February 2014

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Available at: http://scholarship.law.nd.edu/ndlr/vol73/iss3/14
PAUL H. ROBINSON'S CRIMINAL LAW

Robert Batey*

Paul H. Robinson ranks among America's foremost professors of criminal law. Beginning his teaching career at Rutgers University School of Law-Camden, where he rose to the rank of distinguished professor and was briefly acting dean, Robinson moved to Northwestern University School of Law in 1993, after serving two rather controversial years on the United States Sentencing Commission. One of the founders of the Criminal Law Forum, he now advises the Journal of Criminal Law and Criminology. More important though than this enviable record of service is Robinson's extraordinary scholarship. Not yet fifty, he has produced a score of significant law review articles, a two-volume treatise on criminal law defenses, a casebook, and with a co-author, a remarkable book-length synthesis of legal analysis and behavioral science. So the appearance in 1997 of a single-volume treatise entitled Criminal Law promised much: that Robinson would

* Professor, Stetson University College of Law. Gary Cors and Keith Hammond, second-year students at Stetson, provided research assistance; my colleague Mark Brown commented helpfully on an early draft of the review. All errors are of course my own responsibility.

1 Compare Dissenting View of Commissioner Paul H. Robinson on the Promulgation of Sentencing Guidelines by the United States Sentencing Commission (May 1, 1987), with Preliminary Observations of the Commission on Commissioner Robinson's Dissent (May 1, 1987).


3 PAUL H. ROBINSON, FUNDAMENTALS IN CRIMINAL LAW (2d ed. 1995).

4 PAUL H. ROBINSON & JOHN M. DARLEY, JUSTICE, LIABILITY AND BLAME: COMMUNITY VIEWS AND THE CRIMINAL LAW (1995), reviewed in Christopher Slobogin, Is Justice Just Us? Using Social Science to Inform Substantive Criminal Law, 87 J. CRIM. L. & CRIMINOLOGY 315, 316 (1996) (["T"]he book is a major breakthrough in the application of the scientific method to criminal law issues, and should be viewed both as a rich source of ideas for criminal theory and as a model for interdisciplinary work.").

5 PAUL H. ROBINSON, CRIMINAL LAW (1997).
turn his formidable intellect toward the concerns of the primary users of one-volume comprehensive treatises, students and teachers.

That these are the readers Robinson hoped would benefit from his work is apparent in the treatise's first paragraph, listing the purposes of the volume:

The book's three primary goals are all typical of what a teacher would think important in a treatise: It seeks to convey, first, a description of the existing rules of American criminal law; second, an understanding of each rule, its application, and the reasoning behind it; and, third, a conceptual framework of criminal law that explains the interrelations among the rules.\textsuperscript{6}

Unfortunately,\textsuperscript{7} the work fails to satisfy any of these purposes. The treatise's most serious defect is its failure fully to "describe... the existing rules of American criminal law."\textsuperscript{8} Robinson's book flatly equates the Model Penal Code to contemporary American criminal law, overlooking the wide (and expanding) divergence between the American Law Institute's thirty-five year old work product and today's criminal statutes. Less serious, but still troubling, are the recurring deficiencies in the treatise's explications of the Code's rules, particularly its culpability provisions, of which Robinson has given strained readings since the publication of one of his first major articles in 1983.\textsuperscript{9} Finally, in attempting to provide a coherent "conceptual framework" for its subject, Robinson's treatise distorts the inevitable incoherence of an everchanging body of law; round pegs end up in square holes, in order to accommodate a systematic conception of criminal law that deprives it of most of its vitality and interest.

These defects in Robinson's work have a greater significance, for they symbolize similar defects in the criminal law professoriate. It is relatively easy to teach the Model Penal Code as if it were the law everywhere; further, the professor acquires a patina of prestige from teaching "national" as opposed to merely "local" law. There is also a certain enjoyment in splitting hairs in class about the meaning of particular Code provisions, even though one knows that the students are never likely to encounter their language again. And God knows law professors love to develop conceptual frameworks, systems to explain

\textsuperscript{6} Id. at xv.

\textsuperscript{7} I consider myself among the unfortunate. I did not volunteer for this assignment. Instead, a "friend" suggested my name to the editors of the \textit{Notre Dame Law Review}. I agreed to write this book review before I had even cracked the spine of Robinson's treatise. I truly wish I could have liked the book more.

\textsuperscript{8} ROBINSON, \textit{supra} note 5, at xv.

every nuance of every decision. One aim of this review is to suggest that criminal law teachers think twice before succumbing to these temptations.

I

The most serious problem students and teachers will have in using Criminal Law is that it does not adequately present "the existing rules of American criminal law." With relatively few exceptions, Robinson devotes his treatise to a study of the Model Penal Code, because "the Model Penal Code now represents American criminal law as much or more than does any other code." This artfully crafted sentence is certainly correct, for if one could teach only one set of statutes, the Model Penal Code would be the best one to select. But of course law teachers are not constrained in this way: statutes and rules from more than one jurisdiction may be selected to give students a more rounded picture of the law in all jurisdictions. If a treatise (or a teacher) commits to describing American criminal law, the coverage must go beyond the Model Penal Code.

To support his claim that the Code represents current American law, Robinson cites the American Law Institute itself for the proposition that "The Model Penal Code has served as a basis for wholesale replacement of existing criminal codes in over two-thirds of the states." "[W]holesale replacement" is an overstatement, as others have recognized. For example, the American Law Institute claims Florida (where I teach) as a state whose criminal statutes have been substantially affected by the Code, yet one will search the Florida Statutes in vain for anything analogous to Part I of the Code, its general provisions. There is nothing like section 2.02, "General Principles of Culpability," which may be considered the heart of the Model Penal Code, nor is there a statutory definition of insanity, another of the Code's most celebrated sections. There are no general sections on necessity, duress, mistake, or intoxication. The statutory provisions regarding justification defenses, accomplice liability, and inchoate offenses bear little resemblance to the Code's provisions. While Florida

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10 See supra text accompanying note 6.
11 ROBINSON, supra note 5, at xv.
12 Id. at 68 n.13 (citing 1984 A.L.I. ANN. REP. 21); see also id. at xv, 69.
13 "A few of the states in which new legislation has been enacted have adopted only minor revisions, essentially retaining the common-law orientation of their previous codes." RICHARD J. BONNIE ET AL., CRIMINAL LAW, at A-3 (1997). Robinson mutedly acknowledges the point. ROBINSON, supra note 5, at 68.
14 See ROBINSON, supra note 5 at 70 (identifying "a General Part" as one of the "hallmarks" of "[m]odern criminal codes").
may have adopted some of the Code’s definitions of specific crimes, to say that its mishmash of randomly enacted statutes and court-made rules resembles the Code is false. One wonders how many other states on the American Law Institute’s list fall into this category.

A better quick index of the Code’s influence might be how many jurisdictions have adopted versions of section 2.02, which defines the four levels of culpability used under the Code: purpose, knowledge, recklessness, and negligence. The official commentary to the Code reveals that the states are about evenly split, with populous jurisdictions like California, Florida, and Michigan left with no such provision. And of course the largest jurisdiction of all, the federal government, has nothing like section 2.02.

Yet Robinson assumes that the Code’s provisions are the law in America, with scant discussion of other options. Emblematic of this overemphasis on the Model Penal Code is the treatise’s early treatment (in its first section) of the “de minimis infraction” defense created by section 2.12 of the Code. Robinson cites this provision as evidence that “[c]riminal law addresses only harms of a sufficient seriousness.” Nowhere in this discussion, nor in the several subsequent mentions of the section 2.12, does the treatise bother to note that only five American jurisdictions have adopted it.

Robinson’s excessive attention to the Model Penal Code is highlighted by his occasional deflections from it, which point toward what the treatise might have been. The most notable of these fuller treatments is his section on the insanity defense, which discusses not only the Code’s test for insanity, but also the M’Naghten rule, its irresistible-

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16 Wyoming, also claimed by the American Law Institute, provides another somewhat less stark example: “[T]he Wyoming Criminal Code of 1982... represented in some instances a thorough re-working of previous criminal statutes, often influenced strongly by the Model Penal Code and other contemporary criminal law reform proposals, while in others the Criminal Code merely reenacted the language of the old criminal statutes.” Theodore E. Lauer, Burglary in Wyoming, 32 LAND & WATER L. REV. 721, 741 (1997).


18 ROBINSON, supra note 5, at 6.

19 Id. at 56, 96–97, 132–33, 515 n.30, 783 n.7.


21 ROBINSON, supra note 5, at 509–19.
impulse corollary, the federal statutory standard, the Durham test, the guilty-but-mentally-ill verdict, and the option of abolishing the insanity defense. The reader thus gets a good sense of the range of insanity defense law in the United States today.

But even in this more balanced section, Robinson cannot resist overselling the Model Penal Code's insanity defense, which has been in eclipse since the not-guilty verdict in the trial of John Hinckley: \(^{22}\) "The [Code] test has gained wide acceptance, rivaling or surpassing the popularity of McNaghten and McNaghten-plus-irresistible-impulse formulations." \(^{23}\) As authority for this proposition Robinson cites his 1984 treatise on criminal defenses, \(^{24}\) but the current supplement to this work (not prepared by Robinson) indicates that a number of the states cited as Model Penal Code jurisdictions in 1984 have since switched to variations on the M'Naghten rule. \(^{25}\) Unwarranted emphasis on the Model Penal Code test results in the treatise's slighting some important questions under M'Naghten (which most authorities recognize as the majority view today \(^{26}\)), such as uncertainty whether the test applies to knowledge of the legal or moral wrongfulness of one's behavior. \(^{27}\)

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23 Robinson, supra note 5, at 515 (footnote omitted).
24 Id. at 515 n.28. Robinson cites "2 Paul H. Robinson, Criminal Law Defenses § 173(a) n.2 (1984)," but the relevant footnote is note 4.
26 See Wayne R. LaFave & Austin W. Scott, Jr., Criminal Law 312 (2d ed. 1986); Dressler, supra note 22, at 317.
27 A passing reference to this issue appears in a footnote. See Robinson, supra note 5, at 514 n.26. For a recent case dealing with this question, see State v. Wilson, 700 A.2d 633 (Conn. 1997). More space might also have been devoted to the supposed "high standard" set by the irresistible-impulse test, which is asserted in the text, see Robinson, supra note 5, at 517, but questioned in a preceding footnote, see id. at 515 n.27, and to the relationship between the insanity defense and civil commitment. On the latter point, Robinson asserts, "The answer to the problem of dangerous but insane offenders lies not in the perversion of the insanity defense but rather in the adoption of civil commitment standards and procedures that will adequately protect the public." Id. at 519. As an example of such standards and procedures, he cites Jones v. United States, 463 U.S. 354 (1983), see Robinson, supra note 5, at 519 n.43, a case some have condemned as a perversion of the process of civil commitment, see Peter Margulies, The "Pandemonium Between the Mad and the Bad": Procedures for the Commitment and Release of Insanity Acquittees After Jones v. United States, 36 Rutgers L. Rev. 793 (1984); Winsor C. Schmidt, Jr., Supreme Court Decision Making on Insanity Acquittees Does Not Depend on Research Conducted by the Behavioral Science Community: Jones v. United States, 12 J. Psychiatry & L. 507 (1984). This approach begs the question why one body of law should be sullied so that another may remain pure.
Stressing the Code's insanity test is perhaps justifiable because of its superiority to the other tests available (though many would disagree about which test is best).28 Robinson seems to generalize this point into an argument that the Model Penal Code is superior to other law, which might in turn justify his emphasis on it. But his repeated criticisms of the Code's provisions belie this implicit claim. After stating that section 2.03, on causation, is "probably the only major provision that is analytically flawed,"29 Robinson directly and indirectly questions scores of the Code's provisions, including those on involuntariness,30 omissions,31 element analysis,32 concurrence of the act and mental requirements,33 purpose applied to a circumstance element,34 culpability in general (to which Robinson suggests "a few revisions"),35 applying a stated culpability to all elements of the offense,36 mistake,37 intoxication,38 accomplice liability,39 committing crime through an innocent agent,40 defenses to complicity,41 causing the conditions of one's defense,42 mistaken belief in justifying facts,43 choice-of-evils,44 the public authority defense,45 self-defense,46 unknown justification,47 a subjectivized standard of reasonableness,48 the statute of limitations,49 punishing attempts,50 the mental require-

28 Cf. BONNIE ET AL., supra note 13, at 454–56 (noting criticisms of and deviations from the Model Penal Code test after the Hinckley verdict); DRESSLER, supra note 22, at 322 (incorporating in a list of criticisms of the Code test criticism of any test with a volitional prong); LAFAVE & SCOTT, supra note 26, at 329–32 (listing criticisms of the Code test).
29 ROBINSON, supra note 5, at 169.
30 Id. at 185, 500.
31 Id. at 194, 196, 201 n.41.
32 Id. at 211 n.15 ("[I]n no event can I ignore the Model Penal Code's implementation of element analysis is admitted to be seriously flawed in many respects."); see also id. at 232, 340.
33 Id. at 217–18.
34 Id. at 222–23.
35 Id. at 235–38.
36 Id. at 238–42, 341–42 & n.14, 389–90.
37 Id. at 264.
38 Id. at 310 n.8.
39 Id. at 329, 331–32.
40 Id. at 340–43.
41 Id. at 348 & n.13, 354 n.32.
42 Id. at 391.
43 Id. at 390 & nn.12–13, 391–94 & n.21, 463–64.
44 Id. at 412 n.11, 413 & n.15.
45 Id. at 426–27 & n.9.
46 Id. at 439, 441–42.
47 Id. at 474.
48 Id. at 538–39 & n.26.
49 Id. at 577–78.
ments for attempt\textsuperscript{51} and conspiracy,\textsuperscript{52} Wharton's Rule,\textsuperscript{53} the relationship between conspiracy and complicity,\textsuperscript{54} conspiracies with multiple objectives,\textsuperscript{55} impossibility,\textsuperscript{56} renunciation,\textsuperscript{57} the mental requirement for homicide,\textsuperscript{58} felony murder,\textsuperscript{59} aggravated assault,\textsuperscript{60} rape,\textsuperscript{61} causing a catastrophe,\textsuperscript{62} burglary,\textsuperscript{63} the grading of robbery and theft,\textsuperscript{64} unlawfulness as an element of theft,\textsuperscript{65} and theft's mental requirement.\textsuperscript{66} After identifying so many flaws, one can hardly claim that the Model Penal Code deserves exclusive focus because it constitutes "better law."

Of course the Code deserves considerable attention in a treatise (or course) on criminal law, but overemphasizing it sacrifices much. Consequently, the following list of questions that receive short shrift in Robinson's treatise is substantial.

Because the mental requirement for crime concerned the drafters of the Model Penal Code more than the act requirement, the Code's general part gives little concentrated attention to actus reus, and so too does Robinson's treatise. For example, the connections between the principle of legality, the vagueness doctrine, and the construction of criminal statutes, suggested first by Herbert Packer\textsuperscript{67} and later developed by John Jeffries,\textsuperscript{68} receive only superficial treatment.\textsuperscript{69}

\begin{itemize}
\item \textsuperscript{50} Id. at 616, 619, 620, 695.
\item \textsuperscript{51} Id. at 633-34.
\item \textsuperscript{52} Id. at 651-53.
\item \textsuperscript{53} Id. at 646.
\item \textsuperscript{54} Id. at 655-56.
\item \textsuperscript{55} Id. at 665.
\item \textsuperscript{56} Id. at 687-88.
\item \textsuperscript{57} Id. at 697, 700.
\item \textsuperscript{58} Id. at 708 n.4.
\item \textsuperscript{59} Id. at 730-31.
\item \textsuperscript{60} Id. at 739 n.13.
\item \textsuperscript{61} Id. at 752-53, 763-64.
\item \textsuperscript{62} Id. at 774.
\item \textsuperscript{63} Id. at 778.
\item \textsuperscript{64} Id. at 781.
\item \textsuperscript{65} Id. at 784-85.
\item \textsuperscript{66} Id. at 785-86.
\item \textsuperscript{67} See generally Herbert L. Packer, The Limits of the Criminal Sanction 71-102 (1968).
\item \textsuperscript{68} See generally John Calvin Jeffries, Jr., Legality, Vagueness, and the Construction of Penal Statutes, 71 Va. L. Rev. 189 (1985); see also Peter W. Low et al., Criminal Law: Cases and Materials ch. 1 (2d ed. 1986) (coauthored by Jeffries), currently published as Bonnie et al., supra note 13.
\item \textsuperscript{69} Robinson, supra note 5, at 78-85, 87-97. This material includes four pages of hypotheticals and their analyses. See infra text accompanying note 154. It also includes a digression on the lack of legality concerns in discretionary sentencing, which
The treatise’s discussion of the vagueness doctrine gives little guidance as to how to evaluate criminal statutes for potential vagueness, and its treatment of statutory construction is mainly a championing of the Code’s “fair import” rule over the rule of strict construction. 70 Other topics that taken together illuminate thinking about actus reus—voluntariness, liability for omissions, possession, the act requirement for attempt71—are instead parceled out,72 so their congruences are less apparent. Robinson even denigrates the role of the act requirement in drawing these various topics together:

Is act requirement needed? It appears, then, that it is not the act requirement but rather the definition of offenses, including inchoate offenses, that ensures that conduct is sufficiently related to the offense to support liability. . . . Is there value in the “act requirement”? . . . [T]he primary function of the act requirement is to identify those cases where the special rules of possession and omission liability come into play.73

Given this attitude, a teacher who seeks to emphasize the functions served by the criminal law’s act requirement74—or the student who has such an instructor—will find little assistance in Robinson’s treatise.

Another teacher might agree with Robinson that actus reus is relatively unimportant, but might want to emphasize burdens of persuasion. The treatise will not serve this teacher or her students well either because the topic apparently held little fascination for the drafters of Model Penal Code. Robinson’s section on burdens of persuasion75 skims through Mullaney v. Wilbur76 and Patterson v. New York77 in a paragraph, as a sidebar to discussion of the Code’s sections on bur-

70 The fact that I am (perhaps abnormally) interested in these topics has probably affected my perception of Robinson’s coverage; a teacher who glosses over vagueness and construction might find the treatise adequate on them. But I would want to try to convince that teacher that the topics are more important than the treatise and the teacher’s coverage would imply. See generally Robert Batey, Vagueness and the Construction of Criminal Statutes Balancing Acts, 5 VA. J. SOC. POL’Y & L. 1 (1997).
71 See generally LOW ET AL., supra note 68, at 107–91.
72 ROBINSON, supra note 5, at 175–87, 190–205, 281 n.9, 286, 498–506.
73 Id. at 180–81.
74 For a thumbnail sketch of some of these functions, see John Calvin Jeffries, Jr. & Paul B. Stephan III, Defenses, Presumptions, and Burden of Proof in the Criminal Law, 88 YALE L.J. 1325, 1371 n.130 (1979), quoted in BONNIE ET AL., supra note 13, at 217–18.
75 ROBINSON, supra note 5, at 121–27.
dens of persuasion.\textsuperscript{78} This superficiality is telling, for it leads Robinson into error when discussing a facet of strict liability law. He identifies, as an "attractive solution" to the problems generated by liability without fault, a rule that makes negligence the standard but places the burden of persuasion on the defendant. He then asserts that the Supreme Court has prohibited any such rule, with a cross-reference to his section on burdens of persuasion.\textsuperscript{79} While Robinson's statement is literally correct, he should have added that a functional equivalent of his rule—retaining strict liability but making non-negligence an affirmative defense, with the defendant bearing the burden of persuasion—would be fully constitutional under the current interpretation of \textit{Mullaney} and \textit{Patterson}.\textsuperscript{80} Similar affirmative defenses are discussed appreciatively elsewhere in the treatise.\textsuperscript{81}

Regarding causation, the treatise devotes most of its space to applying a variation on section 2.03 of the Code to several fact situations.\textsuperscript{82} Considering this section's spotty record of adoption by the states—\textsuperscript{83} and the even spottier record of the variation Robinson discusses, part of the Proposed Rhode Island Criminal Code—the treatise reader would have been better served by a more balanced treatment of Code and non-Code approaches to causation. Similarly, the treatise's presentation regarding mens rea shortchanges specific and general intent (two paragraphs),\textsuperscript{84} willful blindness (one paragraph),\textsuperscript{85} and liability for negligence (three paragraphs),\textsuperscript{86} again be-


\textsuperscript{79} ROBINSON, \textit{supra} note 5, at 253–54 & n.28.

\textsuperscript{80} \textit{See} Martin v. Ohio, 480 U.S. 228 (1987), \textit{discussed in Dressler}, \textit{supra} note 22, at 58–59.

\textsuperscript{81} ROBINSON, \textit{supra} note 5, at 366, 729–30.

\textsuperscript{82} \textit{Id.} at 153–73, 295–300.


\textsuperscript{84} ROBINSON, \textit{supra} note 5, at 209–10.

\textsuperscript{85} \textit{Id.} at 214–15.
cause section 2.02 of the Code supersedes these topics. But those who teach or hope to practice in the half of America that does not follow section 2.02 are shortchanged as well.

Though the Model Penal Code’s law of accomplice liability has not been widely adopted, Robinson’s treatise focuses on it, thus giving scant attention to interesting questions arising in non-Code jurisdictions. The accomplice’s liability for crimes that are the natural and probable consequences of the principal’s crime receives only two paragraphs of discussion, one in a footnote, while the availability of a defense because the perpetrator is unconvictable gets another two paragraphs discussing only English cases (one of them overruled).

In discussing justification defenses, the treatise systematically downplays non-Code approaches. The section on the choice-of-evils defense mentions some variations from the Model Penal Code approach, but they seem to be afterthoughts despite the fact that

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86 Id. at 216-17. A footnote suggests that “[c]riminal liability sometimes is still permitted for ‘gross negligence’ or a ‘gross deviation’ from the standard of care of a reasonable person,” as if this were a rare occurrence. Id. at 209 n.3. While it may be rare under the Model Penal Code, it is a frequent feature of many jurisdictions’ criminal law. See Low et al., supra note 68, at 218, 242. For a recent example, see State v. Hazelwood, 946 P.2d 875 (Alaska 1997).


88 Robinson, supra note 5, at 321-34, 336-55.

89 Id. at 284 n.19.

90 Id. at 545-47, 346 n.4.

91 Id. at 410-12 (explaining the requirement of an “imminent” threat or that the defendant’s act be “immediately necessary”).

92 There is no effort to identify the jurisdictions that require imminence. While the treatise does produce a list of statutes adopting language of immediate necessity, id. at 410 n.9, the parenthetical years in the statute citations suggest that the list has not been updated since 1984, when the same citations appeared in Robinson’s treatise on criminal law defenses. Robinson, supra note 2, § 124(f), at 57 n.38.

Similar over-reliance on the 1984 treatise is detectable in Robinson’s treatment of non-exculpatory defenses such as immunity and the statute of limitations. Robinson, supra note 5, at 576-97; see also infra note 259. The only post-1984 citations are to subsequent Supreme Court decisions. Robinson, supra note 5, at 594 nn.89-90, 597 n.111. Regarding immunity in particular, discussion of post-1984 lower court cases
most jurisdictions have spurned the Code’s choice-of-evils language.\textsuperscript{93} States have been similarly slow to embrace the Code’s section on the justifiable use of force to enforce the law,\textsuperscript{94} but Robinson looks solely to the Code on this topic,\textsuperscript{95} slighting non-Code law including the constitutional limitations on such force.\textsuperscript{96} On defensive force justifications, most American jurisdictions have not adopted the Code’s limiting provisions;\textsuperscript{97} indeed the trend, as exemplified by statutes like Colorado’s “Make My Day” legislation,\textsuperscript{98} has been to expand the right to defensive force. In addition to ignoring such statutes, the treatise does not consider how non-Code jurisdictions deal with such vexing questions under the “ordinary” law of defensive force such as the esca-


\textsuperscript{95} \textit{Robinson}, \textit{supra} note 5, at 431.


lation of force in a confrontation, the use of deadly force to defend property, and the significance of the availability of retreat.

The treatise’s sections on excuse defenses are somewhat more generous in analyzing non-Code law. As previously noted, Robinson surveys other tests for insanity; the same is true of involuntariness and of entrapment. On other excuses, however, the treatise is less thorough. For example, Robinson treats the invocation of “the person of reasonable firmness” in the Code’s duress defense as if it were a staple of every jurisdiction’s law, even though the official commentary recognizes the language as an innovation—one that has not been widely adopted. Focus on the Model Penal Code simi-

100 Id. at 443, 445. The treatise does say that “all codes bar the use of deadly force in defense of property,” id. at 443, which is quickly contradicted by the acknowledgment that deadly force may be used to protect the habitation, see id. at 445. The recent adoption of statutes expanding the justifiable use of deadly force—for example, Louisiana’s recent legislation allowing deadly force to prevent car theft, see Rick Bragg, In Louisiana, Just Assume It’s a Gun in Their Pockets, N.Y. TIMES, Aug. 31, 1997, § 4, at 5, available in 1997 WL 8001583; Law Allows Louisiana Motorists to Shoot Carjackers, SARASOTA HERALD-TRIB., Aug. 14, 1997, at 11A—suggests that Robinson was limiting his statements to legislation based on the Model Penal Code.
101 Robinson, supra note 5, at 444-45. Again, see supra note 100, Robinson’s language seems to encompass all jurisdictions, but he cites only the Model Penal Code and a case based on it. Robinson, supra note 5, at 444 n.20. Inasmuch as most commentators consider the retreat requirement a minority view, see Bonnie et al., supra note 13, at 352; Dressler, supra note 22, at 203-05, it seems likely that Robinson meant to describe only the law in Code jurisdictions.
102 See supra text accompanying note 21.
103 Robinson, supra note 5, at 498-506. One suspects that the treatise attends to non-Code law on hypnosis as producing involuntary conduct largely because Robinson finds the Code too liberal on this point. Id. at 502-04.
104 Id. at 600-09. But the discussion of non-Code entrapment law has surprising gaps: there is no treatment of entrapment as a matter of law, especially regarding Jacobson v. United States, 503 U.S. 540 (1992), and only one paragraph on the due process defense. Robinson, supra note 5, at 605-06.
105 Robinson, supra note 5. at 488, 493-94.
106 Cf. Model Penal Code and Commentaries § 2.09 (Official Craft 1985). Prior to the Code’s promulgation, apparently only Texas’ duress statute referred to “a person of ordinary firmness.”
larly leads to all-too-brief discussions of addiction,\textsuperscript{108} intolerable prison conditions,\textsuperscript{109} and being battered\textsuperscript{110} as constituents of excuse defenses. The section on mistake of law fails to discuss the limited extent to which reliance on an official misstatement of law constitutes a defense in non-Code jurisdictions,\textsuperscript{111} as well as the penchant of the federal courts to read mistake of law defenses into criminal statutes.\textsuperscript{112} This same section briefly mentions jury nullification, sentencing, and prosecutorial discretion as possible "amelioration[s]" of rules limiting mistake of law as a defense\textsuperscript{113}—a placement that de-emphasizes the impact these processes have on all affirmative defenses, from choice-of-evils to duress.\textsuperscript{114}

The Model Penal Code deeply influences the treatise's analysis of attempt, especially the Code's controversial embrace of "subjective" liability for inchoate crimes, to the point of punishing attempts to the same degree as the completed crime because of the primary importance of the actor's intent.\textsuperscript{115} Robinson acknowledges that most jurisdictions have refused to follow the Code on this matter,\textsuperscript{116} but still overemphasizes its provisions at the expense of contrary law. The treatise's section on the act requirement for attempt, for example, does mention the principal non-Code tests,\textsuperscript{117} but downplays one of their major rationales, the desire to preserve a realm of conduct free


\textsuperscript{108} ROBINSON, supra note 5, at 531.

\textsuperscript{109} The treatise raises this problem only in a brief footnote, in one of the chapters on justification. Id. at 415 n.22. For an interesting discussion of whether this defense should be characterized as a justification or as an excuse, see DRESSLER, supra note 22, at 282-85 (preferring excuse). See also infra text accompanying note 257.

\textsuperscript{110} ROBINSON, supra note 5, at 567-68 (including articles on battered woman's syndrome in the bibliography to a section entitled "Problematic Excuses"; neither this section nor any other portion of the treatise directly analyzes defensive use of the syndrome); see infra text accompanying note 258.

\textsuperscript{111} ROBINSON, supra note 5, at 547-49 & n.18.


\textsuperscript{113} ROBINSON, supra note 5, at 552-54.

\textsuperscript{114} Cf. DRESSLER, supra note 22, at 267 (exploring jury nullification in choice-of-evils cases); LOW ET AL., supra note 68, at 527-28 (exploring prosecutorial and sentencing discretion in choice-of-evils cases).

\textsuperscript{115} ROBINSON, supra note 5, at 614-16.

\textsuperscript{116} Id. at 616-17 & n.10.

\textsuperscript{117} Id. at 624-26 (discussing proximity and res ipsa loquitur).
This loads the argument in favor of the Code's substantial step test (which Robinson seems to favor), a test that attaches criminal liability earlier in the defendant's progress toward the completed crime. Considering the politicization of crime in the decades since the Code's promulgation, it is surprising—and a sign of the Code's relative unimportance—that more jurisdictions have not adopted the substantial step test. Another example of overemphasis on the Model Penal Code is the treatise's abbreviated discussion of what it means to say in a non-Code jurisdiction that attempt is a specific intent crime. Robinson asserts that specific intent requires purpose, without considering whether

118 See Bonnie et al., supra note 13, at 218-19 (quoting Packer, supra note 67, at 73-75). Packer's concept of a locus poenitentia is one means of asserting a correspondence between the act requirement generally and the act requirement for attempt. See supra text accompanying note 71. Robinson nods toward this concept in two brief footnote references to the work of Andrew Ashworth. Robinson, supra note 5, at 625 n.8, 686 n.16.

119 See Robinson, supra note 5, at 627-28.


122 Robinson, supra note 5, at 631-32.
knowledge would also satisfy such a requirement; he also never discusses the question of how this specific intent requirement applies to an attempt to commit a general intent crime.

Parallel deficiencies surface in the sections on conspiracy. The treatise mentions the traditional requirement of a "bilateral agreement" and the Code's easier-to-prove "unilateral" provision, but does not indicate the extent of continued adherence to the traditional approach. There is some discussion of the specific intent requirement for conspiracy under non-Code law, but it is cursory: Whether knowledge satisfies such a requirement gets only a footnote, and how the requirement applies to conspiracies to commit general intent crimes merits just a paragraph. Additionally, Robinson has little to say about conspiracy's Pinkerton doctrine, other than that the Model Penal Code does not adopt it.

129 See Sanford H. Kadish & Stephen J. Schulhofer, Criminal Law and Its Processes: Cases and Materials 589 (6th ed. 1995) ("Assume that a defendant, in order to destroy a competitor's experimental aircraft, plants a bomb on the plane and sets it to explode in midair, knowing that the test pilot will be killed. The bomb fails to explode. May the defendant be convicted of attempted murder?").

124 See Low et al., supra note 68, at 346–51. The treatise does consider how this issue would be resolved "under modern statutes." Robinson, supra note 5, at 635–36.; see also infra text accompanying notes 195–96.

125 Robinson, supra note 5, at 648–49.

126 The Code commentary equivocates on this point, noting that many states have enacted language that could be construed to adopt the unilateral theory of agreement but questioning whether the courts will so construe their statutes. See 2 Model Penal Code and Commentaries, Part I, § 5.03, at 398–99 & n.47 (Official Draft and Revised Comments 1980); see also People v. Foster, 457 N.E.2d 405 (Ill. 1983), discussed in 1 Paul Marcus, Prosecution and Defense of Criminal Conspiracy Cases 2-32 to 2-34 (1997); cf. Dierdre A. Burgman, Unilateral Conspiracy: Three Critical Perspectives, 29 DePaul L. Rev. 75, 75 n.3 (1979) (reaching a similar conclusion). Marcus notes, "As a practical matter, the unilateral approach has not had a significant impact on conspiracy prosecutions." Marcus supra, at 2-31.


127 Robinson, supra note 5, at 649–50 & n.22.

128 See Pinkerton v. United States, 328 U.S. 640 (1946) (holding conspirator liable for the foreseeable crimes of co-conspirators).

129 Robinson, supra note 5, at 664–65.
The treatise ends with a substantial section on specific offenses, the introduction to which again overstates the Code's importance:

**Model Penal Code Influence.** The definition of specific offenses in modern American criminal codes has been heavily influenced by the Model Penal Code. Especially in non-homicide offenses, common law definitions of offenses are now nearly irrelevant; over two-thirds of the states model their definitions of offenses after the Code's, with some tracking its language almost verbatim.130

The profusion of contemporary criminal statutes that deviate substantially from the Code—rape laws are the best but by no means the only examples—belie this statement. Consequently, the treatise's closing section fails in its goal of describing the existing rules of American criminal law.

As the quotation above recognizes, contemporary homicide law differs considerably from the formulations of the Model Penal Code. The treatise, however, gives only superficial accounts of the most significant of these differences, provocation in the law of manslaughter, and premeditation and deliberation in murder.131 On the former topic, Robinson mentions the common law's standard of reasonable provocation, but then misreads it by suggesting it requires "that a reasonable person would have acted the same as the defendant,"132 when the better view of the test is whether the ordinary or reasonable person would have become impassioned, not whether she would have killed.133 The treatise then shifts to the Code, a pattern repeated in its treatment of premeditation. After briefly flirting with a few of the legal issues raised by this requirement, Robinson subsides into a discussion of the Code's rejection of the concept. Other non-Code topics that receive little or no analysis in the treatise are the death penalty, depraved heart murder,134 intent-to-inflict-serious-bodily-harm murder,135 and misdemeanor manslaughter.136 Regarding felony murder, Robinson does acknowledge that the Code's radical curtailment of the rule has not been followed,137 but then devotes more space to speculating why this is true than to describing the ways in which jurisdictions limit the rule.138

130 Id. at 703-04 (footnote omitted).
131 Id. at 709-11, 715-16.
132 Id. at 710-11.
133 See LaFave & Scott, supra note 26, at 654-55.
134 Robinson, supra note 5, at 722-23.
135 Id. at 724.
136 Id. at 726.
137 Id. at 730-31.
138 Compare id at 731-36, with id. at 726-29 & n.4.
The treatise's sections on offenses less serious than homicide display the same cursory attention to non-Code law. Analysis of alternate statutory language would have enhanced the discussions of kidnapping, blackmail, and theft, as well as the extremely brief treatments of burglary, robbery, theft by extortion, and forgery. But the clearest example of the treatise's shortchanging non-Code law regarding a substantive crime comes in its section on rape. Most American jurisdictions have rewritten their rape statutes in the last generation, and most of these have deviated from the Model Penal Code's provisions; in fact, rejection of the Code's language became a rallying cry for some reformers. Yet one reads Robinson's treatise with no real sense of how events in this area have passed the Code by. There is brief consideration of non-Code language in one state, but the remainder of the discussion focuses on the statute proposed by the American Law Institute over thirty-five years ago. The result is inadequate analysis of such important topics as mistaken belief in consent, the spousal exemption, and special evidentiary rules for rape cases. Ironically, the treatise ends with a reference to one of the Code's most embarrassing provisions, a prohibition against rigging publicly exhibited contests, added in response to the television quiz show

139 Id. at 744–47. Comparisons to the federal kidnapping statute, 18 U.S.C.A. § 1201 (West 1984 & Supp. 1997), would have been particularly useful.
140 ROBINSON, supra note 5, at 748–50. These pages also fail to discuss the extremely interesting theoretical questions about blackmail raised in the articles Robinson cites in the bibliography to this section. Id. at 750.
142 As the apparent reason for curtailed coverage, the treatise in each case suggests that the offenses are unnecessary because other Model Penal Code provisions cover the conduct. ROBINSON, supra note 5, at 778, 779–80, 788–89, 790–91. Contemplating the electoral fate of a legislator advocating the repeal of such laws, see supra text accompanying note 120, indicates how far removed from political reality the treatise is.
145 ROBINSON, supra note 5, at 756.
146 Id. at 758 & n.20.
147 Id. at 762–63.
148 Id. at 761–62.
149 Id. at 792.
There is clearly little need for such a statute in a code intended to transcend the legislative passions of the moment; that the Code drafters were unable to satisfy their own aspirations in this respect should cause one to ponder the other ways in which the Model Penal Code is a product of its time, with solutions that many would consider inappropriate to contemporary America. It certainly seems that many legislatures and courts have made such a determination, by refusing to follow the Code’s recommendations on countless occasions. A treatise that largely ignores this phenomenon can hardly claim to describe accurately the existing rules of American law.

II

For the reader who accepts the treatise’s focus on the Model Penal Code, Criminal Law does a better job of accomplishing its second stated goal, “to convey . . . an understanding of each rule, its application, and the reasoning behind it.” Robinson explores most of the Code’s important provisions, delving into its commentaries, both official and unofficial, and assessing the various rationales for the substantive positions it takes.

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151 See supra text accompanying note 6.
152 Most sections end with substantial bibliographies, which should prove helpful to those eager to do further research. There is also a table of authors cited, so that one can locate Robinson’s treatment of a particular author’s work.
153 There are a few oversights. Regarding mens rea requirements under the Code, the treatise could discuss more fully how the definition of knowledge in section 2.02(2)(b) distinguishes between conduct and circumstance elements on the one hand and result elements on the other. Skipped over in the text, see Robinson, supra note 5, at 213–14, the distinction appears explicitly only in a graph, id. at 220. Nor is there discussion of the overlap between the terms “substantial and unjustifiable risk” and “gross deviation” in the definition of recklessness under section 2.02(2)(c); Robinson appears to assume that the latter subsumes the former. Id. at 245–46. But cf. Bonnie et al., supra note 13, at 143–44 (arguing the contrary). The treatise overlooks the discrepancy between the “gross deviation” necessary for negligence under section 2.02(2)(d), Robinson, supra note 5, at 248, and the unreasonableness standard in mistake defenses, equating the two, id. at 263–64, 462–63, 758 n.20, despite the fact that a simple deviation from the standard of reasonable care will typically render a mistake unreasonable. See Bonnie et al., supra note 13, at 180–81; Dressler, supra note 22, at 138. And the treatise makes no effort to explain the difference between “the standard of conduct . . . of a law-abiding person” in the Code’s definition of recklessness and “the standard of care . . . of a reasonable person” in its definition of negligence. Id. at 721 n.8; compare Robinson, supra note 5, at 246 with id. at 248.
As for rule application, the treatise makes extensive use of exam-
style hypotheticals, the analysis of which markedly aids reader un-
derstanding. But Robinson's effort to explain the Code suffers from
the peculiar readings he gives the Code's culpability provisions, espe-
cially section 2.02. Because that section occupies such a crucial posi-
tion in Model Penal Code methodology, the treatise's odd readings of
it and the provisions that build upon it infect the whole work, render-
ing Criminal Law considerably less valuable.

Employing reasoning that Robinson and a co-author first
presented in 1983, the treatise rightly argues that one of the Code's
most significant advances was to shift the focus of mens rea analysis
from each offense to each element of an offense, which section 2.02
accomplishes by the simple device of requiring that some culpability
level (or strict liability) apply "to each material element of the of-
fense." As Robinson notes, one of the principal advantages of ele-
ment analysis over offense analysis is that it returns the power to
define crimes, including their mental requirements, to the legislature:

[T]he early conceptions of mens rea . . . were hopelessly vague and
incomplete. They failed to tell courts enough about the required
culpability for an offense to enable the courts to resolve the cases
that commonly arose. The vague conceptualizations left it to the
courts to fill in the culpability requirements that the statutes did not
provide. Element analysis permits legislatures to reclaim from the
courts the authority to define the conditions of criminal liability.

The drafters of the Code thus sought to establish in section 2.02
the tools with which the legislature might specify the mens rea for

Looking at other provisions of the Code, Robinson discusses culpability as to the
grade of theft offenses without mentioning section 2.04(2), id. at 786–87, which ap-
parently was drafted to deal with such problems, see 2 Model Penal Code and Com-
mentaries, Part II, § 223.1, at 144–45 (Official Draft and Revised Comments 1980).
Further, he does not consider why section 4.02 requires "a mental disease or defect," a
test under the insanity defense used to screen out less serious mental abnormalities,
see Bonnie et al., supra note 13, at 465–66, before such an abnormality may negate a
mental requirement. Robinson, supra note 5, at 271–72.

154 Like the examination questions of many law professors (including me), Robin-
son's hypotheticals are occasionally somewhat puerile. Characters are gratuitously
portrayed as undereducated with weak or obscene vocabularies. Id. at 295–96,
321–22, 435–36, 469–70. Another hypo envisions "retarded men" playing "strip-base-
ball and tackle-badminton." Id. at 336–37. Also like other law professors, Robinson's
hypotheticals can be outdated. Id. at 669–70 (discussing a draft resister), 679–80 (oc-
curring in 1974).

155 Robinson & Grall, supra note 9, at 682–85, 691–94, 703–04.
156 Robinson, supra note 5, at 210–11.
158 Robinson, supra note 5, at 210–11 (footnote omitted).
each material element of every offense: the four levels of culpability—purpose, knowledge, recklessness, and negligence—and two rules about how to read offenses that are silent or ambiguous with regard to culpability. It is in explaining these provisions—specifically, the definition of recklessness and the interaction of the subsections regarding statutes that are silent or ambiguous regarding mens rea—that the treatise propounds rules of law that reintroduce vagueness and incompleteness to culpability analysis and thus foster judicial usurpation of the legislative function. So, Robinson’s interpretation of section 2.02 serves to undermine the accomplishments of the element analysis he champions.

My central quarrel with the treatise’s explication of section 2.02 is its insistence that the Code’s definition of recklessness is incomplete. To reach this conclusion, Robinson begins with the decision of the Code’s drafters to categorize each material element of an offense as conduct, circumstance, or result. As the treatise accurately notes, this decision generates problems because of the drafters’ failure to define these categories; definitions appear necessary because without them it is difficult to classify correctly many elements of particular crimes. One way to minimize such problems is to attribute little practical significance to the distinctions among conduct, circumstance, and result. The treatise, instead, magnifies these problems by insisting that recklessness, the most frequent minimum culpability requirement in the Code, applies differently to conduct elements on the one hand and to circumstance and result elements on the other.

Robinson reaches this conclusion because of what he sees a defect in the Code’s definition of recklessness: “[N]ote that the Code does not expressly define ‘recklessness’ . . . with respect to a conduct element.” He would fill this gap by reading recklessness to require

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159 See Model Penal Code § 2.02(2)(a)-(d) (Official Draft 1985); see also id. § 2.02(5) (establishing a hierarchical arrangement among the four culpability levels). Regarding strict liability, see id. § 2.05.
160 See id. § 2.02(3).
161 See id. § 2.02(4).
162 Robinson, supra note 5, at 149-50 (discussing Model Penal Code § 1.13(9) (Official Draft 1985)).
163 Robinson, supra note 5, at 150-51 (questioning the categorization of “kills,” “obstructs,” “destroys,” “falsifies,” “mutilates,” “desecrates,” “compels,” and “agrees”).
164 Cf. Bonnie et al., supra note 13, at 138, 143 (making light of the distinctions among conduct, circumstance, and result, especially in the definitions of purpose and knowledge because few Code crimes require purpose).
165 Robinson, supra note 5, at 229.
166 Id. at 219. The same comment applies to the definition of negligence.
knowledge when applied to a conduct element, because "the drafters determined that, as a practical matter, . . . recklessness . . . as to conduct is [not] likely to arise—that is, it is unlikely that a person would not at least know the nature of the conduct they were performing."167

This reasoning ignores the plain language of the Code's definition of recklessness, which makes no effort to distinguish among conduct, circumstance, and result elements, instead treating them all equivalently:

A person acts recklessly with respect to a material element of an offense when he consciously disregards a substantial and unjustifiable risk that the material element exists or will result from his conduct. The risk must be of such a nature and degree that, considering the nature and purpose of the actor's conduct and the circumstances known to him, its disregard involves a gross deviation from the standard of conduct that a law-abiding person would observe in the actor's situation.168

That these words apply to conduct, circumstance, and result elements equally is made crystal clear by the official commentary to the Code: "Whether the risk relates to the nature of the actor's conduct, or to the existence of the requisite attendant circumstances, or to the result that may ensue, is immaterial; the concept is the same, and is thus defined to apply to any material element."169 Though the treatise concedes that the definition of recklessness might be read as this commentary implies,170 it nevertheless persists in contending that recklessness requires proof of knowledge when applied to a conduct element.171

167 Id. Again, see supra note 166, the comment also applies to negligence. See also id. at 220–21. Notice how this reasoning resembles the policy analysis used by courts in non-Code jurisdictions to determine the mens rea for a particular statute, as they decide what culpability level "makes sense" in the context of the particular crime. See id. at 211 n.15 (noting that courts "continue to define unstated culpability requirements according to their own view of the public policy interests").

168 Model Penal Code § 2.02(2)(c) (Official Draft 1985). A linguistic argument favoring Robinson's reading is that the verb "exists" applies to circumstances and the verb cluster "will result" to results, leaving no verb for conduct elements. But conduct "exists" just as clearly as a circumstance might. Further, it is no more reasonable to say that the first sentence of the definition does not apply to conduct because conduct elements are not directly mentioned than it would be to say that the second sentence does not apply to result elements, because it mentions conduct and circumstances but not results.


171 See, e.g., id. at 228–29 ("[B]ecause the Code fails to define 'recklessness' as to conduct, . . . [§ 2.02(3)] is frequently interpreted to read in 'knowing' with respect to
By defining recklessness in this way, the treatise makes the classification of elements as conduct (as opposed to circumstance or result) quite important in crimes with a minimum culpability of recklessness. Robinson attempts to solve the problem he has thus created by advocating a narrow definition of conduct, "to include only literally the conduct (muscular movement) of the actor," thus leaving most of the elements of the offense in the circumstance and result categories. As an example of this narrow definition, the treatise construes a statute punishing one who "obstructs a public roadway" to include the "conduct, whatever the particular actions might be, that caused the obstruction (a result) of a public roadway (a circumstance)." This contradicts the far more straightforward reasoning that "obstructs" is a conduct element while "public" and "roadway" state circumstance elements; besides common sense, this approach also has the virtue of diminishing the significance of causation analysis, which remains fraught with difficulty, even under the Code.

The treatise frankly encourages courts similarly to recast conduct elements as results (or circumstances) without regard to how this activity undermines one of the main virtues of element analysis. Regarding crimes of recklessness, courts can use (or forgo) this power and thereby manipulate the culpability required (assuming that recklessness requires knowledge when applied to a conduct element); this judicial authority approximates the culpability-defining power courts have under offense analysis, allowing judges effectively to usurp the legislative role. A reading of the definition of recklessness in section 2.02 as applying identically to conduct, circumstances, and results obviates the need to distinguish among those categories and thus restricts the courts' role in determining the mental requirements of criminal statutes.

Just as Robinson's treatise misreads the definition of recklessness, it misunderstands the relationship between section 2.02's provisions on offenses that are silent or ambiguous with regard to culpability, all conduct elements.

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172 Id. at 221-22; see also id. at 152-53.
173 Id. at 229.
174 See supra text accompanying note 29.
175 Robinson, supra note 5, at 236-37.
176 As previously noted, see supra note 164, the practical impact of the distinctions among such elements in the definitions of purpose and knowledge can be minimized by the definition of the mental requirement in particular crimes.
and again the error expands the courts' ability to redraft the mental requirements in criminal statutes. The subsection on crimes silent with regard to culpability, section 2.02(3), requires that a court read in a minimum requirement of recklessness; the subsection on ambiguous mens rea provisions, section 2.02(4), enjoins a court to apply a culpability term used "without distinguishing among the material elements" of a statute to all the statute's material elements "unless a contrary purpose plainly appears." The treatise expresses fear that application of section 2.02(4) will result in crimes that are too difficult to prove (when purpose or knowledge would apply to all the elements) or too easy (when negligence would apply), and so advocates an interpretive policy that restricts the scope of section 2.02(4)—"to the grammatical clause in which the stated term appears"—in order to allow a broader sway for the recklessness standard of section 2.02(3).

Of course, section 2.02(4) does not contain this "grammatical clause" limitation, and there is reason to believe that the drafters of the Code would disagree with Robinson's applications of the subsection: for example, that recklessness is the minimum culpability applicable to "falsifies" in "A person commits a misdemeanor if, knowing that he has no privilege to do so, he falsifies, destroys, removes or conceals any writing or record, with purpose to deceive or injure anyone or to conceal any wrongdoing." A better analysis—one more faithful to the language of section 2.02(4)—would be that while "purpose" applies only to deceiving, injuring, or concealing (because it is an additional mental requirement that applies to no part of the act requirement), "knowing" clearly applies to one element of the act requirement (the lack of privilege), and because no contrary purpose plainly appears, knowledge should also apply to falsifying, destroying, removing, or concealing any writing or record.

177 See Model Penal Code § 2.02(3) (Official Draft 1985).
178 See id. § 2.02(3), (4).
179 Robinson, supra note 5, at 238–39.
180 Id. at 239.
181 Id. at 239–42.
182 Id. at 227; see also id. at 231–32, 240–42; id. at 740 n.18 (misapplying section 2.02(4) to causing bodily harm with a deadly weapon); cf. id. at 780–81 (misapplying section 2.02(3) to robbery); id. at 786 (overlooking the mens rea impact on theft offenses of the definition of "deprive").
183 Cf. Bonnie et al., supra note 13, at 147–48 (reaching the same conclusion regarding a similar statute); 1 Model Penal Code and Commentaries, Part I, § 2.02, at 245–46 (Official Draft and Revised Comments 1985) (similar examples). A third interpretation of section 2.02(4) would apply purpose to all the elements of the offense except the lack of privilege. While it is evident that the drafters of the Code did
In a footnote, Robinson indicates that his reason for favoring section 2.02(3) over section 2.02(4) is that the former provision "reflects the element analysis approach adopted" by the Code, while the latter "is characteristic of an offense analysis model of offense definition." In other words, restricting the application of a stated culpability level across all elements of an offense will result in more crimes with differing culpability requirements applying to their various elements. While one may doubt whether such complexity is valuable, a more significant question arises regarding the source of the complexity: the treatise seems to overlook that courts, not legislatures, will create these differing culpability levels, that judges interpreting statutory ambiguities will have the power to define mens rea by manipulating the grammatical clause limitation on section 2.02(4), and that the door will thus be open for judicial assumption of the legislative right to define criminal conduct.

The treatise provides examples of this undermining of one of the principal benefits of element analysis. In interpreting the Code's provision on crime committed through an innocent agent—"A person is legally accountable for the conduct of another when . . . acting with the kind of culpability that is sufficient for commission of the offense, he causes an innocent or irresponsible person to engage in such conduct."—Robinson invites courts to apply the recklessness requirement of section 2.02(3) to the element "causes" even if the offense committed requires purpose as to each of its elements. It is difficult to imagine that the legislature, in passing a statute punishing purposeful commission of a crime, meant to criminalize a person who wanted the crime to occur but caused it only recklessly. Another example of the treatise's favoritism of section 2.02(3) over section 2.02(4)—and of the room this favoritism leaves for judicial legislation—arises in its discussion of homicide. Robinson prefers that recklessness be the culpability level for the human being element in all homicides, even though murder, manslaughter, and negligent homicide...

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not intend this result, see sources cited supra, it is also evident that the language of section 2.02(4) does not plainly exclude the interpretation. This ambiguity is one of the major failings of section 2.02.

184 Robinson, supra note 5, at 244 n.31.
186 Robinson, supra note 5, at 341-42 & n.14.
187 The official commentary to the Code disapproves any such reading of the statute: "A defendant is accountable for the behavior of an innocent or irresponsible person when he has caused such behavior to occur, provided he has caused it with the purpose, knowledge, recklessness or negligence that the law requires for the commission of the crime with which he has been charged." 1 Model Penal Code and Commentaries, Part I, § 2.06, at 302 (Official Draft and Revised Comments 1985).
cede each have different culpability levels that would apply to that element.\textsuperscript{188} A court following this invitation would be substituting its judgments of wise policy for those of the legislature.\textsuperscript{189}

In construing and applying section 2.02, \textit{Criminal Law} advocates interpretations that increase the power of courts to define the mens rea requirements of crimes, where more straightforward interpretations would not. The same tendency is evident in the treatise’s treatment of those Code provisions setting the culpability for complicity, attempt, and conspiracy. Using the analytic tools provided by section 2.02, each such provision requires purpose, but the treatise questions how this requirement applies to the elements of the offense the defendant aided, attempted, or conspired to commit. If a lower culpability level would have applied to one committing the offense, is this lower culpability “elevated” to purpose for the accomplice, attempter, or conspirator? Whenever he can, Robinson argues against such elevation, largely limiting the purpose requirement to conduct elements (and thus exacerbating further the thorny problem of distinguishing among conduct, circumstances, and results);\textsuperscript{190} his narrow definition of conduct\textsuperscript{191} reduces the impact of the purpose language even further.

As for complicity, the treatise concedes that an accomplice must purposely assist the conduct of the perpetrator of the crime, but argues that regarding results and circumstances, the accomplice need

\textsuperscript{188} Robinson, \textit{supra} note 5, at 708 n.4.

\textsuperscript{189} Assault with a deadly weapon under the Code provides a similar example. The treatise argues that recklessness should apply to the deadly weapon element, even though negligence is the only stated mental requirement in the offense. \textit{Id.} at 243 n.30.

\textsuperscript{190} See \textit{supra} text accompanying notes 164–65. The difficulty of distinguishing these elements appears quite clearly in Robinson’s discussion of impossibility as a defense to liability for attempt. He argues that element analysis can separate factual from legal impossibility: The former relates to conduct and result elements, and the latter to circumstance elements. Robinson, \textit{supra} note 5, at 683. The following example is meant to illuminate the distinction:

Shooting a stuffed deer out of season, for example, is a legally impossible attempt because \textit{shooting a live deer} (conduct and circumstance) is the prohibition of the offense. If the offense were defined to prohibit \textit{killing a deer}, the same shooting of a stuffed deer would be judged a factual impossibility because a required result is missing—namely death. It is understandable, then, that before the more systematic analysis of offense elements came into being with the drafting of modern codes, the legal-factual impossibility distinction seemed somewhat vague and unpredictable.

\textit{Id.} at 684. Even with modern codes the distinction remains “somewhat vague and unpredictable.” \textit{Id.}

\textsuperscript{191} See \textit{supra} text accompanying notes 172–73.
only manifest whatever culpability the perpetrator must show. As far as results are concerned, this conclusion is not controversial, as the Code specifically allows it. However, the Code's complicity section is silent regarding circumstance elements, and one would have assumed that in the face of this silence the section's general language "with the purpose of promoting or facilitating the commission of the offense," as well as the common law rule elevating circumstance elements at least to knowledge, would have controlled. But instead Robinson says that "the better view" is that the culpability level for circumstance elements not be elevated, giving reasoning much like one would expect from a common law court explaining its version of wise policy.

Similar policy reasoning appears in the treatise's recommendations regarding attempt. Building on his discussion of complicity, Robinson advocates a "narrow interpretation" of attempt's requirement of purpose because it is "the more sound position": "It need not be shown that the actor was purposeful as to every circumstance and result of the substantive offense." But this is not the Code's rule, which rather plainly applies attempt's purpose requirement to conduct and result elements of the completed crime, but not to its circumstances. So the treatise invites courts to depart from the Code's

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192 ROBINSON, supra note 5, at 330–32, 333, 334.
193 MODEL PENAL CODE § 2.06(4) (Official Draft 1985).
194 Id. at § 2.06(3)(a).
195 See ROBINSON, supra note 5, at 327–29, 334.
196 Id. at 333.
197 Id.; see also id. at 331–32.
198 Id. at 634.
199 Id.
200 Id. at 634–35.
201 See 2 MODEL PENAL CODE & COMMENTARIES, Part I, § 5.01, at 301 (Official Draft and Revised Comments 1985). This elevation of the mental requirement accords with the Code's treatment of simple assault, as specifically noted by Robinson:

The culpability requirements for simple assault differ depending on whether the bodily injury or physical menacing form is used. Where the actor causes bodily injury, he or she must do so purposely, knowingly, or recklessly, or negligently with a deadly weapon. If the assault is premised on physical menacing to put another in fear of imminent serious bodily harm but causes no bodily injury, then the actor must do so purposely. Presumably, the drafters are concerned that, in the absence of physical injury and in the absence of a high culpability level, the offense conduct may be too trivial to merit the condemnation of criminal conviction.

ROBINSON, supra note 5, at 741 (footnotes omitted). The same reasoning justifies raising the mental requirement for attempt above that for the completed crime, as Holmes recognized long ago in explaining why attempt was a specific intent crime.
language in order to achieve "more sound" results, precisely the sort of behavior that the Code was designed to prevent.

This line of reasoning reaches its crisis when the treatise turns to conspiracy, where the Code requires that the defendant act "with the purpose of promoting or facilitating . . . commission"\(^{202}\) of the crime that is the object of the conspiracy, without distinguishing among the material elements of the object crime. Despite the fact that this language applies equally to conduct, circumstance, and result elements, Robinson doggedly insists that "[a] better interpretation of the Code's 'purpose' requirement . . . is to require only that it be the actor's purpose that the conduct constituting the object offense be performed."\(^{203}\) While this view is challengeable as a matter of policy,\(^{204}\) a more important reason why a court should not adopt it is that it is inconsistent with the language chosen by the legislature.\(^{205}\)

While it opens the way for judicial legislation, Criminal Law's approach to the culpability required for complicity, attempt, and conspiracy has the virtue of consistency, as does the treatise's narrow definition of conduct and its favoritism for section 2.02(3) over section 2.02(4). But such consistency is inappropriate even to the Model Penal Code, which like any product of human cooperation, contains inconsistent and contradictory aspects.\(^{206}\) Robinson's effort to smooth out these inconsistencies reflects his desire to systematize criminal law, which produces another set of problems for the reader of his treatise.

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203 Robinson, supra note 5, at 654.

204 The treatise argues for a low mental requirement for conspiracy because the defendant's agreement "show[s] unequivocal criminal intent. The agreement requires that the actor agree that a criminal offense be committed. This leaves little room for ambiguity about whether the intended objective is criminal." Id. at 653; see also id. at 645. Such reasoning ignores the ease of proving an agreement under the Code, which may be "tacit" and "unilateral," see id. at 646–47, 648–49—a requirement Robinson characterizes as "slim," id. at 647.

205 The same sort of reasoning, with the same faults, appears in the treatise's discussion of the mental requirement for solicitation. Id. at 674–76.

206 The treatise admits as much, repeatedly noting that some general Code provisions assume that crimes have only one culpability level, as if element analysis of mens rea were not possible under the Code. Id. at 240, 340, 389–90, 463–64; see also id. at 739 n.13 (suggesting lack of coordination between grading provisions for attempt and aggravated assault). Regarding the purpose requirement for complicity, attempt, and conspiracy under the Code, it might be preferable simply to acknowledge that the Code applies that requirement differently for each form of liability and that the provisions are therefore not well coordinated.
The third stated goal of Criminal Law is to "convey...a conceptual framework of criminal law that explains the interrelations among the rules." Not content with a single framework, the treatise presents multiple schemata—frames within frames—to explain the interrelation of virtually all facets of criminal law doctrine. While these comparisons produce some fascinating insights (almost all of which Robinson has previously developed in other works), they ultimately contort the law in a number of areas in order to fit the framework suggested. The resulting portrait fills the frame, but misses much of the reality of contemporary criminal law.

According to its introduction, the treatise aims to show that "each rule serves as only a piece of a larger machine for determining criminal liability." Robinson builds this machine by deploying a "doctrinal structure":

Each doctrine [of criminal law] typically does one of three things: (1) it may define what constitutes an offense; (2) or it may define the conditions under which an actor will be acquitted even though he or she satisfies the elements of an offense—such a doctrine typically is called a defense; (3) or it may define the conditions under which an actor will be held liable even though he or she does not satisfy the elements of an offense. Such a doctrine may be called a doctrine of imputation. This treatise is organized around this doctrinal structure.

Criminal Law treats offense doctrines in the expected fashion, with chapters on the act and mental requirements. But in these chapters, as well as in subsequent ones, the treatise applies competing schemes, a "functional" analysis of criminal law doctrines identifying rules of conduct, liability, and grading, and a contrast of the objective and subjective views of criminality. These counterstructures, which cut across the doctrinal framework, concededly raise nice questions, but nevertheless complicate the workings of the criminal law machine, rendering it more difficult to conceptualize.

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207 See supra text accompanying note 6.
208 ROBINSON, supra note 5, at xvi. The resulting "conceptual framework...may be the book's most important contribution." Id.
209 Id. at 41.
210 But see supra text accompanying note 73.
211 ROBINSON, supra note 5, at 50–63, 143–45, 246 n.7.
212 Id. at 133–37.
Perhaps the chapters on offense doctrines can bear the complexity, but the load becomes too heavy as the treatise presents its unorthodox discussions of defense and imputation doctrines. After act and mental requirement, the treatise turns to imputation, which for Robinson comprehends not just accomplice liability and related rules, but also voluntary intoxication, transferred intent, substituted culpability (as in the lesser-legal-wrong rule), felony murder, corporate liability, possession offenses, status offenses, strict liability, and the use of presumptions. Criminal Law acknowledges the reader’s likely reaction to this profusion: "Given the variety of rules and doctrines of imputed liability, it is not obvious that there is any common theme in their supporting rationales." Such a reaction is appropriate; while the notion that each of these doctrines has an aspect of imputation is illuminating, grouping them together produces a grab bag that creates more confusion than it dispels.

The clearest example of this fault is voluntary intoxication. Its significance is disproof of the mental requirement, but the treatise’s chapter on mens rea does not discuss voluntary intoxication, even though that chapter considers both mistake and mental illness as means of disproving culpability. Robinson saves intoxication for his chapters on imputation, because when courts refuse to allow a defendant to use voluntary intoxication to disprove a mental requirement, they can be said to impute that mental requirement to the defendant. The treatise criticizes the resulting equation of the culpability of becoming intoxicated to the mens rea necessary for the crime, arguing instead that courts should “assess[] an actor’s culpability as to the elements of the offense at the time he or she becomes intoxicated.” While this is a point worth pondering, it casts little light on currently applicable law, where the trend favors diminishing the effect of voluntary intoxication, whether imputation under Robinson’s stan-

214 Id. at 281–89.
215 Id. at 280–81; see also id. at 289–92 (identifying four theories supporting imputation).
216 Id. at 289.
217 Id. at 259–75. The only mention of voluntary intoxication appears in the discussion of using mental illness to disprove mens rea: “The common law treated diminished capacity as analogous to voluntary intoxication, but the analogy is flawed.” Id. at 272; see also id. at 272–73. Without any concurrent discussion of intoxication, it is difficult to see how a reader would understand the point being made.
218 Id. at 312.
219 Id. at 317–18. This contention “is a specific application of a general theory for dealing with an actor who causes the conditions of his or her own defense.” Id. at 318 n.34.
standard is appropriate or not.\textsuperscript{220} So delaying consideration of voluntary intoxication sacrifices understanding of current law in order to maintain fidelity to a conceptual framework that aggrandizes imputation doctrines. Similarly, comprehension of criminal law is advanced little by treating transferred intent as an imputation doctrine,\textsuperscript{221} rather than as an aspect of causation, nor is there much value in placing the treatise’s discussion of inculpatory mistakes\textsuperscript{222} in the imputation chapters instead of in the chapter on culpability.

While the chapters on imputation are unusual in content, the chapters on defenses are unusual in the intricacy of their theoretical explications; the criminal law machine grows even more complex at this point.\textsuperscript{223} The treatise forgoes the usual division of doctrines of defense into justification and excuse,\textsuperscript{224} instead adumbrating five categories of defenses: "absent-element defenses, offense modifications, justifications, excuses, or nonexculpatory defenses."\textsuperscript{225} The treatise then asserts an "internal structure" for the two most important categories: "Triggering conditions permit a necessary and proportional response,"\textsuperscript{226} for justifications, while for excuses, "[a] disability or reasonable mistake must cause an excusing condition."\textsuperscript{227} Each of these structures has substructures, wheels within wheels. For example, the clash between "the reasons theory of justification" and "the deeds theory"\textsuperscript{228} animates much of that body of doctrine, while the explication of excuse returns frequently to the Model Penal Code’s standard of "the person of reasonable firmness."\textsuperscript{229}

In his zeal to make the law of justification fit the system thus created, Robinson de-emphasizes some justification defenses and distorts

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\textsuperscript{221} Robinson, \textit{supra} note 5, at 295–300.

\textsuperscript{222} Id. at 301–07.

\textsuperscript{223} The imputation doctrines also display a share of theoretical complexity. See \textit{supra} notes 215 & 219.

\textsuperscript{224} See Bonnie \textit{et al.}, \textit{supra} note 13, at 324–35.

\textsuperscript{225} Robinson, \textit{supra} note 5, at 379; \textit{see also} id. at 43–47.

\textsuperscript{226} Id. at 404; \textit{see also} id. at 423.

\textsuperscript{227} Id. at 480.

\textsuperscript{228} Id. at 453; \textit{see also} id. at 471–75.

\textsuperscript{229} Id. at 488 (citing \textit{Model Penal Code} § 2.09(1) (Official Draft 1985)); id. at 5, at 489, 493–94, 503, 532–33, 536–39, 559, 564–65. \textit{See supra} text accompanying notes 105–07 and \textit{infra} text accompanying notes 240–44.
}
others. A private citizen’s use of force to prevent the commission of crime does not fit any of the treatise’s paradigms, so it is mentioned only in passing, first as an “exception[]” to “[t]he rule that limits public authority justifications to a special class of persons,” and then in a paragraph that focuses almost all of its attention on the prevention of suicide. A reader will thus search in vain for an adequate account of the current status of the first justification, the “perfect” defense from which the “imperfect” defense of self-protection arose, a justification that contemporary legislatures continue to expand.

Another justification defense that fails to fit the treatise’s system is mistaken belief in justifying facts. Robinson argues for a rigorous distinction between justification and excuse, or what he calls “objective” and “subjective justifications,” but this requires classifying as an excuse what both the common law and the Model Penal Code recognize as a justification—a mistaken belief in facts that would justify the defendant’s conduct. While others have contended that there is a reason for the prevailing characterization, that the line between

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230 The use of force is justified, even if not necessary, for example, in the case of a witness to the crime. Moreover, the force used need not be proportional: contemporary law justifies the use of deadly force to prevent the commission of many felonies that do not threaten life. See Dressler, supra note 22, at 252–53. See generally Franklin E. Zimring & Gordon Hawkins, Crime Is Not the Problem: Lethal Violence in America 167–69 (1997) (questioning the likelihood of limiting the use of deadly force in crime prevention to situations involving threats of death or bodily injury):

[T]he justifiable use of deadly force by police and private citizens is a large-scale enterprise in the United States ....

... [C]itizens are frequently eager to use lethal force in crime prevention whenever they think it is allowed.

....

One reason why further restrictions on the use of deadly force are not likely is a long tradition of public approval for violent citizen self-defense against property felons.

Id.

231 Robinson, supra note 5, at 424; see also id. at 425 & n.6.

232 Id. at 432–33.

233 See Low et al., supra note 68, at 541 n.b.

234 See supra text accompanying note 98 and note 100.

235 Robinson, supra note 5, at 456; see also id. at 456–60 & n.18; see also id. at 455 (characterizing these as “privileged” and “unprivileged justification[s]”). This distinction is necessary to support the treatise’s previous assertion that justifiable (but not excused) aggression may not be resisted. Id. at 439–40.

236 Non-Code jurisdictions require a reasonable mistake, see LaFave & Scott, supra note 26, at 457, while the Code requires a mistake that negatives the culpability necessary for the crime, see Model Penal Code § 3.09(2) (Official Draft 1985).
justification and excuse in this context is not so clear.\textsuperscript{237} Robinson rejects this argument, preferring clarity in his system to the inevitable messiness of life and law.\textsuperscript{238}

*Criminal Law's* preference for a mechanistic system over the relative chaos of organic growth\textsuperscript{239} becomes most apparent, and most inappropriate, when the treatise turns to excuses. Throughout a long chapter, Robinson struggles to conform the recognized excuses to his paradigm, but the effort is unpersuasive. The law's recognition of excuses has been too ad hoc to submit to the sort of systematizing he favors.

At the outset, his proposed structure for excuse—"A disability or reasonable mistake must cause an excusing condition"\textsuperscript{240}—seems both un-gainly, in harnessing the disparate categories of disability and reasonable mistake, and inadequate, because of the generality of "excusing condition." While reasonable reliance on an official misstatement of the law is surely an excuse defense,\textsuperscript{241} it seems quite a stretch to analogize it to the *M'Naghten* test for insanity because they both produce the same excusing condition, that "the actor accurately perceives and understands the physical nature of the conduct and its consequences but does not know that the conduct is wrong or criminal."\textsuperscript{242} This excusing condition is one of a hierarchy of four\textsuperscript{243} tailored to fit involuntariness and the various forms of the insanity defense, but which accommodates other excuses rather poorly. For example, the treatise acknowledges that the immaturity defense requires no excusing condition at all.\textsuperscript{244}

\begin{itemize}
\item \textsuperscript{238} Robinson, *supra* note 5, at 447 n.26 ("[T]o avoid the confusion of justification and excuse," a different name should be found for the defense based on mistaken belief in justifying facts.).
\item \textsuperscript{239} *See generally* id. at 704.
\item \textsuperscript{240} Id. at 480.
\item \textsuperscript{241} *See* id. at 544–54.
\item \textsuperscript{242} Id. at 483; *see also* id. at 485. Because mistaken belief in justifying facts cannot be a justification, *see* supra text accompanying notes 235–38, the treatise puts it in the same excuse category with reasonable reliance on an official misstatement of the law; *see* id. at 484–85. The analogy to insanity is even more forced for this defense.
\item \textsuperscript{243} *See* id. at 482–83.
\item \textsuperscript{244} Id. at 485–86, 533–36.
\end{itemize}
Nor does the excuse paradigm fit very well the less rigorous conceptions of involuntariness. Robinson characterizes lack of voluntariness as "the catchall excuse" because "the law does not impose a specific disability requirement," thus undercutting its fit with the internal structure he asserts for excuse defenses. Plainly dissatisfied with the extent to which some courts and legislatures have stretched involuntariness, he manages to cabin the excuse to suit his taste only by imposing an objective standard, "requir[ing] . . . a comparison of the actor's conduct to that of the reasonable person in the same situation." Though not included in its paradigm of excuse, the treatise imports this standard from the Model Penal Code's provision on duress and generalizes it to all excuses. The problem with this generalization is that "[n]ot every excuse defense includes in its legal formulation an objective standard," especially not involuntariness or insanity. The treatise lamely argues that the results under these defenses conform to those under an objective standard, without commenting on the manifest circularity of justifying an objective standard by saying it conforms to the results under existing law and then using that standard to modify the results under the existing law of involuntariness. Thus the treatise contorts both its own model for excuses and the law of such excuses in a vain attempt to achieve order in an unruly area of criminal law.

The treatise resorts to this objective standard to justify limitations Robinson favors in the excuse defenses based on subnormality, involuntary intoxication, and addiction, as well as to reject excuses Robinson labels "problematic": chromosomal abnormality, brainwashing, cultural indoctrination, and rotten social background. The summarizing paragraph that concludes the latter section asserts generally: "To merit excuse, an actor must show that his or her disability so significantly reduced the capacity to avoid the violation that the

245 The very existence of such an excuse taxes the treatise's organizational structure, which initially treats a voluntary act as part of the act requirement, id. at 183–87, but then decides that its lack is better conceptualized as an excuse defense, id. at 185–86, 504–06. The waters are muddied a bit further by a footnote to the discussion of involuntariness as a defense suggesting that perhaps it should be considered as part of the culpability requirement. Id. at 505 n.28.
246 Id. at 499.
247 Id. at 499–504.
248 Id. at 501; see also id. at 503 (applying this standard).
249 Id. at 486–91, 493–94; see infra note 255.
250 Robinson, supra note 5, at 488.
251 Id. at 488–89.
252 Id. at 530–33.
253 Id. at 556–65.
actor cannot reasonably have been expected to have acted otherwise." Though there may be many good reasons to limit or to reject each member of this disparate set of excuses, it seems tendentious to identify the failure of an objective standard as the master explanation.

Even duress, the excuse defense that most clearly applies an objective standard (if only in its Model Penal Code formulation), does not fit the model for excuses on which the treatise grafts such a standard. Coercion is offered as duress' disability, but Robinson acknowledges:

[C]oercion by itself does a poor job at serving the functions of a disability: It does little to signal the actor as abnormal or different from the rest of the population and also does little to provide an obvious and continuing cause to which to shift the blame for the violation.

Furthermore, duress requires no "independent excusing condition." So both ends of the excuse paradigm are only faintly present in the defense of duress.

The treatise's emphasis on its structure for excuse also produces some significant omissions. Entrapment is banished to the chapter on nonexculpatory defenses because it does not fit the excuse paradigm, thus losing the opportunity for interesting comparisons. Similarly, escape from intolerable prison conditions rates only a footnote in the justification chapter, even though it is more profitably analyzed as an excuse defense. And Robinson does not discuss whether jurisdictions are developing a new version of duress applicable to battered women who assist their batterers in committing

254 Id. at 565.
255 See Model Penal Code § 2.09(1) (Official Draft 1985) (applying the standard of "a person of reasonable firmness"); see supra text accompanying notes 105-07.
256 See Robinson, supra note 5, at 536.
257 Id. at 537.
258 Id.
259 One anomaly in this chapter is its identification of incompetency to stand trial, which can produce at most a dismissal of criminal charges, not an acquittal, as a "defense." Id. at 593-97. Another is Robinson's willingness to give prosecutors discretion to initiate proceedings barred by the statute of limitations, id. at 577-79, which comes only a few pages after he condemns reliance on prosecutorial discretion as a substitute for another excuse defense, because such reliance is inconsistent with the legality principle, id. at 552-54.
260 Id. at 606-09.
261 See Bonnie et al., supra note 13, at 417.
262 Robinson, supra note 5, at 415 n.22; see also supra note 109.
crime\textsuperscript{263} perhaps because such a defense would deviate even further from his proposed structure.

The possible emergence of such a defense exemplifies the chaotic nature of excuses in contemporary criminal law: they are a varied lot, a congeries of distinct doctrines, each produced by different histories and responding to different social needs. Defining a general theory of excuses thus inevitably will misportray current law. Robinson nevertheless pursues the chimera of "a single general excuse defense,"\textsuperscript{264} because he considers the exposition of such a conceptual framework his duty.\textsuperscript{265} Here, as in imputation and justification chapters of the treatise, discharging this duty to describe the criminal law "machine" produces a contraption that may well not work, but that in any event bears too little resemblance to criminal law as it actually exists.

IV

The inadequacies of a legal treatise, no matter how important the subject or how eminent the author, are a relatively minor concern. Students and teachers can simply avoid the work, especially if there are other options in the field.\textsuperscript{266} A more important reason for highlighting deficiencies in a recently published treatise is that it may reflect prevalent styles of teaching the subject; if so, the book's defects may disclose deficiencies in the learning of thousands of lawyers and lawyers-to-be.

Over twenty years of teaching, and of interacting with other law teachers, suggest that Paul H. Robinson's Criminal Law may signify such a development. Too many of today's criminal law teachers rely too much on the Model Penal Code, delight too much in arcane controversies over its provisions, and engage too much in constructing recondite systems of criminal law theory.

\textsuperscript{263} See supra note 110; cf. Robinson, supra note 5, at 538–39 (discussing generally the "individuation" of the reasonable person standard in excuse defenses). See generally Dressler, supra note 22, at 288–89. See also Heather R. Skinazi, Comment, Not Just a "Conjured Afterthought": Using Duress as a Defense for Battered Women Who "Fail to Protect," 85 Cal. L. Rev. 993 (1997).

\textsuperscript{264} Robinson, supra note 5, at 492 n.31; see id. at 491–94.

\textsuperscript{265} Id. at 533 ("The challenge to current theorists is to articulate more precisely the requirements of excuse, or to show that no greater articulation is possible."). Robinson does not explore the latter option. For a rare acknowledgment of the theory's inability to resolve an issue of criminal law, see id. at 713–14, discusses individualization of the reasonable person standard in manslaughter cases.

\textsuperscript{266} See, e.g., Dressler, supra note 22; LaFave & Scott, supra note 26.
For the teachers of my generation, it was easy to become enamored with the Model Penal Code. It heralded a new way of teaching criminal law—from the general part to the specific—that contrasted with the approach of the previous generation.²⁶⁷ Embracing the Model Penal Code in our teaching was a way to show that we were new, bold, and enlightened. But a generation later it is the Code that has become the orthodoxy in criminal law teaching. It is now time to recognize that the American Law Institute’s Model Code does not describe all or even most of American criminal law, and that for every issue faced by the Code’s drafters there is a variety of answers, some old and some very new. Conveying this variety to our students will surely better prepare them for the actual practice of law than will a single-minded focus on the Model Penal Code.

Though my generation of criminal law teachers was eager to declare its independence from the old way of teaching the subject, we continued to glory in one of the traditions of law teaching, showing off our mastery of the interplay of obscure legal rules. Perhaps we forwent the maddening distinctions among larceny, embezzlement, and false pretenses, but we instead plunged into the intricacies of the Model Code, teasing out, for example, the interrelated vagaries of its provisions on conduct, circumstances, and results; purpose, knowledge, recklessness, and negligence; and complicity, attempt, and conspiracy. Of course professors of criminal law should teach some of these interrelations—but we should have a better excuse for doing so than the mere fact that it makes us look erudite. A good test would be to ask whether our students likely will ever again encounter the statutory language; if the answer is no, we should bypass the opportunity to parade our knowledge.

Another tradition in law teaching is system-building, the quest for deep structure, for a conceptual framework. Many criminal law teachers of my generation chose their occupation because of the scope it provided for this kind of philosophizing about a profoundly important aspect of public policy. And so we construct theories of actus reus and mens rea, of imputation, of justification, and excuse. Such theory-building surely is a valid aspect of teaching and learning criminal law, but when theory begins to crowd out or otherwise to contort the law as it is, the learning of our students inevitably suffers.²⁶⁸

²⁶⁸ For a theory of my own, subject to the same criticism, see Batey, supra note 70.
The practice lives of these students will prove the merit of our teaching.\textsuperscript{269} If we can resist the ease of teaching the Model Penal Code as if it were the law everywhere, the gratification of splitting hairs about its provisions, and the allure of erecting elaborate theoretical structures to encompass it, we teachers of criminal law may be pleasantly surprised by the marks the lawyering of our students gives us. If we cannot, we may try to blame the low grades we will surely receive on leaders of the professoriate like Paul H. Robinson—but the failure will truly be our own.

\textsuperscript{269} A possible explanation for the focus of Robinson's treatise is that the elite students he teaches at Northwestern are unlikely ever actually to practice criminal law, so his book aims instead to train theoreticians of criminal law, who may someday advise a legislature on amending its criminal laws or perhaps teach the subject. (The treatise's emphasis on strict and corporate liability, see Robinson, \textit{supra} note 5, at 250–56, 355–60, 363–69, 371–75, the few areas of criminal law elite practitioners are likely to encounter, supports this surmise). Giving credence to the criticism of Judge Harry Edwards and others that academic law is becoming less and less relevant to the practice of law, see Harry T. Edwards, \textit{The Growing Disjunction Between Legal Education and the Legal Profession}, 91 \textit{Mich. L. Rev.} 34 (1992); see generally \textit{Symposium: Legal Education}, 91 \textit{Mich. L. Rev.} 1921 (1993), such a focus renders the treatise largely useless to students at non-elite schools, who may someday have to handle a criminal case—unless of course they have a teacher who insists on training them not for this function, but for the "philosopher-king" functions few if any of them will ever be asked to perform.