

REPORT ON OFFENSE GRADING IN PENNSYLVANIA

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Jointly, the Senate Judiciary Committee,¹ chaired by Stewart J. Greenleaf, and the House Judiciary Committee,² chaired by Thomas R. Caltagirone, commissioned the University of Pennsylvania's Criminal Law Research Group to undertake a study of offense grading in Pennsylvania law. The results of the study confirm the Committees' judgment that the subject was one well worth investigating.

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 the 282 included offenses and suboffenses.³ 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.⁴

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!⁵ Unfortunately, this substantial legislative activity of the past 37 years has graded offenses with little attention to the then-existing offenses, resulting in a system of offenses marked by irrational and contradictory grading differences, and offense grades that seriously conflict with the values of Pennsylvania residents.

I. Examples of Offense Grading Irrationalities and Inconsistencies in Current Pennsylvania Law

The current law contains serious grading problems of at least five different sorts.

A. The Improper Grade Problem

The most common problem is setting the grade of an offense at a level that is inappropriate as compared to other offenses of that grade. For example:

- A pawn shop owner buying a stereo that he knows is stolen, intending to sell it,⁶ is graded by the Pennsylvania residents in the survey the same seriousness as taking property of another valued between \$50 and \$200, a 2nd degree misdemeanor, which has a maximum sentence of *2 years*,⁷ but under current law the buying-stolen-property offense is graded as a 1st degree felony, which has a maximum sentence of *20 years*.⁸
- Making a duplicate copy of a purchased Beatles CD, and selling the copy to a friend for one dollar,⁹ is graded by the Pennsylvania residents in the survey the same as committing acts to annoy another person, with no legitimate purpose, a summary offense, which has a maximum sentence of *90 days*,¹⁰ but under current law the offense is graded as a 1st degree misdemeanor, which has a maximum sentence of *5 years*.¹¹
- Reading another's email without permission¹² is graded by the Pennsylvania residents in the survey the same as committing acts to annoy another person, with no legitimate purpose, a summary offense, which has a maximum sentence of *90 days*,¹³ but under current law the reading-another's-email offense is graded as a 3rd degree felony, which has a maximum sentence of *7 years*.¹⁴
- Breaking into a pharmaceutical company's labs in order to release animals used for testing¹⁵ is graded by the Pennsylvania residents in the survey the same as taking property from another by force, without causing injury, a 3rd degree felony, which has a maximum sentence of *7 years*,¹⁶ but under current law the offense is graded as a 1st degree felony which has a maximum sentence of *20 years*.¹⁷
- Hiring a prostitute for another person¹⁸ is graded by the Pennsylvania residents in the survey as the same as taking property from another valued under \$50, a 3rd degree misdemeanor, which has a maximum sentence of *1 year*,¹⁹ but under current law the offense is graded as a 3rd degree felony, which has a maximum sentence of *7 years*.²⁰

- Deleting non-valuable data from someone's computer without their permission²¹ is graded by the Pennsylvania residents in the survey the same as committing acts to annoy another person, with no legitimate purpose, a summary offense, which has a maximum penalty of *90 days*,²² but under current law the offense is graded as a 3rd degree felony, which has a maximum sentence of *7 years*.²³

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

- Keeping an adult as a slave²⁴ is graded by the Pennsylvania residents in the survey the same as knowingly causing injury that risks death or leads to permanent impairment, a 1st degree felony, which has a maximum sentence of *20 years*,²⁵ but under current law the offense is graded as a 1st degree misdemeanor, which has a maximum sentence of *5 years*.²⁶

Appendix A provides many more examples of these kinds of systemic problems in the current law.²⁷ 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.

B. The Mandatory Minimum Problem

There are good reasons to be skeptical about mandatory minimum sentences generally. 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 about over-punishment as with under-punishment. Mandatory minimums can often lead to over-punishment, especially in cases with facts other than 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 is the primary consideration that makes minimum sentences seem appealing. However, such concerns can be addressed with a coherent sentencing guideline system, without the need for the sledgehammer of mandatory minimums that inevitably guarantee some degree of injustice. 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. The solution is 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 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 past,²⁸ as being similar in seriousness to the theft of property valued between \$50 and \$200, which has a maximum punishment of 2 years.²⁹ Yet, current law sets the mandatory minimum for the offense at 5 years,³⁰ requiring every instance of the offense to be overpunished.
- Pennsylvania residents graded a person, ordered to be on a sex offender registry (for engaging in oral sex with his 15 year old girlfriend), failing to verify his address with the State Police³¹ as being similar in seriousness to recklessly causing bodily injury, which has a maximum punishment of 2 years.³² Yet, current law sets the mandatory minimum for the offense at 3 years,³³ requiring every instance of the offense to be overpunished.
- Pennsylvania residents graded luring a child into a motor vehicle, after already having been convicted once for the same offense,³⁴ as being similar in seriousness to engaging in sexual intercourse without consent, but not by force, which has a maximum sentence of 10 years.³⁵ Yet, current law sets the mandatory minimum for the offense at 25 years,³⁶ requiring every instance of the offense to be overpunished.

In each instance, the mandatory minimum *requires* the sentencing judge to impose a sentence that exceeds the maximum of the offense grade that the Pennsylvania residents saw as most appropriate for the offense. More examples are provided in Appendix B. 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.

C. The Problem of Inconsistent Grades Among Similar Offenses

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

- Failing to provide reasonable care to an infant at its birth is graded by current law as a 3rd degree felony, carrying a maximum sentence of 7 years,³⁷ 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 1st degree misdemeanor, carrying a maximum sentence of 5 years.³⁸ 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, already-existing offense. Adding an unnecessary offense is problematic, first, because it improperly allows liability and punishment for multiple offenses when the offender's conduct is a single harm or evil.³⁹ In 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 the two overlapping offenses differently. For example:

- Agricultural vandalism⁴⁰ is a specific instance of the general offense of criminal mischief.⁴¹ Yet committing agricultural vandalism by destroying up to \$500 worth of crops on a farm

- is punished with up to *1 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 *90 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.⁴²
- Unauthorized administration of an intoxicant with the intent to rape⁴³ is a specific instance of the offense of attempted rape.⁴⁴ Yet the former is punishable by up to *7 years*, while the latter carries a maximum sentence of *20 years* – nearly three times the penalty.⁴⁵ 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 vehicle⁴⁶ is a specific instance of the more general offense of reckless endangerment.⁴⁷ Yet, the specific, throwing offense has a maximum penalty of *5 years*, while the more general reckless endangerment offense has a maximum penalty of *2 years*.⁴⁸ 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.
 - The offense of stealing another's motor vehicle in his presence⁴⁹ is a specific instance of the offense of robbery.⁵⁰ Yet the former is given a maximum penalty of *20 years*, while the latter carries a maximum penalty of *10 years*, with no apparent reason why the more specific offense should have a maximum penalty twice that of the more general offense.⁵¹

Other examples are provided in Appendix C. 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.

D. The Problem of Failing to Distinguish Conduct of Significantly Different Seriousness Contained Within a Single Offense Grade

For all of the reasons detailed in Part III of this Report, more-serious conduct needs to be graded more seriously than does less-serious conduct. Getting offense grades right is important because, by building moral credibility with the community, the criminal justice system can more effectively fight crime. Further, proper offense grading is necessary to tell citizens the relative importance of conflicting duties, to express legislative value judgments and thereby avoid delegation to individual judges, and to ensure that the same grading rule is applied to all offenders (which reliance upon judicial discretion cannot do).⁵²

Despite this need for proper grading, it is common, in the ad-hoc crimes amendment process that has been common in the state, to have the definition of a new crime ignore the importance of distinguishing importantly different conduct and to use a very broad offense definition that includes under the same offense and the same grade conduct of very different degrees of seriousness.

The problem here is that, in order to provide a sufficiently high grade for the most serious conduct within the broad offense, the grade must be set quite high. But that high grade is then also applicable to much less serious conduct included in the offense definition by virtue of very broad statutory language. By failing to enact a nuanced grading scheme for such broad offenses, the legislature fails to provide its judgments as to the relative seriousness of various conduct

falling under that offense. Consequently, individual sentencing judges must determine the relative seriousness of an offender's conduct on an ad-hoc basis.

For example:

- 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.⁵³ Under current law, both courses of conduct are graded as a felony, carrying a minimum sentence of 25 years,⁵⁴ but the Pennsylvania residents in the survey graded the first as a 1st degree felony, carrying a maximum sentence of 20 years,⁵⁵ and the second as a 2nd degree misdemeanor, carrying a maximum sentence of 2 years.⁵⁶
- The offense of false imprisonment of a minor is defined so broadly as to include both chaining a 14 year old to a wall for a month and illegally locking a 17 year old in her room for a half an hour.⁵⁷ Under current law, both courses of conduct are graded as a 2nd degree felony, carrying a maximum sentence of 10 years, but the survey of Pennsylvania residents graded the first as a 1st degree felony, carrying a maximum sentence of 20 years,⁵⁸ and the second as a 3rd degree misdemeanor, carrying a maximum of 1 year.⁵⁹
- 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 18 year old female pretending to have sex with a 17 year old male.⁶⁰ Under current law, both courses of conduct are graded as a 3rd degree felony, carrying a maximum sentence of 7 years,⁶¹ but the survey of Pennsylvania residents graded the first as a 2nd degree felony, carrying a maximum sentence of 10 years,⁶² and the second a 2nd degree misdemeanor, carrying a maximum sentence of 2 years.⁶³
- 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 from a pharmaceutical company a formula worth \$5,000,000.⁶⁴ Under current law, both courses of conduct are graded as a 2nd degree felony,⁶⁵ carrying a maximum sentence of 10 years, but the survey of Pennsylvania residents graded the first as a 3rd degree misdemeanor, carrying a maximum sentence of 1 year,⁶⁶ and the second as a 3rd degree felony, carrying a maximum sentence of 10 years.⁶⁷
- 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.⁶⁸ Under current law, both courses of conduct are graded as a 2nd degree misdemeanor, carrying a maximum sentence of 2 years,⁶⁹ but the survey of Pennsylvania residents graded the first as 3rd degree misdemeanor, carrying a maximum sentence of 1 year,⁷⁰ and the second as a 3rd degree felony, carrying a maximum sentence of 7 years.⁷¹

Other examples are given in Appendix D. 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.

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. The 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 (3rd degree misdemeanor), \$50-\$199.99 (2nd degree misdemeanor), \$200-\$2,000 (1st degree misdemeanor), and \$2,000-plus (3rd degree felony).⁷² 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 (3rd degree misdemeanor).⁷³ As a result:
 - Stealing property valued at \$40 is punishable with a maximum of *1 year* if stolen from an individual, but is punishable by a maximum of *90 days* if stolen from a library.
 - Stealing a rare book valued at \$3,000 is punishable by up to *7 years* if stolen from an individual, but only *1 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.⁷⁴ 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 (1st degree misdemeanor), and above \$2,000 (3rd degree felony).⁷⁵ As a result:
 - Stealing property valued at \$125 from a store is punished with a maximum of *90 days*, while stealing the same article from an individual is punished with up to *2 years*.
 - Stealing property valued at \$175 from a store is punished with up to *5 years*, while stealing the same article from an individual is punished with a maximum of only *2 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 suffering that results may be quite a bit higher for the person than for the company.

- The general offense of theft makes grading distinctions according to the value of the property stolen, as noted above.⁷⁶ The similar offense of unlicensed reproduction of electronic data also distinguishes grades according to value but uses different values: below \$2,500 is a 3rd degree felony, and above \$2,500 is a 2nd degree felony.⁷⁷ As a result:
 - Stealing a software DVD valued at \$125 is punishable by up to *2 years*, while copying the same software from a computer has a maximum penalty of *7 years*.
 - Stealing a software DVD valued at \$3,000 is punishable by up to *7 years*, while copying the same software from a computer has a maximum penalty of *10 years*.

In a second, even 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 2nd degree misdemeanor),⁷⁸ causing bodily injury with a deadly weapon (a 2nd degree felony),⁷⁹ causing serious bodily injury (a 1st degree felony).⁸⁰ In contrast, for the related offenses of Arson Endangering Persons⁸¹ and Causing a Catastrophe,⁸² 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* (3rd 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 3 acres of pasture will be liable for the *same level offense* (1st degree felony) as a person who starts a forest fire that burns 300 acres and destroys 40 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 2nd degree felony is a 3rd degree felony, obstructing a second degree felony is a 2nd degree felony, and obstructing a murder or felony of the 1st degree is a 1st degree felony.⁸³ Similarly, the offenses of failing to appear for a required court date⁸⁴ and flight to avoid apprehension⁸⁵ are graded in light of the underlying offense charged.
 - In contrast, the offense of tampering with evidence to undercut an investigation,⁸⁶ which can likewise include varying degrees of harm depending on the seriousness of the offense being investigated, *makes no grading distinctions*.
 - As a result, whether the underlying offense is murder or petty theft, the tampering offense is graded as a 2nd degree misdemeanor.⁸⁷
- The general offense of theft varies the grade of the offense according to the value of the object taken, as noted above.⁸⁸ The offense of computer theft can likewise include varying degrees of monetary loss, yet all instances of computer theft are graded as 3rd degree felonies, carrying a maximum penalty of 7 years.⁸⁹
 - 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 3rd degree felony.

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.

II. A Survey of Pennsylvania Residents' Grading Judgments

Throughout the previous Part, we have referred to the judgments of Pennsylvania residents in a survey. Here we describe that survey and how it was conducted. With funding from the University of Pennsylvania Law School, the Research Group conducted a survey of 131 Pennsylvania residents.⁹⁰ Paid respondents were solicited from Amazon.com's Mechanical Turk,⁹¹ and volunteer participants were solicited through public notices, local newspapers, and

from Craigslist and other community internet sites⁹² in communities throughout Pennsylvania. In all, 88 respondents were compensated, while 43 respondents were unpaid volunteers.

The subject pool had a broad demographic distribution. 28.1% were aged between 15 and 24 (most of these were probably at the high end of the range because the survey was available only to "non-students"), 41.3% between 35 and 44, 14% between 45 and 54, and 5.8% between 55 and 64. Subjects were narrowly divided between men and women, with 57% male and 43% female.

The subject pool was educationally diverse, with 1.7% of subjects reporting they had not graduated from high school, 12.6% had a high school diploma or GED, 26.9% had some college experience, 10.9% had a 2-year College degree, 36.1% had a 4-year College degree, 9.2% had a Master's degree, and 2.5% had a professional degree.

Respondents identified the area where they live from a map of Pennsylvania.⁹³ 14.5% were in Area 1, the Pittsburgh area, 6% were in Area 2, roughly the western part of the state surrounding Pittsburgh, 11.1% were in Area 3, containing Erie and College Park, 12.8% were in Area 4, including Williamsport, Harrisburg, and Lancaster, 17.9% were in Area 5, including Scranton, Wilkes-Barre, and Allentown, and 37.6% were in Area 6, the Philadelphia area.

The subject pool had some racial diversity, with 2.5% of respondents identifying as African American, 4.2% Asian, 4.2% Hispanic, 0.8% Native American, 85.8% White, and 2.5% choosing "other."

Regarding marital status, 37.3% of the subjects were married, 11.8% were divorced or separated, 50% were single, and 0.8% were widowed. Regarding income, 9.2% of our respondents reported a household income below \$20,000, 31% reported below \$40,000, 21% reported below \$60,000, 10% reported below \$80,000, 6.7% reported below \$100,000, and 6.7% reported at or above \$100,000, with an additional 14.3% choosing not to answer.

Subjects were given a table of what might be called "milestone" offenses from the existing Pennsylvania Crimes Code. The table, reproduced in Appendix G and similar to Table 1 below, presented examples of the kinds of common offenses found in each of the various grading categories used in current Pennsylvania law. The table included the 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), thereby ranging across the entire continuum of offense seriousness, from imprisonment for a maximum of 90 days to punishment by life imprisonment or death. These offenses were presented in order of seriousness, and given a numeric level, 1 through 9, corresponding to the grades provided in criminal code. See Table 1 below.

Table 1. Milestone Offenses from the Pennsylvania Crimes Code⁹⁴

[super grade]	Murder of the First Degree: Intentionally killing another person.
[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).
1st Degree Felony	Aggravated Assault: Knowingly causing injury that risks death or leads to permanent impairment. Rape: Engaging in sexual intercourse by force.
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.
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.
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.
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.
3rd Degree Misdemeanor	Theft of less than \$50: Taking property of another valued under \$50.
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.

Subjects were then given a series of test offenses, also drawn from current law, and were asked to compare the seriousness of those offenses to the milestone offenses presented in the table. Subjects were prompted to choose which milestone offenses were most similar to the seriousness of the test offense, 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.⁹⁵ 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 different additions by different subjects understandably can produce different judgments about offense seriousness. 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 all, each subject categorized a minimum of 55 such offenses against the milestone offenses.⁹⁶ The offenses that were tested are those presented as examples in this Report and its Appendices. In all, the online surveys collected at minimum of 103 valid responses for each test offense, upon which to base the residents' grading judgments reported in Part I.⁹⁷ Those judgments are based upon the average of the subjects' grading, with the raw numerical score, the mode, and the standard deviation reported in the notes.⁹⁸ The full results of the study, including statistical significance tests for all results, are reported in Appendix F.

III. Why Should We Care About Getting Offense Grades Right?

Part I suggests there are serious problems in the way Pennsylvania law now grades offenses. Should we care? Why is proper offense grading important?

Offense Grades that Conflict with Community Views Undermine the Criminal Law's Moral Credibility and, Thereby, Its Ability to Fight Crime If one cares about doing justice, as all societies should, it ought to care about insuring that the proper level of punishment is imposed, neither too much nor too little. Doing justice has deontological value of its own and requires no further justification. It is the mark of a civilized society.

However, recent social science research suggests that a criminal justice system's reputation for doing justice – no more, no less – has more than deontological value. It also has important practical value in fighting crime. If the system's liability and punishment rules, such as its offense grading judgments, track the community's shared intuitions of justice, the resulting moral credibility of the system promotes cooperation, acquiescence, the powerful social influences of stigmatization and condemnation, and increases criminal law's ability to shape societal and internalized norms. Where the law's offense grading judgments conflict with the community's lay intuitions of justice, it undermines 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.⁹⁹

Offense Grades Tell Citizens the Relative Importance of Conflicting Duties Proper grading of offenses also 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; thus it follows that a citizen ought to pay relatively more attention to avoiding the latter than the former.¹⁰⁰ And when a citizen's different duties conflict, the relative grades of the two relevant offenses tell the person which

duty must take priority over another. Faced with an emergency that requires a person to choose between two bad outcomes, state law tells the person to "avoid the greater harm or evil,"¹⁰¹ but it is the legislature's assessment of the relative seriousness of the harms or evils – as reflected in its relative grading of the relevant offenses – that we want to be given deference, not each individual's personal judgment of the matter. For example, animals are entitled to a life free from cruelty, and cruelty to animals is therefore criminalized.¹⁰² 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 3rd degree felony and grades cruelty to animals as only a summary offense.¹⁰³ This relative grading of the two harms tells citizens they may not use force in such a situation, despite any personal moral judgment to the contrary.

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 insuring that the relative seriousness of offenses is defined according to the legislature's judgment, rather than delegating this significant authority 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 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 sentence to be imposed for that offense, providing a hard limit to sentencing discretion. 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.

Offense Grades Insure a Fixed Rule for All Offenders One reason the judgment of the legislature is preferred to that of the judiciary is because it is the more democratic branch, but its judgment is also preferred because it is the only branch whose rules can be applied equally 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 similar ways. An offender's punishment ought to depend upon what he has done and his culpability and capacities at the time of doing it. It ought not depend upon who happens to be assigned as a sentencing judge and his or her 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 which may not coincide with the legislature's. (The existence of voluntary sentencing guidelines does not solve the problem.¹⁰⁴)

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 seriously than less serious offenses. Prison is expensive.¹⁰⁵ In a world of finite resources, funds spent on less serious offenses are not available to punishment 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.

IV. 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 then¹⁰⁶ – amendments to offenses 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 I are in large part a product of the commonly ad-hoc nature of criminal law legislation, with significant exacerbation by the natural political dynamics of crime legislation – what has been called the "crime du jour" problem.¹⁰⁷ These forces are not unique to Pennsylvania, but rather are typical of most (if not all) American jurisdictions.¹⁰⁸

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, 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 I, 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: 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. 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 often are not helpful, and worse, may hurt the

cause of fighting crime and doing justice. In many instances, the criminal justice system would be better off with no new 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.

For example, in 1982 the Legislature created the broad new offense of Institutional Vandalism, which, among other proscribed conduct, made the desecration of a historic burial place a 2nd degree misdemeanor.¹⁰⁹ This aspect of the legislation was hardly necessary: such conduct was already criminalized under the offense of Desecration, Theft, or Sale of Venerated Objects,¹¹⁰ which was similarly graded as a 2nd degree misdemeanor. Then, in 1988, the Legislature amended the Institutional Vandalism offense, changing the grade of the offense from a 2nd degree misdemeanor to a 3rd degree felony,¹¹¹ 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 §905, attempted conduct is graded the same as the completed conduct would be.¹¹² Thus, administering an intoxicant with the intention of committing rape, which would be prosecuted as attempted rape under §3121 of the original Crimes Code, is a first degree felony. In 1997, the Legislature amended §3121 to impose additional punishment on an offender who commits rape, or attempted rape, by administering intoxicating drugs to their unknowing victims.¹¹³ At the same time, the Legislature also passed §2714 (Unauthorized Administration of an Intoxicant), criminalizing the administration of intoxicants to a person with the intent to commit rape, and making it a third degree felony.¹¹⁴ 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, we have seen 797 amendments to the Crimes Code, and another 1,532 crimes-related amendments to titles outside of that Code!¹¹⁵ That is an average of 22 per year to the Crimes code, and an additional 41 annually outside that title!¹¹⁶ More troubling is that the rate of criminal-law related amendments is continually increasing,¹¹⁷ 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?

V. How Can These Problems Be Fixed?

Ideally, the best way to deal with the problems described in Part I would be to recodify the state's criminal law into a code that drops 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. Past recodification efforts suggest that the 686 offenses contained in current law 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.¹¹⁸ The recodification could be done without any purpose to change the legislative judgments embodied in existing law, but rather to simply recast those judgments into a rational, coherent code. Existing law would need to be changed only to the extent that it was internally inconsistent, requiring the recodifiers to choose between the conflicting positions – preferably selecting the one that best captures present legislative values.

It may be, however, that such a recodification project is not currently politically feasible,¹¹⁹ (although, the political appeal of such recodification will only 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). A more modest approach would be to simply fix the irrationalities and inconsistencies that exist in current law, beginning with those highlighted in this Report and its Appendices.

To do this, the Legislature could re-examine the offense grading of existing law informed, if they choose, by the judgments of Pennsylvania residents on the relative seriousness of different offense conduct, as revealed in a study such as that described in Part II of this Report. (As a start for such a project, appendix H contains a table that summarizes all offenses and suboffenses, and their grading, that are contained in the current Crimes Code, all offenses set out in the Controlled Substance, Drug, Device and Cosmetic Act,¹²⁰ and all offenses existing elsewhere in current law that contain a mandatory minimum sentence.

Specifically, the grading reform program could:

- Reconsider the grade of each offense in relation to other offenses. This re-evaluation certainly would want to include all of the examples of improper grading set out in *Appendix A*, but ideally would consider all offenses and suboffenses in current law, both within and outside of Title 18. A carefully constructed survey of Pennsylvania residents could be useful in assessing the proper grade of an offense as compared to other offenses.
- Review all mandatory minimums prescribed by Pennsylvania law, especially those referred to in *Appendix B*, to ensure that each is really needed and appropriate. 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 done requires not only insuring that offenders get the punishment they deserve but also that they get no more punishment than they deserve. A survey of Pennsylvania residents could help resolve these issues.

- Abolish overlapping offenses where possible. Some of the most egregious examples of this – in which specific and general offenses of the same seriousness are graded differently – are illustrated in *Appendix C*, and at very least these specific problems should be examined. 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, such as those offenses listed in *Appendix D*, the offense definition should define suboffenses of different grades. Here too, a survey of Pennsylvania residents could help 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 Crimes Code all serious offenses and sentence enhancements now contained outside of Title 18. 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.¹²¹
- Repeal offenses that punish conduct that Pennsylvania residents find insufficiently blameworthy to deserve the condemnation of criminal conviction. To avoid diluting the condemnation carried by a criminal conviction, liability ought to be limited to the conduct that, in the view of the community as a whole, deserves criminal condemnation.¹²²

VI. 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 and produced a shorter, clearer criminal code, it is likely that the dynamics that have degraded current Pennsylvania criminal law over the past several decades would continue to operate and begin immediately to degrade the code again, just as they did immediately after the enactment of the original 1972 Code. While the recodification effort would certainly bring an improvement over the present situation, it would be useful to consider

how the degradation problem might be avoided in the future, avoiding the need for regular recodification projects.

Here are several proposals, including both more minimalist and more ambitious approaches. They are admittedly not typical legislative procedures (although there is some precedent for some items) but the fact is that crime legislation may be almost unique in its political dynamics. There are few other sorts of legislation that carry a threat as easy to make and as powerful in effect as the "soft on crime" epithet at the next election. The result is good legislators voting for bad bills in record numbers.

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

- **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 the most related offenses in existing law and a showing that those offenses do not already criminalize the conduct sought to be criminalized in the proposed offense, and
 - (2) Legislation proposing either a new offense or a change in the grading of an existing offense, must include a description of the grades of the existing offenses most similar in seriousness to the proposed offense, and a showing that the conduct in the proposed legislation is a different level of seriousness than those existing offenses.
- **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 both the House and Senate Judiciary Committees issue a statement in which they critique the Existing Crimes Comparison Statement offered for each crime bill before that bill is put to a vote. 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.
- **Establish a Standing Criminal Law Revision Commission (That Would, Among Other Things, Issue a Critique Before a Vote on Any Crime Bill)** 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, together with the resources to regularly comment on the crime bills introduced, based on their research assessments of the Code's true needs rather than the political dynamics of "crime du jour." A central theme of this Report has been the need to step back from the heat of "crime du jour" dynamics and to consider the larger picture of the criminal code's needs as well as its internal integrity. A Standing Commission, existing apart from the Legislature, could provide the needed distance and larger perspective to offer and encourage needed reforms while discouraging reforms that degrade the code.¹²³
- **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 only complicate the application of the state's criminal law and produce serious grading

irrationalities, they do not solve the problem of legislators who have a need to show their constituents that they are indeed aware of and enthusiastic to respond to a crime problem that constituents are concerned about. While amending the criminal code may be a poor method of effective crime control, legislators ought to have available to them some means by which they can show their concern for crime problems perceived by their constituents. And, as a practical matter, the pressure for unhelpful crime bills can be reduced if some other mechanism is available to legislators to signal interest in their constituent's concern about crime.

One means of doing this might be to create an official commentary to the criminal code. Any code reform project inevitably would do so, but the thought here is to give that commentary a continuing permanent official status, such that there is legal significance to amending the commentary in the future. Thus, when a perceived crime problem generates a need for some kind of legislative action, rather than pressing a new, unnecessary crime or a distortion in offense grading, the bill could direct an amendment of the official commentary to "clarify" any ambiguity that might exist with regard to the application of the existing law. For example, rather than creating a new, more specific redundant offense covering the "crime du jour," the commentary might be amended instead with language that makes it clear that the existing offense does indeed cover the "crime du jour" conduct of present concern.¹²⁴ The official commentary might make it clear, for example, that the conduct of throwing an object into a roadway¹²⁵ really is included in and prohibited by the existing offense of "recklessly endangering another person,"¹²⁶ that destroying property in a field¹²⁷ really is an instance of the existing offense of criminal mischief,¹²⁸ and that carjacking¹²⁹ really is an instance existing offense of robbery with a threat of serious bodily injury.¹³⁰

The official commentary and its amendments would not have illusory power. They would indeed serve as a standing statement of legislative intent on the meaning of the offense that the courts would be obliged to take into account in their interpretation of any ambiguities in the language of the offense definition.¹³¹

VII. Conclusion

We concede that some of the proposals above call for an ambitious reform program, but we think the reputation of Pennsylvania's criminal law is well worth the investment. As noted above in Part III, its reputation for doing justice – no more, no less – has both ethical and practical crime-control importance. A rational grading scheme that 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 punishing less serious offenses that should be spent punishing more serious offenses.¹³²

We think any project to improve the rationality of the state's offense grading would be an important one, and we stand ready to offer any assistance that we can.

NOTES

*. Professor Paul H. Robinson, Thomas Gaeta, Matthew Majarian, Alberto Medrano, Megan Schultz, Phontip Tanompongphandh, Douglas M. Weck, and Katherine Zlock. The authors thank the University of Pennsylvania Law School for its financial support of the data collection for this study.

1. Stewart J. Greenleaf, Chair, Mary Jo White, Vice Chair, Daylin Leach, Minority Chair, Joseph B. Scarnati III, ex-officio; Majority Members: Patrick M. Browne, Jane M. Earll, John R. Gordner, Jane Clare Orie, Jeffrey E. Piccola, John C. Rafferty Jr.; Minority Members: Lisa M. Boscola, Jay Costa, Wayne D. Fontana, Michael J. Stack; Committee Counsel Gregg Warner.

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3. Act of December 6, 1972, P.L. 1482, No. 334 (codified as amended) at 18 Pa. Cons. Stat. §§2101 to 7661 (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 different grades of the offense that it recognizes.

4. 18 Pa. Cons. Stat. §106 (2009).

5. 18 Pa. Cons. Stat. (2008). Each separate grade for a conduct is counted as a separate offense.

6. 18 Pa. Cons. Stat. §5111(a) (2009).

7. Mean = 3.19, Mode = 3, SD = 1.283 (see Appendix F, item A107); 18 Pa. Cons. Stat. §§3902; 3903(a1),(b) (2009) (consolidated theft provisions).

8. 18 Pa. Cons. Stat. §5111(a) (2009).

9. 18 Pa. Cons. Stat. §4116(b) (2009).

10. Mean = 1.23, Mode = 0, SD = 21.142 (see Appendix F, item A36); 18 Pa. Cons. Stat. §§3902; 3903(a1),(b) (2009) (consolidated theft provisions).

11. 18 Pa. Cons. Stat. §4116(b) (2009).

12. 18 Pa. Cons. Stat. §7613 (2009).
13. Mean = 1.41, Mode = 1, SD = 1.413 (see Appendix F, item A22); 18 Pa. Cons. Stat. §2709(a), (c) (2009).
14. 18 Pa. Cons. Stat. §7613 (2009).
15. 18 Pa. Cons. Stat. §3311(a), (b)(2) (2009).
16. Mean = 3.63, Mode = 3, SD = 1.659 (see Appendix F, item A97); 18 Pa. Cons. Stat. §3701(a)(v) (2009) (robbery).
17. 18 Pa. Cons. Stat. §3311(a), (b)(2) (2009).
18. 18 Pa. Cons. Stat. §5902(b)(4)-(8) (2009).
19. Mean = 2.32, Mode = 0, SD = 2.005 (see Appendix F, item A87); 18 Pa. Cons. Stat. §§3902; 3903(a1), (b) (2009) (consolidated theft).
20. 18 Pa. Cons. Stat. §5902(b)(4)-(8) (2009).
21. 18 Pa. Cons. Stat. §7615 (2009).
22. Mean = 1.36, Mode = 1, SD = 1.147 (see Appendix F, item A57); 18 Pa. Cons. Stat. §550 (a), (b) (disorderly conduct) (2009).
23. 18 Pa. Cons. Stat. §7615 (2009).
24. 18 Pa. Cons. Stat. § 2902(a)(2) (2009) (Unlawful Restraint: knowingly “holds another in a condition of involuntary servitude.”).
25. Mean = 7.11, Mode = 7, SD = 1.486 (see Appendix F, item A16); 18 Pa. Cons. Stat. §2702(a)(1) (2009) (aggravated assault).
26. 18 Pa. Cons. Stat. § 2902(a)(2) (2009).
27. One might argue that many of the survey items are cases in which the maximum of the offense does not apply, 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 offenses that could be more or less aggravated.

28. 18 Pa. Cons. Stat. §6111(g)(3) (2009).
29. Mean = 3.05, Mode = 3, SD = 1.709 (see Appendix F, item B44); 18 Pa. Cons. Stat. §§3902; 3903(a1),(b) (2009) (consolidated theft provisions).
30. 18 Pa. Cons. Stat. §6111(h)(1) (2009).
31. 18 Pa. Cons. Stat. §4915(a)(2) (2009).
32. Mean = 2.56, Mode = 1, SD = 1.934 (see Appendix F, item B25); 18 Pa. Cons. Stat. §2701 (a), (b) (2009) (simple assault).
33. 42 Pa. C.S. §9718.3 (2009).
34. 42 Pa. C.S. §9718.2 (2009).
35. Mean = 6.23, Mode = 6, SD = 1.601 (see Appendix F, item B23); 18 Pa. Cons. Stat. §3124.1 (2009) (sexual assault).
36. 42 Pa. C.S. §9718.2 (2009).
37. 18 Pa. Cons. Stat. §3212(b) (2009).
38. 18 Pa. Cons. Stat. §4304(a) (2009). (C19.)
39. 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 prevents this with its §1.07. Although the Pennsylvania Code is based upon the Modal 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, the offenses merge. *Id.* The rule tracks part of Modal Penal Code §1.07: “An 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.” §1.07(a).
40. 18 Pa. Cons. Stat. §3309 (2009).

41. 18 Pa. Cons. Stat. §3304 (2009).
42. (C4.)
43. 18 Pa. Cons. Stat. §2714 (2009).
44. 18 Pa. Cons. Stat. §§3121(4), 905 (2009).
45. (C12.)
46. 18 Pa. Cons. Stat. §2707(a) (2009).
47. 18 Pa. Cons. Stat. §2705 (2009).
48. (C1.)
49. 18 Pa. Cons. Stat. §3702 (2009).
50. 18 Pa. Cons. Stat. §3701(a)(v) (2009).
51. (C28.)
52. See text accompanying notes 96-102 *infra*.
53. 42 Pa. Cons. Stat. §9718.2 (2009).
54. *Id.*
55. Mean = 7.34, Mode = 7, SD = .805 (see Appendix F, item D11a).
56. Mean = 3.10, Mode = 3, SD = 1.727 (see Appendix F, item D11b).
57. 18 Pa. Cons. Stat. §2903 (2009). In *Appeal of T.G.*, 2003 PA Super 436 (2003), the Superior Court held that evidence that a 14 year old took a six year old inside her house, pulled her hair, and kept her inside when she was crying to leave for less than a half hour, was sufficient for a finding of false imprisonment.
58. Mean = 7.21, Mode = 7, SD = 1.187 (see Appendix F, item D4a).
59. Mean = 2.24, Mode = 1, SD = 2.086 (see Appendix F, item D4b).
60. 18 Pa. Cons. Stat. §6312(c) (2009).
61. *Id.*
62. Mean = 5.63, Mode = 7, SD = 1.987 (see Appendix F, item D9a)

63. Mean = 2.82, Mode = 3, SD = 2.045 (see Appendix F, item D9b).
64. 18 Pa. Cons. Stat. §3930(a) (2009).
65. *Id.*
66. Mean = 2.24, Mode = 1, SD = 1.636 (see Appendix F, item D18a).
67. Mean = 5.70, Mode = 5, SD = 1.445 (see Appendix F, item D18b).
68. 18 Pa. Cons. Stat. §4108(a) (2009).
69. *Id.*
70. Mean = 1.84, Mode = 2, SD = 1.082 (see Appendix F, item D17a).
71. Mean = 4.73, Mode = 5, SD = 1.078 (see Appendix F, item D17b).
72. 18 Pa. Cons. Stat. §§3902, 3903 (2009) (consolidated theft provisions).
73. 18 Pa. Cons. Stat. §3921.1 (2009). (E11.)
74. 18 Pa. Cons. Stat. §§3902, 3903 (2009) (consolidated theft provisions).
75. 18 Pa. Cons. Stat. §3929 (2009). (E2.)
76. 18 Pa. Cons. Stat. §§3902, 3903 (2009) (consolidated theft provisions).
77. 18 Pa. Cons. Stat. §7614 (2009). (E11.)
78. 18 Pa. Cons. Stat. §2701(a) (2009) (simple assault).
79. 18 Pa. Cons. Stat. §2702 (2009) (aggravated assault).
80. 18 Pa. Cons. Stat. §2702(a) (2009) (aggravated assault).
81. 18 Pa. Cons. Stat. §3301(a) (2009).
82. 18 Pa. Cons. Stat. §3302(a) (2009).
83. 18 Pa. Cons. Stat. §4952(b)(1) (2009).
84. 18 Pa. Cons. Stat. §5124 (2009).
85. 18 Pa. Cons. Stat. §5126 (2009).
86. 18 Pa. Cons. Stat. §4910 (2009).

87. *Id.*

88. 18 Pa. Cons. Stat. §§3902, 3903 (2009) (Value below \$50 (third degree misdemeanor), \$50-\$199.99 (second degree misdemeanor), \$200-\$2,000 (first degree misdemeanor), and \$2,000-plus (third degree felony)).

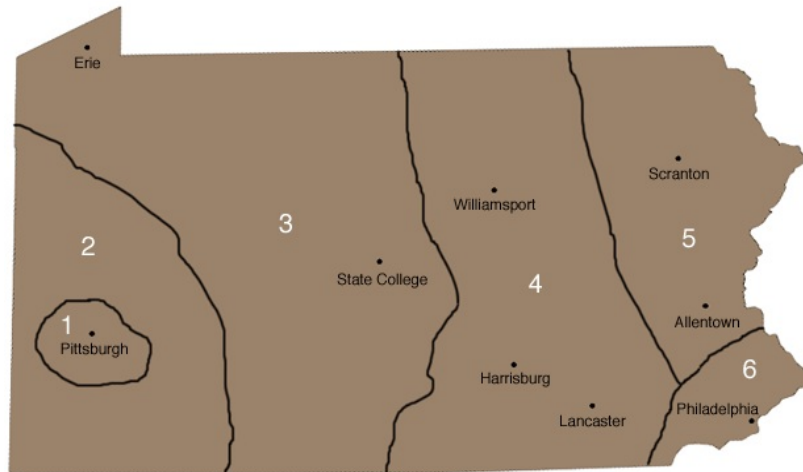
89. 18 Pa. Cons. Stat. §7613 (2009).

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

91. Mechanical Turk is a service operated by Amazon.com, 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.

92. Craigslist 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.

93.



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

	Code Designated Grade	Max Punishment
	[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

95. 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 we chose an 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 possible applications of the offense.

96. Subjects were given an opportunity to categorize additional 55 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.

97. All responses other than “I do not understand the test offense” were included in the analysis.

98. 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.

99. 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 and John Darley, *Intuitions of Justice: Implications for Criminal Law and Justice Policy*, 81 S. Cal L. Rev. 1 (2007); Paul H. Robinson, Geoff P. Goodwin, and Michael Reisig, *The Disutility of Injustice* (forthcoming 2010), available at <http://ssrn.com/abstract=1470905>.

100. 18 Pa. Cons. Stat. § 3302 (2009) (Causing or risking catastrophe): A person who causes a catastrophe by any means of causing potentially widespread injury commits a felony of the first degree if he does so knowingly or a felony of the second degree if he does so recklessly.

101. See, e.g., 18 Pa. Cons. Stat. §503 (2009) (Justification generally): "(a) General rule.-- Conduct 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; ..."

102. 18 Pa. Cons. Stat. §5511(c) (2009).

103. Compare 18 Pa. Cons. Stat. §3701(a)(1)(v) with 18 Pa. Cons. Stat. §5511(c). This example is similar to a recent Pennsylvania case involving theft of a dog, *Commonwealth v. Grimes*, 2009 Pa. Super. LEXIS 3758 (2009).

104. The presence of sentencing guidelines in Pennsylvania does not fix the problem of inappropriately graded offenses. This is because Pennsylvania's sentencing guidelines are voluntary. A judge with idiosyncratic views of the offense at hand could disregard the guidelines entirely and give a sentence that is too low or too high based on his own views of the seriousness of the crime, rather than the legislatures'. 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.

105. The average cost of incarceration in 2008 was approximately \$100 per prisoner per day. *I in 31: The Long Reach of American Corrections - Pennsylvania*, (Pew Center on the States, Washington D.C.) Mar 24, 2008. In all, the Commonwealth spent over \$1.6 billion on prison costs, approximately 6.7% of all Commonwealth spending. *Id.*

106. 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 ? infra.

107. See Paul H. Robinson & Michael T. Cahill, *The Accelerating Degradation of American Criminal Codes*, 56 *Hasting L.J.* 633 (2005) (discussing degradation of the American Criminal code, the politics that drives degradation, and how and how criminal codes can be improved).

108. 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 Paul H. Robinson, Michael T. Cahill, & Usman Mohammad, *The Five Worst (and Five Best) American Criminal Codes*, 95 *Nw. U. L. Rev.* (2000) (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.

109. 18 Pa. Cons. Stat. §3307(a)(2) & (b) (1982) (Institutional vandalism): “Offenses Defined – 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 or the third degree if the actor causes pecuniary loss in excess of \$5,000...Otherwise, institutional vandalism is a misdemeanor of the second degree.” The 1982 version of the law is available at: <http://www.palrb.us/pamphletlaws/19001999/1982/0/act/0154.pdf>.

110. 18 Pa. Cons. Stat. §5509(a)(1) (2009) (Desecration, theft or sale of venerated objects): “Offense Defined – A person commits a misdemeanor of the second degree if he...intentionally desecrates any public monument or structure, or place of worship or burial...”

111. 18 Pa. Cons. Stat. §3307(b) (1988) (Institutional vandalism): “Grading – An 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 [added text in italics].”

112. 18 Pa. Cons. Stat. §905(a) (2009) (Grading of criminal attempt, solicitation and conspiracy): Grading– Except 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 . . .

113. 18 Pa. Cons. Stat. §3121(b) (2009) (Rape): Additional Penalties– In 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 . . .

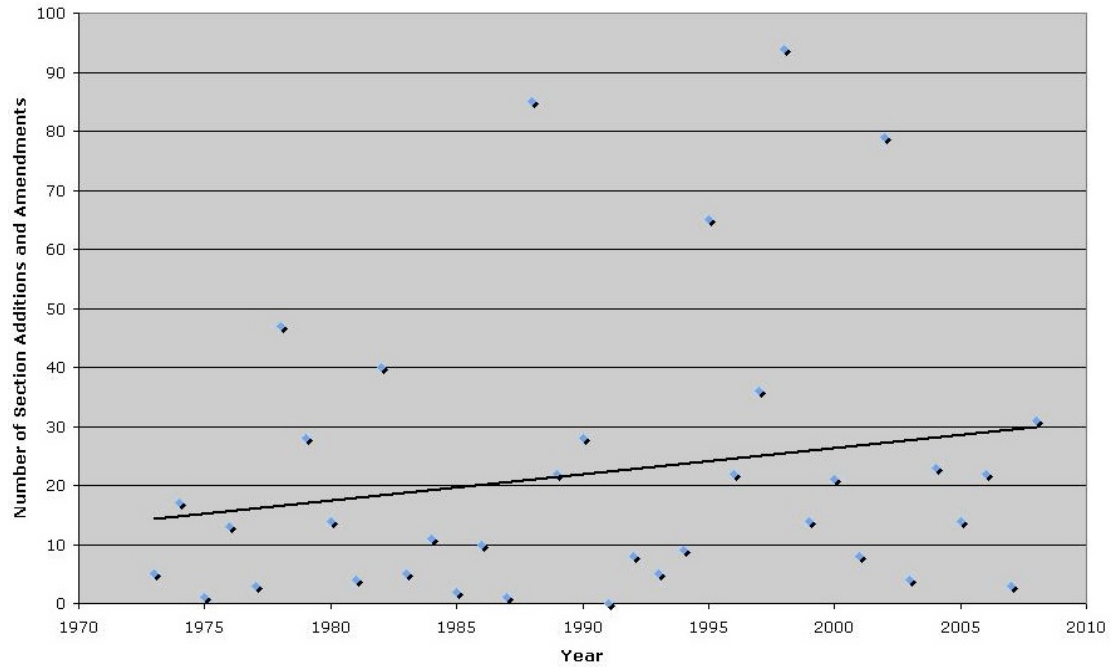
114. 18 Pa. Cons. Stat. §2714 (2009) (Unauthorized Administration of an Intoxicant): A person commits a felony of the third degree when, with intent to commit an offense under section 3121(a)(4) . . . he or she substantially impairs the complainant’s power to appraise or control his or her conduct by administering, without the knowledge of the complainant, drugs or other intoxicants.

115. See Act of December 6, 1972, P.L. 1482, No. 334 (codified as amended at 18 Pa. Cons. Stat. §§2101 to 7661 (2009); 18 Pa. Cons. Stat. (2008). Each separate grade for a conduct counted as a separate offense.

116. See *infra*, at note ?, for our methodology in counting offense-related amendments to the criminal code.

117.

Title 18 Legislative Activity



The above scatter plot measures the number of criminal law amendments and additions by the PA 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. See *supra*, note ?, for our methodology in counting the amendments and additions represented.

118. 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 code, but reduced its size to close to 1974 levels. The Kentucky Penal Code Revision Project’s report is available at: <http://www.law.upenn.edu/fac/phrobins/kentucky/KYFinalReportVol1.pdf> (volume 1); <http://www.law.upenn.edu/fac/phrobins/kentucky/KYFinalReportVol2.pdf> (volume 2). 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! The Illinois Criminal Code Rewrite and Reform Commission’s Report is available at: <http://www.law.upenn.edu/fac/phrobins/illinois/IL%20final%20report%20Vol1.pdf> (volume 1); <http://www.law.upenn.edu/fac/phrobins/illinois/IL%20final%20report%20Vol2.pdf> (volume 2).

119. For a detailed discussion of political obstacles facing penal code reform and ways to overcome them, *see* Robinson & Cahill, *The Accelerating Degradation of American Criminal Codes*, at 645-652.

120. 35 Pa. Cons. Stat. §780-113 (LexisNexis 2009).

121. This is also a problem in other states. *See* Robinson & Cahill, *Accelerating Degradation*, at 636 (discussing instances of serious crimes occurring outside the criminal codes in Illinois and Kentucky).

122. Examples of this problem might be seen in archaic criminal codes such as 18 Pa. Cons. Stat. §7361 (2009) (prohibiting any “worldly employment or business whatsoever” on Sunday); 18 Pa. Cons. Stat. §7104(a) (2009) (prohibiting fortune-telling), and 18 Pa. Cons. Stat. §7105 (2009) (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. *See* Appendix F, item A25 (Mode of 0).

123. For more on a standing criminal law commission, *see* Robinson & Cahill, *Accelerating Degradation*, at 653-54.

124. A similar but related problem occurs with the passage of broad offenses which 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. §2705. Despite this commentary, the legislature concurrently reenacted existing specific prohibitions. These included the disposal of a refrigerator in a place accessible to children, 18 Pa. Cons. Stat. §6502, allowing a light to dangerously interfere with train signals, 18 Pa. Cons. Stat. §6909, and the sale of gasoline in a glass container, 18 Pa. Cons. Stat. §7305. In each case, the older, specific statute provides for a lower grade than the broad, 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.

125. 18 Pa. Cons. Stat. §2707 (2009) (Propulsion of missiles into an occupied vehicle or onto a roadway).

126. 18 Pa. Cons. Stat. §2705 (2009).

127. 18 Pa. Cons. Stat. § 3309(a)(b) (Agricultural vandalism): “intentionally or recklessly defaces, marks or otherwise damages the real or tangible personal property of another, where the property defaced, marked or otherwise damaged is used in agricultural activity or farming....felony of the third degree if the actor intentionally causes pecuniary loss in excess of \$ 5,000, a misdemeanor of the first degree if the actor intentionally causes pecuniary loss in excess

of \$ 1,000 or a misdemeanor of the second degree if the actor intentionally or recklessly causes pecuniary loss in excess of \$500. Pecuniary loss includes the cost of repair or replacement of the property affected. Otherwise, agricultural vandalism is a misdemeanor of the third degree.”

128. 18 Pa. Cons. Stat. § 3304(a)(5), (b) (2009) (Criminal mischief): “intentionally damages real or personal property of another...felony of the third degree if the actor intentionally causes pecuniary loss in excess of \$5,000, or a substantial interruption or impairment of public communication, transportation, supply of water, gas or power, or other public service. It is a misdemeanor of the second degree if the actor intentionally causes pecuniary loss in excess of \$1,000, or a misdemeanor of the third degree if he intentionally or recklessly causes pecuniary loss in excess of \$ 500 or causes a loss in excess of \$150 for a violation of subsection (a)(4). Otherwise criminal mischief is a summary offense.”

129. 18 Pa. Cons. Stat. §3702 (passed in 1993) (Robbery of motor vehicle): “felony of the first degree if he steals or takes a motor vehicle from another person in the presence of that person or any other person in lawful possession of the motor vehicle.”

130. 18 Pa. Cons. Stat. §3701(a)(1)(iii) (2009) (Robbery with a threat of serious bodily injury): “guilty of robbery if, in the course of committing a theft...threatens another with or intentionally puts him in fear of immediate serious bodily injury...” Two decades after passage of the crimes code, the legislature enacted a new statute providing 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. 18 Pa. Cons. Stat. §3701(a)(1)(ii) (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. 18 Pa. Cons. Stat. §3701(b).) Despite receiving 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 less nuance 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.

131. For further discussion of the use of an official commentary, see Paul H. Robinson and Michael T. Cahill, *The Accelerating Degradation of American Criminal Codes*, 56 *Hastings L. J.* 633, 654-55 (2005).

132. See Part III *supra*.