

Penal Panopticon: The Idea of a Modern Model Penal Code

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The Model Penal Code is ripe for a fundamental reconsideration. Drafted in the 1950s, the Model Code today no longer serves as a model for American penal legislation. Since its publication in 1962, the conceptual foundation of the Model Code has collapsed in form and in substance. In form, the Model Code is a child of post-war Legal Process, and as such reflects the straightforward means-ends pragmatism associated with that law and policy movement. After decades of attacks on its naive assumptions about societal consensus regarding policy ends, Legal Process has been thoroughly discredited in theory, even if no constructive alternative to its rational and comprehensive approach to law reform has emerged. In the practice of American penal law, the war on crime has led to the suspension of most constraints on penal policymaking, which as a result has been neither rational nor comprehensive.

In substance, the Model Code implemented a simple consequentialist model: prevent crime through deterrence and, if deterrence fails, through “treatment and correction.” Today, this model no longer enjoys the broad consensus it might have in the 1950s. Instead retributivism, decried as irrational, anachronistic, and barbaric by the Code drafters, has reasserted itself as a demand of penal justice. Even within a consequentialist framework, treatment theory has long since been radically transmogrified, if not discarded altogether. As enemies of the state in the war on crime, offenders today are warehoused or executed rather than “corrected.” Within the confines of treatment theory, the offender as menace to society receives incapacitative, not reformatory, treatment.

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The original Model Code belongs to a bygone era of American penal law. Since the publication of the Code, the war on crime has quadrupled the incarceration rate, increasing the inmate population six-fold, to over two million, and the number of persons under some form of penal enforcement to over six million.¹ Federal criminal law, the most popular weapon of the crime war, expanded dramatically, resulting in an increase in the federal prison population of over 300%. The crime war took its heaviest toll on its most visible enemies, minority drug offenders. The number of federal drug offenders increased 18-fold from a paltry 3,000 to over 50,000, or 60% of federal prisoners. In 1993, the number of drug offenders in prison reached 350,000, almost twice the *total* number of all prisoners at the time of the original Model Code. This also means that, with African Americans accounting for almost three quarters of drug prisoners, the number of African Americans incarcerated for drug offenses today significantly exceeds the size of the entire prison population in 1962. By 1995, almost one-third of African American males in their twenties (over 800,000) was under penal enforcement.² In some urban centers, that proportion topped one half.³

The war on crime transformed penal law from a policy means into a weapon. The crime war, however, has begun to recede in ferocity. As with any exceptional state of affairs, the crisis of crime carries within itself its own denouement. Eventually, the crisis of crime will evolve into the crisis of punishment, as sobered legislators sift through the heap of hastily accumulated additions to the crime war's arsenal.

The coming crisis of penalty creates the urgent need for a modern model penal code. At this historic moment,

1. See Bureau of Justice Statistics, U.S. Dep't of Justice, Bureau of Justice Statistics 2000: At a Glance 19 (2000).

2. See Marc Mauer & Tracy Huling, *Young Black Americans and the Criminal Justice System: Five Years Later* (1995).

3. See Michael Tonry, *Malign Neglect: Race, Crime, and Punishment in America* 4 (1995).

reform-minded legislators must be provided with a model of penal law, if they are to reject the option of simply extending the state of emergency indefinitely, thus converting the exceptional measures of the crime war into the rule of law. A new model penal code project thus faces the crucial task of stimulating and ultimately shaping the reconstruction of a *postbellum* American penal law. The importance of this project cannot be overemphasized. At stake is not merely the reform of particular provisions, or even of entire codes. At stake is the recovery of principle in American penal law, its transformation from war into law, from an instinctual reflex against outsider threats into a rational legal institution, and from a species of nuisance control into a system of penal justice.⁴

The task of a new model code is to reassert the presumption of innocence, broadly understood, and thereby to shift the burden of proof back onto the state, where it belongs. A state built upon the autonomy of its constituents must carry the burden of legitimation not only when it comes to the imposition of penal norms—in the criminal process—upon those very constituents (and therefore, ultimately, upon itself). That burden applies with equal force to every aspect of the state's most awesome coercive power, punishment, including the definition of penal norms, their imposition, and their eventual enforcement. The presumption of innocence, long recognized as a bedrock principle of the American criminal process, therefore represents merely one, impositional, aspect of a more general presumption of freedom from punishment. In its full scope, that presumption falls into three parts: a definitional presumption of legality (or non-criminality), an impositional presumption of innocence (or non-violation), and an executionary presumption of immunity (or non-interference). Each presumption must be overcome by an affirmative legitimation on the part of

4. A new model penal code project, therefore, would form but one part of the comprehensive reform of all aspects of American penal law, including teaching, scholarship, legislation, and practice. Cf. Markus Dirk Dubber, *Reforming American Penal Law*, 90 J. Crim. L. & Criminology 49 (1999).

the state.

The impact of a new model code thus would go far beyond the impact of its specific content. The original Model Penal Code crystallized a wide ranging analysis of American penal law, the result of which can be found in the official Code commentaries published over twenty years after the drafting of the Code. This analytic project must be revived. It also must be expanded and refocused to capture the momentous changes in penal lawmaking since the original Code. These include:

The expansion of the victim's significance in all aspects of penal law, from definition (consent, assisted suicide, hate crimes, victim-based punishment aggravation or mitigation) to imposition (consultation and participation in plea bargaining, testimony at sentencing) to infliction (victim-offender mediation, restitution);⁵

The shift from penal codes to punishment guidelines as the paradigmatic source of penal law;

The creation of a mandatory determinate punishment law that relies almost exclusively on two factors: the nature of the act and the actor's criminal record;

The transfer of the power to make the law of punishment to a sui generis agency, the sentencing commission;

The continued disappearance of trial by jury, with a concomitant expansion of expert dominated processes like

5. For an overview of the victim's role in penal law generally speaking, see Markus Dirk Dubber, *The Victim in American Penal Law: A Systematic Overview*, 3 *Buff. Crim. L. Rev.* 3 (1999). On the victim's role in the criminal process specifically, see Douglas E. Beloof, *Victims in Criminal Procedure* (1999) (a useful collection of materials); Lynne N. Henderson, *The Wrongs of Victim's Rights*, 37 *Stan. L. Rev.* 937 (1985) (still the best and most comprehensive critical assessment of the victim's procedural role).

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plea bargaining and bench trials;

The proliferation of possession offenses, and of drug offenses in particular;

The expansion of so-called statutory, non-traditional, public welfare, or *malum prohibitum* crimes, offenses, violations, and infractions on the periphery of the penal law, surrounding the so-called common law, traditional, or *malum in se* offenses;

The retention and spread of strict liability offenses throughout the periphery (drug offenses, public welfare offenses) and the core of the penal law (felony murder, misdemeanor manslaughter);

The continued splintering of the penal law through the unsystematic multiplication of penal provisions outside the penal code, including penal provisions in non-penal codes, county codes, city codes, town codes, and village codes, and in administrative regulations;

The resulting transfer of penal lawmaking power from the legislature to executive agencies;

The emergence of vaguely defined offenses like RICO, targeted at actors rather than acts and thereby freeing law enforcement officials from the constraints of legality in the pursuit of elusive “criminal networks”;

The addition of duplicative offenses that fit uneasily into the structure of the penal law’s special part because they do not reflect a clear understanding of the interests subject to systematic penal protection, including carjacking, “computer” crimes, “hate” crimes, and stalking;

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The curtailment of the insanity defense;

The related erosion of the distinction between the treatment of juveniles and the punishment of adults in all aspects of penal law, including curtailment of juvenile incapacity and irresponsibility, the development of a uniform law of punishment for offenders of all ages, and of uniform institutions of punishment imposition and infliction;

The imposition of harsher punishments for drug offenses and for crimes committed by certain persons, including those identified as “repeat offenders” or “sexual predators”;

The creation of drug (and prostitution) free zones;

The renaissance of gang loitering ordinances;

The expansion of so-called non-punitive measures, including civil forfeiture, indefinite commitment of “sexual predators,” involuntary registration of sex offenders: branding (and other shaming)

The curtailment of probation, the abolition of parole, and a dramatic increase in the prison population beyond the one million mark;

The privatization of prisons; and

The reemergence of capital punishment.⁶

6. A more detailed discussion of these developments appears in Markus Dirk Dubber, *Criminal Law Reform: Current Issues in the United States*, in __ *Encyclopedia of Crime & Just.* __ (Joshua Dressler ed., 2d ed. forthcoming); see also Sanford H. Kadish, *Fifty Years of Criminal Law: An Opinionated Review*, 87

Apart from this general expansion in the scope, variety, and severity of American penal law since 1962, the war on drugs—and the concomitant explosion of the population of drug prisoners—by itself would require a revision and expansion of the original Model Penal Code project. A “Model Penal Code” that avoids the issue of drug criminal law is a model code only by name.⁷

To cope with the new penal law, the new model penal code must rethink its function. A fresh start is needed. The original Code set out to wrest control of penal lawmaking away from the judiciary. As a result, the judiciary is the only branch of government that does not participate in the proliferation of penal offenses. The new model penal code must now place meaningful limits on the penal lawmaking power of the legislature and the executive.

This shift of function also has important implications for the substance and shape of the new model code. For one thing, the code’s general part could be shortened considerably. The original Code was obsessed with limiting judicial discretion in the definition of offenses, though it retained much of it in the imposition of punishment. This attempt by the Code to establish legislative control over the definitional aspect of penal law, while limiting judicial influence to its impositional aspect, has been highly successful. Today, there is no serious danger that judges will decide circles around statutory criminal law with the help of the rule of strict construction, as they did during the judiciary’s nineteenth century struggle with amateur legislatures over criminal lawmaking power. In Model Penal Code jurisdictions, the criminal code generally structures and thereby standardizes judicial analysis, i.e., statutory interpretation.

The original Model Code also set out to create a

Cal. L. Rev. 943 (1999).

7. See Model Penal Code at 241 additional arts. (Proposed Official Draft 1962) (“[A] State enacting a new Penal Code may insert additional Articles dealing with special topics such as narcotics, alcoholic beverages, gambling and offenses against tax and trade laws.”).

comprehensive account of American penal law from scratch. It was as much a criminal law treatise as it was a criminal law code. For this reason, it has proved so very popular as a teaching tool in American law schools. The Code's foundational function was particularly important until the publication of the official commentaries to the Code in the 1985. At least since then, however, a model code no longer needs to lay out American penal law and codify it at the same time. Instead, the new model penal code must rediscover the second, and now most important, aspect of the original Code's function, namely *distilling* that comprehensive analysis into a universally applicable and readily accessible model legislation.

To transform itself into a comprehensive model code from a comprehensive (re)statement of American penal law, the new model code can no longer afford to preempt penal law scholarship. While the original Code has loomed large in American penal law scholarship since the 1950s, it has generated remarkably little critical commentary.⁸ So all-encompassing was its ambition, as it manifested itself first in the Code itself and then in the six volumes of official commentary, that it has stifled the development of a treatise literature in American penal law. It is no accident that the last attempt at a systematic analysis of American penal law predates the Model Code, nor is it an accident that its author, Jerome Hall, played no part in the Code's drafting.⁹

In the long run, the Model Code will regain its significance only if it is integrated into a comprehensive body of literature on penal law derived and continuously

8. No book length treatment, critical or expository, of the Code exists, apart from the drafters' comments and the official commentaries. The most influential article on the Code appeared more than twenty years after its publication: Paul Robinson's piece on the Code's element analysis of mens rea, which has guided generations of American law students (and teachers) through the thicket of the Code's culpability scheme. Paul H. Robinson & Jane A. Grall, *Element Analysis in Defining Criminal Liability*, 35 Stan. L. Rev. 681 (1983).

9. See Jerome Hall, *General Principles of Criminal Law* (1947); cf. *infra* note 13 & accompanying text (discussing Herbert Wechsler's scathing review of Hall's book).

revived in an expansive dialogue on penal law including legal scholars, judges, and practitioners. A new model penal code project must leave room for such a dialogue by aiming for comprehensiveness in structure, not in content, by identifying the full scope of issues in penal law, not resolving them once and for all. This open approach should extend not only to the code itself, but also to its commentaries. Scholars should be encouraged to supplement any official commentaries with other comprehensive commentaries. While the official commentary would retain its significance as an elucidation of the drafters' motives, alternative commentaries could afford to move beyond exegesis (and occasionally apologia) to critique and thereby to explore alternative approaches to general and specific topics in penal law.

The model penal code project, in other words, must become an enterprise engulfing all commentators and experts on penal law. This may also mean that the project can no longer be entrusted to the American Law Institute alone. The subject of penal law is far too important, and far too unfashionable, to remain in the care of a body of distinguished jurists the vast majority of whom have no expertise or interest in it. The time therefore may have come to launch an organization of penal law experts, an American Society for Penal Law, dedicated to fostering sophisticated exchange on topics related to the theory and practice of American penal law.¹⁰ Regardless of the particular institutional arrangement, principled thinking about American penal law can ill afford another forty year hiatus.

Rethinking the Model Code's function, however, will be impossible without developing a new theory of penal law and of penal codification. The original project found its justification in a mere reference to the chaos of judge-made common law crimes and ill-conceived statutory patchwork compilations, a reference that required little elaboration at a time when the rationalizing tendencies of Legal Process

10. See Dubber, *supra* note 4, at 68-69.

and the American Law Institute reinforced each other.

The new code project instead requires an investigation into the foundations of a modern penal code. A modern penal code must face four facts. First, the evaporation of the historic—treatmentist—consensus undergirding the original Code. Second, and more fundamental, the disappearance of the trust in the existence—as well as even the possibility—of any consensus on legal rules. Third, the ever-expanding web of penal provisions emanating from all levels and aspects of modern government. Fourth, the development of sophisticated computer technology and means of mass communication that may allow us to capture and then to disseminate the web of modern penalty, thus facilitating the development of a modern penal code, reconceived as a penal panopticon, i.e., as the common core, rather than the encyclopedia, of modern penal law. I will address each of these points in turn.

I. THE DEMISE OF TREATMENTISM

The drafters of the original Model Code did not concern themselves with grounding their project in a theory of penal law and of penal codification. This is not to say that their project lacked a theoretical foundation. Instead that foundation remained unexamined and, ultimately, self-contradictory. In the end, the Code's theory of penal law—treatmentism—turned out to be neither a theory of *penal* law nor a theory of penal *law*, and rendered even the possibility of a theory of penal codification impossible as it had no use for any sort of code.

The new theory of penal law and penal codification, by contrast, must expose the essential connection between the two by deriving both from the fundamental demands of legitimacy. Legitimacy, I believe, will turn out to require that the substance of modern penal law take the form of a penal code. The penal code facilitates and illustrates the legitimacy of the diverse components of modern penal law by exposing their integration within and without penal law. It is the penal panopticon at the heart of modern penal law

from which the legitimacy of its components can be continuously scrutinized.¹¹

The Model Penal Code emerged from a universal—scientific—consensus about the objective of penal law: the prevention of behavior harmful to certain basic societal interests (where these interests remained woefully underspecified). This prevention was to be achieved by deterring potential offenders and, if deterrence proved unsuccessful (as it did quite frequently), by “treating” those persons identified as abnormally dangerous to these societal interests. The notion that the penal law should provide for the just punishment of those who violated certain community norms was considered beyond the pale; in fact, retributivism was considered to have been “disproved” as an ethical theory by a long line of distinguished criminal law experts including—to use a string of precedents compiled in 1937 by Herbert Wechsler, the eventual Chief Reporter of the Model Code—“Beccaria, Bentham, the nineteenth century English Criminal Law Commissioners, Stephen, Livingston, the New York codifiers, and Holmes,” and culminating in its definitive scientific disproof by Mortimer Adler and Wechsler’s Columbia Law School colleague Jerome Michael on pages 340-352 of their now forgotten 1933 book on “Crime, Law and Social Science.”¹² Whatever questions about the proper goal of penal policy remained, or had reappeared after World War II, were once and for all disposed of in a 1958 article by Wechsler’s fellow Legal Process traveler Henry Hart.¹³

11. Cf. Lindsay Farmer, *Reconstructing the English Codification Debate: The Criminal Law Commissioners 1833-45*, 18 *Law & Hist. Rev.* 397 (2000); Markus Dirk Dubber, *The Historical Analysis of Criminal Codes*, 18 *Law & Hist. Rev.* 433 (2000).

12. 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).

13. See generally Henry M. Hart, Jr., *The Aims of the Criminal Law*, 23 *Law & Contemp. Probs* 401 (1958). Hart, though not a criminal law specialist, proved more sophisticated on matters of penal theory than was Wechsler. Even today, his 1958 article remains one of the best comprehensive analyses of the American penal process.

Wechsler had little inclination to challenge this received wisdom. As a leading exponent of the Legal Process school, Wechsler was impatient with theoretical excursions of little pragmatic significance for policy making. Wechsler was eager to get on with the business of drafting model penal legislation that demonstrated to legislators throughout the land how the treatment approach might be worked out in an internally consistent policy system. Alternatives to treatment theory deserved no attention simply because they were irrational and therefore could not guide rational policy. So Wechsler deemed Jerome Hall's suggestion, made in the first edition of "General Principles of Criminal Law" in 1947, 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," to be so unsupportable as not to require serious consideration, never mind refutation.¹⁴ Of course, Hall's view has long since carried the day against the treatment orthodoxy to which Wechsler subscribed. This very move from penal treatment to penal justice, in fact, has condemned Wechsler's Model Code to irrelevance and now requires the creation of a new model code. Had Wechsler not ignored Hall's work, the original Code might have survived the collapse of treatment ideology.

Relieved of the need to consider the objective of penal law, the Code drafters were free to focus on the means necessary to achieve the objective of prevention: deterrence or treatment. The treatment approach was advanced with considerable force by the growing community of criminal psychologists and psychiatrists, who in their less guarded moments called for the outright abandonment of punishment in favor of treatment. Psychological experts,

14. Herbert Wechsler, Book Review, 49 Colum. L. Rev. 425 (1949). Accusing Hall of "the sheerest kind of dogmatism," Wechsler rises in defense of two great protagonists of rational penal policy: "When the dogma is attached to an attack on Holmes and Stephen, one is reminded of what Emerson told Holmes: 'When you strike at a King, you must *kill* him.' The King does not seem dead to me." Id. at 428.

rather than legal experts such as judges (not to mention non-experts like the jury), were to diagnose the delinquent's particular conditions and prescribe the proper treatment, whose application again was to occur under the strict supervision of further psychological experts. Although the psychologists naturally shied away from undue simplification of the complex process of diagnosis, prescription, treatment, and prognosis—the stuff of their science—treatment basically came in two forms, rehabilitative and incapacitative. The curable deviants were to be rehabilitated; the incurable ones incapacitated.

This two-pronged, rehabilitative-incapacitative, approach was essential to modern treatment theory from its very beginning.¹⁵ To reduce treatment theory to rehabilitationism, as is commonly done, is therefore seriously misleading. Once one appreciates the double-sided nature of treatment theory, the evolution from “rehabilitation” to “incapacitation” over the past few decades emerges not as a radical ideological rift, but merely as a shift along the spectrum of treatment from the rehabilitative to the incapacitative end. The reverse shift, from incapacitation back to rehabilitation, occurred in Germany after the demise of Nazi penal law and its emphasis on incapacitation, itself the result of an earlier shift from the professed rehabilitative tendencies of early positive or “progressive” penology. The continuity of treatment theory emerges particularly clearly in the case of the famous two-track system of German penal law, which was enacted by the Nazis in 1933, after having been a key reform demand by the German progressive treatmentists for decades. Meting out punishment for criminally guilty conduct, with the one hand, and prescribing rehabilitative or incapacitative treatment for deviance, with the other, the two-track system of “penalties” (*Strafen*) and “measures” (*Maßregeln*) remains in place not only in Germany but also in many other countries throughout the

15. See Markus Dirk Dubber, *The Right to Be Punished: Autonomy and Its Demise in Modern Penal Thought*, 16 *Law & Hist. Rev.* 113 (1998).

world.¹⁶

Though one might have thought that the flowering of treatmentism under totalitarian regimes in Italy and Germany would have dampened some of the American enthusiasm for a radical actor-focused approach to punishment, the well-organized and vocal treatmentist movement enjoyed tremendous influence throughout the decade of the Model Code's drafting. Several leading psychiatrists served on the Model Code's advisory committee; the early years of the Code project were devoted in considerable part to assigning the treatment theorists an appropriate place in the project without rendering penal law entirely irrelevant.¹⁷

In the end, the Code drafters opted for a general deterrence framework.¹⁸ Within that framework, however, treatmentism played a significant role. Treatment considerations governed not only the "Correctional Code" in parts III & IV of the Model Penal Code, but also much of the general and special part of the "Penal Code," in parts I & II. The Penal Code proper, after all, was not to restrict itself to the deterrence of criminal conduct, but in the event of its violation despite its best deterrent efforts, also helped diagnose the treatment potential and needs of offenders. Significant portions of the Code, most importantly the extensive article on inchoate offenses, are explicitly based on treatment considerations. After all, "[i]t ought to be the objective of the criminal law to describe the character deficiencies of those subjected to it in accord with the propensities that they . . . manifest."¹⁹

16. See *id.* at 131 & n.74.

17. Wechsler was by no means a radical treatment theorist. Although he shared the treatmentists' disdain for ostensibly irrational retributivism, he repeatedly defended deterrence considerations against what he considered to be doctrinaire attempts by treatmentists to forego penal sanctions in the absence of treatment need. Wechsler was generally suspicious of treatmentist attempts to reformulate legal questions in medical terms.

18. See Model Penal Code §§ 1.02(1)(a), (2)(a) (Proposed Official Draft 1962).

19. Model Penal Code §§ 220.1-2.30.5 cmt. at 157 n.99 (Official Draft and Revised Comments 1980). This passage appears in a discussion of the claim of right defense in the law of theft. That defense is needed because "[p]ersons who take only property to which they believe themselves entitled *constitute no*

The influence of the treatment approach reveals itself most clearly in the Code's provisions on the consequences of conviction, which appear at the end of part II (sentencing) as well as in parts III & IV, and are governed by the purposes enumerated in section 1.02(2) (as opposed to section 1.02(1)).²⁰ One must beware of anachronistically underestimating the Code's efforts to place limits on the discretion of judges and other system participants (e.g., professional penologists) to assess and reassess a particular offender's treatment needs. Still, the Code does reflect the treatmentist call for the individualization of treatment not only at the moment of sentencing but throughout the treatment process in various ways.²¹ For example, the Code provides for fewer classes of offenses (six) than, say, the (Model Penal Code based) New York Penal Law (eleven), with fairly wide sentencing ranges for each class of offense. So a judge could sentence an offender convicted of a first-degree felony to anywhere between one to ten years in prison and 1 year to life imprisonment (or the more definite death penalty). Furthermore, any felony prison sentence was to be considered tentative for the first year, during which time the "Commissioner of Correction" could petition the court to resentence the offender, if she was "satisfied that the sentence of the Court may have been based upon a misapprehension as to the history, character or physical or mental condition of the offender."²²

More noteworthy, one finds definite traces of treatment theory beyond the Code provisions addressing consequences of conviction. Take for example, the Code's section on attempts, which is governed by treatmentist considerations, rather than by deterrence. In the words of the official commentary to the Code: "The primary purpose of punishing attempts is to neutralize dangerous

significant threat to the property system and manifest no character trait worse than ignorance." Id. at 157 (emphasis added).

20. See Model Penal Code § 1.02(2) (Proposed Official Draft 1962).

21. See Gerard E. Lynch, *Toward a Model Penal Code, Second (Federal?): The Challenge of the Special Part*, 2 Buff. Crim. L. Rev. 297 (1998).

22. Model Penal Code § 7.08 (Proposed Official Draft 1962).

individuals and not to deter dangerous acts,”²³ given that “[i]t is doubtful . . . that the threat of punishment for the inchoate crime can add significantly to the net deterrence efficacy of the sanction threatened for the substantive offense that is the actor’s object, which he, by hypothesis, ignores.”²⁴ From these insights, the equal penal treatment of consummator and attemptor follows with the inexorable logic of penological science: “To the extent that sentencing depends upon the *antisocial disposition* of the actor and the demonstrated need for *corrective sanction*, there is likely to be little difference in the gravity of the required measures depending on the consummation or the failure of the plan.”²⁵ The deviant who attempts an offense, in other words, has displayed the same abnormal dangerousness as the deviant who succeeds in consummating it. Since they share the same diagnosis, the attemptor and the consummator also share the same prescription for the “corrective sanction[s]” and “required measures” of incapacitative or rehabilitative treatment.

The Model Code’s exceptionally harsh provisions regarding the punishment of inchoate crimes, which abandon the traditional distinction between punishment for completed and inchoate crimes, reflect treatmentism’s exclusive focus on the actor. To the treatmentist, the deviant’s act (or, rather, her “behavior”) was of at best diagnostic significance; the results of that behavior were irrelevant even for diagnostic purposes.²⁶

The most pervasive manifestation of treatment theory in the Model Code, however, is semantic, and appropriately so. Wechsler, in particular, from the beginning of the Model Code project was careful to talk the penologists’ talk,

23. Model Penal Code §§ 3.01-5.07 cmt. at 323 (Official Draft and Revised Comments 1985); see also id. cmt. at 325.

24. Id. cmt. at 490.

25. Id. (emphasis added).

26. Wechsler himself turns out to be surprisingly ambiguous—and treatmentist—in his defense of the act requirement against the treatmentists. He called for the retention of the requirement as a “behavior symptom” for purposes of “diagnosis and prognosis.” Herbert Wechsler, *The Challenge of a Model Penal Code*, 65 Harv. L. Rev. 1097, 1123 (1952).

even if he did not always walk their walk.²⁷ So, already at the first American Law Institute discussion of Tentative Draft No. 1 at the 1953 Annual Meeting, Wechsler can be found defending the draft's use of the term "behavior" instead of "conduct" as "a concession to the social sciences—particularly since it does not cost us anything, because we can define it any way we please."²⁸ ("Behavior" was later dropped.) One may of course praise Wechsler's pragmatic adherence to what he called the "humpty-dumpty principle" of penal codification: "I don't care what the words are, so long as we know and can determine what they mean."²⁹ It is, however, quite another matter if semantic hypocrisy is the primary charge against the approach whose vocabulary one adopts. But according to its critics, sugarcoating the painful facts of punishment was what "treatmentism" was all about.³⁰

The Model Code's greatest concession to the penologists came in its wholehearted adoption of the hypocrisy at the heart of treatment theory: The relabelling of punishment as treatment, followed by the exclusion of punishment from the realm of enlightened state action. It is this semantic move that relieved treatment theory of the burden to legitimate punishment and that therefore undermined the Model Code's attempt to provide that very legitimacy.³¹

Moreover, Wechsler's failure to appreciate the crucial significance of this apparently formal move suggests a more basic failure to appreciate the need to ground the Model Code in a coherent legitimation of punishment *as punishment*, an omission that was to render the Code irrelevant as soon as the consensus about the purposes of treatment upon which Wechsler unthinkingly, though

27. See, e.g., Wechsler's exchange with Manfred Guttmacher on the insanity defense. Model Penal Code §§ 3.01 to 5.07 cmt. at 186-210 (Official Draft and Revised Comments 1985).

28. ALI, Thirteenth Annual Meeting, Proceedings 155 (1953).

29. *Id.*

30. See Francis A. Allen, *The Decline of the Rehabilitative Ideal: Penal Policy and Social Purpose* (1981).

31. See Dubber, *supra* note 15, at 122-23.

pragmatically, relied fell apart.

During the 1930s, the word punishment had become a taboo among sophisticated writers on penal law.³² For example, Wechsler and his co-author Jerome Michael studiously avoid the word in their monumental two-part 1937 article, *A Rationale of the Law of Homicide*,³³ which lays out a program for the reform not only of the law of homicide but of the penal law in its entirety, including the “treatment” of offenders. The article is an extended set of variations on the treatment theme, including “unpleasant treatment,”³⁴ “punitive treatment,”³⁵ “incapacitative and reformatory treatment,”³⁶ “incapacitative and curative-reformatory treatment,”³⁷ “compulsory treatment,”³⁸ “painful treatment,”³⁹ and “rigorous treatment.”⁴⁰

The Model Code also studiously avoids mention of the unmentionable word “punishment,” which for decades had become associated with the benighted, and long disproved, retributive view of the penal law. It is instructive to consider the few places in the Code where the dreaded unscientific term does appear, as they expose the Code’s mighty, and ultimately futile, struggle to excise punishment from the penal law.

In the hundreds of provisions in the four parts of the “Model Penal and Correctional Code,” the word punishment appears a total of twenty-three times. Not once does the Code refer to a sanction it prescribes for the violation of a provision contained in its special part as punishment. Among the “purposes of the provisions governing the sentencing and treatment of offenders,” one finds “safeguard[ing] offenders against excessive,

32. See Hart, *supra* note 13, at 425.

33. Michael & Wechsler, *supra* note 12.

34. *Id.* at 752.

35. *Id.* at 753 n.378, 1306.

36. *Id.* at 758.

37. *Id.* at 759.

38. *Id.* at 1261.

39. *Id.* at 1264.

40. *Id.* at 1302.

disproportionate or arbitrary *punishment*.”⁴¹ Since the Code does not provide for any punishment at all, this provision is somewhat puzzling. Perhaps it is best understood as an inadvertent slip into the pre-scientific language of retribution; alternatively it might be read as a general prohibition of punishment of any kind given that punishment by definition was unscientific and hence illegitimate (excessive, disproportionate, *and* arbitrary).

One of the Code’s discreetly bracketed provisions on capital sentencing provides for the consideration of mental disease in mitigation of “*punishment* in capital cases.”⁴² It can only be surmised that not even the considerable tolerance for euphemism characteristic of treatment theory could accommodate the characterization of capital punishment as a method of treatment, irrespective of the considerable incapacitative potential of its execution. At any rate, the Code is free to refer to the death penalty as punishment since it is not among the forms of treatment it prescribes (at least outside brackets).⁴³

The Code does contemplate the infliction of punishment, rather than the administration of treatment, but never as the enforcement of its provisions, or as a matter of penal law. When it comes to punishment in the Code, it is always someone else’s doing. The punishers include judges as well as parents and teachers. So the section codifying the principle of legislativity explicitly exempts “the power of a court to *punish* for contempt”⁴⁴ Similarly, the provision defining justified use of force by “persons with special responsibility for care,

41. Model Penal Code § 1.02(2)(c) (Proposed Official Draft 1962) (emphasis added).

42. Id. § 4.02. Despite their non-committal brackets, these provisions provided the blueprint for the revival of capital punishment in the United States. See, e.g., *McGautha v. California*, 402 U.S. 183, 202 (1971); *Gregg v. Georgia*, 428 U.S. 153, 158, 190-91, 194 (1976); *Proffitt v. Florida*, 428 U.S. 242, 247 (1976); *California v. Ramos*, 463 U.S. 992, 1009 (1983).

43. Wechsler himself did not call the death penalty capital *punishment*; to him, it was an “extreme affliction sanction.” Wechsler, *supra* note 26, at 1123.

44. Model Penal Code § 1.05(3) (Proposed Official Draft 1962) (emphasis added).

discipline or safety of others” exculpates parents who use force against their children “for the purpose of safeguarding or promoting the welfare of the minor, including the prevention or *punishment* of his misconduct.”⁴⁵

The person most frequently associated with punishment in the Code is the warden. Here the awkwardness of the Code’s psychologically correct relabelling of punishment as treatment becomes particularly obvious. The Code explains that the warden has “the right to *punish*.”⁴⁶ This declaration must confound any student of the history of modern punishment, according to which the state, not the executioner (nor, for that matter, the pater familias), enjoys a monopoly over the power to punish. Plus, thinking through this upside-down approach generates odd doctrinal results. For example, double jeopardy still would be inapplicable to measures of prison discipline imposed by the warden on top of a judicially imposed sentence, though now *not* because the former is correction and the latter punishment,⁴⁷ but conversely because the former is punishment and the latter correction.

In its effort to meet semantically the requirements of psychological science, the Code thus goes so far as to stand the very concept of punishment on its head. While the criminal code provides for the treatment and correction—but not the punishment—of those who violate its provisions, the warden punishes those same offenders for violating the prison dress code. A convict, therefore, may spend his entire adult life in prison without suffering punishment if he manages to stay on the warden’s good side.

With the Model Code monopolizing scientific treatment, prescientific punishment is left to the infliction

45. Id. § 3.08(1)(a) (emphasis added).

46. Id. § 303.6(1).

47. See, e.g., *People v. Hart*, 710 N.E.2d 263 (N.Y. 1999) (“disciplinary sanction” of solitary confinement for escape in addition to “criminal punishment” of imprisonment for same conduct).

of violence by others to enforce order, whether it is at home, in the courtroom, or in prison. The parent punishes, the state treats. The euphemistic treatment flip-flop is complete.

The Model Code's reliance on treatment theory exposes three crucial shortcomings that must be remedied by a new model penal code. First, and most obvious, treatment theory as an approach to the penal law has been completely and thoroughly discredited. One might even go so far as to say that the generally optimistic interdisciplinary spirit which the Model Code project invoked from the beginning has been replaced with a bitter distrust of the usefulness of social scientific research for lawmaking.⁴⁸ Penology in its various incarnations has been relegated to an academic exercise with little practical legislative significance.

The collapse of traditional penology, however, points toward two more fundamental problems traceable to the Model Code's reliance on treatment theory: The failure to develop, and to ground the Model Code in, a theory of *penal codification* and a theory of *punishment as punishment*. As a result, after the collapse of the elaborate scientific apparatus of treatment theory, the Model Code was left with no theoretical leg to stand on.

At bottom, treatment theory is incompatible both with the principles of a penal code and, more basic, with the principles of penal justice, or punishment as punishment. Treatmentist influence on the Model Code could not have been more extensive than it was simply because treatment theory is fundamentally inconsistent with the idea of a penal code. The science of penology, taken to its logical—scientific—conclusion, has no more need for a codification of penal law than it would have for the codification of a physician's desk book of symptoms.⁴⁹ Only a failure to

48. That is not to say that the social sciences are irrelevant to a modern penal code. See *infra* text accompanying notes 64-75.

49. Perhaps the Model Penal Code is best read as a primitive legalized nosology of criminal pathology, i.e., the criminal law's equivalent of the Diagnostic and Statistical Manual of Mental Disorders (better known as the DSM). The American Psychiatric Association published the DSM's first edition in

consider the principles of penal codification can account for the Code drafters' failure to recognize the incompatibility of codification with treatment theory.

This shortcoming of the Model Code therefore highlights the need for the establishment of principles of penal codification. Here a modern penal code can draw upon the science of penal codification, a discipline that has lain dormant since the great wave of European penal codification in the century between 1750 and 1850. A science of penal codification, which is part of a general science of legislation, would address questions of the following sort:⁵⁰

What is a code? What distinguishes a code from a collection of legislative enactments?

What is the purpose of a penal code? (*why* to codify?)

What is the audience of a penal code?

How complex and technical should a penal code be? Should it adopt "plain" language?

What should a penal code contain? Should it codify the entirety of penal law? Should there be separate codes of substantive criminal law, criminal process, evidence, and punishment? (*what* to codify?)

1952, a year before the American Law Institute's Model Penal Code project got underway. See Stuart A. Kirk & Herb Kutchins, *The Selling of DSM: The Rhetoric of Science in Psychiatry* 27 (1992).

50. See Markus Dirk Dubber, *Commentary*, in *Towards a Clear and Just Criminal Law* 156 (Don Stuart et al. eds., 1999); see also Paul H. Robinson, *Structure and Function in Criminal Law* (1997); cf. Meir Dan-Cohen, *Decision Rules and Conduct Rules: On Acoustic Separation in Criminal Law*, 97 Harv. L. Rev. 625 (1984).

Where should a particular provision be codified? in the general part or in the special part or in an entirely different code? (*where* to codify?)

What should a penal code look like? Should it have a general part and a special part? (*how* to codify?)

Should a penal code be the exclusive source of penal provisions? If not, what is the relationship between the penal code and other penal provisions? Should trivial offenses be codified separately from more serious offenses?

How should a penal code be disseminated? Should it be taught in schools? Should it be made easily available not only in paper form, but also in more advanced media, e.g., television, the internet, or video telephones?⁵¹

To the extent the drafters of the original Model Code addressed any of these questions, they did so sporadically and without an attempt to rely on a set of basic principles of codification. The lengthy section on “purposes,” for example, features two largely, but not entirely, overlapping laundry lists of five and eight “general purposes,” respectively, one pertaining to “the provisions governing the definition of offenses,” the other to “the provisions governing the sentencing and treatment of offenders.”⁵² These lists of purposes, however extensive, appear not to cover most of the Model Code’s general part (i.e., the part containing the lists themselves, thus leaving their purpose or purposes unclear), insofar as that part does not define offenses or provide for the sentencing or treatment of offenders. It is precisely the general part, however, that raises the most vexing questions of codification. For example, it is not at all clear whether a penal code should contain provisions defining mental states (the Model Code

51. See *infra* pt. IV.

52. Model Penal Code § 1.02 (Proposed Official Draft 1962).

does, the revised German Penal Code does not⁵³), act (the Model Code does, the German Penal Code does not), causation (the Model Code does, the New York Penal Law does not), consent (the Model Code does, the New York Penal Law does not), necessity (the Model Code does, the German Penal Code of 1871 did not⁵⁴), or excuses (the Model Code does, the Federal Criminal Code does not⁵⁵), or even whether it should have any general part at all (the Model Code does, the Canadian Criminal Code does not⁵⁶).

More important, the Code's lists of purposes are an uncoordinated mishmash without apparent connection to any single theory or consistent theories of penal law (or treatment, for that matter). While the first list focuses on acts (or "conduct" and "offenses") and the second on actors (or "offenders"), the former also includes the incapacitation of abnormally dangerous persons, while the latter speaks of preventing "the commission of offenses" and giving fair warning of "the nature of the sentences that may be imposed on conviction of an offense," in addition to coordinating the treatment system and "advanc[ing] the use of generally accepted scientific methods and knowledge" in that system. The point here is not that actor- and act-based approaches are necessarily irreconcilable within a given theory of penal law, or that one is preferable to the other, but that the Model Code does not recognize the need for reconciliation in the first place.

Ever the pragmatic practitioner of Legal Process,

53. Proposals for definitions of mental states contained in early drafts of the revised German Penal Code, including the official draft of 1962 and the law professors' alternative draft (AE), were omitted from the final version. See *Alternativ-Entwurf eines Strafgesetzbuches: Allgemeiner Teil* 56-57 (Jürgen Baumann et al. eds., 2d ed. 1969) (E 1962 §§ 16-17, AE §§ 17-18).

54. Necessity eventually was codified in the revised German Penal Code roughly a century later, after it had been recognized in the case law. See StGB § 34 (necessity as justification); id. § 35 (necessity as excuse) [German Penal Code].

55. With the noteworthy exception of insanity, which receives in-depth treatment in the federal criminal code and elsewhere in the U.S. Code, largely thanks to John Hinckley's botched attempt on Ronald Reagan's life in 1981. See 18 U.S.C. § 17 (1994).

56. See Don Stuart, A Case for a General Part, in *Towards a Clear and Just Criminal Law* 95 (Don Stuart et al. eds., 1999).

Wechsler viewed penal law as a matter of instrumental policy, a problem of means, not ends. This lack of interest in ends prevented Wechsler from seeing treatment theory not merely as a theory of means, but as a theory of ends that ultimately was incompatible with the basic principles of penal justice, and of a penal code. The problem with treatment theory is not that it is ineffective, that “nothing works,” to quote the slogan of the anti-rehabilitation backlash in the decades following the Model Code’s completion in 1962. Treatment theory fails not because it is insufficient as a means, but because it is illegitimate as an end. Even if “everything works,” treatment theory flies in the face of the normative foundations of penal justice, which presuppose the judged’s autonomy as a person as well as her membership in the judge’s normative community.⁵⁷ It is puzzling how Wechsler and the Model Code commentary could repeatedly invoke the condemnatory aspect of penal law as a normative practice and, at the same time, join the treatmentist effort to identify normatively abnormal offender-patients who do not deserve punishment but require treatment of their deviance, if necessary over their benighted objection.

This vacillation between two radically incompatible approaches to penal codification and penal law, one inclusionary and egalitarian, the other exclusionary and discriminatory, reveals a troubling disregard for questions of legitimacy. The only other explanation for this hodgepodge of apparently incompatible approaches would seem to be that the drafters in fact did not mean to endorse a normative approach to punishment, thus removing any incompatibility and resting the Model Code entirely on a treatmentist foundation. The recurring reference to and endorsement of the stigmatizing, and therefore exclusionary, effect of publicly identifying, or marking, an offender as deviant provides some evidence for this reading of the drafters’ views. In that case, of course, the Model Code would require fundamental revision not because it

57. See Dubber, *supra* note 15, at 132-46.

lacked a consistent foundation but because its consistent foundation, namely treatment theory, is itself incompatible with the requirements of legitimate punishment, or penal justice.

Any principles of penal codification must derive from principles of penal justice and, ultimately, from a general theory of the legitimacy of state action, i.e., a general theory of justice. Penal codification and penal justice are intimately connected. The question of codification is not simply a matter of legislative drafting technique, relegated to manuals for committee staffers. Codification instead is a matter of vital importance for the legitimacy of state punishment. Ever since the enlightenment placed the concept of autonomy at the heart of moral and political legitimacy, the questions of whether to codify what and how are determined by the urgent need to legitimate the most intrusive form of state interference in the lives of its constituents and thereby to solve the central legitimacy problem of the modern state: How to discharge its duty to manifest and reflect the autonomy of its constituents by what appears on its face to be a gross violation of that very autonomy, namely the infliction of punitive pain.⁵⁸ It is no accident that two of the great enlightenment theorists of penal law, Jeremy Bentham in England, and P.J.A. Feuerbach in Germany, were also great codifiers of penal law, nor that the beginning of modern penal law coincides with the emergence of modern penal codes.

The drive to codify and the drive to theorize in penal law spring from the same recognition of the urgent need to scrutinize the state's interference with the autonomy of its constituents in the name of autonomy. The code is the form of modern law which functions as the visible manifestation of the state's attempt to achieve and maintain legitimacy through constant and comprehensive scrutiny of its actions. This legitimacy scrutiny occurs on two levels. First-level, or internal, legitimacy scrutiny checks the consistency between the actual practice of

58. See *id.*

punishment and its legal norms and between lower-level and higher-level legal norms. Second-level, or external, legitimacy scrutiny goes beyond the confines of the explicit legal norms to test them against certain more fundamental political or moral norms.⁵⁹

The code's primary function is to lay bare the principles of penal law upon which the legitimacy of punishment is said to rest. Thereby the code facilitates the continuous *critical analysis* of state punishment without which its legitimacy cannot be maintained, for that legitimacy builds on the identification of the state's constituents with the principles manifested in the institutions of their state.⁶⁰

The development of a modern theory of penal law and of penal codification will require serious and extensive work by the entire community of American penal law scholars.⁶¹ This paper merely hopes to expose the urgent need for this foundational work and to suggest how a modern codification effort might determine and reflect the role of penal law and penal codes in contemporary American society. Having disposed of the former task, I now turn to the latter.

II. THE DEMISE OF CONSENSUS

The original Model Code drafters viewed themselves as working out the detailed policy implications of what they perceived as a solid substantive consensus. To determine the substance of this consensus, they did not—and could not—turn to popular decisionmaking. Instead, they relied on the findings of science, social and legal. Wechsler rejected retributivism because Stephen and Holmes, the legal scientists, and Michael and Adler, the social

59. On the distinction between first- and second-level legitimacy scrutiny, see Dubber, *supra* note 4, at 59.

60. On critical analysis of penal law through historical research, see Markus Dirk Dubber, *Historical Analysis of Law*, 16 *Law & Hist. Rev.* 159 (1998); Dubber, *supra* note 11.

61. Cf. Dubber, *supra* note 4.

scientists, rejected it. The source of the American Law Institute's authority for drafting model penal legislation was similarly obvious. The ALI, after all, was an organization of distinguished lawyers 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."

None of the sources of authority upon which the original Model Code drafters relied without hesitation is available today. We have already seen that the particular substantive consensus upon which the entire Code rests has long since evaporated. There is no legal science today. Social science is in a turmoil, traditional penology nowhere to be found. And the ALI's mission today rings of a bygone era when the law was a learned profession under the wise direction of dignified members of the bar, and laws were made by amateur legislators with little appreciation for the finer points of jurisprudence or the economic inefficiency of diverse and inconsistent commercial laws.

The very idea of a modern model penal code therefore appears to be internally inconsistent for three reasons: first, the absence, even the improbability and perhaps impossibility, of substantive consensus; second, the collapse of legal and social science, and, third, the disappearance of the learned jurist. If we agree that the learned jurist could not—and need not—be resurrected, two obvious remedies for the idea of a modern model penal code suggest themselves: first, an emphasis on form, combined with restraint on substance, and, second, the resurrection of legal science and related social science.

Given the contested nature or scope of certain penal norms, e.g., the prohibition of abortion or of drug possession, drafters of a modern penal code must carefully scrutinize the necessity of invoking penal protection for a particular norm in a particular application. Every employment of the penal law, i.e., every penalization of a given norm, presumptively interferes with the autonomy of its potential and actual objects. Insofar as the penal law,

as all law, ultimately derives its legitimacy from the manifestation of autonomy, every penal provision therefore is presumptively illegitimate. That presumption—the presumption of legality⁶²—will be overcome only if the employment of the penal law against a particular person is required, and required for a particular purpose, namely the manifestation of her victim's autonomy, and therefore of the (formal) basic norm of autonomy legitimating the state and its various coercive powers, including the penal law.

Assuming that any penal code nonetheless will retain contested norms, its legitimacy will have to derive not exclusively from its substance, but also from its structure and origin. The code must be structured to facilitate legitimacy scrutiny. Whenever possible, the code must clearly define its provisions and their relation to higher order principles, and ultimately to the fundamental norm, autonomy. Only if this overall expository function would be compromised may the exposition of particular interconnections be removed from the code itself into an easily accessible set of commentaries. The accomplishment of this goal is significantly complicated by the diversity, complexity, and sheer expanse of modern penal law, discussed in part III. Part IV will explore how these difficulties nonetheless might be overcome with the help of modern information technology.

The code's origin likewise affects its legitimacy. 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 Legal Process school, would have been particularly sensitive to the question of the process of drafting the Model Code. This is not so, however. Perhaps the legitimacy of the ALI's project was beyond question, perhaps the treatmentist consensus too entrenched to bother oneself with the process of working that consensus out in a code. Then again, concern with originary

62. See *supra* text accompanying note 4.

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 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 original Model 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,⁶³ but is illegitimate in and of itself.

The originary legitimacy of a model code will also depend in large part on the identity and status of its drafters. Here again, the original 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 points 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

63. A Penal Code Prepared by the Indian Law Commissioners (Calcutta 1862).

institution had an eminence it no longer has.⁶⁴

A new model penal code therefore must find a new source of legitimacy. The age of moral heroes has passed with the age of all encompassing moral struggles between good and evil. 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 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.⁶⁵

The personal and institutional void today must be filled with the resurrection of scientific expertise in law and related social sciences, as well as with the creation of a new institutional framework for this new scientific enterprise, an American Society for Penal Law. The legitimacy of a model code can no longer flow as naively and directly from science as it did in the days of the original Code. Still, a sustained effort at establishing scientific expertise can only bolster any claims to legitimacy—or at least relevance—that a modern model code might make.

What is needed is a new science of penal law, part of a new science of law, dedicated to the critical analysis of legal norms and praxis. To avoid the conceptualist error of

64. 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)).

65. There is some indication that the ALI may once again turn its attention to penal law. It recently initiated a project on "principles of the law of sentencing," under the direction of Professor Gerard Lynch of Columbia University. Cf. Lynch, *supra* note 21.

traditional legal formalism, the first (and so far only) attempt to establish an American science of law, the new legal science must be conceived as a human science, and therefore draw on the findings of other human sciences, including philosophy, psychology, sociology, and economics. Recent research in these sciences justifies the hope that their findings will be useful to the development of a science of law. Take, for example, the rediscovery of the question of legitimacy in political philosophy inspired by the work of John Rawls⁶⁶ and Jürgen Habermas.⁶⁷ The construction in political philosophy of theories of justice—however formal they may be—brings us one step closer to the construction of theories of *penal* justice, the paradigmatic non-ideal supplement to the ideal theories of Rawls and Habermas. In fact, the new legal theory undergirding the new legal science will be a species of non-ideal political theory, i.e., a theory of state coercion. Here the work of Hannah Arendt deserves serious reconsideration, particularly if the realm of law is to be distinguished from that of mere administration or regulation within a general account of state governance.⁶⁸

In psychology, foundational—rather than forensic—research into human development and cognitive capacities also may inform the resolution of certain crucial, but unresolved, issues in legal science. The most obvious example here is Piaget's⁶⁹ and Kohlberg's⁷⁰ work on developmental stages, which had a significant impact on Rawls's ideal theory of justice, though this influence

66. See John Rawls, *A Theory of Justice* (1971).

67. See Jürgen Habermas, *Faktizität und Geltung: Beiträge zur Diskurstheorie des Rechts und des demokratischen Rechtsstaates* (3d ed. 1993); *Autonomy and Solidarity: Interviews with Jürgen Habermas* (Peter Dews ed., rev. ed. 1992); Jürgen Habermas, *Legitimation Problems in the Modern State*, in *Communication and the Evolution of Society* 178 (Thomas McCarthy trans., 1979); Jürgen Habermas, *Moral Consciousness and Communicative Action* 116 (Christian Lenhardt & Shierry Weber Nicholsen trans., 1990).

68. See Hannah Arendt, *The Human Condition* (1958).

69. See Jean Piaget, *The Moral Judgment of the Child* (1965).

70. See 1 Lawrence Kohlberg, *The Philosophy of Moral Development: Moral Stages and the Idea of Justice* (1981); 2 Lawrence Kohlberg *The Psychology of Moral Development: The Nature and Validity of Moral Stages* (1984).

generally has been ignored by the commentators.⁷¹ More recent examples include research on the development of cognitive competence in young persons, with obvious implications for the still arbitrary line separating children from blameworthy persons and even for the only slightly less arbitrary definition of legal insanity.⁷² This research promises to be more easily integrated into legal science—and codification—because it does not challenge the very idea of law and codification, as did the penological attack on punishment launched by such organizations as the Group for the Advancement of Psychiatry at the time of the original Model Penal Code.

Despite the development of a sociological subdiscipline dedicated to the study of penalty, “criminology,” recent work in sociology and social psychology has made little constructive contribution to a science of penal law. These disciplines generally have been content to challenge, rather than explore, the distinctions between criminal conduct and other forms of deviance and between penal law and other forms of state coercion. Nonetheless, the critical analysis upon which a science of penal law is based cannot ignore the social, or communal, aspect of crime and punishment. The legitimacy of penal law, in fact, depends on its ability to accommodate the communal instincts triggered by criminal behavior, i.e., behavior that challenges the central constitutive norms, and perhaps even the existence, of a given community. Here the pioneering work of Freud,⁷³ Durkheim,⁷⁴ George Herbert Mead,⁷⁵ and Harold Garfinkel⁷⁶ may well prove more useful

71. See John Rawls, *The Sense of Justice*, 72 *Phil. Rev.* 281 (1963); John Rawls, *A Theory of Justice* ch. viii (1971).

72. See, e.g., Special Issue, *Children's Capacities in Legal Contexts*, 20 *Law & Hum. Behav.* 219-277 (1996) (N. Dickenson Reppucci et al. eds., 1996).

73. See Sigmund Freud, *Civilization and Its Discontents* (Joan Riviere & James Strachey trans., 1963).

74. See Emile Durkheim, *The Division of Labor in Society* (George Simpson trans., 1933).

75. See George Herbert Mead, *The Psychology of Punitive Justice*, 23 *Am. J. Soc.* 577 (1918).

76. See Harold Garfinkel, *Conditions of Successful Degradation Ceremonies*, 61 *Am. J. Soc.* 420 (1956); Harold Garfinkel, *Research Note On Inter- and Intra-*

than more recent research in sociology or social psychology. Some promising recent empirical work suggests that scholars in these fields may soon make constructive contributions to the science of penal law.⁷⁷

III. THE MORASS OF MODERN PENALITY

The fact of the saturation of modern society with penal norms confronts the drafters of a modern penal code with the choice between radically reducing the scope of the penal law or altogether abandoning the enlightenment ideal of a comprehensive penal code. This choice must proceed from a careful critical analysis of all existing penal norms. No such overview currently exists.⁷⁸ Once stock has been taken, the question of the role of penal law in modern governance can no longer be avoided. A model penal legislation must speak to the general question of what may and may not be penalized. No account of the role of penal law among the modes of governance at the disposal of American legislatures currently exists.⁷⁹ As a result, penal law finds its undifferentiated place among various state regulatory mechanisms, with the exploration of non-penal policy means left to the unguided discretion of (legislative) lawmakers and, still more troubling, (executive) regulation makers.

If the scope of modern penal law is reduced to its enlightenment dimensions, the enlightenment ideal of a comprehensive penal code can be maintained. Otherwise, that ideal must be abandoned. A modern penal code can no longer define every crime. Currently, penal codes exhaustively treat some offenses (most, but not all, of

Racial Homicides, 27 Soc. Forces 369 (1949).

77. See Marvin E. Wolfgang et al., U.S. Dept. of Justice, National Survey of Crime Severity (1985); Paul H. Robinson & John M. Darley, Justice, Liability, and Blame: Community Views and the Criminal Law (1995).

78. For an attempt to assemble a list of state criminal offenses in one U.S. jurisdiction, New York State, see New York Criminal Offenses, (last modified October 5, 2000) <<http://wings.buffalo.edu/law/bclc/nycriminaloffenses.htm>>.

79. For earlier attempts, see Herbert Packer, The Limits of the Criminal Sanction (1968); Hart, *supra* note 13.

which are so-called traditional offenses), while ignoring others (most, but not all, of which are so-called regulatory offenses). In other words, current penal codes are comprehensive neither in scope nor in content. While the enlightenment ideal of comprehensiveness in both respects cannot be sustained absent a radical compression of penal law, comprehensiveness in scope must be recovered.

Defining the province of penal law, however, requires more than a theory of penal legislation, but a theory of penal law itself. To determine why, what, and how to codify, is impossible without first determining why, what, and how to punish. Penal law therefore must be integrated into law and other forms of governance. Here the focus on codification provides a convenient point of reference. As the code is the common form of modern law, the comparison of codes facilitates the comparison of their subject. So the province of penal law might be explored by comparing the Model Penal Code with the Uniform Commercial Code, the Restatement of Contracts, and the Restatement of Torts. For example, it would be profitable to compare the “interests” protected by the Model Penal Code and the Restatement of Torts, as well as the nature and extent of their protection. Similarly, the treatment of common concepts such as consent in the Penal Code and the Restatements might be compared.⁸⁰ This intercode comparison highlights differences—and similarities—not only in substance, but also in form or structure, which reflect the nature of a given area of law. Take, for example, differences in tone and complexity in the UCC and the Model Penal Code, which may suggest a difference in audience or perhaps in attitude toward that audience.⁸¹

The code also makes for a useful point of departure for an investigation of the place of penal law within other modes of state governance. For example, one would expect that agency regulations differ significantly in form and substance from penal provisions, and “codes” of regulations

80. For additional illustrations, see Dubber, *supra* note 4, at 59-63.

81. See also *id.*

(such as the “Code of Federal Regulations”) from penal codes—with the erosion of that difference providing palpable evidence of the conflation of the modes of governance they represent, (penal) law and administration.

The contested boundaries of penal law are defined by such questions as the propriety of punishing non-acts (status, omission, possession), non-culpable conduct (negligence⁸² and strict liability⁸³), inchoate offenses, risk creation, and so-called victimless crimes. The retention of victimless crimes is a particularly pressing issue given the recent emphasis on the significance of victim harm in the penal law, not to mention the central role assumed by drug offenses, which are often characterized as victimless, in the drug focused war on crime of the past few decades.⁸⁴ These questions need to be reexamined not merely in preparation for an account of positive penal law, but within the more general context of determining the proper modes of governance that permit the state to discharge its constitutive duty of manifesting and protecting the autonomy of its constituents. The interests to be protected by penal law in threat, imposition, and infliction must be identified and clearly distinguished from and related to the interests protected by other modes of governance, including other forms of law (most importantly the law of torts and of contracts) and regulation.

Similarly, the fundamental distinction between traditional and non-traditional offenses must be reexamined. In its current state, this distinction is useless at best, misleading at worst. A century of frantic penalization has transformed scores of non-traditional offenses into hallmarks of modern penal law, turning the exception into the rule along the way. This substantive question can no longer be resolved by drawing procedural or semantic distinctions, such as that between criminal and

82. See Jerome Hall, *Negligent Behavior Should Be Excluded from Penal Liability*, 63 Colum. L. Rev. 632 (1963).

83. See Herbert L. Packer, *The Model Penal Code and Beyond*, 63 Colum. L. Rev. 594 (1963).

84. For commentary on the victim's role, see Dubber, *supra* note 4.

non-criminal offenses found in the original Model Penal Code.⁸⁵ Despite their non-criminal label, these “violations,” presumably invented by the drafters to avoid the politically unpopular decision of doing away with strict liability offenses altogether, were defined in the Penal Code and were subject to the Penal Code’s general part. Assuming some distinction between serious and trivial offenses is to be maintained, the drafters of a new model penal code might consider the separate codification of trivial offenses. Such a code would highlight the distinct nature of trivial offenses and thereby allow for their differentiated treatment in matters of the general part, as well as in matters of law reform.

Once this process of external integration of the penal law into law, and eventually governance, has been completed, its internal integration can be achieved.⁸⁶ As with its external integration, the internal integration of penal law presupposes first a distinction among its various components. Here it might be useful to distinguish between the definition of penal norms (the province of criminal law), their imposition (the province of criminal procedure), and their enforcement (the province of the law of corrections and prisons).⁸⁷

The original Model Code contributed greatly to the internal integration of penal law. As a “Penal and Correctional Code,”⁸⁸ it contains not only the general and special parts of a penal code (parts I & II), which have received the lion share of scholarly and legislative attention, but also a two-part code of punitive treatment. Part III, entitled “treatment and correction,” codifies not only a complex law of punishment infliction, along with the fundamental constraints upon the infliction of punishment now commonly referred to as prison law, but also a detailed

85. See Model Penal Code § 1.04(5) (Proposed Official Draft 1962).

86. On the distinction between internal and external integration, see Dubber, *supra* note 4, at 59.

87. See Markus Dirk Dubber, *The Pain of Punishment*, 44 *Buff. L. Rev.* 545, 545 (1996).

88. Model Penal Code § 1.01(1) (Proposed Official Draft 1962).

penological program for imprisonment; part IV, “organization of correction,” codifies the structure and operation of a department of corrections to ensure the compliance of all penal institutions with the constraints and obligations laid out in part III.

The Model Code, in short, set out to codify two of the three aspects of punishment, the *definition* of penal norms and the *infliction* of punishment upon a finding of their violation. Much of the remaining aspect of punishment, the imposition of norms, fell outside the Code’s ambit as it had been the subject of the American Law Institute’s Model Code of Criminal Procedure of 1930. Still, in its comprehensive ambition the Model Penal Code codified a number of central impositional provisions as well, particularly those often classified as evidentiary, including detailed provisions on double jeopardy, venue, burden of proof, the sentencing process (including, in non-committal brackets, its highly influential blueprint for capital sentencing), and—in the case of the insanity defense—even the appointment of expert witnesses. These impositional provisions were then complemented by the ALI’s Model Code of Pre-Arrestment Procedure of 1972.

Today, the internal integration of the original Model Code retains only formal significance as its substantive basis, treatment theory, has been abandoned some decades ago in theory as well as in practice. Yet that formal significance should not be underestimated. Legislatures have abandoned the ideal of integration altogether as even penal codes based on the Model Code are rapidly turning into unprincipled heaps of statutory pronouncements not unlike the haphazard statutory compilations the original Model Code set out to replace.

The challenge of the new Model Code therefore will be to revive the original Code’s goal of internal integration, but based on a different integrative principle (or set of principles). This is not to say that the new Model Code would have to adopt the format of the original Code, which covered two of the three aspects of punishment. In the end, the definition, imposition, and infliction of penal norms

must all find their place in a comprehensive account of state punishment as a whole, if not in the same code. This account itself must include a theory of penal justice which lays out minimum requirements of legitimacy that each aspect must meet. Perhaps such a theory of penal justice could be derived from the standard theories of punishment, retribution and prevention. These theories themselves, however, are more easily applicable to some aspects of punishment (definition and infliction) than others (imposition) and may well turn out to rest on more general principles that link penal justice to a general theory of justice, which traditionally has been the concern of political, rather than penal, theory. This connection between legal and political theory has remained largely unexplored by penal law theorists and political philosophers alike.

Even within penal law, different aspects have attracted vastly different levels of theoretical attention. Massive scholarly energies have been devoted, and continue to be devoted, to the respective merits of so-called theories of punishment that actually are theories of substantive criminal law alone. The question of which constraints a theory of penal justice might place on the imposition, as opposed to the definition, of these norms has attracted far less attention. Virtually no attention has been paid to the penal justice of punishment itself, i.e., the actual infliction of penal norms on convicted offenders, despite promising attempts, now some twenty years old, to develop a “justice model of corrections” and to reconceive the inflictional process in light of Kohlberg’s theory of moral development.⁸⁹

The implications of the internal and external integration of modern penal law for the form and content of a modern penal code are not obvious. As the integration of penal law into law—and in fact governance generally

89. See, e.g., *Justice as Fairness: Perspectives on the Justice Model* (David Fogel & Joe Hudson eds., 1981); Joseph E. Hickey & Peter Scharf, *Toward a Just Correctional System* (1980); Lawrence Kohlberg, *The Just Community Approach to Corrections: A Theory*, 4 *J. Moral Educ.* 243 (1975).

speaking—does not require the integration of all law into a single Justinian code, so the internal integration of the various aspects of penal law would not imply the creation of a single penal code, as the original Model Code set out to do, with the obvious exception of (much of) criminal procedure. One might instead consider the creation of three separate codes, a criminal code, a criminal procedure code (including an evidence code), and a code of enforcement, with their connection to penal law laid out in the commentary, thus reviving Livingston's comprehensive codification project in ambition, if not in substance.⁹⁰

IV. THE PROMISE OF MODERN INFORMATION TECHNOLOGY

One of the most significant developments since the drafting of the original Model Penal Code is the appearance of sophisticated and widely accessible methods of structuring and transferring information. The new Model Code project should enlist this new technology, and the internet in particular, wherever and whenever possible. To begin with, the computer dramatically simplifies the foundational task of analyzing existing penal provisions. Painstaking paper research can be replaced by quick searches in existing databases. Given the dispersion of penal norms into every corner of modern law and regulation, only an electronic search has any hope of assembling a fairly comprehensive list of penal provisions.⁹¹ The computer, however, not only assembles the necessary information, it also can display it in useful ways. For example, it dramatically facilitates comparative research by allowing drafters to compare provisions within and across jurisdictions at any time and on any topic.⁹²

Most important, the new electronic medium will affect

90. See *The Complete Works of Edward Livingston on Criminal Jurisprudence* (Salmon P. Chase ed., 1873).

91. See, e.g., <<http://wings.buffalo.edu/law/bclc/nycriminaloffenses.htm>>, *supra* note 78.

92. See, e.g., *Penal Law: A Web*, <<http://wings.buffalo.edu/law/bclc/web/cover>>.

not only the drafting of a new model penal code, but the model code itself, and eventually the codes based upon it. Here the audience of the model code and of enacted codes must be distinguished. The model code is addressed to penal law experts; actual penal codes also address the non-expert public. Enacted codes address the general public in two important senses. First, one of the functions of a penal code, wholly apart from its enforcement, is the deterrence of its violation.⁹³ Second, and perhaps less obvious, enacted codes address the public because their legitimacy depends on public scrutiny. In a modern democratic state, any law, and particularly penal law, the most coercive mode of law, can only be legitimated through its continuous scrutiny by its subject-objects, the constituents of the state. Thayer was only half right when he pointed out some time ago that the constitutionality of American law must be entrusted also to the legislature, rather than primarily, or even exclusively, to the judicial branch.⁹⁴ In fact, the constitutionality, even the legitimacy, of American law is entrusted to each and every citizen, not merely to those few who serve in an official legislative or adjudicatory capacity.

The virtually unlimited storage capacity of a website allows the comprehensive collection of all penal norms in a given jurisdiction. Unlike a similar paper collection that would fill several hefty loose leaf tomes,⁹⁵ a web collection of this kind would be immediately and widely accessible to experts and non-experts alike. There is no reason to ignore modern technology for the publication of modern penal norms. The drafters of the recent revision of the French Penal Code apparently considered a proposal to disseminate the code through the national telephone system, giving each telephone user access to the code on a

93. See Paul H. Robinson, *Structure and Function in Criminal Law* (1997).

94. See James B. Thayer, *The Origin and Scope of the American Doctrine of Constitutional Law*, 7 Harv. L. Rev. 129, 155-56 n.1 (1893).

95. See, e.g., the multi-volume loose leaf collection of German "supplemental" penal laws, the most recent edition of which runs to "app. 12,582 pages." See *Strafrechtliche Nebengesetze* (Georg Erbs et al. eds. 7th ed., C.H. Beck 1999).

screen attached to her telephone set (called Minitel).⁹⁶ The enlistment of modern media becomes particularly urgent if a radical simplification and reduction of American penal law should prove impossible or even undesirable.

Modern code drafters unable or unwilling to dramatically shrink penal law can either throw up their hands in the face of the enormous bulk of modern penal law or explore modern models for its dissemination. The enlightenment ideal of passing out comprehensive code pamphlets to high school students is no longer attainable, if it ever was. This is not to say, however, that the ideal of dissemination, and therefore of notice, should be abandoned altogether. If it is possible to condense the various federal and state tax codes into simple instructions, it surely must be possible to do the same for the various federal and state penal codes. The analogy between tax and criminal law is particularly close if one focuses on the deterrent communicative function of a penal code. The potential offender is to calculate her "criminal liability" in much the same way as the potential tax payer figures her "tax liability."⁹⁷

A combination of traditional paper and modern electronic media is more likely to bring modern penal law to the people who are to abide by it, and to scrutinize its legitimacy along the way. Pursuing the analogy to the famously tangled web of modern tax law, it is worth noting that American governments have been remarkably quick to distribute tax forms and "instructions" electronically. Long before the advent of "downloading," they also found ways to

96. As of 1995, Minitel was used by over five million residential and commercial telephone subscribers in France. See generally Ewan Sutherland, *Minitel: The Resistible Rise of French videotex*, <<http://www.sutherla.dircon.co.uk/minitel/>>.

97. The main difference is that the penal calculation is to be performed prospectively only, with the penal liability extensive enough to deter the calculator from engaging in the conduct in the first place—thus also obviating the need for a retrospective assessment of tax liability. In other words, the state prefers to deter criminal conduct, rather than to collect tax on it later, which is not to say that the two modes of governance are mutually exclusive (see, e.g., the taxation of criminal activities such as drug trafficking or the use of the tax law to deter certain conduct).

distill the Byzantine complexity of tax law into relatively simple (or at least short) forms, accompanied by guidelines written in plain (or at least plainer) English. The income tax form, in fact, generally resembles the structure of criminal liability: An assessment of maximum (or possible) liability is followed by an assessment of various exemptions from liability (called “defenses” in criminal law), resulting in an assessment of actual (or likely) liability. Surely, it cannot be more difficult to develop and disseminate a penal liability form based on, say, the U.S. Sentencing Guidelines, federal penal law’s analogue to the tax code (or to IRS regulations and opinions, depending on one’s view of the federal sentencing commission and the relative significance of the guidelines and the U.S. Code as sources of federal criminal law). The point is not to recommend the drafting of punishment forms, but to suggest the feasibility of making the fundamentals of penal law accessible in content and form.

The dissemination of modern penal law, however, presupposes its distillation into an interconnected web of topics and principles, all emanating from a common core. An important question of modern penal codification is what form and content this node of penal law should take. It may come in the form of a paper booklet or of a central web page, or both. In content, the node might contain basic principles of penal law, applicable across the entirety of penal norms and, perhaps, across all aspects of the penal process, to comprise a true general part of penal law, rather than merely of substantive criminal law.⁹⁸ It might include a selection of the norms themselves, or at the very least an easily accessible summary of the rights (or interests) protected by penal law.

Alternatively, the penal node might lay out a general method for the identification of penal norms, interests, or rights. The system wide principles of penal law might include, most fundamentally, the basic principle of

98. See Wolfgang Naucke, Lücken im Allgemeinen Teil des Strafrechts, in *Strafrechtstheorie im Umbruch* 269, 277-78 (Raimo Lahti & Kimmo Nuotio eds., 1992).

autonomy, plus general substantive and formal requirements of criminal liability (act, legality, etc.), as well as exemptions from that liability (justification, excuse, age, insanity, etc.), plus relevant constitutional provisions. Reflecting the integration not only of criminal law, but also of penal law, the node might contain brief descriptions and depictions of the criminal process and the conditions and modes of punishment execution. Care should always be taken to elucidate the connection of any given principle to others of equal and higher levels of generality. In the end, the penal node should provide the citizen with all the necessary tools for the critical analysis of all aspects of penal law not only by arming her with the required conceptual apparatus, but more importantly by illustrating the very mode of critical thought it is meant to foster.

This node of the penal web should fit into the pocket of every member of the normative community under a given penal law.⁹⁹ In addition, it should be placed at the center of a web of websites dedicated to the various components of penal law. Most immediate, a website can help disseminate a modern model code and, later on, its enacted analogues to its expert and non-expert audiences alike. More important, a website can integrate the penal node into its web of principles, rules, and provisions. This potential for systematization can be realized by interconnecting all materials on the core site through hyperlinks. In this way, the site both facilitates and illustrates the much needed integration of every element of modern penal law, from the core to the periphery, from the criminal code to the administrative regulation to the village code. Hyperlinks can highlight the connections within a given criminal code, across criminal codes (e.g., state and federal codes), between criminal and non-criminal codes (e.g., the Model Penal Code and the Restatement of Torts), between codes and commentaries, between codes and court

99. In the not so distant future, our pockets may well hold storage and communications devices that will permit us to have at our fingertips not only the penal node, but the penal code itself (along with other primary and interpretative legal materials). Until then, a small booklet of basic principles will do.

opinions (and other interpretative documents), between commentaries and court opinions, among court opinions, and so on and so on, thus creating a comprehensive web of penal law, the components and levels of which each user, expert or non-expert, could explore as she sees fit.¹⁰⁰

Most important, by capturing and highlighting the interconnectivity of penal law, a website facilitates the fundamental function of a modern penal code: The legitimation of penal law through continuous scrutiny by the constituents of the state, the subject-objects of all modern law.

CONCLUSION: THE PENAL PANOPTICON

The modern penal code should therefore be reconceived as the common core, rather than the compendium, of modern penal law. The modern penal code would represent the principled vantage point from which the external and internal legitimacy of penal law can be tested. Mixing and misappropriating metaphors from Bentham and Foucault, the modern penal code would function as the panopticon for the carceral archipelago of modern penal practices. By placing that panopticon into the hands and minds (and pockets) of the public, rather than merely in the scrolls of the functionaries, the modern penal code can externalize the process of legitimation and thereby direct that process against itself. The crucial task of legitimation in the long run cannot be achieved if it is confined to a small group of experts who view themselves as merely the subject rather than as also the object of the law they make. This basic fact of power lies at the foundation of the American system of government and its implications are as obvious in the case of taxation as they are in the case of the state's exercise of its most awesome power, punishment.

The idea of a modern penal code, in other words, turns the invidious and hypocritical psychological mechanisms of

100. For a more detailed illustration of this integrative potential, see Dubber, *supra* note 4, pts. III & IV (discussing prototype of a penal law website, <http://wings.buffalo.edu/law/bclc/web/cover>).

state control, which Foucault so famously and chillingly described, against the state by employing them as a means of mass self-governance and therefore of control of the state. The dispersion and psychologization of governance thus circumscribes, rather than expands, the power of the state. A method of control *by* the state becomes a method of control *of* the state. In the modern psychologized state, the oppression as well as the freedom of its constituents, and therefore its legitimacy, is simply a matter of attitude. To achieve and then to maintain its legitimacy, the state therefore paradoxically must instill in its constituents, including but not limited to its functionaries,¹⁰¹ the desire to test and contest that legitimacy at every step.

The success of the modern *model* penal code will be measured in terms of legitimacy first, and crime suppression second. Its success will turn on how well it in its generation, form, and content exemplifies and reflects the critical attitude of constant legitimacy scrutiny that it must instill in system officials and other state constituents and without which long-term legitimation is impossible in the complex web of modern penal law that has long ago expanded beyond the comprehension, never mind the critical vigilance, of a single person.

The new panoptical penal code is designed to allow every state constituent, expert or not, to scrutinize the legitimacy of penal law in its entirety. As such it fits into a new legitimacy centered theory of penal law, including a theory of penal justice as well as a connected theory of penal legislation, that is designed to facilitate and guide public scrutiny of penal law through critical analysis.

A central weakness of the original Model Penal Code, and one cause for its demise, was the drafters' failure to ground it in a theory of penal justice and of penal codification. The original Model Code took its theoretical foundations for granted and took pragmatic pride in

101. On the limited significance of the distinction between system insiders and outsiders, see Dubber, *supra* note 87, at 608-11; see also Cornelius Castoriadis, *The Imaginary: Creation in the Social-Historical Domain*, in *World in Fragments* 3, 17-18 (David Ames Curtis ed. & trans., 1997).

ignoring them. As a result, the Code's significance vanished along with its unconsidered foundations. Today an analysis of American penal law as it exists, no matter how clear-eyed and comprehensive, is a necessary, but not a sufficient, prerequisite for the success of a new model code. The new model code instead must derive itself not merely from the positive law, much of which must be discarded as arational.¹⁰² To withstand inevitable future assaults on the rationality of penal law during times of crisis, it must dig deeper in search of a stronger foothold in American penal law theory and practice. Unlike its predecessor, it must arise out of a reconsideration of the foundations of penal justice itself.

By identifying fundamental principles and then applying them throughout the entirety of penal law, a modern model penal code will function as a model of form as well as substance, of process as well as content. The rationality of penal law thus must be captured not only internally by consistently applying the code's general rules within itself, as the original Model Code had done, but also externally by linking these general rules to fundamental principles of state governance. By embodying these formal requirements of legitimacy in addition to providing a substantive model, the new code will be better able to accommodate shifts in substantive positions, such as the one from treatment to retribution and incapacitation that rendered the original Code irrelevant within two decades.

The fundamental principles framing a modern model penal code will not be what we traditionally have thought of as the principles of penal law. They instead will be principles that connect the penal law to the power of a democratic state over its constituents, grounding penal theory in political theory. If this foundational connection between the political community as a whole, including its norm breakers, and the question of punishment has been established once and for all, a new model code will have

102. On the concept of arational penal lawmaking, see Markus Dirk Dubber, *Recidivist Statutes as Arational Punishment*, 43 *Buff. L. Rev.* 689 (1995).

laid the groundwork for principled punishment in the future, even if no legislature ever enacted a single one of its provisions. Otherwise American penal law will continue its drift into an unreflected acting out of self-protective impulses, no matter how many model code rules find their way into statute books that will continue to lose significance in a hectic crime extermination campaign with little patience for the constraints of legality.