years*,²⁶³ but under current law the offense is graded as a first degree misdemeanor, which has a maximum sentence of *five years*.²⁶⁴

Impersonating a notary public²⁶⁵ is graded by the Pennsylvania survey participants the same as taking property of another valued between \$50 and \$200, a second degree misdemeanor, which has a maximum sentence of *two years*,²⁶⁶ but under current law the offense is graded as a first degree misdemeanor, which has a maximum sentence of *five years*.²⁶⁷

A lawyer paying a paramedic for the names of accident victims, planning to solicit their business,²⁶⁸ is graded by the Pennsylvania survey

²⁵⁴ Mean=3.80, Mode=3, SD=1.650, $p<0.005$; 18 PA. CONS. STAT. ANN. § 3902 (West 1983); 18 PA. CONS. STAT. ANN. § 3903(b) (West Supp. 2010).

²⁵⁵ § 3307(a)(2).

²⁵⁶ 18 PA. CONS. STAT. ANN. § 5123(c)(1) (West Supp. 2010).

²⁵⁷ Mean=2.78, Mode=3, SD=1.650, $p<0.005$; § 3902; § 3903(b).

²⁵⁸ § 5123(c)(1).

²⁵⁹ 18 PA. CONS. STAT. ANN. § 5904 (West 2000).

²⁶⁰ Mean=2.06, Mode=0, SD=2.375, $p<0.005$; § 3902; § 3903(b).

²⁶¹ § 5904.

²⁶² 18 PA. CONS. STAT. ANN. § 6106(a)(2) (West Supp. 2010).

²⁶³ Mean=2.89, Mode=3, SD=1.830, $p<0.005$; § 3902; § 3903(b).

²⁶⁴ § 6106(a)(2).

²⁶⁵ 18 PA. CONS. STAT. ANN. § 4913 (West Supp. 2010).

²⁶⁶ Mean=3.03, Mode=3, SD=1.50, $p<0.005$; § 3902; § 3903(b).

²⁶⁷ § 4913.

²⁶⁸ 18 PA. CONS. STAT. ANN. § 4117(b)(1) (West Supp. 2010).

participants the same as taking property of another valued between \$50 and \$200, a second degree misdemeanor, which has a maximum sentence of *two years*,²⁶⁹ but under current law the offense is graded as a first degree misdemeanor, which has a maximum sentence of *five years*.²⁷⁰

Marrying someone, knowing that the person is already married,²⁷¹ is graded by the Pennsylvania survey participants the same as taking property of another valued under \$50, a third degree misdemeanor, which has a maximum penalty of *one year*,²⁷² but under current law the offense is graded as a second degree misdemeanor, which has a maximum sentence of *two years*.²⁷³

Using a camcorder in a theater without the theater owner's permission²⁷⁴ is graded by the Pennsylvania survey participants the same as taking property of another valued under \$50, a third degree misdemeanor, which has a maximum sentence of *one year*,²⁷⁵ but under current law the offense is graded as a second degree misdemeanor, which has a maximum sentence of *two years*.²⁷⁶

Unlawfully selling \$500 worth of food stamps²⁷⁷ is graded by Pennsylvania survey participants the same as taking property of another valued between \$50 and \$200, a second degree misdemeanor, which has a maximum sentence of *two years*,²⁷⁸ but under current law the offense is graded as a first degree misdemeanor, which has a maximum sentence of *five years*.²⁷⁹

An employer requiring his employees to take a lie detector test after a theft in the workplace, telling them that if they do not they will be fired,²⁸⁰ is graded by the Pennsylvania survey participants the same as taking property of another valued under \$50, a third degree misdemeanor, which has a maximum sentence of *one year*,²⁸¹ but under current law the offense is

²⁶⁹ Mean=3.07, Mode=4, SD=1.658, $p<0.005$; § 3902; § 3903(b).

²⁷⁰ § 4117(b)(1).

²⁷¹ 18 PA. CONS. STAT. ANN. § 4301 (West 1983).

²⁷² Mean=2.36, Mode=1, SD=1.910, $p<0.005$; § 3902; § 3903(b).

²⁷³ § 4301.

²⁷⁴ 18 PA. CONS. STAT. ANN. § 4116.1 (West Supp. 2010).

²⁷⁵ Mean=2.30, Mode=2, SD=1.456, $p<0.005$; § 3902; § 3903(b).

²⁷⁶ § 4116.1.

²⁷⁷ 18 PA. CONS. STAT. ANN. § 7313(a)-(b) (West 2000).

²⁷⁸ Mean=3.21; Mode=4, SD=1.319, $p<0.005$.

²⁷⁹ § 3902; § 3903(a)(1), (b).

²⁸⁰ 18 PA. CONS. STAT. ANN. § 7321 (West 2000).

²⁸¹ Mean=2.32, Mode=1, SD=1.737, $p<0.005$; § 3902; § 3903(b).

graded as a second degree misdemeanor, which has a maximum sentence of *two years*.²⁸²

Producing \$5,000 worth of counterfeit purses²⁸³ is graded by Pennsylvania survey participants the same as taking property of another valued between \$200 and \$2,000, a first degree misdemeanor, which has a maximum sentence of *five years*,²⁸⁴ but under current law the offense is graded as a third degree felony, which has a maximum sentence of *seven years*.²⁸⁵

Calling in a false bomb threat and causing a building to be evacuated²⁸⁶ is graded by the Pennsylvania survey participants the same as taking property of another valued between \$200 and \$2,000, a first degree misdemeanor, which has a maximum sentence of *five years*,²⁸⁷ but under current law the offense is graded as a third degree felony, which has a maximum sentence of *seven years*.²⁸⁸

2. Examples of Offenses Graded Too Low as Compared to Grading of Pennsylvania Residents

Selling an infant to a couple who is purchasing the child because they are unable to adopt due to being unfit parents²⁸⁹ is graded by the Pennsylvania survey participants the same as inflicting bodily injury on a person while committing a theft, a second degree felony, which has a maximum sentence of *ten years*,²⁹⁰ but under current law the offense is graded as a first degree misdemeanor, which has a maximum sentence of *five years*.²⁹¹

Failing to douse a campfire, knowing that there is a substantial risk that it could cause a forest fire if left burning, when thousands of acres of land are burned as a result,²⁹² is graded by the Pennsylvania survey participants the same as taking property of another valued over \$2,000, a

²⁸² § 7321.

²⁸³ 18 PA. CONS. STAT. ANN. § 4119(a) (West Supp. 2010).

²⁸⁴ Mean 4.15, Mode=5, SD=1.513, $p<0.005$; § 3902; § 3903(b).

²⁸⁵ § 4119(a).

²⁸⁶ 18 PA. CONS. STAT. ANN. § 2706(a), (d) (West Supp. 2010).

²⁸⁷ Mean=4.26, Mode=3, SD=1.726, $p<0.005$; § 3902; § 3903(b).

²⁸⁸ § 2706(a), (d).

²⁸⁹ 18 PA. CONS. STAT. ANN. § 4305 (West 1983).

²⁹⁰ Mean=6.17, Mode=7, SD=1.810, $p<0.005$; 18 PA. CONS. STAT. ANN. § 3701(a)(1)(iv) (West 2000).

²⁹¹ § 4305.

²⁹² 18 PA. CONS. STAT. ANN. § 3303 (West 2000).

third degree felony, which has a maximum sentence of *seven years*,²⁹³ but under current law the offense is graded as a second degree misdemeanor, which has a maximum sentence of *two years*.²⁹⁴

Threatening someone at gunpoint because they testified at a trial, without actually harming them,²⁹⁵ is graded by the Pennsylvania survey participants the same as inflicting bodily injury on a person while committing a theft, a second degree felony, which has a maximum sentence of *ten years*,²⁹⁶ but under current law the offense is graded as a third degree felony, which has a maximum sentence of *seven years*.²⁹⁷

²⁹³ Mean=4.80, Mode=5, SD=1.729, $p<0.005$; 18 PA. CONS. STAT. ANN. § 3902 (West 1983); 18 PA. CONS. STAT. ANN. § 3903(a)(1), (b) (West Supp. 2010).

²⁹⁴ § 3303.

²⁹⁵ § 4953(a); § 9712.

²⁹⁶ Mean=5.66, Mode=7, SD=1.636, $p<0.005$; § 3701(a)(1)(iv).

²⁹⁷ § 4953(b); § 9712.

APPENDIX B. EXAMPLES OF THE MANDATORY MINIMUM PROBLEM

Pennsylvania residents graded luring a child into a motor vehicle, after having already been convicted of the same offense twice in the past,²⁹⁸ as being similar in seriousness to knowingly causing injury that risks death or leads to permanent impairment, which has a maximum penalty of *twenty years*.²⁹⁹ Yet, current law sets the mandatory minimum for the offense at *life*.³⁰⁰

Pennsylvania survey participants graded a person, ordered to be on a sex offender registry for engaging in oral sex with his fifteen-year-old girlfriend when he was nineteen, failing to verify his address with the state police for the second time,³⁰¹ as being similar in seriousness to taking property of another valued between \$50 and \$200, which has a maximum sentence of *two years*.³⁰² Yet, current law sets the mandatory minimum for the offense at *three years*.³⁰³

Pennsylvania survey participants graded killing a three-month-old fetus during an assault on a pregnant woman³⁰⁴ as being similar in seriousness to knowingly causing injury that risks death or leads to permanent impairment, which has a maximum penalty of *twenty years*.³⁰⁵ Yet, current law sets the mandatory minimum for the offense at *life*.³⁰⁶

Pennsylvania survey participants graded selling a gun that is improperly wrapped, after having already been convicted of the same offense in the past,³⁰⁷ as being similar in seriousness to taking property of another valued between \$50 and \$200, which has a maximum sentence of *two years*.³⁰⁸ Yet, current law sets the mandatory minimum for the offense at *five years*.³⁰⁹

²⁹⁸ 18 PA. CONS. STAT. ANN. § 2910 (West Supp. 2010).

²⁹⁹ Mean=6.50, Mode=7, SD=1.569, $p<0.005$; 18 PA. CONS. STAT. ANN. § 2702(a)(1) (West Supp. 2010).

³⁰⁰ § 2910; 42 PA. CONS. STAT. ANN. § 9718.2(a)(2) (West Supp. 2010).

³⁰¹ 18 PA. CONS. STAT. ANN. § 4915(a)(2) (West Supp. 2010).

³⁰² Mean=3.07, Mode=3, SD=2.366, $p<0.005$; 18 PA. CONS. STAT. ANN. § 3902 (West 1983); 18 PA. CONS. STAT. ANN. § 3903(b) (West Supp. 2010).

³⁰³ § 9718.3.

³⁰⁴ 18 PA. CONS. STAT. ANN. § 2604(a) (West 1998); 18 PA. CONS. STAT. ANN. § 1102(a)(2) (West Supp. 2010).

³⁰⁵ Mean=7.19, Mode=8, SD=2.21, $p<0.005$; 18 PA. CONS. STAT. ANN. § 2702(a)(1) (West Supp. 2010).

³⁰⁶ § 2604(a); § 1102(a)(2).

³⁰⁷ 18 PA. CONS. STAT. ANN. § 6111(a)(1) (West Supp. 2010).

³⁰⁸ Mean=3.32, Mode=3, SD=1.830, $p<0.005$; 18 PA. CONS. STAT. ANN. § 3902 (West 1983); 18 PA. CONS. STAT. ANN. § 3903(b) (West Supp. 2010).

³⁰⁹ § 6111(h).

APPENDIX C. EXAMPLES OF THE PROBLEM OF INCONSISTENT GRADES AMONG SIMILAR OFFENSES

Shooting a paintball gun at a person not participating in the game³¹⁰ is a specific instance of the offense of simple assault.³¹¹ But the former is graded as a summary offense and subject to a maximum penalty of *ninety days*, while the latter is graded as a third degree misdemeanor and subject to a maximum penalty of *one year*, with no apparent reason given as to why the latter more general offense should have a penalty four times that of the more specific offense.

Trespassing on agricultural land³¹² is a specific instance of the offense of criminal trespass, which is entering any place to which notice against trespass is given.³¹³ But the former is graded as a third degree misdemeanor and carries a maximum penalty of *one year*, while the latter is graded as a summary offense and subject to a maximum penalty of *ninety days*, with no apparent reason given as to why the former, more specific offense should have a penalty four times that of the more general offense.

Forging information relating to email in order to send spam³¹⁴ is a specific instance of the offense of tampering with records or identification.³¹⁵ Yet the former can be graded as high as a third degree felony and subject to a maximum penalty of *seven years*, while the latter is graded as a first degree misdemeanor and subject to a maximum of *five years*, with no apparent reason given as to why the former, more specific offense should have a penalty 1.4 times that of more general offense.

The offense of shooting a gun into an occupied building³¹⁶ is a specific instance of reckless endangerment.³¹⁷ Yet shooting a gun into an occupied building is graded as a third degree felony and given a maximum sentence of *seven years*,³¹⁸ while reckless endangerment is graded as a second degree misdemeanor and carries a maximum sentence of *two years*,³¹⁹ a 350% increase in possible punishment.

³¹⁰ 18 PA. CONS. STAT. ANN. § 2707.2(a)(1) (West Supp. 2010).

³¹¹ 18 PA. CONS. STAT. ANN. § 2701 (West Supp. 2010).

³¹² 18 PA. CONS. STAT. ANN. § 3503(b)(2) (West Supp. 2010).

³¹³ 18 PA. CONS. STAT. ANN. § 3503(b)(1)(ii) (West Supp. 2010).

³¹⁴ 18 PA. CONS. STAT. ANN. § 7661(a), (b)(3) (West Supp. 2010).

³¹⁵ 18 PA. CONS. STAT. ANN. § 4104(a) (West 1983).

³¹⁶ 18 PA. CONS. STAT. ANN. § 2707.1 (West Supp. 2010).

³¹⁷ 18 PA. CONS. STAT. ANN. § 2705 (West 2000).

³¹⁸ § 2707.1(b).

³¹⁹ § 2705.

Driving a boat under the influence of a controlled substance³²⁰ is a specific instance of the offense of recklessly endangering persons.³²¹ Yet driving a boat under the influence, a specific form of reckless endangerment, is given a maximum penalty of *six months*, while recklessly endangering is subject to a maximum penalty of *two years*. It is unclear why the specific offense should be subject to a maximum penalty only one quarter the length of the general offense.

Causing alarm to a law enforcement agent by possessing a facsimile of a weapon of mass destruction, which cannot cause actual harm,³²² is a specific instance of causing a false alarm.³²³ Yet, the former is given a maximum penalty of *seven years*, while the latter carries a maximum penalty of *one year*.³²⁴ This can amount to a 700% increase in punishment for the offender who causes alarm by possessing a facsimile weapon, even though the harm caused by the alarm is essentially the same whether or not the weapon is involved.

³²⁰ 30 PA. CONS. STAT. ANN. § 5502(a)(3) (West Supp. 2010).

³²¹ *Id.*

³²² 18 PA. CONS. STAT. ANN. § 5516 (West Supp. 2010).

³²³ 18 PA. CONS. STAT. ANN. § 4905 (West Supp. 2010).

³²⁴ *Id.*

APPENDIX D. EXAMPLES OF THE PROBLEM OF FAILING TO
DISTINGUISH CONDUCT OF SIGNIFICANTLY DIFFERENT
SERIOUSNESS CONTAINED WITHIN A SINGLE OFFENSE GRADE

The offense of interference with custody of a committed person is defined so broadly as to include both removing a juvenile who is held on suicide watch from his treatment facility and taking a low-risk mental facility patient out for an hour's drive without permission from the facility's staff.³²⁵ Under current law, both courses of conduct are graded as a second degree misdemeanor, carrying a maximum sentence of two years,³²⁶ but the Pennsylvania survey participants graded the first as a first degree misdemeanor, carrying a maximum sentence of *five years*,³²⁷ and the second as a third degree misdemeanor, carrying a maximum sentence of *one year*.³²⁸

The offense of unlawful restraint is defined so broadly as to include both holding somebody against his will in a dangerous place for half an hour and holding somebody against his will in a dangerous place for several months.³²⁹ Under current law, both courses of conduct are graded as a first degree misdemeanor, carrying a maximum sentence of five years,³³⁰ but the Pennsylvania survey participants graded the first as a third degree felony, carrying a maximum sentence of *seven years*,³³¹ and the second as a first degree felony, carrying a maximum sentence of *twenty years*.³³²

The offense of requesting confidential information in the sale or transfer of firearms is defined so broadly as to include both a gun store owner requesting records, such as a background check, simply to satisfy a personal curiosity and a gun store owner requesting records, such as a criminal history, intending to sell them to others.³³³ Under current law, both courses of conduct are graded as a third degree felony, carrying a maximum sentence of seven years,³³⁴ but the Pennsylvania survey participants graded the first as a third degree misdemeanor, carrying a maximum sentence of

³²⁵ 18 PA. CONS. STAT. ANN. § 2905 (West 2000).

³²⁶ *Id.* at § 2905(a).

³²⁷ Mean=4.32, Mode=5, SD=2.067.

³²⁸ Mean=2.09, Mode=1, SD=1.747, $p < 0.005$.

³²⁹ 18 PA. CONS. STAT. ANN. § 2902(a) (West Supp. 2010).

³³⁰ § 2902(b)(1).

³³¹ Mean=5.32, Mode=7, SD=1.717.

³³² Mean=7.00, Mode=7, SD=2.177, $p < 0.005$.

³³³ 18 PA. CONS. STAT. ANN. § 6111(g)(3) (West Supp. 2010).

³³⁴ *Id.*

one year,³³⁵ and the second as a first degree misdemeanor, carrying a maximum sentence of *five years*.³³⁶

³³⁵ Mean=2.29, Mode=1, SD=1.745.

³³⁶ Mean=3.84, Mode=4, SD=1.746, $p<0.005$.

APPENDIX E. EXAMPLES OF THE PROBLEM OF INCONSISTENT USE OF GRADING FACTORS AMONG ANALOGOUS OFFENSES

Type 1 (Inconsistent Grading Distinctions for Similar Offenses)

The general offense of theft makes grading distinctions according to the value of the property stolen, as noted above.³³⁷ The similar offense of unlicensed reproduction of electronic data also distinguishes grades according to value but uses different values: below \$2,500 is a third degree felony, and above \$2,500 is a second degree felony.³³⁸ As a result:

Stealing a software DVD valued at \$125 is punishable by up to *two years*, while copying the same software from a computer has a maximum penalty of *seven years*.

Stealing a software DVD valued at \$3,000 is punishable by up to *two years*, while copying the same software from a computer has a maximum penalty of *ten years*.

Type 2 (Grading Distinctions Used in One Offense Are Not Used in an Analogous Offense)

The general offense of theft varies the grade of the offense according to the value of the object taken: below \$50 (third degree misdemeanor), \$50-\$199.99 (second degree misdemeanor), \$200-\$2,000 (first degree misdemeanor), and \$2,000-plus (third degree felony).³³⁹ The offense of computer theft can likewise include varying degrees of monetary loss, yet all instances of computer theft are graded as third degree felonies, carrying a maximum penalty of seven years.³⁴⁰

As a result, whether the crime is a theft of useless data with a value of less than \$50 or a theft of a new high-tech statistics algorithm worth \$3,000, the offense is *graded the same*, as a third degree felony.

The general offense of theft makes grading distinctions according to the value of the property stolen, as noted above.³⁴¹ The offense of trade secret theft³⁴² similarly can include many different valuations of harm done, yet the Code *makes no grading distinctions according to value*.

³³⁷ 18 PA. CONS. STAT. ANN. § 3902 (West 1983); 18 PA. CONS. STAT. ANN. § 3903 (West Supp. 2010).

³³⁸ 18 PA. CONS. STAT. ANN. § 7614 (West Supp. 2010).

³³⁹ § 3902; § 3903.

³⁴⁰ 18 PA. CONS. STAT. ANN. § 7613 (West Supp. 2010).

³⁴¹ § 3902; § 3903.

³⁴² 18 PA. CONS. STAT. ANN. § 3930(b) (West Supp. 2010).

As a result, whether the crime is a theft of an outdated drill design with little value or the theft of a new high-tech brewing process that saves millions of dollars a year, the offense is graded as a third degree felony.