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The American Law Institute's Model Penal Code and European Criminal Law

Markus D. Dubber*

It has been suggested that the American Law Institute's Model Penal Code might serve as a model for a European Model Penal Code, or at least for the project of assembling general principles of European criminal law.¹ This paper presents a critical analysis of the Model Penal Code project, paying particular attention to the form of the project, rather than its substance, on the assumption that the idea, and the drafting, of the Model Penal Code would be of greater interest to a European criminal law project than its content, a systematic and comprehensive general part and a representative special part of "American criminal law."²

I. The Model Penal Code's Success

The Model Penal Code, drafted under the auspices of the American Law Institute between 1952 and 1962, is widely considered a success. This success can be measured in several ways. Most obviously, although the Model Penal Code was not adopted in its entirety by any state, the Model Penal Code triggered widespread reform in the majority of American states, including New York, Pennsylvania, New Jersey, Texas, with several notable exceptions, including California and federal law. (The federal Congress eventually abandoned its attempt to reform substantive criminal law and adopted the infamous federal sentencing guidelines instead, which as a result amounted to a shadow criminal code, given the need—in the absence of a usable federal criminal code—to redefine the criminal conduct to which a guideline sentence applied.³)

Note, however, that the Model Code's influence was limited to its first two parts, the general part and special part of a criminal code, respectively. Its Parts III & IV, containing provisions dealing with the classification and treatment of offenders in correctional institutions, were ignored. This is significant because treatmentism—

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¹ See, e.g., A. Cadoppi, "Towards a European Criminal Code?," 4 Eur. J. Crime Crim. L. & Just. 2 (1996) (a programmatic tour de force); see also Bart Stapert, "American Approach to Harmonization: The Model Penal Code as an Example for Europe?," in *Harmonisation and Harmonising Measures in Criminal Law* 109 (André Klip and Harmen van der Wilt, eds. 2002).

² Although illustrative provisions of the Model Penal Code will be cited, a summary of the Model Penal Code is beyond the scope of this essay. For an introductory overview, see Markus D. Dubber, *Criminal Law: Model Penal Code* (2002); see also Markus D. Dubber, *Einführung in das US-amerikanische Strafrecht* (2005).

³ See Gerard E. Lynch, "The Sentencing Guidelines as a Not-So-Model Penal Code," 7 Fed. Sent. Rep. 112 (1994).

the ideological foundation of the “Model Penal and Correctional Code,” to cite its full and proper title—regarded the Model Penal Code (Parts I & II) as preparatory to the Model Correctional Code (III & IV), where the rough pre-diagnosis of criminal dangerousness by a judge (and jury) under the Model Penal Code was refined and tailored to the peno-correctional treatment needs of each offender under the Model Correctional Code. (More on the Model Code’s treatmentism later.⁴)

The Model Penal Code’s influence, however, extends beyond its impact on criminal code reform.⁵ Even in jurisdictions that did not revise their criminal codes in light of the Model Code, courts regularly invoke specific provisions of the Model Code to deal with particular doctrinal issues before them. For instance, the Model Code’s four-part scheme of mental states (purpose, knowledge, recklessness, negligence⁶) and its element analysis (which requires a differentiated inquiry into the mental states attaching to individual elements, rather than to an offense as a whole⁷) has appealed to many courts struggling to make heads or tails of the traditional common law distinctions between intent, intention, purpose, scienter, mens rea, knowledge, willfulness, willful blindness, recklessness, advertent and inadvertent negligence, and so on.

The Model Code also exerted considerable influence on the teaching and study of American criminal law. Arguably, there is no such thing as “American criminal law,” since each state, as well as the federal government, has a separate criminal law system built on a distinct criminal code (which may be based on the Model Penal Code or not). Still, the Model Code is the closest thing to a conceptual—if not a doctrinal—backbone of American criminal law. It is a common reference point in criminal law casebooks—the main tools for instruction in American legal education—and textbooks.⁸

By contrast, the Model Penal Code’s impact on American criminal law scholarship has been limited. Model Penal Code provisions are cited frequently as statements of the—or at least a—position on a given issue in “American criminal law,” and critiqued in isolation. Yet little scholarship has concerned itself with the Model Penal Code as a code, that is, as a systematic and comprehensive statement of the norms of substantive criminal law based on a particular view of criminal law, rather than as a more or less random collection of specific norms (on attempt, mens rea, self-defense, etc.).⁹

⁴ *Infra* Part III.

⁵ Dubber, *Criminal Law: Model Penal Code* 1-7

⁶ MPC § 2.02(2).

⁷ Markus D. Dubber & Mark G. Kelman, *American Criminal Law* 200-03 (2d ed. 2008).

⁸ See, e.g., Dubber/Kelman 2d 7-13; Wayne R. LaFave, *Criminal Law* (4th ed. 2003).

⁹ But see Dubber, *Criminal Law: Model Penal Code*; Anders Walker, “American Oresteia: Herbert Wechsler, the Model Penal Code, and the Uses of Revenge,” 2009 *Wisconsin Law Review* 1018.

In another sense, the Model Penal Code became a victim of its own success: it rendered scholarly engagement with it unnecessary through the publication, in the 1980s, of a six-volume set of commentaries. The Model Penal Code project was a treatise project first, and a code second.¹⁰ This was no accident. Herbert Wechsler, the Chief Reporter of the Model Code, consciously followed what he saw as the example of other criminal codifier in the common law world, particularly James Fitzjames Stephen, who regarded, or at least presented, his 1878 draft of an English criminal code as merely the codified form of his *A General View of the Criminal Law* (1863) and *A Digest of the Criminal Law* (1877).¹¹ To this day, the Model Penal Code itself is the best textbook of “American criminal law,” and, along with the Commentaries, the best treatise on the subject.

When assessing the Model Penal Code’s success, one also should not overlook the impact of the drafting process itself. From the early 1950s through the early 1960s, the Model Penal Code project defined and drove American criminal law scholarship and, to a lesser extent, even and already American criminal law reform. It provided the fledgling community of American criminal law scholars with a common focus, an opportunity to systematically engage with their subject matter.¹² In this sense, the Model Penal Code marks the beginning of modern American criminal law scholarship, not by combining (rather meager) local pockets of scholarship based on state criminal law, but by creating the subject of American criminal law out of whole cloth—for better or for worse (given the unfortunate neglect of jurisdiction-specific criminal law in the United States¹³). Even before its completion in 1962, the Model Code project began to influence criminal law reform through the regular publication of “tentative drafts” and comments (which would later form the foundation for the far more ambitious set of Commentaries), which served as models for several state recodification efforts.¹⁴

Having taken the measure of the Model Penal Code’s multifarious influence, two questions arise. First, what accounted for the success? And, second, is influence the only measure of success?

Herbert Packer, who participated in the ill-fated attempt to reform California criminal law in the wake of the Model Penal Code, described the Code drafters’

¹⁰ See Herbert Wechsler, “The American Law Institute: Some Observations on Its Model Penal Code,” 42 *ABA Journal* 321, 321 (1956).

¹¹ Herbert Wechsler, “The Challenge of a Model Penal Code,” 65 *Harv. L. Rev.* 1097, 1131 (1952).

¹² For illuminating—and entertaining—account of the drafting process from an outsiders’ perspective, see Norval Morris, “Medico-Legal Problems in Drafting a Criminal Code,” in *The Proceedings of the Medico-Legal Society of Victoria, 1957-1959*, vol. VIII (G.H. Lush & Bryan Gandevia, eds., 1961).

¹³ See Markus D. Dubber, *New York Criminal Law: Cases and Materials* xix-xxi; see also Chad Flanders, “The One-State Solution to Teaching Criminal Law, or, Leaving the Common Law and the MPC Behind,” 8 *Ohio St. J. Crim. L.* 167 (2010).

¹⁴ See Paul H. Robinson & Markus D. Dubber, “The American Model Penal Code: A Brief Overview,” 10 *New Criminal Law Review* 319 (2007)

approach—and Wechsler’s in particular—as “principled pragmatism.”¹⁵ That the Code was a success, pragmatically speaking, is clear. But pragmatism in law reform, and perhaps especially in criminal law reform, also means sensitivity to time and place. What works at one time may not work at another, and what works in one place may not work in another. More specifically, the question is whether the Model Penal Code project would have succeeded in the United States today, and even if so, whether the Model Penal Code project would succeed in Europe today. These questions will be addressed next, in Part II.

Part III will move from form to substance: even if the idea of the Model Penal Code could serve as a model for European criminal law, here and now, the question remains whether the Model Penal Code, in whole or in part, might serve as a model in substance. Apart from the process that produced the Model Penal Code, in other words, it remains to be seen whether the outcome deserves attention on its merits. Addressing this question will require a closer look at the treatmentist program motivating the Code that, first laid out by Wechsler in a famous article in the 1930s, pervades the Code—within pragmatic limits.

II. Reasons for Success: Form

A. The ALI and the Model Penal Code

The Model Penal and Correctional Code was a project of the American Law Institute, an organization of lawyers, judges, and professors (with a current maximum membership of 4,000) founded in 1923, with a grant from the Carnegie Foundation, 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.”¹⁶ The ALI’s first order of business was a series of so-called “Restatements” of private law, notably contracts and torts. Its first criminal project was a Code of Criminal Procedure, 1924-1930, which was unremarkable and was widely ignored. The ALI turned its attention to substantive criminal law, but the project did not begin in earnest until after World War II, following Herbert Wechsler’s return from Nuremberg, where he served as chief technical adviser to the American judges at the first (and main) trial, the International Military Tribunal.

¹⁵ Herbert L. Packer, “The Model Penal Code and Beyond,” 63 *Columbia Law Review* 594 (1963). The discussion of substantive criminal law in Packer’s celebrated book *The Limits of the Criminal Sanction* (Stanford University Press 1968), which today is (narrowly) remembered largely as for its distinction between the due process and crime control models of the criminal process, is deeply indebted to the Model Penal Code project.

¹⁶ The history of the ALI, and particularly the account of its origins and early years, is somewhat contested. See G. Edward White, “The American Law Institute and the Triumph of Modernist Jurisprudence,” 15 *Law and History Review* 1 (1997); N. E. H. Hull, “Restatement and Reform: A New Perspective on the Origins of the American Law Institute,” 8 *Law and History Review* 55 (1990).

With Wechsler as Chief Reporter, the Model Penal Code project was launched in 1952, with the help of a grant from the Rockefeller Foundation, and was completed in 1962. The Model Penal Code made up Parts I and II of the “Model Penal and Correctional Code,” with Parts III and IV (the Model Correctional Code) devoted to matters of peno-correctional treatment (which, though roundly ignored, remains the most sophisticated American correctional code to this day). Part I (General Provisions) of the Model Penal Code consists of a comprehensive and systematic general part built on a definition of crime as “conduct that unjustifiably and inexcusably inflicts or threatens substantial harm to individual or public interests.”¹⁷ It includes the following articles:

- Preliminary
- General Principles of Liability
- General Principles of Justification
- Responsibility
- Inchoate Crimes
- Authorized Disposition of Offenders
- Authority of Court in Sentencing

The Model Penal Code does not take a clear stand on the death penalty. Reflecting fundamental disagreements among the drafters, and within the American Law Institute as a whole, the Code includes a bracketed (!) provision on capital punishment.¹⁸ Ironically, this provision would emerge as one of the most influential provisions in the Code, when the U.S. Supreme Court suggested it as a roadmap for states eager to revise their capital punishment schemes in the wake of the Court’s qualified endorsement of capital punishment in the 1970s.¹⁹

Part II (Definition of Specific Offenses) deals with the special part of criminal law, but was designed to be less comprehensive than the general part. In particular, it does not include “offenses against [the] existence or stability of the state” at the beginning of the special part and mentions the possibility of legislatures inserting miscellaneous “additional articles” at the end. The former class of offenses,

including treason, sedition, espionage and like crimes, was excluded from the scope of the Model Penal Code. These offenses are peculiarly the concern of the federal government. ... Also, the definition of offenses against the stability of the state is inevitably affected by special political considerations. These factors militated against the use of the Institute's limited resources to attempt to draft "model" provisions in this area.²⁰

¹⁷ MPC § 1.02(1)(a).

¹⁸ MPC § 4.02.

¹⁹ Markus D. Dubber, “Penal Panopticon: The Idea of a Modern Model Penal Code,” 4 Buffalo Criminal Law Review 53, 71 & 71 n.42, 90 (2000).

²⁰ Model Penal Code 241 (Proposed Official Draft 1962).

The latter class of offenses, “dealing with special topics such as narcotics, alcoholic beverages, gambling and offenses against tax and trade laws” were not covered in the Code

partly because a higher priority on limited time and resources was accorded to branches of the penal law which have not received close legislative scrutiny. Also, in legislation dealing with narcotics, liquor, tax evasion, and the like, penal provisions have been so intermingled with regulatory and procedural provisions that the task of segregating one group from the other presents special difficulty for model legislation.²¹

The Model Code’s special part is structured in the following way:

- Offenses against Existence or Stability of the State [not covered]
- Offenses involving Danger to the Person
- Offenses against Property
- Offenses against the Family
- Offenses against Public Administration
- Offenses against Public Order and Decency
- Additional Articles [not covered]

B. Private

The Model Penal Code project, like the ALI as a whole, was private in the obvious sense of not relying on government funding. As a result, it was not necessarily confined to the criminal law of any particular state, nor to federal criminal law. Despite a radical expansion of federal criminal law over the past century or so, American criminal law remains mainly state criminal law, or rather the criminal law(s) of the various states. Federal criminal law is regarded as *sui generis*, insofar as it is based not on the so-called police power; according to the U.S. federalist compromise, that power is limited to the states, for surrendering the power to police would have amounted to surrendering sovereignty, given the police power’s essential connection to the very notion of sovereignty.²² The police power is not enumerated in state constitutions (nor, obviously, in the federal constitution); it is rather an implicit power that requires no explicit constitutional assertion precisely because it is so broad, and so fundamental, as to be equated with the power to govern itself. In fact it is so taken for granted, particularly in its manifestation in the power to criminalize, that its existence, and its foundational significance, tends to—quite literally—go without saying. By contrast, the federal government’s power to criminalize must be grounded in specific provisions in the federal constitution that grant powers otherwise reserved for the states; among these enumerated powers,

²¹ *Id.*

²² See generally Markus D. Dubber, *The Police Power: Patriarchy and the Foundations of American Government* ch. 6 (2005).

the power to regulate interstate commerce has proved a particular fertile ground for novel federal criminal law norms.²³

The Model Penal Code, then, untethered to public support, and therefore to any particular jurisdiction, local or national, state or federal, regarded itself as a model code for any government that saw fit to revise, or to recodify, its criminal law. Legislatures that followed, or at least considered, the Model Penal Code's model adopted different institutional mechanisms for criminal law reform; while most relied on public, and publicly funded, revision commissions, others assigned a greater role to bar associations.²⁴

Without government support, the Model Penal Code project could operate independently of direct state influence. That is not to say, however, that the Code drafters were not indirectly influenced not a particular government or legislature, but by governments or legislatures, its primary (though, as we will see shortly not the sole) addressees and potential consumers. Engaged in an exercise in principled pragmatism, the Model Penal Code drafters, though driven by the conviction that American criminal law needed radical reform, also took into account the likely acceptability of their proposals. It is difficult to gauge which proposals were affected by these pragmatic concerns, but likely candidates include the provision on intoxication (which the Model Penal Code irrationally limits to purpose and knowledge offenses, thereby perpetuating the common law rule²⁵) and its inclusion of the (bracketed) provision on capital sentencing mentioned above.²⁶

C. Elite

More interesting, the private nature of the Model Penal Code enterprise raises questions of legitimacy (related to, but also beyond, the question of the adoption of the Model Penal Code draft, at least in part, by a particular legislature).²⁷ The question of how it is drafted by whom cannot be ignored if the code is to meet its function of legitimating—or at least facilitating the legitimation of—penal law. One might think that Wechsler, as one of the main exponents of the then-influential Legal Process School, would have been particularly sensitive to the question of the process of drafting the Model Code.²⁸ This is not so, however. Perhaps concern with

²³ *Id.*

²⁴ Richard Bartlett, "Criminal Law Revision Through a Legislative Commission," 18 *Buff. L. Rev.* 213 (1968-1969); Richard Denzer, "Drafting a New Penal Law for New York," 18 *Buff. L. Rev.* 251 (1968-1969).

²⁵ MPC § 2.08(2).

²⁶ MPC § 4.02; see also Markus D. Dubber, *Criminal Law: Model Penal Code 218-223* (2002) (use of deadly force in defense of property).

²⁷ The following draws on Dubber, "Penal Panopticon."

²⁸ Wechsler co-authored, with Henry Hart, one of the two central texts of the Legal Process School. Henry M. Hart & Herbert Wechsler, *The Federal Courts and the Federal System* (1st ed. 1950); Henry M. Hart & Albert M. Sacks, *The Legal Process: Basic Problems in the Making and Application of Law* (William N. Eskridge & Philip P. Frickey eds., 1994) (1958).

originary legitimacy may be inappropriate in the case of a model code, particularly if the model code is seen merely as an outline of various policy options to be adopted or rejected by specific legislatures. These legislatures and the penal codes they generate, however, would then face the questions of originary legitimacy a model code avoids.

Still, legislatures today are far more likely to scrutinize a model code's claims to attention—if not already to legitimacy—than they were in the days of the ALI's Model Penal Code. This is a welcome change. Scrutiny of this sort is crucial to the legitimacy of the resulting legislative action, as an unquestioned adoption of a model code would fly in the face of the fundamental norm of autonomy which requires that state norms, and especially penal norms, be self-generated by its potential and actual objects, directly or indirectly, through their representatives.

This critical analysis of a model code would distinguish its adoption from the importation of foreign drafted penal codes, which is not only illegitimate under conditions of oppression, as in the case of Macaulay's Indian Penal Code,²⁹ but is illegitimate in and of itself.

More to the point, the originary legitimacy of a model code will also depend in large part on the identity and status of its drafter(s). Here again, the ALI project was beyond scrutiny. Had the question been raised, the ALI's stellar reputation would have settled it, supplemented by Wechsler's unassailable scientific and moral credentials. Today, the question would not find so obvious an answer. As Richard Posner has pointed out:

[T]here is no longer anyone in the legal profession who has the kind of stature that Wechsler achieved, with his service at Nuremberg, his Supreme Court advocacy, his coauthorship of the most famous casebook in legal history . . . , his authorship of the Model Penal Code, and his directorship of the American Law Institute when that institution had an eminence it no longer has.³⁰

The age of moral heroes has passed with the age of all-encompassing moral struggles of the Cold War. The search for a new Wechsler therefore is futile. As an elite institution of legal generalists with a general interest in the betterment of law, the American Law Institute likewise struggles for relevance at a time when legislatures have become more sophisticated and the law more complex and fragmented. The ALI's commitment to—and competence in—penal law in particular

²⁹ See generally Barry Wright, "Macaulay's Indian Penal Code: Historical Context and Originating Principles," in *Macaulay's Legacy of Criminal Law Codification and Challenges of Reform* (Wing-Cheong Chan, Barry Wright & Stanley Yeo, eds., forthcoming 2011).

³⁰ Richard Posner, *The Material Basis of Jurisprudence* 41 (preliminary draft January 19, 1993, on file with the Columbia Law Review) (quoted in Norman Silber & Geoffrey Miller, "Toward 'Neutral Principles' in the Law: Selections from the Oral History of Herbert Wechsler," 93 *Colum. L. Rev.* 854, 854 n.7 (1993)).

is especially doubtful. While projects with more obvious commercial ramifications, including the Restatements and the Uniform Commercial Code, have continued to attract the Institute's attention, the subject of penal law remained untouched for almost four decades after the completion of the Model Penal Code.³¹

The Model Penal Code project, then, was private not merely in the sense of an undertaking by a private organization unattached to a specific state, or government, but also in the sense of an elite private club. The ALI was a club of Great Men of the Law, and the Model Penal Code, as were the ALI's other projects, was the work of a Great Man among Great Men, with Wechsler assuming the role that Williston had played in the original Restatement of Contracts, completed in 1932, the first edition of Williston's influential contracts treatise having appeared in 1920.³² (Although Wechsler never wrote a criminal law treatise, his "Rationale of the Law of Homicide," co-authored with Jerome Michael, serves as the analogue to Williston's treatise, though it is more manifesto than treatise, not only because it is significantly shorter—though still hefty as a two-part law review article—but also because it reflected Wechsler's, and the ALI's, judgment that the criminal law needed not merely a systematic norm compilation but radical reform, nor merely rationalization, not merely a restatement, but a model code.³³)

The ALI was dominated by East Coast big city (particularly commercial) lawyers, Ivy League law professors, and distinguished (primarily appellate and federal) judges. Much like membership in other exclusive private clubs, ALI membership required, and still requires, a proposer and two seconders (all three being ALI members) and is granted on the basis of three factors: excellence in the law, high character, and commitment to the ALI's mission, which is, to repeat, "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 ALI makes no claims to representativeness, other than perhaps a rough effort to include members of all three constituent groups (lawyers, judges, professors), and certainly does not seek representativeness among states or governments, never mind segments of the population, or for that matter of interests. It is not a pseudo-legislative body, a sort of Model United States, but a collection of self-identified experts.

³¹ Recently, the American Law Institute launched a project to revisit the Model Penal Code's (widely ignored) sentencing provisions.

³² At the outset of the Model Penal Code project, Wechsler was not a member of the ALI, apparently because he was so distinguished that it was generally assumed that he had been elected to the organization. The oversight was corrected as soon as it came to the attention of the ALI. Interview with Herbert Wechsler, Apr. 13, 1989, <http://www.youtube.com/watch?v=ZqzBs3TJGMM> (visited Feb. 25, 2011).

³³ Jerome Michael & Herbert Wechsler, "A Rationale of the Law of Homicide I & II," 37 Colum. L. Rev. 701, 1261 (1937).

Still, the Model Penal Code in particular is noteworthy for its attempt to reflect, if not to represent systematically, a range of disciplinary perspectives. Its Advisory Committee and cadre of “Special Consultants,” though not meaningfully interstate or –national, were quite interdisciplinary. In addition to the requisite law professors, lawyers, and judges, they included psychiatrists (Lawrence Z. Freedman, Manfred S. Guttmacher, Winfred Overholser), a sociologist/criminologist (Thorsten Sellin), and a professor of English—and leading literary critic (Lionel Trilling), who was to help with drafting style.

In the end, then, it is at least doubtful that, in the United States today, there is, or could—or even should—be, another Wechsler, or even whether the ALI has retained—or could or should recover—its previous stature. Whether the age of Great Men of the Law in Europe has passed is, of course, another question, as is whether an organization like the American Law Institute—perhaps a European Law Institute³⁴—would attain the ALI’s erstwhile stature.

III. Treatmentism and Principles of Criminal Law: Substance

Not surprisingly, the Model Penal Code’s substance reflected its time and place no less than did its form. The American Law Institute was, and remains, a law reform institution and nowhere more so than in its criminal law work. The Model Penal Code as a model code rather than a mere “restatement” of the law was an instrument of reform, not only through the development of model legislation for the benefit of reform-minded legislatures but also through radical reeducation; after all, the Model Penal Code (along with its comments and, eventually, its multi-volume set of “official commentaries”) was directed not only at legislators, but also at judges, and—particularly in Parts III & IV, the Model Correctional Code—the executive.

In fact, the Code was not merely a rationalization project loosely speaking, but a Rationalization project with a capital R. It was the manifestation of Wechsler’s “Rationale of the Law of Homicide,” writ large, i.e., systematically applied to the entirety of the penal system; it was an attempt to drag punishment from the dark dank days of retributivism into the bright light of treatmentism. Vengeance was to give way to peno-correctional treatment.

Treatmentism put the “principle” in the Model Penal Code’s principled pragmatism. Or, more precisely, to the extent that the Model Penal Code project pursued principle, and not merely pragmatism, that principle was treatmentism: The principled nature of treatmentism, after all, is at least subject to debate, as treatmentism was—and was regarded by Wechsler and his contemporaries as—an

³⁴ See, e.g., Christoph U. Schmid, “The Emergence of a Transnational Legal Science in European Private Law,” 19 *Oxford J. Legal Studies* 673 (1999); see also Lance Liebman, “The American Law Institute: A Model for Europe?”, in *Making European Private Law* 209 (Fabrizio Cafaggi & Horatia Muir-Watt, eds. 2008).

unabashedly utilitarian pursuit, explicitly designed to replace the barbaric, pointless, anachronism of retributivism, which was seen as at the time as vengeance hiding behind a thin veneer of moralism.³⁵

Let us consider the Model Penal Code's reform aspirations in general first, and then turn to its treatmentist aims in particular.

A. Reform, not Harmony

Already early on, before World War II, the American Law Institute had concluded that American criminal law was in desperate need of reform. That sense only intensified after the War, when Wechsler's generation turned their gaze home- and inward and found the law wanting. American criminal law was thought to be an international embarrassment (a not uncommon diagnosis even today³⁶) and the American Law Institute resolved to do something about it—by means not of a Restatement of Criminal Law, but of a Model Code of Criminal Law (and, in fact, of Correctional Law as well). The U.S. Supreme Court, starting around the same time, turned its attention—under the leadership of Chief Justice Earl Warren—to the law of criminal procedure and, through an ambitious campaign of constitutionalization sought to end un-American practices in the criminal process, particularly in the criminal process of the Southern States, most notably in cases with African-American defendants. The U.S. Supreme Court paid almost no attention to substantive criminal law, however.³⁷ That remained the realm of the American Law Institute's Model Penal Code.

The Model Penal Code, in other words, pursued a civilization mission in substantive criminal law that paralleled the U.S. Supreme Court's in procedural criminal law. The Model Penal Code drafters set out to combat the ignorance and incompetence they thought dominated state criminal justice officials, from lawmakers to judges to prosecutors to wardens. It was that ignorance that manifested itself in the "variety, disparity and confusion," across but more importantly *within* jurisdictions, on fundamental questions of criminal law, including, most notably the law of mens rea (bemoaned, for instance, by Justice Jackson, Wechsler's fellow Nuremberg alumnus, in his celebrated, but long-winded

³⁵ See generally Dubber, "Penal Panopticon," with further references.

³⁶ See, e.g., Adam Liptak's 2008 N.Y. Times series "American Exceptionion," http://topics.nytimes.com/topics/news/us/series/american_exception/index.html; for a historical analysis, see James Q. Whitman, *Harsh Justice: Criminal Punishment and the Widening Divide between America and Europe* (2005).

³⁷ Markus D. Dubber, "Toward a Constitutional Law of Crime and Punishment," 55 *Hastings Law Journal* 509 (2004); William J. Stuntz, "Substance, Process, and the Civil-Criminal Line," 7 *J. Contemp. Legal Issues* 1 (1996).

and ultimately non-committal, opinion on strict liability offenses, in *United States v. Morissette*).³⁸

This civilization mission was conducted in the spirit of the Legal Process School, of which Wechsler was a leading adherent, focused on the pragmatic task of finding the best official for a given job and then of guiding that official's discretion within a functional framework.³⁹ In other words, at bottom, the Model Penal Code's task was an administrative one. "Punishment" having been rationalized, and rebranded, as peno-correctional treatment (the word "punishment" is almost nowhere to be found in the Model Penal Code, except in telling cases, such as the use of parental or prison discipline⁴⁰), the Model Penal Code was designed to delegate discretion to the proper officials (judges, juries, but ultimately penological experts), to educate these officials (through a clear and comprehensive penal—and correctional—code, with explanatory comments and, longer term, through reorienting criminal legal education), and then to channel these officials' decisions in particular cases with the help of various pointers (including, for instance, a lengthy statement of purposes⁴¹ and various rules of statutory interpretation, ranging from the general ("interpret provisions in light of aforementioned purposes"⁴² to the specific ("interpret a statute as requiring mental state X with the respect to element Y if X appears with respect to element Z elsewhere in the statute"⁴³).

Relatedly, the ALI in general, and the Model Penal Code drafters in particular, also saw themselves as engaged in a scientization project—rationalizing American law, and American criminal law in particular, also meant subjecting it to scientific study. Just what was meant by "science," however, is difficult to pin down, and at any rate varied considerably from time to time, project to project, and even person to person. Wechsler, for one, was interested in the scientific analysis of questions of

³⁸ 342 U.S. 246 (1952) ("[C]ourts of various jurisdictions, and for the purposes of different offenses, have devised working formulae, if not scientific ones, for the instruction of juries around such terms as "felonious intent," "criminal intent," "malice aforethought," "guilty knowledge," "fraudulent intent," "wilfulness," "scienter," to denote guilty knowledge, or "mens rea," to signify an evil purpose or mental culpability.")

³⁹ See Herbert Wechsler, "The Challenge of a Model Penal Code," 65 Harv. L. Rev. 1097, 1127-30 (1952); Herbert Wechsler, "The American Law Institute: Some Observations on Its Model Penal Code," 42 ABA Journal 321, 394 (1956).

⁴⁰ See Dubber, "Penal Panopticon," 70-72.

⁴¹ MPC § 1.02(1) & (2).

⁴² MPC § 1.02(3). This provision was significant because it abandoned "strict construction" ("rule of lenity") the traditional common law rule of statutory interpretation in criminal cases, according to which courts faced with an ambiguous criminal provision were to adopt that construction which favored the defendant. This rule, the drafters felt, had been abused by common law courts to hamstring legislatures as they expanded the scope of statutory crimes at the expense of judicially created, and managed, common law crimes.

⁴³ MPC § 2.02(4) ("When the law defining an offense prescribes the kind of culpability that is sufficient for the commission of an offense, without distinguishing among the material elements thereof, such provision shall apply to all the material elements of the offense, unless a contrary purpose plainly appears.")

criminal law and saw the Model Penal Code project as an opportunity to bring to bear to discoveries of the “behavior sciences,”⁴⁴ “the fruits of special medical and psychological knowledge,”⁴⁵ will to a reconceptualization, and rationalization, of criminal law: “To the extent—and the extent is large—that legislative choice ought to be guided or can be assisted by knowledge or insight gained in the medical, psychological and social sciences, that knowledge will be marshalled for the purpose by those competent to set it forth.”⁴⁶ The triumph of treatmentism over retributivism, then, was the triumph of rationality over irrationality, of expertise over amateurism, and of science (and more specifically, penology) over ignorance.

This ambitious project of rationalization, scientization, and modernization was to take the form of a code, a systematic and comprehensive statement of the principles of criminal liability along with (at least) an illustrative compendium of criminal offenses, grouped by protected rights or interests, rather than alphabetically, as tended to be the case in traditional American criminal codes (and remains so in the Federal Criminal Code, Title 18 U.S.C.). From the treatmentist perspective, the code appeared as a comprehensive desk manual for judges (and other penal officials) whose job it was to diagnose types and degrees of criminal dangerousness and then to prescribe the indicated peno-correctional treatment.

Regardless of the ideology underlying the Model Penal Code, it was clearly a normative, rather than a merely descriptive enterprise. Their main task was not to attempt to divine or to infer “common principles” taken from a variety of jurisdictions. There was no search for a “common core,” perhaps identified as the overlap between common doctrines, or for that matter, common principles. The Model Penal Code was emphatically not a mapping exercise, nor an archaeological—or at least botanical—mission to unearth the common roots of American criminal law as it manifested itself in the laws of the fifty states and the federal government.

Likewise, the Model Penal Code cannot be seen as an anormative harmonization project, designed to smooth out the differences between the various criminal law systems that constitute “American criminal law,” perhaps so as to better coordinate law enforcement efforts. Interstate crime is the province of federal law, and the Model Penal Code, again, was not a federal criminal law reform project. Here, once more, the Model Penal Code project might be distinguished from the ALI’s private law projects, the Restatements, which were launched partly to facilitate interstate commercial interaction through harmonization of legal norms (notably the law of contracts or, most directly, the Uniform Commercial Code (UCC), a joint project of the ALI and the National Conference of Commissioners on Uniform State Laws

⁴⁴ Wechsler, “Challenge,” 1123.

⁴⁵ *Id.* at 1133.

⁴⁶ *Id.* at 1130.

(NCCUSL), launched in 1942 under the leadership of Karl Llewellyn, a colleague of Wechsler's at Columbia Law School).⁴⁷

B. Treatmentism

The Model Penal Code drafters saw their task as reformatory, but not as foundational, or justificatory. As was typical of Legal Process thought at the time, the fundamental questions of substance were regarded as settled, leaving only the matter of implementation, which of course itself could prove quite difficult, as an administrative matter. The consensus, in the eyes of the Model Penal Code drafters, and Wechsler in particular, was that rational criminal law was about the diagnosis and treatment of criminal dangerousness.⁴⁸ This question was thought to have been settled, and retributivism "disproved," already before World War II, when progressive legal scholars began to call for the recognition of the discoveries of the social sciences in the study and practice of law.⁴⁹ Treatmentism was not a choice, but the truth, not one among many theories of criminal law, but the only modern, rational, scientific one. As Wechsler put it in his ALI blueprint for the Model Penal Code, "The Challenge of a Model Penal Code," which he also published in the Harvard Law Review at the outset of the project:

The legislative question therefore is: What past behavior has such rational relationship to the control of future conduct that it ought to be declared a crime?

The formal principles of any answer may be readily articulated:

(1) conduct that is so harmful that the social force should make an effort to deter it by its condemnation under threat of penal sanctions; and (2) conduct that shows the individual sufficiently more likely than the rest of men to be a menace in the future to justify official intervention to measure and to meet the special danger he presents.

The challenge lies in making the social and psychological evaluations of behavior involved in legislative application of these principles upon a practicable scale.⁵⁰

From the perspective of scientific progress, there was no point in historical analysis, except to remark upon the superiority of current scientific knowledge over antiquated unscientific ignorance. As a result, the Model Penal Code project was ahistorical; history intruded only in the very limited sense typical of all common law

⁴⁷ See Herbert Wechsler, "The American Law Institute: Some Observations on Its Model Penal Code," 42 ABA Journal 321, 321 (1956). For an interesting comparative historical discussion of the UCC, see James Q. Whitman, "Commercial Law and the American Volk: A Note on Llewellyn's German Sources for the Uniform Commercial Code," 97 Yale L.J. 156 (1987).

⁴⁸ See, e.g., Herbert Wechsler, "The Challenge of a Model Penal Code," 65 Harv. L. Rev. 1097, 1104 (1952).

⁴⁹ See Herbert Wechsler, Book Review, 37 Colum. L. Rev. 687, 690 (1937); Jerome Michael & Herbert Wechsler, "A Rationale of the Law of Homicide I," 37 Colum. L. Rev. 701, 732 n.126 (1937).

⁵⁰ See, e.g., Herbert Wechsler, "The Challenge of a Model Penal Code," 65 Harv. L. Rev. 1097, 1105 (1952). The central ideas of this article stem from Wechsler's "Rationale," published in 1937.

projects, which pay heed to judicial precedent (if only to document the origins and development of an antiquated unscientific norm ripe for rational reform).

It was also a comparative.⁵¹ Penological discoveries were not limited to any particular legal system. Social science was a global pursuit; there was no point in comparative analysis of social scientific truth. Once it had been determined that criminal law must concern itself with the diagnosis and treatment of criminal dangerousness, the reformer's task was to devise and implement the most scientifically sound means of advancing this aim.

More fundamentally, the Model Penal Code project was a legitimate one. We have already seen that the American Law Institute, and the Model Penal Code project within it, did not concern itself with questions of legitimacy. As a body of experts undertaking a rigorous analysis of their subject matter, the Model Penal Code drafters required no legitimation, or were their own legitimation.

But the substance of their expertise, the body of knowledge they applied, the *what* as well as the *who*, was beyond legitimation as well. By replacing punishment with treatment, and in fact reducing punishment to a taboo in the penal lexicon, treatmentism avoided, rather than answered, the fundamental question of the legitimacy of state punishment: "[P]enal law ought to concern itself with the offender's personality, viewing his crime primarily as a symptom of a deviation that may yield to diagnosis and to therapy."⁵² The penal project thus understood is illegitimate; a doctor diagnosing any other "deviation" and prescribing the indicated treatment requires no legitimation, and neither do penal officials (from judge to warden) meting out peno-correctional treatment.

In this conception, penal power is an exercise of the police power, the essentially discretionary and indefinable sovereign power to maintain the police (*Polizei*) of the state considered as a household. As treatmentism, penalty is an administrative challenge, subject to norms of good governance, rather than norms of justice, against which the legitimacy of a state practice can be measured.

In its adherence to treatmentism, i.e., in its substance, the Model Penal Code was no less beholden to its time than in its form. Much as the idea of a model code of criminal law drafted by a Great Man among the Great Men of an elite private organization of jurists appears outdated today, so does the notion that social scientific progress holds the key to the rational solution of the problem of penalty.

⁵¹ Glanville Williams of Cambridge was the only non-American contributor to the project and comparative analysis of American norms with those of other legal systems occurred rarely, if at all. Contrast the ambitious comparative analysis of criminal law undertaken in connection with the (unsuccessful) reform of the German criminal code in the early twentieth century. *Vergleichende Darstellung des deutschen und ausländischen Strafrechts: Vorarbeiten zur deutschen Strafrechtsreform* (16 vols., 1905-09).

⁵² Wechsler, "Challenge," 1104.

In the United States, retributivism has made a comeback, while treatmentism has fallen victim to a combination of the “nothing works” sentiment, liberal attacks on its incompatibility with the rule of law, and conservative law-and-order slogans. Today, treatmentism survives only as a shadow of its former self, in the form of unbridled incapacitation without rehabilitation. The presumptive diagnosis of the so-called war on crime is incorrigible dangerousness, resulting in the widespread use of sentences as everlengthening periods of incapacitation, or warehousing on a massive scale. Although this is clearly not what the Model Penal Code drafters had in mind, incapacitation is but one side of the treatmentist coin, the more attractive face being that of rehabilitation of presumptively corrigible offenders.⁵³

Whatever the merits of a treatmentism, or of a police power-based conception of penalty more generally, and even if the treatmentist consensus at the time was so wide as to render engagement with alternative accounts of criminal law unnecessary (notwithstanding the contemporary work of important retributive theorists, notably that of Jerome Hall⁵⁴), it is doubtful that a European criminal law project, including a European Model Penal Code, today could succeed without addressing fundamental questions of the nature, foundation, and legitimacy of the state’s power to punish, questions that may or may not receive different answers in different European legal systems and traditions. It may well be that a common European conception of penalty emerges, despite considerable differences in the history of penal power in particular and of state power in general, but the existence, or the nature, of that common conception cannot be taken for granted.⁵⁵

At any rate, even if one recognizes the Model Penal Code as a penological treatment manual designed to guide the discretion of penal officials (most importantly, but not exclusively, judges), and even if one regards it as both textbook and code, as both educational and declaratory, it does represent an ambitious, and remarkably successful, attempt to systematically and comprehensively capture the principles of criminal liability and to conceptualize, or at least to categorize, and to define those criminal offenses that the drafters thought central to the criminal law of their day, including offenses against both private and public interests and rights. The Model Penal Code, for instance, rivals, and in many respects, exceeds the German Criminal Code in both breadth and depth of coverage.⁵⁶ So the Model Penal

⁵³ Markus D. Dubber, “The New Police Science and the Police Power Model of the Criminal Process,” in *The New Police Science: The Police Power in Domestic and International Governance* 107 (Markus D. Dubber & Mariana Valverde eds., 2006).

⁵⁴ See, e.g., Jerome Hall, *General Principles of Criminal Law* (1st ed. 1947, 2d ed. 1960). Wechsler dismissed Hall’s claim that “the proper role of criminal law is to provide a proper punishment for persons who cause legally proscribed social harms and do so voluntarily, i.e., either intentionally or recklessly” as “the sheerest kind of dogmatism.” Herbert Wechsler, Book Review, 49 *Colum. L. Rev.* 425 (1949).

⁵⁵ See Carol Harlow, “European Administrative Law and the Global Challenge” in *The Evolution of EU Law* 261 (Paul Craig & Grainne de Burca, eds., 1998).

⁵⁶ See Bernd Schünemann, “Geleitwort: Warum das amerikanische Strafrecht den deutschen Juristen angeht,” in Dubber, *Einführung*, vii, viii

Code included a provision on the necessity defense before the German Criminal Code (which only added it in 1969). The Code's centerpiece, the scheme of mental states, in particular, is worth highlighting. Where other codes—again, including the StGB—are content to leave the definition of mental states to others (courts, scholars), the Code provides a detailed taxonomy of modes of culpability:

Section 2.02. General Requirements of Culpability.

...

(2) Kinds of Culpability Defined.

(a) Purposely.

A person acts purposely with respect to a material element of an offense when:

(i) if the element involves the nature of his conduct or a result thereof, it is his conscious object to engage in conduct of that nature or to cause such a result; and

(ii) if the element involves the attendant circumstances, he is aware of the existence of such circumstances or he believes or hopes that they exist.

(b) Knowingly.

A person acts knowingly with respect to a material element of an offense when:

(i) if the element involves the nature of his conduct or the attendant circumstances, he is aware that his conduct is of that nature or that such circumstances exist; and

(ii) if the element involves a result of his conduct, he is aware that it is practically certain that his conduct will cause such a result.

(c) Recklessly.

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.

(d) Negligently.

A person acts negligently with respect to a material element of an offense when he should be aware of 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 the actor's failure to perceive it, considering the nature and purpose of his conduct and the circumstances known to him, involves a gross deviation from the standard of care that a reasonable person would observe in the actor's situation.

This scheme only makes sense against the backdrop of the Code's "element analysis," which requires an inquiry into the subjective aspect of each element of a given offense (conduct, attendant circumstance, result), rather than of the offense as a whole, as was the traditional common law practice. A comparative discussion of

the merits, or even of the substance, of this taxonomy of mental states, exceeds the scope of this essay. Suffice it to say that such a comparative analysis may prove illuminating, apart from the relative merits of the Model Penal Code and “civil law” (dolus vs. culpa) schemes.⁵⁷

IV. Conclusion

The American Law Institute’s Model Penal Code enjoyed remarkable success in its time and place: post-WWII Cold War America, during the heyday of the pragmatic and consensus-based Legal Process School of law and policymaking, when the ALI in general, and Herbert Wechsler in particular, recently returned from Nuremberg, commanded considerable authority as experts in the law well-situated to move American law forward.

It is unclear whether a European Law Institute, modeled on the ALI, could hold similar status here and now. Certainly the ALI no longer occupies that role in the United States and no new Wechslers have appeared, nor are they likely to appear anytime soon.

Yet the Model Penal Code remains a signal achievement in the history of American criminal law, not least because it managed to focus the minds of criminal lawyers throughout the land on a common project that combined law reform with scholarly inquiry and, as a result, triggered the development of the modern subject of American criminal law. And the Model Penal Code’s substantive accomplishments, notably as a comprehensive and systematic statement of general principles of criminal liability, continue to reward careful study, also from a comparative perspective.

⁵⁷ For just such a discussion, see Jeroen Blomsma, “Fault Elements in European Criminal Law: The Case for Recklessness,” in this volume; see also Dubber, *Criminal Law: Model Penal Code*; Dubber, *Einführung*.