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Version  Post-print/accepted manuscript

Citation (published version)  Dubber, Markus D., The Integration of Substantive Criminal Law in the United States (October 2004). http://dx.doi.org/10.2139/ssrn.871545

Publisher's Statement  This is the peer reviewed version of the following article:
Dubber, Markus D., The Integration of Substantive Criminal Law in the United States (October 2004).

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The Integration of Substantive Criminal Law in the United States

Markus D. Dubber*

1. Introduction

In an important sense, there is no such thing as the integration of substantive criminal law in the United States. Substantive criminal law in the United States is primarily state law. As a result it is quite diverse. There has not been an effort on the part of the national legislature to integrate the criminal law of the fifty states and the District of Columbia into a coherent whole. The federal Congress has no such power. The national integration of state criminal law would constitute an impermissible interference with the sovereignty of the states.

The power to make criminal law in U.S. law is said to derive from the so-called police power of the state, i.e., a general power to protect and enhance the public welfare which “extends to the protection of the lives, limbs, health, comfort, and quiet of all persons, and the protection of all property.”¹ That power is considered an essential component of sovereignty. Moreover, the police power is explicitly limited to the states. The federal government enjoys only those powers explicitly enumerated in the federal constitution. The police power is not among them. What federal criminal law there is therefore derives from other constitutional sources, most importantly the power to regulate interstate and international commerce.

2. Internal Integration

Even in the absence of a comprehensive integrative strategy by the national legislature, however, it would be simplistic to assume that American criminal law is completely nonintegrated. For one thing, criminal jurisdictions have achieved varying degrees of internal integration.

a. Federal Criminal Law

Take federal criminal law, for instance. There is one body of federal criminal law that applies across the United States (and, in many cases, extraterritorially as well). The U.S. federalist system not only denies the federal legislature the police power, but also from the very beginning of the Republic denied the federal judiciary the power to create common law—i.e., non-statutory—crimes.² As a result there has always only been a

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² Hudson & Goodwin v. United States, 11 U.S. 32 (1812).
single source of federal criminal law, namely statutes passed by the federal Congress. This feature facilitated the integration of federal criminal law.

Statutes, however, do not interpret or apply themselves. The federal judiciary thus played a role in defining federal criminal law. The federal courts in the twelve federal judicial circuits (the first through the eleventh circuit, plus the circuit for the District of Columbia), however, occasionally differ in their interpretation of federal criminal statutes. These conflicts are from time to time resolved by the United States Supreme Court. The U.S. Supreme Court, however, reviews only a very small number of cases each year, only a fraction of which deal with federal criminal law, only some of which in turn raise inter-circuit conflicts. As a result, conflicts among federal circuits often remain unresolved. Within each circuit, the circuit courts of appeal attempt to achieve consistency among the district courts within their respective circuit, though in this case as well a conflict can only be addressed, and not to mention resolved, if the issue in question reaches the court of appeal. An inter-district conflict is more likely to reach a circuit court, however, than an inter-circuit conflict is to reach the U.S. Supreme Court since federal criminal defendants can appeal to the circuit court as a matter of right whereas the U.S. Supreme Court grants a writ of certiorari only in those few cases it deems significant enough for its attention.

The inconsistency in the interpretation of federal criminal statutes can in some cases be seen as an unintended consequence of the vagueness, or at least the breadth, of the statute in question. The federal mail fraud statute provides a prominent example. Ostensibly designed to protect the integrity of the federal postal service, mail fraud consists of three elements: [1] “a scheme or artifice to defraud,” [2] furthered by the use of interstate mail, [3] to deprive another of money, property, or “the intangible right of honest services.” Federal courts have found it particularly difficult to produce consistent interpretations of “honest services” fraud. “Over time, the ‘honest services’ doctrine became applicable to four general categories of defendants: [1] government officials who defraud the public of their own honest services; [2] elected officials and campaign workers who falsify votes and thereby defraud the electorate of the right to an honest election; [3] private actors who abuse fiduciary duties by, for example, taking bribes; and [4] private actors who defraud others of certain intangible rights, such as privacy.” As the various circuits plumbed the meaning of “honest services fraud,” conflicting interpretations of the statute continued to arise.

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3 One should also mention here the increasingly common practice of executive criminal lawmaking, i.e., the creation of criminal offenses by administrative agencies. This practice, however, ultimately can be traced back to the federal legislature’s delegation of its criminal lawmaking power to these agencies on particular issues. See the discussion of the United States Sentencing Commission and its Guidelines infra.

4 Not all inter-district conflicts reach a circuit court because criminal defendants regularly waive their right to an appeal as part of a plea agreement.

5 Note, however, that the statute now also applies to the use of “private or commercial interstate carrier[s],” like UPS and Federal Express. 18 U.S.C. § 1341.


7 United States v. Handakas, 286 F.3d 92, 101-02 (2d Cir. 2002).

8 For example, compare United States v. Frost, 125 F.3d 346, 365-66 (6th Cir. 1997) (requiring a breach of a fiduciary duty to sustain a theft of “honest services” in the private sector), with United States v. Sancho, 157 F.3d 918, 921 (2d Cir. 1998) (rejecting a fiduciary duty requirement); and compare United States v. Cochran, 109 F.3d 660, 667 (10th Cir. 1997) (subjecting omission or misrepresentation to a test of
So great is the inconsistency that one federal judge recently remarked that “the substantive force of the statute varies in each judicial circuit.”9 A federal circuit court went so far as to strike down the statute as unconstitutionally vague.10 From the outset, the meaning of “honest services” was in doubt, as the following exchange between a legal advisor to a congressional subcommittee considering the proposed adoption of the honest services fraud statute (Ronald Stroman) and a justice department official testifying in support of its adoption (John C. Keeney) illustrates:

Mr. STROMAN: Well, honest services of [a] public official, do you think that is [] specific? I mean what does “honest services” mean? Certainly if I am a public official--
Mr. KEENEY: Well, it means that--it means what the circuit courts of appeals have been saying for years that when a [public official] corruptly uses his office he is depriving the citizens of that State of his honest services.
Mr. STROMAN: . . . If I am an official in the Government and I see the term “honest government,” that certainly does not alert me . . . as to what you are trying to cover. I do not know what that means. . . . I would have to read the cases to specifically understand what the statute is attempting to get at.11

The vagueness of federal statutes may have the unintended consequence of interfering with the integration of federal criminal law. The vagueness itself, however, is not unintentional. To the contrary, it has been lauded as a breakthrough in the war on crime because it places discretion in the hands of expert officials (prosecutors and, to a lesser extent, judges) to determine its proper scope: “When a ‘new’ fraud develops—as constantly happens—the mail fraud statute becomes a stopgap device to deal on a temporary basis with the new phenomenon, until particularized legislation can be developed and passed to deal directly with the evil.”12

Vague criminal statutes, of course, complicate the integration of a system of criminal law by facilitating not only inconsistent judicial interpretation, but also executive enforcement. What is mail fraud to one federal prosecutor may not be mail fraud to another. U.S. criminal law is notoriously unconcerned with guiding prosecutorial discretion. A principle of legality (in the sense of a requirement of compulsory prosecution) familiar from European legal systems is unknown in U.S. criminal law. Federal prosecutors’ discretion instead is subject to occasional guidelines issued by the Attorney General, which set out factors to be taken into account when it comes to deciding whether or not pursue a criminal prosecution:

1. Federal law enforcement priorities;
2. The nature and seriousness of the offense;

materiality), with Frost, 125 F.3d at 368 (subjecting omission or misrepresentation to a test of reasonable foreseeability).
9 United States v. Brumley, 116 F.3d 728, 743 n.6 (5th Cir. 1997) (Jolly, J., dissenting).
10 United States v. Handakas, 286 F.3d 92 (2d Cir. 2002).
3. The deterrent effect of prosecution;
4. The person’s culpability in connection with the offense;
5. The person’s history with respect to criminal activity;
6. The person’s willingness to cooperate in the investigation or prosecution of others; and
7. The probable sentence or other consequences if the person is convicted.\textsuperscript{13}

In particular cases, these general considerations are supplemented by others. Consider, for instance, the guidelines pertaining to the initiation of a prosecution under the federal Racketeer Influenced and Corrupt Organizations Act of 1970, better known as RICO,\textsuperscript{14} another oft-cited example of an intentionally vague federal criminal statute:

The decision to institute a federal criminal prosecution involves balancing society’s interest in effective law enforcement against the consequences for the accused. Utilization of the RICO statute, more so than most other federal criminal sanctions, requires particularly careful and reasoned application, because, among other things, RICO incorporates certain state crimes. . . . Despite the broad statutory language of RICO and the legislative intent that the statute “. . . shall be liberally construed to effectuate its remedial purpose,” it is the policy of the Criminal Division that RICO be selectively and uniformly used. [N]ot every proposed RICO charge that meets the technical requirements of a RICO violation will be approved. Further, the Criminal Division will not approve “imaginative” prosecutions under RICO which are far afield from the congressional purpose of the RICO statute. . . .

These guidelines provide only internal Department of Justice guidance. They are not intended to, do not, and may not be relied upon to create any rights, substantive or procedural, enforceable at law by any party in any matter civil or criminal. Nor are any limitations hereby placed on otherwise lawful litigative prerogatives of the Department of Justice.\textsuperscript{15}

Note here the absence of legislative guidelines that could integrate the enforcement of the RICO statute. In fact, the legislature, by calling on courts and prosecutors to “liberally construe” RICO “to effectuate its remedial purpose,” more precisely “to seek the eradication of organized crime,”\textsuperscript{16} explicitly refused to place constraints on the interpretation or enforcement of the statute. Here the integration of U.S. federal criminal law is assigned a lower priority than the pursuit of a war on crime.

b. Integrating Common Law Judges

While U.S. criminal law has never attempted to set meaningful limits on prosecutorial discretion in the enforcement of criminal statutes, the limitation of judicial discretion in the interpretation of criminal statutes has attracted more attention. To understand why this is so, one must take a brief detour into the history of American criminal law.

\textsuperscript{14} 18 U.S.C. §§ 1961 et seq.
Traditionally American criminal law—as all American law—derived from English law. English criminal law, however, was predominantly judge-made, rather than statutory. There exists no English criminal code to this day, though there are numerous criminal statutes dealing with specific offenses. Efforts beginning in the nineteenth century to draft an English criminal code have failed repeatedly. English “common law” consisted of an ever-expanding body of judicial precedent that extended over centuries and whose origins were lost in the mist of medieval law. In the colonial period, American courts applied English common law—along with English statutes—and developed a jurisprudence that relied heavily on English precedent. In fact, there was no distinction in principle between English precedent and American precedent. If anything, English precedents were more influential because they were considered more sophisticated and because reports of English court opinions were more plentiful and more accessible, especially during the formative decades of American criminal law.

Even after the American Revolution, however, English jurisprudence continued its dominance. Even as American courts began generating opinions on a wide range of subjects, English decisions set the standard. Blackstone’s discussion of criminal law in the fourth volume of his Commentaries on the Law of England, published in 1769, remained the leading book on criminal law throughout at least the first half of the nineteenth century, until the publication of American criminal textbooks, most notably by Joel Prentiss Bishop.17

English influence on American criminal law could still be seen in American criminal law casebooks, the primary materials for criminal law instruction in American law schools, in the first half of the twentieth century, which relied as heavily on English court opinion as—if not more heavily than—they did on American ones.18 To this day, the most influential opinion on the insanity defense in American criminal law is an 1843 advisory opinion by an English court.19 In fact, many criminal law teachers in the United States still teach their subject as a common law subject, whose rules are derived primarily from judicial precedent rather than from legislative statutes.

Conceptualizing American criminal law as a body of common law affects its integration in various, and not necessarily consistent, ways. On the one hand, the very existence of a unified body of “American criminal law” relies, paradoxically, on the assumption that there is such a thing as a unified body of The Common Law.20 The common law, in theory, continuously generates itself out of court opinions from common law countries, including the United States and England, as well as other Commonwealth countries. In practice, of course, The Common Law in the United States consisted originally exclusively of English cases and then was thought increasingly to incorporate American cases as well. But the theory of the common law remains supranational. Still, the common law is the closest thing to a unified body of American criminal law because the codification of American criminal law, particularly since the middle of the twentieth century, has also resulted in a particularization of American criminal law. Today,

17 Joel Prentiss Bishop, Commentaries on the Criminal Law (1856); see also Francis Wharton, A Treatise on the Criminal Law of the United States (1846).
18 See, e.g., Joseph Henry Beale, A Selection of Cases and Other Authorities upon Criminal Law (1915); Francis Bowes Sayre, A Selection of Cases on Criminal Law (1927).
American criminal law is codified in codes specific to individual jurisdictions, i.e., the states, the federal government, and the District of Columbia (as well as the military). With the demise of the idea of the common law, the idea of a single American criminal law has given way to a New York criminal law, California criminal law, federal criminal law, and so on, where each jurisdiction-specific system of criminal law of course may be well integrated without adding up to a coherent whole.

On the other hand, a system of common law is not subject to the explicit integration efforts of a central legislature so that even jurisdiction-specific integration is difficult to achieve. Instead, common law is created out of the decisions of individual judges, or panels of judges, that add up to a patchwork of rules whose consistency derives solely from a shared commitment to *stare decisis*.

Moreover, to the extent that American criminal law is thought of as a *dual system* of both common law and statutory elements, a commitment to *stare decisis*, though conducive to uniformity within the common law system of judicial precedent, may result in judicial resistance to statutory law that is seen as encroaching upon the traditional authority of courts to make criminal law. In a common law system uniformity results from *stare decisis* and from nothing else, so that legislative efforts at integration might be rebuffed by the judiciary.

The past two hundred years have witnessed a struggle between legislatures and courts over the authority to make criminal law in the United States. Over time, the judiciary’s dominance has been replaced by a virtual legislative monopoly over criminal lawmaking. As the legislature asserted its authority through the comprehensive codification, and thereby integration, of criminal law in a particular jurisdiction, it sought to eliminate, or at least to significantly guide, judicial discretion in the interpretation of the new criminal codes.

c. The Model Penal Code

The single most important codification project in American criminal law history is the American Law Institute’s Model Penal Code, which was completed in 1962. It is important to recognize that the Model Penal Code project was not connected to any particular U.S. federal or state government. Whatever integrative ambition it manifested stemmed from the members of the American Law Institute, a private organization of distinguished lawyers, judges, and professors, founded in 1923 “to promote the clarification and simplification of the law and its better adaptation to social needs, to secure the better administration of justice, and to encourage and carry on scholarly and scientific legal work.” The Model Penal Code project was directed by an influential professor of criminal law and constitutional law, Herbert Wechsler of Columbia University Law School, who directed and coordinated the work of a group of drafters and advisors that included judges, lawyers, and law professors as well as representatives from other disciplines such as sociology, criminology, psychology, and psychiatry.

The Model Penal Code was a remarkable success. Most states revised their criminal codes in its wake, though California and several other states did not.²¹ A large-scale effort to reform federal criminal law also failed after over a decade of work under the direction of Wechsler’s co-reporter on the Model Penal Code project, Professor Louis

Schwartz of the University of Pennsylvania Law School. The federal reform effort instead resulted in a major overhaul of the federal law of punishment, which will be discussed in greater detail below.

The Model Penal Code was designed to integrate American criminal law both internally and externally, i.e., both within and across jurisdictions. The very idea of a code, of course, implies the ambition to integrate as every part of criminal law doctrine is formed into a coherent whole driven by a common set of functions. At the same time the rationalization pursued by a codification project, and a *model* code in particular, implies a certain uniformity across jurisdictions. While each jurisdiction might adopt its own definition of intent, for instance, no jurisdiction would be expected to adopt a wildly incoherent definition of intent. Here, the rationality of the provision would result in incidental integration not unlike the development of *common* law jurisprudence; it’s no accident that the common law has often been said to be motivated by an underlying rationality.22

In the face of centuries of judicial resistance to legislative criminal lawmaking, the Model Penal Code drafters understood that a criminal code could only hope to achieve its integrative goal if it eliminated judicial criminal lawmaking to the greatest extent possible and then guided whatever judicial interpretation of code provisions was inevitable (and even desirable). First, the Model Penal Code explicitly deprived judges of the power to make criminal law, by providing that “[n]o conduct constitutes an offense unless it is a crime or violation under this Code or another statute of this State.”23 Second, and at least as important, the Model Penal Code set out in considerable detail its purposes and instructed judges to interpret its provisions in lights of these purposes:

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Section 1.02. Purposes; Principles of Construction.

(1) The general purposes of the provisions governing the definition of offenses are:

(a) to forbid and prevent conduct that unjustifiably and inexcusably inflicts or threatens substantial harm to individual or public interests;

(b) to subject to public control persons whose conduct indicates that they are disposed to commit crimes;

(c) to safeguard conduct that is without fault from condemnation as criminal;

(d) to give fair warning of the nature of the conduct declared to constitute an offense;

(e) to differentiate on reasonable grounds between serious and minor offenses.

(3) The provisions of the Code shall be construed according to the fair import of their terms but when the language is susceptible of differing constructions it shall be interpreted to further the general purposes stated in this Section and the special purposes of the particular provision involved. The discretionary powers conferred by the Code shall be exercised in accordance with the criteria stated in the Code and, insofar as such criteria are not decisive, to further the general purposes stated in this Section.

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22 It must be noted, however, that the Model Penal Code drafters would have disputed this claim, at least when it came to certain doctrines, including that of intent. They viewed themselves as very much in opposition to what they regarded as the often irrational body of criminal law that had arisen out of hundreds of years of judicial criminal lawmaking.

23 § 1.05(1).
The Model Penal Code thus rejected not only the judiciary’s power to make criminal law, but also abandoned a long-standing rule of interpretation that had allowed courts to stem the influence of statutory criminal law. Through the rule of strict construction—also known as the rule of lenity—courts traditionally had refused to interpret criminal statutes in light of legislative intent, instead insisting on interpreting them as narrowly as possible. If a statute criminalized theft of horses, courts might refuse to apply it to a defendant accused of stealing donkeys. While this practice was often justified as motivated by a desire to protect the rights of criminal defendants who lacked notice of the criminality of their conduct, it also provided courts with a convenient means for protecting the supremacy of judicial over legislative criminal lawmaking, both by limiting the scope of the latter and by exposing its inferiority to the former. Unlike amateurish legislatures that only met occasionally to take up matters of government, the judiciary regarded itself as belonging to a long and distinguished jurisprudential tradition dedicated to the development of the common law of crimes. Moreover, criminal lawmaking by the judiciary was in a state of continuous evolution, unlike statutory criminal law, which was portrayed as stationary and inflexible. While judges could adapt judicial criminal law to the circumstances at hand—even if that meant extending the definition of theft to cover donkeys—statutory criminal law was frozen in time, already outdated at the time of its promulgation. If the legislature insisted on generating ill-drafted anachronistic criminal statutes, then judges saw it as their obligation to limit the statutes’ reach through the rule of strict construction.

The Model Penal Code roundly rejected this judicial tradition, by instructing judges to take into account the purposes underlying a criminal statute, rather than resolving ambiguities—which were inevitable in a criminal code of manageable size and reasonable clarity and accessibility—in favor of the defendant. What’s more, the drafters then went further and specified the purposes of the criminal code as a whole in the code itself.

While many jurisdictions adopted the Model Penal Code at least in part, several others did not. As noted above, neither federal criminal law nor California criminal law was ever reformed in light of the Code. As a result, the federal criminal code and the California criminal code lack the Model Penal Code’s integrative potential. The federal criminal code, for instance, consists of an alphabetical listing of federal crimes with no conceptual framework and a negligible general part that pales in comparison to the Model Penal Code’s general part. Title 18 of the U.S. Code—which goes by the name of Federal Criminal Code—contains no general provision on jurisdiction, voluntariness, actus reus, mens rea, causation, mistake, entrapment, duress, infancy, justification, self-defense, or inchoate offenses. The so-called federal criminal code also can make no claim to comprehensiveness; the vast majority of federal criminal offenses are defined elsewhere.

d. The Law of Punishment

24 See, e.g., R v. Bazeley, 2 East’s P.C. 571 (1799) (embezzlement by bank teller vs. by stockbroker); McBoyle v. United States, 283 U.S. 25 (1931) (transportation of motor vehicle vs. of aircraft).
One area in which the federal government did strive for greater integration has been the law of sentencing. While the federal criminal code was never reformed, leaving an inconsistent mass of perhaps 10,000 federal crimes strewn throughout federal statutes and, increasingly, executive regulations, the federal law of sentencing was radically revised in 1984 with the establishment of the United States Sentencing Commission. The Commission promulgates the mandatory United States Sentencing Guidelines which were specifically designed to achieve "reasonable uniformity in sentencing by narrowing the wide disparity in sentences imposed for similar criminal offenses committed by similar offenders." Under the guidelines, federal judges are required to impose a sentence within a certain range as specified on a sentencing grid based on characteristics of the offense and the offender. To achieve consistency, the Sentencing Commission could not use the haphazard definitions of criminal conduct in the federal criminal code as the basis for its sentencing guidelines. It instead grouped offenses into eighteen offense categories specially created for this occasion, which illustrate—among other things—the considerable breadth of federal criminal law today:

Offenses Against the Person; Offenses Involving Property; Offenses Involving Public Officials; Offenses Involving Drugs; Offenses Involving Criminal Enterprises and Racketeering; Offenses Involving Fraud or Deceit; Offenses Involving Prostitution, Sexual Exploitation of Minors, and Obscenity; Offenses Involving Individual Rights; Offenses Involving the Administration of Justice; Offenses Involving Public Safety; Offenses Involving Immigration, Naturalization, and Passports; Offenses Involving National Defense; Offenses Involving Food, Drugs, Agricultural Products, and Odometer Laws; Offenses Involving Prisons and Correctional Facilities; Offenses Involving the Environment; Antitrust Offenses; Money Laundering and Monetary Transaction Reporting; Offenses Involving Taxation; Other Offenses.

Given this reclassification of statutory offenses drawn from all corners of federal statutory law and federal regulations, the federal sentencing guidelines can be regarded as indirectly coordinating the federal law of crimes as well as the federal law of punishment. Even so, the selective reform of federal criminal law has resulted in the odd combination of a highly disintegrated federal law of crime and a highly integrated federal law of punishment.

Uniformity in punishment is to be ensured not only through the application of the rigid and highly detailed sentencing grid, but also through the appellate review of sentences. In a significant departure from tradition, federal criminal law permits sentencing appeals not only by defendants but also by prosecutors. Appellate review is particularly important in cases where the trial judge departed from the prescribed guideline sentence. The sentencing statute permits a court to depart from a guideline-specified sentence only when it finds "an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing

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Commission in formulating the guidelines that should result in a sentence different from that described.”

To the extent that the federal sentencing guidelines contribute to the integration of the federal law of punishment, they reflect not the efforts of the federal Congress, but of the federal sentencing commission. The federal legislature in effect has delegated the law of punishment to the federal sentencing commission, a *sui generis* “independent commission in the judicial branch of the United States.” The commission has seven voting members (one of whom is the Chairman) appointed by the President “by and with the advice and consent of the Senate.” “At least three of the members shall be Federal judges selected after considering a list of six judges recommended to the President by the Judicial Conference of the United States.” No more than four members of the Commission shall be members of the same political party. The Attorney General, or his designee, is an ex officio non-voting member. The Chairman and other members of the Commission are subject to removal by the President “only for neglect of duty or malfeasance in office or for other good cause shown.” Except for initial staggering of terms, a voting member serves for six years and may not serve more than two full terms. The delegation of the law of punishment to this “expert body” has been upheld against constitutional challenge.

Several states have sought to integrate their law of punishment through the adoption of so-called determinate sentencing schemes, and even sentencing guidelines, though none has adopted a mandatory guidelines system that is as detailed and as strict as the federal sentencing guidelines. Self-generated and self-enforced judicial sentencing guidelines have failed to impose significant uniformity on sentencing practices as judges have continued to insist on their discretion to impose sentences that reflect the particular circumstances of each crime and each offender.

It is noteworthy that the mandatory nature of the federal sentencing guidelines has repeatedly been confirmed, and defended against constitutional attack, by the United States Supreme Court. At this point, not only the prescribed sentencing ranges, but also every other aspect of the sentencing guideline manual issued by the sentencing commission is binding on the federal courts, including policy statements and commentary.

e. The States

Most states have taken an approach to the integration of substantive criminal law that is the exact opposite of that taken by the federal government. They have focused on revising the law of crimes, rather than the law of punishment. As a result, their law of crimes tends to be more highly integrated than their law of punishments. They have followed the Model Penal Code in its attempt to integrate the law of crimes through a comprehensive codification of substantive criminal law and fairly detailed guidelines regarding the judicial interpretation of the provisions in the criminal code.

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30 Ibid.  
31 §§ 992(a) & (b).  
Vague criminal statutes that permit inconsistent judicial interpretation, however, are not limited to federal criminal law. For instance, many states have adopted racketeering statutes modeled on the federal RICO statute. Still, the states generally have been more sensitive to the disintegrative potential of vague criminal statutes despite their usefulness in the war on crime. As a New York court explained with respect to New York’s “Organized Crime Control Act” (OCCA),

although OCCA is based upon RICO, it is clear from both the language of OCCA and the legislative history that the New York State Legislature intended to draft a narrower and more precise statute than RICO. The legislature was aware of and sought to avoid the wide scope and sweep of RICO.33

State law has no ambitions of external integration. Whatever integration occurs in state criminal law is limited to the particular jurisdiction. That is not necessarily the case with federal criminal law. The federal legislature, explicitly or implicitly, has advanced—deliberately or not—the integration of U.S. criminal law in various ways. Federal criminal law, by its very nature, furthers the integration of U.S. criminal law insofar as it is justified in terms of national—i.e., supra-state—interests. Foremost among these interests is the regulation of interstate and international commerce. (Recall that the federal government, at least in theory, does not possess a general power to police, i.e., to legislate or regulate in pursuit of the welfare of the nation.)

3. External Integration: The Expansion of Federal Criminal Law

The past century has seen a dramatic expansion of federal criminal law, largely justified as an exercise of the power to regulate interstate (and occasionally international) commerce. This body of federal criminal law can be seen as highly integrated insofar as it is common to the entire nation and, as a federal matter, is not subject to state law and is therefore free of the potential for inconsistency inherent in the existence of fifty (fifty-one if one counts the District of Columbia) jurisdictions.

The expansion of federal criminal law, however, cannot be seen in isolation from state criminal law. As federal criminal law has grown, it has encroached upon areas traditionally reserved for state criminal law. To pick but one example, in the name of the regulation of commerce, the federal legislature now criminalizes all street crime connected to the possession and distribution of controlled substances. Virtually the entire body of federal drug criminal law, however, duplicates the drug criminal law of each state. In this sense, the expansion of federal criminal law hinders, rather than advances, the integration of U.S. criminal law by adding another statutory and regulatory layer to the traditional patchwork of state criminal laws.

Note that the considerable, and increasing, overlap between federal and state criminal law is facilitated by the so-called dual sovereignty exception to the constitutional prohibition against double jeopardy. The fifth amendment to the U.S. Constitution provides that no “person [shall] be subject for the same offense to be twice put in jeopardy of life or limb.” The violation of two overlapping norms of state and federal criminal law, however, is held not to contravene this constitutional principle because each

violation constitutes not one but two “offenses,” one each against the state as sovereign and the federal government as sovereign. Since two sovereigns were offended, the offender may be punished twice, once by each sovereign. In fact, if two states can establish jurisdiction—say, because different elements of the criminal act were committed in each state—then the dual sovereignty doctrine would not stand in the way of punishment by each state (not to mention the federal government, provided a federal statute was violated as well).34

The integration of U.S. criminal law is irrelevant for purposes of the double jeopardy prohibition. No matter how similar or dissimilar two jurisdictions’ statutes are that apply to a given course of conduct, there is no constitutional bar against their enforcement. The dual sovereignty doctrine enables the continued coexistence of fifty-two separate systems of criminal law, without any perceived need for coordination or integration.

The federal mail fraud statute, which we have already encountered, illustrates another trend: the integration of state criminal law into federal criminal law. Federal mail fraud criminalizes conduct that is often, at least potentially, subject to state criminal law as well. For instance, in a recent case the owner of a construction company was charged with federal mail fraud for, among other things, violating a “prevailing rate of wage” provision in a New York state contract.35 The defendant was the lowest bidder on a contract, but had underpaid his workers and filed bogus payroll records as a cover-up. This conduct constituted a misdemeanor under New York state law punishable by up to thirty days’ imprisonment. By prosecuting this case under the federal mail fraud act, the federal prosecutor elevated the defendant’s conduct to a felony with a maximum penalty of five years’ imprisonment.

The federal legislature also integrates U.S. criminal law indirectly, through the use of financial incentives under its constitutional spending power. While it is prohibited from “compelling” or “commandeering” the states to pass legislation, the Congress is permitted to encourage the states to adopt reforms by tying the award of federal funding to their passage.36 For instance, the federal government might condition the award of federal funding for highway construction on the state legislature’s setting a certain (usually a lower) blood alcohol level for criminal liability for driving while intoxicated, creating an offense of driving without a seatbelt, or adopting a certain (usually a higher) minimum drinking age. States generally meet the federal legislature’s conditions, though there are some exceptions. For example, though Massachusetts initially complied with federal demands to prohibit the operation of a motorcycle without a helmet, it repealed the helmet law in response to a public outcry. Eventually, however, the state legislature gave in and repassed the law.

4. Federal Constitutional Law

Finally, the potentially most important, and also the most underused, method for integrating U.S. criminal law is the federal constitution. The federal constitution sets out minimum protections of individual rights for any government, state or federal. States are

35 United States v. Handakas, 286 F.3d 92 (2d Cir. 2002).
free to provide greater protections of individual rights than those demanded in the federal constitution, but they cannot provide fewer. This integrating power of the federal constitution is well illustrated by the law of criminal procedure. In the United States, criminal procedure law is largely synonymous with the constitutional law of criminal procedure. The U.S. Supreme Court under Chief Justice Earl Warren (the “Warren Court”) in the 1950s and 60s held that the federal bill of rights (i.e., the protections of individual rights set out in the first ten amendments to the federal constitution) applied not only to the federal government, but to state governments as well. This decision had crucial implications for the integration of U.S. criminal procedure. Criminal law, then even more so than now, was by and large state law so that limiting the application of federal constitutional rights to federal criminal law rendered them meaningless for the vast bulk of criminal cases. The application of the bill of rights to the states, however, brought about a fundamental shift in U.S. criminal procedure as defendants were held to be entitled under the federal constitution to a jury, to the effective assistance of counsel, to a privilege against self-incrimination, to refuse (and to give) consent to a search, to receive Miranda warnings setting out these rights (that they have a right to remain silent and a right to an attorney, even if they can’t afford one, etc.), and so on.

In sharp contrast to the thorough constitutionalization, and therefore integration, of U.S. criminal procedure law, U.S. substantive criminal law has largely remained untouched by constitutional law. Nonetheless, there are some areas where the U.S. Supreme Court has applied federal constitutional law to substantive criminal law and some others still where the Court might do so in the future. The following provides only a cursory summary of constitutional constraints upon substantive criminal law. It should also be noted that state courts have been active—in fact in some cases considerably more active than the U.S. Supreme Court—in constitutionalizing substantive criminal law. Unlike federal constitutional jurisprudence, however, these efforts can only have an internal integrative effect within a given state jurisdiction. Federal constitutional law, by contrast, carries the potential of integrating U.S. criminal law as a whole by providing a common constitutional baseline.

a. General Part

(i) Legality Principle

The U.S. Supreme Court has long recognized the constitutional status of at least some aspects of the legality principle. Criminal statutes violate the federal constitutional due process guarantee (embodied in the fifth amendment and, as applied to the states, the fourteenth amendment to the U.S. Constitution) if they are “void for vagueness.” A statute is unconstitutionally vague “for either of two independent reasons. First, it may fail to provide the kind of notice that will enable ordinary people to understand what conduct it prohibits; second, it may authorize and even encourage arbitrary and discriminatory enforcement.” Among the statutes struck down by the Supreme Court


on vagueness grounds are a state statute criminalizing being a gangster, a city ordinance criminalizing being a vagrant, a state law criminalizing “crimes against nature,” a state statute requiring that a suspect provide a “credible and reliable” identification, and, most recently, a city ordinance criminalizing gang loitering. Largely relying on this federal constitutional precedent, state courts have struck down several criminal statutes as well. Only rarely have lower federal courts used the vagueness doctrine to strike down, or at least limit the application of, the intentionally vague federal statutes discussed previously.

Related to the prohibition of vague criminal statutes (the requirement of specificity) is the rule of statutory interpretation according to which courts are to interpret ambiguous criminal statutes in favor of the defendant. The constitutional status of this so-called rule of lenity is unclear. Insofar as ambiguous criminal statutes do not provide citizens with sufficiently clear notice of what is and is not criminal, the rule of lenity rests on due process concerns similar to those underlying at least the first prong of the void-for-vagueness principle. Nonetheless, the U.S. Supreme Court has applied the rule of lenity inconsistently, leaving doubts about its constitutional foundation. As a canon of statutory interpretation the rule of lenity is also known as the rule of strict construction. As we’ve discussed previously, this rule has been used by courts to limit the impact of statutory criminal law. To the extent that legislatures aim to integrate a diverse body of criminal law doctrine through a comprehensive criminal code, this rule can have an anti-integrative effect. To the extent that the strict construction of criminal statutes prevents the uncoordinated expansion of criminal liability beyond the clear statutory language, however, it can promote, rather than hinder, integration.

Another aspect of the legality principle, the prohibition of retroactive criminal legislation (the principle of prospectivity), is made explicit in the constitution (without the need to have recourse to the general due process guarantee). The (still) controlling interpretation of the constitutional prohibition of ex post facto laws appeared in an early Supreme Court case from 1798, Calder v. Bull:

I will state what laws I consider ex post facto laws, within the words and the intent of the prohibition. 1st. Every law that makes an action, done before the passing of the law, and which was innocent when done, criminal; and punishes such action. 2nd. Every law that aggravates a crime, or makes it greater than it was, when committed. 3rd. Every law that changes the punishment, and inflicts a greater punishment, than the law annexed to the crime, when committed. 4th. Every law that alters the legal

rules of evidence, and receives less, or different, testimony, than the law required at the time of the commission of the offence, in order to convict the offender.\footnote{Calder v. Bull, 3 U.S. 386 (1798).}

In keeping with Calder’s reading of the ex post facto clause, courts have turned a blind eye to the retroactivity of judicially created—as opposed to statutory—norms.\footnote{Rogers v. Tennessee, 532 U.S. 451 (2001).} In addition, they have refused to apply the prohibition to modern punitive measures such as registration and notification requirements for sex offenders\footnote{Smith v. Doe, 538 U.S. 84 (2003).} and even the indefinite incarceration of so-called “sexually violent predators” beyond their legally imposed sentence.\footnote{Kansas v. Hendricks, 521 U.S. 346 (1997).}

Insofar as specificity and prospectivity are based on a general requirement of notice, it should be pointed out that courts have not found it appropriate to constitutionalize a notice requirement in other contexts. For instance the rejection of a good-faith mistake of law defense has not raised constitutional concern.\footnote{See, e.g., People v. Marrero, 69 N.Y.2d 382 (1987).} Publication of state criminal norms is required, but the publicity of legislative deliberations preceding the adoption of the norm has been held to satisfy the requirement.\footnote{United States v. Casson, 434 F.2d 415 (D.C. Cir. 1970).}

As we have already noted, there is no requirement that prosecutors or police officers pursue every provable violation of a state criminal norm (principle of compulsory prosecution, or Legalitätsprinzip), leaving charging and investigatory decisions to the discretion of individual officials, without meaningful guidance or review.

Three other doctrines are associated with the principle of legality in American criminal law. The principle of legislativity (i.e., the requirement that criminal lawmaking power be vested solely in the legislature) has never been invoked to invalidate a judge-made common law crime. In an early case, United States v. Hudson & Goodwin,\footnote{11 U.S. 32 (1812).} the U.S. Supreme Court held that federal courts do not enjoy the power to make criminal law, but that decision was based largely on considerations of federalism. Since the federal legislature did not have broad police power authority to make statutory crimes, it was argued, the federal judiciary could have no similarly broad power to make common law crimes. (To what extent the active participation of federal judges—and prosecutors—in shaping vague federal criminal statutes today amounts to de facto judicial criminal lawmaking is another question.\footnote{Dan M. Kahan, Three Conceptions of Federal Criminal-Lawmaking, 1 Buff. Crim. L. Rev. 5 (1997).} Criminal law was to remain the province of the states. Some state courts have expressed reservations about the propriety—if not the constitutionality—of their power to make criminal law.\footnote{Meadows v. State, 291 Ark. 105 (Ark. 1987).} In general, however, the courts’ power to recognize new common law crimes came to an end through legislative action, rather than through constitutional adjudication.\footnote{See Model Penal Code § 1.05.}

(ii) Actus Reus
The substance of the general part of U.S. criminal law has also been partially constitutionalized. In traditional English and American criminal law, a crime consists of two major components: actus reus and mens rea. The actus reus requirement in turn is often said to have two components, the act requirement itself and the requirement of voluntariness. Criminal liability thus attaches only to acts (rather than thoughts or beliefs) and, among acts, only to those voluntarily engaged in (thus excluding acts committed while sleepwalking, under hypnosis, etc.). The U.S. Supreme Court, in the 1962 case of Robinson v. California, struck down a California statute criminalizing, among other things, being a drug addict under the prohibition against “cruel and unusual punishments” in the Eighth Amendment to the U.S. Constitution. The Court held that it is cruel and unusual punishment to punish someone for having a disease—and that drug addiction is a disease in the relevant sense. This opinion has been read as constitutionalizing the act requirement as a whole, or at least the voluntariness component of the requirement. Note, however, that six years later, in Powell v. Texas, the Supreme Court rejected the claim that punishing an alcoholic for public intoxication violates the Eighth Amendment. The Court distinguished between criminalizing a disease (assuming arguendo that alcoholism is a disease) and criminalizing conduct incidental to the disease. Some years later, the New York Court of Appeals relied on Powell to hold that the Eighth Amendment likewise did not prohibit punishing a drug addict for drug possession.

(iii) Mens Rea

The U.S. Supreme Court has yet to hold that the federal constitution prohibits punishment without proof of mens rea. In a series of cases, the Court has upheld various state and federal strict liability statutes, even if they were punishable by imprisonment. Occasionally, however, the Court has interpreted federal statutes to require a showing of mens rea, even if the statutory language is silent on this issue, particularly when the statute under review implicated freedom of thought, speech, or expression or was classified as a so-called traditional, or “malum in se,” crime. The use of strict liability in the case of “public welfare,” or “malum prohibitum,” offenses, however, appears to face no constitutional obstacles at this point.

(iv) Justifications

On the question of justification, the U.S. Supreme Court in effect required states to recognize certain justifications with respect to particular crimes. For instance, in the famous 1973 case of Roe v. Wade, the Court held that the criminal prohibition of abortion violates federal due process unless the statute recognized certain justifications,
including the necessity to preserve the woman’s life (in which case the woman’s right to life outweighed that of the fetus) and, most significant, the viability of the fetus.  

The Court also defined the parameters for some justification defenses. A good example is the justification of law enforcement. In Tennessee v. Garner, the Court held that the Fourth Amendment requires that deadly force be used to effect an arrest only if it is necessary to prevent escape and there is probable cause to believe that the suspect poses a significant threat of death or serious physical injury to the officer or others.

Attempts to achieve constitutional status (under the due process and equal protection guarantees in the federal constitution) for the defense of consent in cases of assisted suicide were not successful.

(v) Excuses

Turning briefly to excuses, the U.S. Supreme Court has not directly addressed the question of whether a defendant is constitutionally entitled to raise an insanity defense. Some state courts, however, have found such a constitutional right on federal or state constitutional grounds, or both. With regard to defenses generally, the U.S. Supreme Court has frequently addressed the question of whether a state may constitutionally assign the burden of proof (or at least the burden of producing evidence) on a given defense to the defendant—thus turning the defense into an “affirmative defense.” In general, the Court has held that the defendant may be assigned the burden of proving any justification or excuse defense. The state may not shift the burden in the case of defenses that negate an element of the offense, rather than establishing a separate ground for exculpation.

(vi) Sanctions

When it comes to the constitutionality of sentences, the U.S. Supreme Court has shown great deference to state legislatures. In noncapital cases, the Court has been reluctant to strike down statutes imposing harsh prison sentences on proportionality grounds. It has upheld, for example, sentences of forty years and a $20,000 fine for possession and distribution of nine ounces of marijuana, and of life imprisonment without the possibility of parole for simple possession (i.e., possession without the element of intent to distribute) of 672 grams of cocaine. Most recently it rejected constitutional proportionality attacks on recidivist statutes that imposed life sentences on

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64 See, e.g., N.Y. Penal Law § 125.05(3).
defendants with prior felony conviction who were convicted of stealing three golf clubs and $150 worth of videotapes, respectively.\textsuperscript{72}

In the area of capital punishment, the Court has held that proportionality militates against the imposition of the death penalty in cases of rape,\textsuperscript{73} as well as in certain unintentional murder cases (e.g., the get away driver in a robbery during which a death occurs).\textsuperscript{74} The death penalty itself has been held not to violate the Eighth Amendment’s prohibition of cruel and unusual punishments.\textsuperscript{75}

\begin{itemize}
  \item[b. Special Part]

  The U.S. Supreme Court scrutinized the special part of criminal law more carefully than it has the general part, even though it does not always highlight the criminal nature of the statute in question. Most recently, it struck down a state anti-sodomy statute on due process grounds.\textsuperscript{76} Other criminal statutes recently invalidated on constitutional grounds include a gang loitering ordinance,\textsuperscript{77} and a hate crimes statute in a cross-burning case.\textsuperscript{78}

\end{itemize}

\textbf{5. Conclusion}

The notion of national integration is foreign to U.S. substantive criminal law, which traditionally has been highly particularized and localized, with a clear emphasis on the states rather than the federal government. Even in the absence of an explicit integrative ambition, however, the expansion of federal criminal law has resulted in the creation of a uniform body of criminal law that covers the entire United States. The further development of federal constitutional criminal law likewise may advance the integration of substantive criminal law in the United States, through the establishment of a common denominator of individual rights.

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  \item[76] Lawrence v. Texas, 123 S. Ct. 2472 (2003).
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