

# “Silent Revolution”: The Rockefeller Foundation’s Invisible Influence on the Model Penal Code

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## ABSTRACT

*For over a hundred years, rich families have been channeling their wealth through private foundations to remake American society, but their immense impact on the law is still poorly understood. This article begins to fill that gap by studying the almost completely unknown origins of one of the most important reforms in the history of American criminal law: the Model Penal Code (“MPC”).*

*To show how the MPC was influenced by its primary funder, this article presents unpublished documents from the archives of two of the most important private organizations in American law: the American Law Institute (“ALI”) and the Rockefeller Foundation, which gave the ALI the money for some of its most important endeavors. The MPC is one such project, a complete code of criminal law that states could adopt in whole or in part to replace antiquated and contradictory common law crimes. Many states did just that after the MPC’s completion in 1962.*

*The MPC was both directly and indirectly influenced by Rockefeller money. The ALI would almost certainly not have pursued a model criminal code if the Foundation had not agreed to pay for it, and its leadership would very likely not have gone to Herbert Wechsler (its eventual Chief Reporter) if he had not worked hard to make his candidacy appealing to Foundation officers. The MPC was influenced in more diffuse ways, too. One of John D. Rockefeller’s first major charitable projects was founding the University of Chicago in the late 19<sup>th</sup> century, and the university championed a view of human nature as something that could be transformed with the right treatment. The MPC took its progressive goal of reforming rather than punishing criminals from the prevailing sociological consensus that Rockefeller funding helped create and whose conclusions the Foundation encouraged the ALI to adopt.*

*That influence has also had unintended and oppressive consequences. Adopting a treatment-oriented vision of criminal justice ensured that the MPC was far more focused on defendants’ dangerousness than the common law it replaced. As a result, judges and juries today must often decide how dangerous they think defendants are, and they unwittingly draw on prejudices likely to reinforce the racial and economic disparities of American incarceration.*

*Enormous pieces of our criminal law were thus written by a private group of preeminent lawyers and judges, who were paid by a private charity that pushed them to accept the social scientific ideas that the charity had been promoting for decades. This was not a sinister conspiracy, but the Foundation did intentionally keep its role out of the public view: the Rockefeller Foundation saw itself as conducting a “silent revolution,” a massive transformation of the country in which their own role would be almost totally invisible and of which the MPC was an important part. It is crucial that we understand this revolution, so that we can better understand how our laws are written and can think more critically about how they should be written.*

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## INTRODUCTION

The story of American criminal law contains an important character whose role has rarely been scrutinized. Beginning in the late nineteenth century, the Rockefeller family set out to change the world through lavish spending, which it did by funding academic and reform-oriented institutions like the University of Chicago and the American Law Institute ("ALI"). One of the single most influential reforms in the history of American criminal law, the Model Penal Code ("MPC"), is itself the result of such spending and of the large degree of influence the Rockefeller Foundation exerted through its control of the purse strings. If we trace that influence back further, we learn that the investments of the Foundation's predecessor — the Laura Spelman Rockefeller Memorial — created the conditions in legal and sociological education that shaped the ideas of the MPC's creators, and especially of its Chief Reporter, Herbert Wechsler.

The MPC's importance is as widely acknowledged as its origins are misunderstood. One of the foremost experts on the MPC calls it "the key to American criminal law in fact, and not only in theory," because "so much of American criminal law derives from it, one way or another."<sup>1</sup> Even while the Model Penal Code was still being drafted in the mid-1950s, states began looking to its early versions to help guide their criminal law reforms, a process that continued and intensified following its publication in the early 1960s. "Most obvious is the Code's influence in the forty or so jurisdictions that recodified their criminal law on its basis . . . Even though none of these

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<sup>1</sup> MARKUS DIRK DUBBER, AN INTRODUCTION TO THE MODEL PENAL CODE 5 (2d ed. 2015).

revisions adopted the Code as a whole, all of them were influenced by it to a greater or lesser extent.”<sup>2</sup> The MPC and its commentaries have also long been frequently and approvingly cited in state and federal opinions trying to make sense of the criminal law of their jurisdictions,<sup>3</sup> a fact that remains true today. Though some have challenged what they consider an overweening focus on the MPC as distinct from a general criminal common law,<sup>4</sup> the MPC nevertheless obviously merits significant study, both as an underlying driver of major historical change in American law and as an ongoing source of legal guidance.

The MPC’s broad influence on American criminal law is often treated as a natural phenomenon. According to brief introductions in two of the mostly widely used criminal law casebooks,<sup>5</sup> the criminal law was in hopeless disarray, so the ALI’s smartest and most experienced legal thinkers decided to set it right on their own initiative, creating a coherent and unified body of rules defining what crimes are that states could directly adopt. The story we tell law students is more or less the same one scholars tell each other in legal scholarship.<sup>6</sup> While the MPC has been “a major focus for all American criminal theory since the 1950s,” it has nevertheless remained “a document that has attracted only passing efforts at historical explanation.”<sup>7</sup> Much of its history is invisible in legal scholarship, which has done little to investigate the MPC’s origins; outside of legal academia, scholars often shy away from such squarely legal topics, so the MPC is left out of the impressive studies on the domestic and international impacts of American foundations in the twentieth century. As a result, we are

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<sup>2</sup> *Id.* at 5–6.

<sup>3</sup> Mark D. Rosen, *What Has Happened to the Common Law? — Recent American Codifications, and Their Impact on Judicial Practice and the Law’s Subsequent Development*, 1994 WIS. L. REV. 1119, 1251–52 n.496.

<sup>4</sup> The precise nature and extent of the MPC’s influence has been powerfully complicated by scholars like Anders Walker, who explains that because states never adopted the MPC in its entirety (and it in fact often rejected its most radical innovations), we should understand much of contemporary American criminal law and the result of an interaction between the MPC and the laws of the various states that adopted parts of it. See generally Anders Walker, *The New Common Law: Courts, Culture, and the Localization of the Model Penal Code*, 62 HASTINGS L.J. 1633 (2010).

<sup>5</sup> JOSHUA DRESSLER & STEPHEN P. GARVEY, *CRIMINAL LAW: CASES AND MATERIALS* 5–6 (9th ed. 2022); SANFORD H. KADISH, STEPHEN J. SCHULHOFER & RACHEL E. BARKOW, *CRIMINAL LAW AND ITS PROCESSES: CASES AND MATERIALS* 296 (11th ed. 2022).

<sup>6</sup> See, e.g., Anders Walker, *American Oresteia: Herbert Wechsler, the Model Penal Code and the Uses of Revenge*, 2009 WIS. L. REV. 1017, 1029 (2009); Kimberly Kessler Ferzan, *From Restatement to Model Penal Code: The Progress and Perils of Criminal Law Reform*, in THE AMERICAN LAW INSTITUTE: A CENTENNIAL HISTORY (Andrew S. Gold & Robert W. Gordon eds., 1st ed. 2023), <https://academic.oup.com/book/45786> [<https://perma.cc/E9Y3-QVDU>]; Sanford H. Kadish, *The Model Penal Code’s Historical Antecedents*, 19 RUTGERS L.J. 521 (1988).

<sup>7</sup> Gerald Leonard, *Towards a Legal History of American Criminal Theory: Culture and Doctrine from Blackstone to the Model Penal Code*, 6 BUFFALO CRIM. L. REV. 691, 696 (2003).

surprisingly ignorant of the most basic facts surrounding the creation of the MPC.<sup>8</sup>

This article aims to begin to rectify that ignorance. Part I provides some of the background on John D. Rockefeller's earliest and most influential charitable donations, through which he established the University of Chicago in the early 1890s. With Rockefeller's support, the University's psychology department developed and promoted some of the theories that would eventually become foundational to the Model Penal Code, including the notion that people are largely products of their environments and can be reformed through treatment. This Part also offers a previously unknown sketch of interactions between the Laura Spelman Rockefeller Memorial — a philanthropic body established by Rockefeller — and the American Law Institute in the 1920s. The Memorial provided funding for the ALI to develop a Model Code of Criminal Procedure. Although it was disappointed with the results, considering them too lawyerly and insufficiently attuned to developments in social science, the Memorial did little to attempt to influence the ALI, maintaining a largely hands off approach to the efforts it underwrote. Among the officers of the Rockefeller Foundation (which absorbed the Memorial in the late 1920s), this attitude underwent a profound shift, thanks to the Second World War, which convinced them that a far more interventionist approach was required to save humanity from itself. Part II presents a great deal of never-before-published archival material demonstrating the effect of that new approach on the Foundation's dealings with the ALI in the 1950s. The Foundation played a large role in choosing what project the ALI would pursue (the Model Penal Code), who would lead it (Herbert Wechsler), and what its basic philosophical orientations would be (among others, the identification and treatment of dangerous offenders). The records I present show that this influence was maintained even after the grant was awarded, as the ALI had to repeatedly return to the Foundation to request extensions of time or more funding. Part III explains that Rockefeller-funded ideas about human nature and the function of law — dangerous people should be getting treatment rather than punishment — became fixtures throughout American criminal law. Although this notion sprang from a progressive desire for rehabilitation, the retributive turn in

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<sup>8</sup> I cannot, for example, locate a single published source containing the date of Herbert Wechsler's appointment as Reporter (December 19, 1951). Instead, people get the dates wrong, even in work dedicated to the history of the American Law Institute: "This work was undertaken in 1950 with Professor Herbert Wechsler . . . as its Chief Reporter." John P. Frank, *The American Law Institute, 1923–1998*, 26 *HOFSTRA L. REV.* 615, 620 (1998). Trivial, you might say. We know that the MPC project got going sometime in the early 1950s and that Wechsler was pretty much in charge of the whole thing. What's the difference if it was sometime in 1950 or late 1951? Beyond the commitment to accuracy that should be the foundational hallmark of any scholarship, legal academia's ignorance of even this timeline is a symbol of its inability to see the code as connected to other events in the world or to understand it as shaped by the processes of its creation. "To get a handle on the Model Penal Code," writes Dubber, "it helps to know something about where it came from and who drafted it." DUBBER, *supra* note 1, at 7. I wholeheartedly agree, but there's much more to the story than has been told so far.

American criminal adjudication in the latter half of the twentieth century left the MPC’s focus on offender dangerousness open to uses that reinforce harmful stereotypes and produce discriminatory outcomes on the basis of race and class. Finally, the conclusion suggests the need for comparative study of legal reform processes worldwide and questions whether organizations like the ALI and their private funders should be allowed to retain their privileged position in the development of American law.

The story this article tells has been hard to see in part because some of the most important players wanted it that way. For example, it was unquestionably the Rockefeller Foundation’s desire to stay out of sight. Joseph Willits (1889–1979) — the head of the Foundation’s Division of Social Sciences, which funded the MPC — wrote that his general philosophy was simply to seek out the best people in every field and give them the resources they needed to come up with the best ideas. “Supporting rather widely the best there are in a field exerts the maximum leverage for betterment and influence of that field. It does not make RF’s [the Rockefeller Foundation’s] role highly visible, except to the discerning.”<sup>9</sup> That invisibility, in Willits’ view, came with benefits.

By frankly focusing on the intellectual process at the highest level as our primary concern, RF surrenders something; it not only surrenders the role of traffic policeman, it surrenders something of its institutional visibility and glory; and it surrenders also something of the freedom of its officers and Trustees to be the prime initiators of new ideas.<sup>10</sup>

Willits’ approach was certainly successful in surrendering the Foundation’s “institutional visibility and glory” in the area of criminal law, although the archival evidence I present in this article suggests that he was considerably less concerned with surrendering the Foundation’s “freedom . . . to be the prime initiator of new ideas.” First, convincing the Foundation to fund the MPC at all was a struggle that required the ALI to conform their proposal to the preferences of their potential patron. The MPC would not exist if they had not been successful in convincing the Foundation that it was worthwhile. Second, both before and after the initial grant in 1952, Foundation officers repeatedly expressed concerns that the lawyers weren’t doing enough to incorporate the social scientific insights they had spent so many years paying for. In turn, the ALI members worked hard to allay these concerns by changing the nature of their materials and the composition of their team. The MPC looks the way it does in significant part because it had to look that way to get funded. Finally, Wechsler was chosen as Chief Reporter in large part

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<sup>9</sup> Joseph H. Willits, *Memorandum from Joseph H. Willits to DR* (Nov. 25, 1952) (unpublished), available at Rockefeller Archives Center, Joseph H. Willits Collection, General File Series 1, Division of Social Sciences, Program and Policy, Box 3, Folder 28, Page 2.

<sup>10</sup> *Id.* at 4.

because he and the ALI were able to convince the Foundation — through a framework for the MPC written specifically to address Foundation criticism, as well as meetings and conversations over a period of months — that he was the person best suited to carry out their aims. Wechsler had certain specific preoccupations that matched those of the Foundation and that are reflected throughout the MPC, such as his commitment to a focus on the identification and treatment of dangerous offenders. Admittedly, the code was a group effort and went through many rounds of revision; it wasn't dominated by Wechsler's vision alone. But due both to his position and the extraordinary amount of time and energy he devoted to the work, his impact on the MPC was immensely significant, and the Rockefeller Foundation was in large part responsible for his selection as Chief Reporter.

This article is a first foray into much larger stories — to be explored in future work — that stretch both backwards and outwards. The Model Penal Code represents a combination of at least two major historical trends that deserve more attention both individually and together: twentieth-century American codification and the influence of private philanthropy on American law. First, codification. Though it might seem obvious today, the idea of “rationalizing” law through the creation of legal codes has a complex and contentious history in which the ALI played an important role. There is a rich literature on this history, including on the colonial origins of Anglo-American codes, the role of foreign law in English codification debates that informed American ones, international codification, the differences between the English and American experiences of codification, and the American acceptance and process of codification.<sup>11</sup> Almost none of it, however, touches in any significant way on the MPC,<sup>12</sup> which was a product of these multiple histories and represented the highwater mark of twentieth-century

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<sup>11</sup> CODIFICATION, MACAULAY AND THE INDIAN PENAL CODE: THE LEGACIES AND MODERN CHALLENGES OF CRIMINAL LAW REFORM (Wing Cheong Chan, Barry Wright & Stanley Meng Heong Yeo eds., 2016); Eva Steiner, *Codification in England: The Need to Move from an Ideological to a Functional Approach — A Bridge Too Far?*, 25 STATUTE L. REV. 209 (2004); DAVID S. CLARK, *AMERICAN COMPARATIVE LAW: A HISTORY* (2022); Gunther A. Weiss, *The Enchantment of Codification in the Common-Law World*, 25 YALE J. INT. L. 435 (2000); LAW BOOKS IN ACTION: ESSAYS ON THE ANGLO-AMERICAN LEGAL TREATISE (Angela Fernandez & Markus D. Dubber eds., 2012); ROSCOE POUND, *THE FORMATIVE ERA OF AMERICAN LAW* (1938); Deborah A. DeMott, *Restating the Law in the Shadow of Codes: The ALI in Its Formative Era*, in *THE AMERICAN LAW INSTITUTE: A CENTENNIAL HISTORY* (Andrew S. Gold & Robert W. Gordon eds., 1st ed. 2023), <https://academic.oup.com/book/45786> [<https://perma.cc/E9Y3-QVDU>]; Sylvain Soleil, “*On the Vocation of Our Age for Codes.*” *Le Recours à Savigny Lors de La Controverse Anglo-Américaine Sur La Codification Du Common Law (1820–1835)*, 18 HISTORIA ET IUS - RIVISTA DI STORIA GIURIDICA DELL'ETÀ MEDIEVALE E MODERNA 1 (2020); Kellen Funk, *The Theological Framework of American Codification* (2014) (unpublished), <https://osf.io/preprints/osf/kb3a2> [<https://perma.cc/9QCX-9XWW>]; Andrew P. Morriss, *Codification and Right Answers*, 74 CHICAGO-KENT L. REV. 355 (1999); Nathan M. Crystal, *Codification and the Rise of the Restatement Movement*, 54 WASH. L. REV. 239 (1979); Aniceto Masferrer, *The Passionate Discussion Among Common Lawyers About Postbellum American Codification: An Approach to Its Legal Argumentation*, 40 ARIZ. ST. L.J. 173 (2008).

<sup>12</sup> Those scholars who examine it tend to obscure or misstate its origins. See, e.g., Kadish, *supra* note 6.



American codification. A fuller explanation of these dynamics and their ultimate effects on the code (and thus on our criminal law today) must await considerable further study. The same goes for broader examinations of the numerous code and code-like creations (such as the Uniform Commercial Code or the Restatement of the Law, Liability Insurance) produced by several bodies dedicated to legal reform, including the ALI and the National Conference of Commissioners on Uniform State Laws.<sup>13</sup>

Moreover, American codification and the institutions which advanced it were deeply connected to the aims and dignitaries of American foreign policy at various moments. For example, while this article deals with the specific influence of the Rockefeller Foundation on the MPC, it's important to remember that the ALI, the organization responsible for coordinating the work on the MPC, was itself the creation of yet another private foundation, the Carnegie Endowment for International Peace (“CEIP”).<sup>14</sup> The head of the CEIP was Elihu Root (1845–1937), who had served as a cabinet secretary in three presidential administrations and who was a leader in the world of an American foreign policy establishment that worked to expand American influence abroad, an aim which the Carnegie Endowment wholeheartedly supported.<sup>15</sup> In all the writing about the MPC, it is almost never viewed as having any connection to the world beyond the United States, but it was created by organizations whose origins and preoccupations were global. The MPC therefore needs to be understood as an internationally influenced and oriented work, though explicating the nature and implications of that fact will require a great deal of further research and has not been attempted here. Although this aspect of the MPC's history goes almost completely unmentioned in legal scholarship, it was undoubtedly not an accident that the Rockefeller Foundation was willing to put so much money into it at a time when the efforts of so many American organizations (including the Foundation) were devoted to social and military competition with the Soviet Union. Viewed in this light, the MPC might also be seen as an effort to demonstrate the robustness of American institutions to a foreign audience.

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<sup>13</sup> There is a general scholarly lacuna concerning twentieth-century American codification. Many articles cite a single work on the American codification movement in the 19<sup>th</sup> century: CHARLES M. COOK, *THE AMERICAN CODIFICATION MOVEMENT: A STUDY OF ANTEBELLUM LEGAL REFORM* (Bloomsbury Publishing PLC 1981). However, very little work views the twentieth century as a significant period of codification in the United States, despite (to take one example) the numerous state criminal codes that were newly promulgated or significantly revised following the publication of the MPC. Some scholarship does approach the twentieth century as an era during which legal rules were increasingly centralized in code-like ways. See, e.g., NILS JANSEN, *THE MAKING OF LEGAL AUTHORITY: NON-LEGISLATIVE CODIFICATIONS IN HISTORICAL AND COMPARATIVE PERSPECTIVE* (1st ed. 2010). But this work needs to be far more firmly connected to the tribulations of earlier debates over and efforts at codification.

<sup>14</sup> N. E. H. Hull, *Restatement and Reform: A New Perspective on the Origins of the American Law Institute*, 8 L. & HIST. REV. 55, 75–76 (1990), <https://www.jstor.org/stable/743676> [<https://perma.cc/FZ8H-QKET>].

<sup>15</sup> INDERJEET PARMAR, *FOUNDATIONS OF THE AMERICAN CENTURY: THE FORD, CARNEGIE, AND ROCKEFELLER FOUNDATIONS IN THE RISE OF AMERICAN POWER* 40 (2014).

In any case, no story about the ALI and its projects should be told without taking account of the fact that they were, from the beginning, deeply embedded in a network of power and money whose principal aim was American global dominance.

Second, the legal impacts of private philanthropic foundations. While there is a great deal of literature that documents the effects of these foundations on certain aspects of American thought and life,<sup>16</sup> much less writing specifically concerns philanthropy's influence on law. In a recent excellent example of what such scholarship can look like, Sara Mayeux explains that the question of how much power private charities should have over the establishment and functioning of American institutions is really a question about the basic nature of democratic government. Her story about the rise of American public defenders and the role of the Ford Foundation in making it happen is one of "contestation and uncertainty within the legal profession . . . over the proper relationship between lawyers, markets, and the modern state."<sup>17</sup> As Mayeux explains, when private foundations get to decide on these basic social arrangements, it squeezes out the democratic participation that many (including the foundations themselves) profess to value so highly.<sup>18</sup> Their unaccountability also makes the doings of private foundations largely invisible to most people, which may account for the lack of scholarly exploration of the Rockefeller Foundation's influence on American law.

A word here about the nature of my argument. The claim that secretive, wealthy elites are the ones really running the world out of the view and reach of the common folk is the stuff of conspiracy theories whose adherents can cause a great deal of harm. In identifying these mechanisms of influence, it's crucial not to reinforce the (often ethnic) stereotypes that accompany such theories. It's also not as simple as saying that wealthy people controlled the development of American criminal law to protect their own interests. Joseph Willits himself wrote of the evils of too much interference by grant-making organizations like his own. While "the malevolent motives and warped intellect of Hitler are not present in these efforts in this

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<sup>16</sup> See, e.g., THE HISTORY OF THE SOCIAL SCIENCES SINCE 1945 (Roger Backhouse & Philippe Fontaine eds., 2010); EMPIRE AND THE SOCIAL SCIENCES: GLOBAL HISTORIES OF KNOWLEDGE (Jeremy Adelman ed., 2019); WILLIAM RUSSELL EASTERLY, THE TYRANNY OF EXPERTS: ECONOMISTS, DICTATORS, AND THE FORGOTTEN RIGHTS OF THE POOR (2013); ELLEN CONDLIFFE LAGEMANN, THE POLITICS OF KNOWLEDGE: THE CARNEGIE CORPORATION, PHILANTHROPY, AND PUBLIC POLICY (1992).

<sup>17</sup> SARA MAYEUX, FREE JUSTICE: A HISTORY OF THE PUBLIC DEFENDER IN TWENTIETH-CENTURY AMERICA 4 (2020).

<sup>18</sup> "For an entity committed to democracy, the Ford Foundation was not especially democratic in its own governance structures. The average person had no say in how the foundation spent its funds, yet those very funds might determine that very person's access to health care, education, or legal representation. From the beginning, the philanthropic foundations born of corporate wealth in the United States were bedeviled by questions about their unaccountable power. By midcentury, the Ford Foundation had amassed the clout to remake professions, cities, states, and even countries. Yet it had no obligation to hold elections or public hearings, or to maintain open records of its internal decision-making." *Id.* at 161–62.



country,” self-interestedly interventionist foundations would, in his view, have a distorting and weakening effect on the critical results of the researchers they were funding: “the effort to narrow research to ends that appear immediately useful to those with the funds has the possibility of drying up the fresh stream of ideas which free societies encourage and which totalitarian societies destroy.”<sup>19</sup> I do not believe Willits was being disingenuous when he warned that, “Foundation officers are too prone to maximize their own importance by failing to get away from ‘projectitis’ and too apt not to trust with general sums people who are fit to be trusted.”<sup>20</sup> Yet, as this article demonstrates, he was clearly also aware of, and used, the enormous power he had to direct the MPC. If it wasn’t simply the case that the Foundation’s impact on the MPC afforded large corporations protections far beyond those of ordinary citizens, as some scholars suggest,<sup>21</sup> the nature of that impact was more subtle but more profound. I am also not saying that American criminal law is, as a general matter, worse off for this influence: foundations often produce salutary legal changes, such as the Ford Foundation’s key role in development of clinical legal education<sup>22</sup> or the Garland Fund’s contributions to the NAACP legal effort that produced *Brown v. Board of Education*.<sup>23</sup>

There are, however, at least two potential problems that flow from our ignorance of the Rockefeller Foundation’s involvement with American law, one practical and one constitutional (in a broad sense). The practical concern, as I argue later in the article, is that like the Ford Foundation’s creation of a public defender system that helped head off calls for broader progressive legal reforms,<sup>24</sup> such moves to “liberalize” or “modernize” the law can produce effects at odds with the motives of the original reformers. The MPC’s drafters wanted to create a criminal law that laid aside the barbarous rod of punishment in favor of the scientific clipboard of medical treatment. In so doing, they helped open the way for legal formulations that make it harder to detect or correct the operation of prejudice. The second concern has to do with how we want our decisions made and by whom. When “lawyers, legal scholars, law schools, and professional organizations collaborate with large philanthropic foundations” to reform the criminal law, they “blend public and private initiative in complex and often obfuscatory ways”

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<sup>19</sup> Joseph H. Willits, *Capital Sums in DSS, Joseph H. Willits to DR* (Oct. 15, 1953) (unpublished), available at Rockefeller Archives Center, Joseph H. Willits Collection, General File Series 1, Division of Social Sciences, Program and Policy, Box 3, Folder 28.

<sup>20</sup> *Id.*

<sup>21</sup> See, e.g., Walter Gordon, *Strict Legal Liability, Upper Class Criminality, And The Model Penal Code*, 26 *How. L.J.* 781, 784 (1983).

<sup>22</sup> See generally RICHARD J. WILSON, *THE GLOBAL EVOLUTION OF CLINICAL LEGAL EDUCATION: MORE THAN A METHOD* (2018).

<sup>23</sup> See John Fabian Witt, *Garland’s Million; or, the Tragedy and Triumph of Legal History: American Society for Legal History Plenary Lecture, New Orleans, 2021*, 40 *LAW & HIST. REV.* 123, 125 (2022).

<sup>24</sup> MAYEUX, *supra* note 18, at 17.

that can depart from their stated missions.<sup>25</sup> “These collaborations may (or may not) be broadly liberal in their commitments and aims, but are rarely entirely transparent about those aims, and are certainly not premised on any kind of thoroughgoing confrontation with the deep structures of law and the legal profession.”<sup>26</sup> We should care that American criminal law was significantly influenced by private foundations who have successfully obscured the results of their efforts, because it matters who writes our laws and how.

### I. THE MPC’S ROOTS

The way the Rockefeller Foundation approached the American Law Institute and its proposed Model Penal Code in the 1950s was in large part a function of two major events: the experiences of Rockefeller-funded philanthropists with the ALI in the 1920s and the Second World War. The first major Rockefeller charity, the Laura Spelman Rockefeller Memorial, gave the ALI a great deal of money in the mid-1920s to craft a Model Code of Criminal Procedure, gently encouraging its team to work closely with the social scientists whose research the Memorial was largely dedicated to supporting. The ALI failed to do so to the Memorial’s satisfaction, and the suspicion of the Memorial’s staff about the ALI lawyers was transferred to the Division of Social Sciences of the Rockefeller Foundation, which took over operations from the Memorial in 1929. Although this early collaboration inspired a great deal of hesitancy among the Foundation’s officers about working with the ALI again, World War II convinced them that criminal law was one of many American institutions in urgent need of reform in light of the enormous perils of the nuclear age. The interventionist approach the Foundation took to its work with the ALI in the 1950s was thus partly a reaction to the failure of its light-touch attitude in the 1920s, spurred by the fear of nuclear annihilation. Two of the MPC’s major precursors — the Model Code of Criminal Procedure and the Foundation’s reaction to the Second World War — are described below.

John D. Rockefeller (1839–1937) made much of his money during the second half of the nineteenth century. In 1870, he formed the company that would grow over the next decade into the immensely profitable Standard Oil. As he became one of the wealthiest men in the country, Rockefeller also began to give away a great deal of money, often to relatively small, local causes.<sup>27</sup> As he looked for more and larger philanthropic outlets, he was influenced by the ideas of Andrew Carnegie (1835–1919), whose articles and speeches particularly emphasized the importance of private spending on

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<sup>25</sup> *Id.* at 23.

<sup>26</sup> *Id.*

<sup>27</sup> DAVID L. SEIM, ROCKEFELLER PHILANTHROPY AND MODERN SOCIAL SCIENCE 9 (2013).

educational institutions.<sup>28</sup> In 1892, Rockefeller gave \$600,000 to establish the University of Chicago.<sup>29</sup>

The University became both a source of ideas and a training ground for Rockefeller’s further philanthropic endeavors. In 1918, he established the Laura Spelman Rockefeller Memorial (named for his wife) and then endowed it with a staggering \$74 million in 1921. Its first director, appointed in 1922, was a 1915 PhD graduate of the University of Chicago’s Psychology department, Beardsley Ruml (1894–1960).<sup>30</sup> While the Memorial was initially established with the mission of “providing resources to assist the well-being of women and children,”<sup>31</sup> Ruml’s appointment accompanied a broadening of its remit. Until 1929, “the Memorial focused on providing resources to social scientists in an effort to promote the broad advancement of knowledge, methods and applications in the social sciences.”<sup>32</sup> The Memorial was very successful at what it set out to do under Ruml’s guidance: “During his decade at the Spelman Memorial, he gathered together a group of fellow young iconoclasts . . . and used his average annual budget of \$4 million to make the [Memorial] the most important American philanthropic foundation supporting research in social science.”<sup>33</sup>

It was at first unclear whether Ruml was prepared to invest any of the Memorial’s resources in legal reform, in part because some on the Memorial staff thought that law might simply be subsumed into the other social scientific fields the organization was committed to developing.<sup>34</sup> Ruml seems to have eventually decided that it was worth spending Memorial money on attempts to unite the two. Most interesting for the story of the Model Penal Code is the fact that social scientists from Columbia University applied for and received a “substantial” Memorial grant in 1925,<sup>35</sup> and that, a few years later, the dean of Columbia Law School oversaw a similar request: “Funds were needed for another area of research, which aimed to establish links between criminal law and a body of facts in sociology.”<sup>36</sup> “The grant was awarded in May 1927,”<sup>37</sup> the year before Herbert Wechsler arrived as a Columbia law student, and likely played a role in shaping his early views on criminal law.<sup>38</sup>

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<sup>28</sup> *Id.* at 25.

<sup>29</sup> *Id.* at 24.

<sup>30</sup> *Id.* at 105.

<sup>31</sup> *Id.* at 103.

<sup>32</sup> *Id.*

<sup>33</sup> JUDITH SEALANDER, *PRIVATE WEALTH & PUBLIC LIFE: FOUNDATION PHILANTHROPY AND THE RESHAPING OF AMERICAN SOCIAL POLICY FROM THE PROGRESSIVE ERA TO THE NEW DEAL* 85 (1997).

<sup>34</sup> SEIM, *supra* note 28, at 200.

<sup>35</sup> *Id.* at 139.

<sup>36</sup> *Id.* at 200.

<sup>37</sup> *Id.* at 201.

<sup>38</sup> I have so far been unable to locate any mention of this grant in any other work of scholarship or in Herbert Wechsler’s papers, and my hope is that future archival research at Columbia

A. *The Model Code of Criminal Procedure (1924-1928)*

But although the Memorial had indicated some commitment to uniting law and social sciences, its first major foray into directly funding legal reform efforts was unsuccessful in this regard.<sup>39</sup> In the 1920s, the Memorial undertook the first large-scale effort by a modern private foundation to influence the development of American law:<sup>40</sup> it provided a great deal of money to the ALI to pay for the development of a Model Code of Criminal Procedure. As far as I can determine, the papers related to the Memorial's work with the ALI during the 1920s have never been the subject of scholarly investigation. Here, I present a brief overview of the story they tell, because it stands in stark contrast to the Rockefeller Foundation's attitude towards the ALI when it was funding the MPC in the 1950s. In both instances, the Rockefeller officers were very concerned that the ALI was insufficiently interested in incorporating the views of social scientists into their work, but the Memorial did little to try to direct the course of the criminal procedure code. The Rockefeller Foundation, on the other hand, was deeply involved in shaping the MPC.

In essence, it appears as if the Laura Spelman Rockefeller Memorial gave the ALI \$60,000 in 1925 (\$1,069,654.34 today)<sup>41</sup> and then didn't hear from them until the ALI's Director William Draper Lewis sent a brief update on the project's near completion in 1927.<sup>42</sup> Perhaps unsurprisingly, the Memorial wasn't thrilled with the results. Lawrence Dunham (1882–1959) — a former Deputy Commissioner of Police in New York City who was “directing studies

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University or the Rockefeller Archive Center will turn up something about its aims and effects. Nevertheless, as we will see later, Wechsler certainly seems to have agreed with many of the Rockefeller-associated ideas about law and human nature.

<sup>39</sup> This may have been partially due to Ruml's management style. Despite his institutional and financial clout, Ruml's instinct was to take a hands-off approach to the projects he funded: “although he was always full of fresh ideas, he was also very modest and did not set himself in a position in which he could influence the substance of a discipline, except for the general criterion of methodical rigour.” Martin Bulmer & Joan Bulmer, *Philanthropy and Social Science in the 1920s: Beardsley Ruml and the Laura Spelman Rockefeller Memorial, 1922–29*, 19 *MINERVA* 347, 407 (1981). Many saw Ruml's light touch and ability to balance competing interests as the secret of his success, arguing that it “explains why the Laura Spelman Rockefeller Memorial was able to contribute so much to the shaping of the social sciences as they came to be by the middle of the twentieth century.” *Id.*

<sup>40</sup> SEIM, *supra* note 28, at 107.

<sup>41</sup> All currency calculations in this article were performed using the CPI Inflation Calculator, U.S. BUREAU OF LAB. STATS., [https://www.bls.gov/data/inflation\\_calculator.htm](https://www.bls.gov/data/inflation_calculator.htm) [<https://perma.cc/K35W-CKHP>].

<sup>42</sup> William Draper Lewis, *Letter from William Draper Lewis to Beardsley Ruml* (June 11, 1927) (unpublished), available at Rockefeller Archive Center, Laura Spelman Rockefeller Memorial Records, American Law Institute (1924–28), Appropriations (Series 3), Social Studies (Subseries 3\_06). The Rockefeller Archive's record is of course incomplete, and there are ample indications in Lewis' letters that he and Ruml were communicating in other ways. But it is consistent with the ALI's own archives concerning the Model Code of Criminal Procedure, which contain no correspondence addressed or related to members of the Laura Spelman Rockefeller Memorial Foundation. The Memorial just doesn't seem to have had much input in the planning or drafting stages of the criminal procedure code.

of crime and juvenile delinquency” for the Memorial<sup>43</sup> — was particularly dissatisfied with the ALI’s approach. As a general matter, he wrote,

A careful study of preliminary drafts, particularly those relating to Arrest and Bail, shows the care and thoroughness with which the project is being undertaken but indicates the possibility of the approach being too legalistic and the possible failure to give due consideration to the realities of the situation and to secure the cooperation and advice of all interested parties.<sup>44</sup>

Dunham was concerned that the lawyers of the ALI were dominating a project that had the potential to “prove of unusual importance in the improvement of the practice of the law and the work of the criminal courts” and he hoped Draper would realize that “other sections might be benefited by consultation with those having daily familiarity with the actual requirements of the situation.”<sup>45</sup>

Dunham’s reaction set off a scramble by the ALI to convince the Memorial that their work already did or soon would contain the elements he felt were lacking,<sup>46</sup> but the flurry of activity in the week following his memo did little to convince him. Dunham clearly had little faith that any of the ALI team was taking his concerns seriously: “I wonder if you gathered the same impression in our talk with Mr. Lewis that I did,” he asked Ruml, “to wit, that he looked on this undertaking with toleration.”<sup>47</sup> Neither was he hopeful that their final efforts would allow the drafters to “view the whole

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<sup>43</sup> *Description of Lawrence B. Dunham Papers*, THE ONLINE COLLECTION AND CATALOG OF ROCKEFELLER ARCHIVE CENTER, <https://dimes.rockarch.org/collections/9LN83MyUZ-7caenPcoj3r8> [<https://perma.cc/E9GW-S5G6>].

<sup>44</sup> Lawrence Boardman Dunham, *Memorandum from Lawrence Boardman Dunham to HL* (June 14, 1927) (unpublished), available at Rockefeller Archives Center, Laura Spelman Rockefeller Memorial Records, American Law Institute (1924–28), Appropriations (Series 3), Social Studies (Sub-series 3\_06).

<sup>45</sup> *Id.*

<sup>46</sup> William Draper Lewis, *Letter to Lawrence Dunham* (June 16, 1927) (unpublished), available at Rockefeller Archives Center, Laura Spelman Rockefeller Memorial Records, American Law Institute (1924–28), Appropriations (Series 3), Social Studies (Subseries 3\_06); Lawrence Boardman Dunham, *Letter to William Draper Lewis* (June 20, 1927) (unpublished), available at Rockefeller Archives Center, Laura Spelman Rockefeller Memorial Records, American Law Institute (1924–28), Appropriations (Series 3), Social Studies (Subseries 3\_06); Edwin Keedy, *Letter to Lawrence Dunham* (June 21, 1927) (unpublished), available at Rockefeller Archives Center, Laura Spelman Rockefeller Memorial Records, American Law Institute (1924–28), Appropriations (Series 3), Social Studies (Subseries 3\_06); William Draper Lewis, *Letter to Charles Merriam* (June 16, 1927) (unpublished), available at Rockefeller Archives Center, Laura Spelman Rockefeller Memorial Records, American Law Institute (1924–28), Appropriations (Series 3), Social Studies (Subseries 3\_06); Charles Merriam, *Letter to Beardsley Ruml* (June 21, 1927) (unpublished), available at Rockefeller Archives Center, Laura Spelman Rockefeller Memorial Records, American Law Institute (1924–28), Appropriations (Series 3), Social Studies (Subseries 3\_06).

<sup>47</sup> Lawrence Boardman Dunham, *Letter to Beardsley Ruml* (June 24, 1927) (unpublished), available at Rockefeller Archives Center, Laura Spelman Rockefeller Memorial Records, American Law Institute (1924–28), Appropriations (Series 3), Social Studies (Subseries 3\_06).

picture, not merely immerse themselves in legalistic theories.”<sup>48</sup> Instead, the code’s authors were fully committed to the ivory-tower, lawyerly intellectualism that Dunham decried. Speaking of the criminal procedure code’s two reporters, he wrote: “Mikell has gone to Castine, Maine, with 300 books and evidently considers that the way to accomplish the necessary results. I would feel a lot more sanguine of the results if Mikell and Keedy were spending a couple of months in the District Attorney’s office . . . .”<sup>49</sup> Dunham’s summary of the work on the Model Code of Criminal Procedure suggested he maintained significant reservations about how the ALI had conducted itself and that he looked forward to a day in which lawyers would be less in control of the process.

It is the belief of the Memorial staff that the time is fast approaching when there will be an extended revision of the substantive criminal law and the approach will be far less legalistic than the procedure heretofore pursued in such undertakings. In other words, we may expect a response to the growing belief which has already penetrated the faculties of our ablest law schools, that much of the substantive law must be brought in line with existing conditions and thought if our judicial procedure is to fulfill the function that it formerly exercised in the life of the community.<sup>50</sup>

Yet despite these misgivings, he wrote, “We believe that the present undertaking marks a necessary step in progress toward that end and should receive the continued support of the Memorial.”<sup>51</sup> The money, in other words, would keep coming.

But these kinds of collaborations left the Memorial so nonplussed that they largely decided to give up on the idea of supporting particular legal or political changes. Ruml and his team’s evaluation of their tenure was that, while significant integration between the social sciences and other fields had been achieved, much more basic research was required before Rockefeller funds should be used for large-scale reform projects like the model code. “The conclusion was that it was not yet time to use accumulated knowledge in the social sciences to begin any pursuit of a major investment in building social technologies directed toward reform. The social sciences needed still to attain more knowledge.”<sup>52</sup> Their work with the ALI (among other undertakings) helped convince Memorial employees that the whole notion

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<sup>48</sup> *Id.*

<sup>49</sup> *Id.*

<sup>50</sup> Lawrence Boardman Dunham, *Proposal to Continue Funding the ALI’s Model Code of Criminal Procedure* (1928) (unpublished), available at Rockefeller Archives Center, Laura Spelman Rockefeller Memorial Records, American Law Institute (1924–28), Appropriations (Series 3), Social Studies (Subseries 3\_06).

<sup>51</sup> *Id.*

<sup>52</sup> SEIM, *supra* note 28, at 207.



of trying to transform major institutions through the application of social scientific research was premature.

Such experiences affected how future Rockefeller officers would view the ALI and legal reform in general through the 1930s and 40s. Although the Memorial itself was dissolved in December of 1928, its work was immediately absorbed by the Rockefeller Foundation's<sup>53</sup> Division of Social Sciences, which began operations the following month.<sup>54</sup> When the Memorial turned over operations to the Rockefeller Foundation, the former's skepticism had clearly been communicated to the latter. Edmund Day (1883-1951), the first Director of the Division of Social Sciences at the Foundation, echoed the sentiments of Memorial staff like Lawrence Dunham, viewing legal rewriting projects of the kind favored by the ALI as distinctly secondary to the basic research Ruml advocated.

I have never been convinced that codification of the law constitutes a valuable means of social advance. Furthermore, as long as the codification is entirely in the hands of the lawyers, I do not feel that it is a very useful way of promoting our social forces and social conditions. I am personally much more interested in what the law does than I am in what the law is, by all of which I undoubtedly evidence my lack of legal understanding.<sup>55</sup>

If the Memorial was disappointed by the ALI's failure to more fully commit to social scientific methods, the ALI for its part manifested no great desire to cross disciplinary boundaries more than it already had. When looking ahead to potential reforms in substantive criminal law, Lewis (the ALI's director) emphasized that, “The American Law Institute, being an association of lawyers to promote the improvement of the law, is necessarily confined to those lines of improvement in which the lawyer, because of his special training, has a right to speak with some authority.”<sup>56</sup> Addressing any of the fundamental questions concerning the proper functioning of law in society that so interested the Memorial was not, in Lewis's view, one of those “lines of improvement.”

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<sup>53</sup> In 1913, John Rockefeller had established the Rockefeller Foundation, many of whose early efforts focused on fighting disease. Over the subsequent decade and a half, its scope grew larger and more ambitious. Our History, THE ROCKEFELLER FOUNDATION, <https://www.rockefellerfoundation.org/about-us/our-history/> [<https://perma.cc/THH3-B2N4>].

<sup>54</sup> SEIM, *supra* note 28, at 208.

<sup>55</sup> Edmund E. Day, *Letter to Raymond B. Fosdick* (Feb. 26, 1930) (unpublished), available at Rockefeller Archives Center, Rockefeller Foundation Records, American Law Institute (1930–33), Projects (Grants), RG 1, SG 1.1, United States (Series 200), Social Studies (Subseries 200.S), Box 301, Folder 3598.

<sup>56</sup> William Draper Lewis, *Letter to Beardsley Ruml* (Feb. 25, 1925) (unpublished), available at Rockefeller Archives Center, Laura Spelman Rockefeller Memorial Records, American Law Institute (1924–28), Appropriations (Series 3), Social Studies (Subseries 3\_06).

Such matters as the causes of crime, the proper method of investigating the mental state of the person who has committed the act alleged to be a crime, the objects of punishment and the best method of attaining these objects, are not matters on which the lawyer as such has any special knowledge. Indeed the experience of the lawyer is rather apt to make him assume that existing methods of dealing with such matters as the prevention of crime, punishment, investigation of sanity, are sound when as a matter of fact there is in these and other non-legal fields a vast amount of work that should be done.<sup>57</sup>

The results of their funding of the Model Code of Criminal Procedure left the Memorial and its inheritors in the Rockefeller Foundation's Division of Social Sciences unconvinced that the ALI (or perhaps lawyers in general) were capable of tackling the most fundamental and urgent problems facing American law. Nor did the members of the ALI appear eager to pursue those issues. The reaction on the Rockefeller side was disengagement from this kind of domestic legal reform.

### *B. The Effect of the Second World War*

By the mid-1940s, however, world events had convinced the leaders of the Rockefeller Foundation that simply supporting basic research could be an existentially hazardous pursuit. As those leaders understood it, private funding of the kind they oversaw was significantly responsible for having produced the atomic arsenals that threatened global destruction. The Foundation would therefore return to legal reform in the 1950s with a very different approach from the hands-off style Ruml had employed with the ALI in the 1920s. The second time around, it was determined to have a far greater say in how the lawyers used its money, in part because it feared the threat represented by nuclear-armed nations that failed to resolve their social problems.

In a remarkable annual report in 1945, Raymond Fosdick (1883–1972), the President of the Rockefeller Foundation, began his speech with a dramatic line: “With many other organizations The Rockefeller Foundation played a part — an unwitting part — in the creation of the atomic bomb. A number of the leaders of the project — 23 of them, in fact — had received part of their specialized training on fellowships provided by Rockefeller funds.”<sup>58</sup> As he explained, the Foundation hadn't sought to create something so deadly; it was motivated instead by pure scientific curiosity. “This record is set down,” he said, “solely to emphasize the point that when these various

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<sup>57</sup> *Id.*

<sup>58</sup> THE ROCKEFELLER FOUNDATION, 1945 ANNUAL REPORT 6, <https://www.rockefellerfoundation.org/wp-content/uploads/Annual-Report-1945-1.pdf> [<https://perma.cc/D2NH-WWYD>].

grants were made, no one was thinking of an atomic bomb. The only motive behind this support was to extend the boundaries of knowledge, to stimulate the search for truth, in the belief that there is no darkness but ignorance.”<sup>59</sup> The war had forced the Foundation to reconsider this approach to its funding decisions, and to weigh the desire to know against the terrible destruction that can result from knowledge: “The pursuit of truth has at last led us to the tools by which we can ourselves become the destroyers of our own institutions and all the bright hopes of the race. In this situation what are we to do — curb our science, or cling to the pursuit of truth and run the risk of returning our society to barbarism?”<sup>60</sup> Though Fosdick expressed no desire to “curb science,” he was keenly aware of what science undirected might produce and felt the clock ticking down. “[T]he bomb on Hiroshima suddenly woke us up to the fact that perhaps we have very little time,” he said. “The hour is growing late and our work has scarcely begun.”<sup>61</sup>

The answer, as Fosdick saw it, must lie not in the natural sciences, which had proved that their capacities were already too great, but in the social. “Our analysis comes down to this: Men are discovering the right things but in the wrong order, which is another way of saying that we are learning how to control nature before we have learned how to control ourselves.”<sup>62</sup> The Foundation would therefore be overseeing its grants with a far greater sense of urgency, as well as much more fear about what would happen if they failed to properly direct the development of the knowledge and systems required to regulate a human race that had just given itself the capacity to destroy the world.

Joseph Willits, the man who ran the Rockefeller Foundation’s Division for Social Sciences from 1939 to 1954<sup>63</sup> and who would have the greatest impact on the MPC on the funding side, shared Fosdick’s sense of danger and mission. He conceived of his job as rearing the people and ideas that would facilitate American leadership in a perilous world. “As I see it,” he wrote, “the SS Division has not the choice of ignoring the new position in world affairs thrust upon the United States.”<sup>64</sup> Willits, though, apparently took a more positive view than Fosdick’s speech suggested of Foundation influence to date. He looked back at a long list of prominent figures who had helped secure the Allied victory in World War II and noted how many of them had been Foundation Fellows or received other support from the Social Science Division.

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<sup>59</sup> *Id.* at 7.

<sup>60</sup> *Id.*

<sup>61</sup> *Id.* at 10.

<sup>62</sup> *Id.*

<sup>63</sup> *Description of Joseph H. Willits*, ROCKEFELLER ARCHIVE CENTER, <https://dimes.rock-arch.org/agents/nKcCPzBnEHgxRniKSXNZAP> [<https://perma.cc/2PA8-N8CA>].

<sup>64</sup> Joseph H. Willits, *Memorandum from Joseph H. Willits to AB* (Aug. 2, 1949) (unpublished), available at Rockefeller Archives Center, Joseph. H. Willits Collection, Box 3, Folder 27.

I could go on throughout the various echelons of service, but these, I hope, will suffice to show that a silent revolution has been and is occurring. I do not mention these instances merely for purposes of “horn-tooting” but to stress the fact that such trained ability to serve didn’t just happen. It was available when the crisis came because, back through the years, funds were available to finance the growth of men and the studies which developed methods of research and analysis of problems and made slowly for accumulation of knowledge.<sup>65</sup>

The “silent revolution,” in Willits’ view, was the Foundation-directed cultivation and education of people of superior abilities who would either advance human knowledge through their research or take leadership roles in crucial institutions. Legal reform was very much a part of the position he envisioned for the Division in this ongoing revolution, but he had no intention of leaving it in the hands of the current class of lawyers and law professors. According to Willits, “the legal profession was not properly trained to assume its postwar leadership responsibilities. The profession was complacent,” and Willits and his allies “were looking for new approaches that could shake up the academic establishment.”<sup>66</sup> The Rockefeller Foundation that the ALI would encounter in the 1950s was therefore very different from the Memorial it had worked with in the 1920s: This would be an organization newly endowed with a sense of its importance to American global leadership, a determination to influence the direction of legal change, and a sharp fear of what might happen if it failed to do so.

## II. THE ROCKEFELLER FOUNDATION’S MODEL PENAL CODE (1945–1963)

### A. *Choosing the MPC*

Although both the ALI and the Rockefeller Foundation had been interested in criminal law reform in general terms for years,<sup>67</sup> it was far from a foregone conclusion that the Model Penal Code would become a major focus of the ALI’s work in the 1950s. As his correspondence makes clear, Herbert Goodrich (1889–1962), who replaced William Draper Lewis as ALI Director in 1947,<sup>68</sup> was open to almost any project that could attract

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<sup>65</sup> *Remarks at Williamsburg Meeting of RF Board of Trustees* (Dec. 7, 1949) (unpublished), available at Rockefeller Archives Center, Joseph H. Willits Collection, Box 3, Folder 27.

<sup>66</sup> Bryant G. Garth, *James Willard Hurst as Entrepreneur for the Field of Law and Social Science*, 18 *LAW & HIST. REV.* 37, 45 (2000).

<sup>67</sup> The ALI did create and submit to the Rockefeller Foundation a proposal to prepare a Model Penal Code in the mid-1930s, but the archival record to which I currently have access is too skimpy to allow for meaningful discussion of that process. Further research on this proposal is vital to an even fuller understanding of the MPC’s origins.

<sup>68</sup> “He had graduated cum laude from the Harvard Law School in 1914, had been Professor and Dean at the University of Pennsylvania Law School from 1929 to 1940 and lecturer there for eight years more, and . . . he had been on the United States Court of Appeals for the Third

sufficient funding. Early descriptions of an MPC-style endeavor caught the interest of Joseph Willits of the Foundation’s Division of Social Sciences, and that interest was heightened by the appraisals of his colleagues at other private foundations that he would be in a position to exert a great deal of influence over the work. Nevertheless, it was still only through a lengthy process of persuasion and negotiation that the ALI leadership was able to convince Willits to commit the large sums that would be necessary to complete the MPC, a process that demonstrated the ALI’s willingness to follow Willits’ lead in significant ways. Without both Willits’ initial interest and his sense that he would be able to direct the MPC’s framing (a sense confirmed by the ALI), the MPC would likely not exist at all.

In the early 1950s, the ALI knew it wanted to undertake some kind of task, but it didn’t know what, with whom, or under whose leadership. In 1950, Herbert Goodrich acknowledged that, “[i]t is easy to make about the American Law Institute the suggestion that having completed its work it now looks around for things to do to keep itself going.”<sup>69</sup> But nothing would be possible without money. When Jerome Hall (one of the principal advocates for ALI-led criminal law reform) wrote to Goodrich to ask what was happening with criminal law, Goodrich responded that no further progress would be made from the ALI’s side without financial support: “We do not have any definite project pending at the present time which we have submitted to any one with the request for funds to do the work.”<sup>70</sup> Alfred Gausewitz (one of the scholars who several years earlier had made proposals for a Model Penal Code) wrote to Goodrich: “I assume that the Criminal Law project that Dr. Lewis was considering at the time of the meeting in Philadelphia in 1946 or 1947 is completely dead.”<sup>71</sup> Goodrich responded:

Your assumption that the Criminal Law project is dead comes from the fact that you haven’t heard anything about it lately. But we haven’t forgotten it. I send, for your confidential use, the latest revision of our thoughts on the subject. If you could find us a Santa Claus to back the work we should start the week after next.<sup>72</sup>

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Circuit since 1940.” Harrison Tweed, *In Memoriam: Herbert F. Goodrich*, 111 U. PA. L. REV. 1, 1 (1962); Roberta Cooper Ramo, *The American Law Institute at 100: A Three-Decade Personal Reflection*, in *THE AMERICAN LAW INSTITUTE: A CENTENNIAL HISTORY*, 24 n.13 (Andrew S. Gold & Robert W. Gordon eds., 1 ed. 2023), <https://academic.oup.com/book/45786> [<https://perma.cc/A92R-T25G>] (last visited June 21, 2023).

<sup>69</sup> Gordon, *supra* note 22, at 783–84.

<sup>70</sup> Herbert F. Goodrich, *Letter from Herbert F. Goodrich to Jerome Hall* (Oct. 19, 1948) (unpublished), available at the University of Pennsylvania, Biddle Law Library, American Law Institute Model Penal Code Records, Box 2, Folder 8.

<sup>71</sup> Alfred Gausewitz, *Letter from Alfred Gausewitz to Herbert F. Goodrich* (Apr. 19, 1950) (unpublished), available at the University of Pennsylvania, Biddle Law Library, American Law Institute Model Penal Code Records, Box 2, Folder 8.

<sup>72</sup> Herbert F. Goodrich, *Letter from Herbert F. Goodrich to Alfred Gausewitz* (Apr. 28, 1950) (unpublished), available at the University of Pennsylvania, Biddle Law Library, American Law Institute Model Penal Code Records, Box 2, Folder 8.

When Goodrich wrote to Herbert Wechsler to solicit his opinion about a criminal law project, funding was again the issue: “If the prospectus is fairly good[,] all we need is some money to carry out the things it suggests.”<sup>73</sup>

The Rockefeller Foundation was an obvious place to apply for funding: as described above, the Memorial had funded a similar project in the area of criminal procedure and it had wanted the ALI to delve more deeply into what it considered the most fundamental questions of criminal law.<sup>74</sup> But the Foundation wasn’t initially very interested in the proposal, likely in large part because the ALI didn’t seem to have become more open to thinking outside its disciplinary boundaries.<sup>75</sup> To take one example: in 1949, when asked to consider ALI participation in “America’s Town Meeting of the Air” — a New York-based radio show that aimed “to consider the ways that freedom of speech and freedom of discussion can serve the purposes of American democracy”<sup>76</sup> — Goodrich clearly saw it as beyond the ALI’s limited scope: “Our job is one strictly in the legal profession: work by lawyers for lawyers for the most part. It has comparatively little public appeal and then to a select group, rather than the general public. So I guess we had better keep on talking to lawyers.”<sup>77</sup> It seems the ALI leadership hadn’t much changed its views on interdisciplinary work from those Lewis had expressed at the end of the criminal procedure code project in the late 1920s, views that were so disappointing to the Memorial. At a moment when the Division of Social Sciences was facing a significantly reduced budget,<sup>78</sup> Willits would have had

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<sup>73</sup> Herbert F. Goodrich, *Letter from Herbert F. Goodrich to Herbert Wechsler* (Apr. 18, 1950) (unpublished), available at the University of Pennsylvania, Biddle Law Library, American Law Institute Model Penal Code Records, Box 2, Folder 8.

<sup>74</sup> See *supra* Section I.A.

<sup>75</sup> In the late 1940s, the ALI was occasionally pitching interdisciplinary projects to the Foundation. For example, Goodrich wrote to Joseph Willits to pass along a proposal for the creation of a more sociologically informed legal education. But he didn’t exactly give Willits the hard sell: “Please don’t read it now, but put it in your bag and read it when you are riding on a train, or some other time when you have leisure to read something which does not demand an immediate reply. When you have done so, I wish you would drop me a line and tell me whether there is anything in it.” Herbert F. Goodrich, *Letter from Herbert F. Goodrich to Joseph H. Willits* (Nov. 12, 1947) (unpublished), available at the University of Pennsylvania, Biddle Law Library, American Law Institute Model Penal Code Records, Box 1, Folder 15. Willits, unsurprisingly, didn’t respond with great enthusiasm, telling Goodrich: “The number of interesting opportunities that press for a place on our limited budget makes me doubtful whether this proposal, interesting though it is, would be apt to be included.” Joseph Willits, *Letter from Joseph H. Willits to Herbert F. Goodrich* (Nov. 19, 1947) (unpublished), available at the University of Pennsylvania, Biddle Law Library, American Law Institute Model Penal Code Records, Box 1, Folder 15.

<sup>76</sup> Cary O’Dell, *America’s Town Meeting of the Air: Should Our Ships Convoy Materials to England?* LIBRARY OF CONGRESS (May 8, 1941), <https://www.loc.gov/static/programs/national-recording-preservation-board/documents/AMERICA%27S%20TOWN%20MEETING.pdf> [<https://perma.cc/JT4F-ACL2>].

<sup>77</sup> Herbert F. Goodrich, *Letter from Herbert F. Goodrich to Elizabeth Colclough* (Mar. 7, 1949) (unpublished), available at the University of Pennsylvania, Biddle Law Library, American Law Institute Model Penal Code Records, Box 6, Folder 4.

<sup>78</sup> Joseph H. Willits, *Adjustments in the Light of the SS Budget for 1949* (Jan. 24, 1949) (unpublished), available at Rockefeller Archives Center, Joseph H. Willits Collection, General File Series 1, Box 3, Folder 27.



good reason to doubt the ALI’s commitment to the kind of wholesale legal change in which he was interested.

Nonetheless, the ALI kept trying. On August 17, 1950, Goodrich and Harrison Tweed (1885–1969) — the ALI’s President and former counsel to the Rockefeller family and the Chase Manhattan Bank they controlled<sup>79</sup> — went to talk to Willits to propose a Model Penal Code project. As Willits recorded in his diary, they knew what their audience would want to hear: “They recognize that to do what they want, extensive assistance from psychiatrists and social scientists will be necessary.”<sup>80</sup> Their assurances didn’t do much to assuage the skepticism of Willits or his colleagues, one of whom wrote in pencil at the top of the record: “Certainly an ambitious program — but I don’t know where it would get.”<sup>81</sup>

As it turns out, however, Goodrich and Tweed had succeeded in at least piquing Willits’ curiosity, though he didn’t think that they were fully up to the job, and set out to steer them in the right direction. Over the months following their visit, Willits solicited many opinions on their proposal, and, from the beginning, he was clear about the influence he intended to wield over it: “In short, this proposal is up for RF to mould by criticism or to reject. I would very much appreciate having your estimate of the proposal and its possibilities. I am sending it to two lawyers and to three social scientists for judgment.”<sup>82</sup> The responses he received would shape his reaction to the eventual draft presented by the ALI at the end of the year in both general and specific ways. Many of his correspondents wrote that it was crucial that the lawyers work closely with social scientists; some feared that their failure to do so would render the entire enterprise a waste.<sup>83</sup> Willits recorded a phone call with Donald Young (1899–1977) of the Russell Sage Foundation in which Young asked him:

How reliably can it be determined if a prisoner is a good prospect for reprieve? Lawyers certainly are not competent to answer. Such questions are important but the general umbrella Goodrich and Tweed are hunting for should not be written into such underlying questions or answered. If G and T could be educated into an approach jointly between social scientists and lawyers to pick up the problems one at a time it would have a chance of being an effective venture. Their attitude seems to be “There are good lawyers and

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<sup>79</sup> MAYEUX, *supra* note 18, at 1.

<sup>80</sup> Joseph H. Willits, *Interview with Harrison Tweed and Herbert F. Goodrich* (Aug. 17, 1950) (unpublished), available at Rockefeller Archives Center, Rockefeller Foundation Records, RG 1.1, Series 200, Box 303, Folder 3609.

<sup>81</sup> *Id.*

<sup>82</sup> Joseph H. Willits, *Memorandum from Joseph H. Willits to Donald Young and Henry Moe* (Aug. 22, 1950) (unpublished), available at Rockefeller Archives Center, Rockefeller Foundation Records, RG 1.1, Series 200, Box 303, Folder 3609.

<sup>83</sup> Another common theme of the responses was that the ALI was a habitual overspender.

we will do the job and call in social scientists occasionally when we deem it necessary.” The Law Institute group does not have the answers to questions it raises. They leave out the central social sciences concerned with behavior – psychology, sociology and social anthropology.<sup>84</sup>

Young also expressed his worry that a model code would “freeze” the law in the state it was in at the time of drafting. Both concerns were reflected in Willits’ eventual evaluation of the proposed MPC. Most strikingly, his colleagues at other wealthy foundations recognized and supported his intention to shape the MPC proposal. Henry Moe (1894–1975) of the Guggenheim Foundation wrote: “If you can ‘mould’ — your word — the proposition to take in the Liebowitzes [people with practical experience of the law], I’d be for it.”<sup>85</sup>

From the beginning, Willits was clear that he intended to steer the MPC towards close collaboration with social scientists. Without that collaboration, he wouldn’t have seen the project as a prospect for Foundation funding.

Ordinarily we do not support such codifications by the American Law Institute. The reason why we might be interested in this proposal is that in order to answer the questions involved in drafting a model code, extensive participation by social scientists is necessary. The scheme, therefore, might be molded so as to afford an opportunity.<sup>86</sup>

To make sure that the MPC’s framework was in line with the Foundation’s aims, Willits told Goodrich to apply for a small grant for a preliminary “pondering committee,”<sup>87</sup> the goal of which would be to produce a proposal that the Foundation could support. Willits recorded his dim view of the ALI’s initial idea and how he intended such a committee to improve it:

The American Law Institute proposes one of their standard jobs of restatement. Perhaps that is most important; but it may also be that something prior to that, namely, the answering of fundamental questions of human behavior is essential before any model code is possible. Or the important thing may have to do with human

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<sup>84</sup> Joseph H. Willits, *Notes on Call with Donald Young* (Aug. 29, 1950) (unpublished), available at Rockefeller Archives Center, Rockefeller Foundation Records, RG 1.1, Series 200, Box 303, Folder 3609.

<sup>85</sup> Henry Moe, *Letter from Henry Moe to Joseph H. Willits* (Sept. 7, 1950) (unpublished), available at Rockefeller Archives Center, Rockefeller Foundation Records, RG 1.1, Series 200, Box 303, Folder 3609.

<sup>86</sup> Joseph H. Willits, *Letter from Joseph H. Willits to Thorsten Sellin* (Sept. 20, 1950) (unpublished), available at Rockefeller Archives Center, Rockefeller Foundation Records, RG 1.1, Series 200, Box 303, Folder 3609.

<sup>87</sup> This idea had actually come from John Davis, a former Solicitor General, founding president of the Council on Foreign Relations, and Rockefeller Foundation trustee. Joseph H. Willits, *Interview with John Davis* (Nov. 10, 1950) (unpublished), available at Rockefeller Archives Center, Rockefeller Foundation Records, RG 1.1, Series 200, Box 303, Folder 3609.

problems of enforcement and administration of law, rather than the law itself. Law can be ever so good, but if the fundamental human problems of its administration, from the policeman to the warden of the penitentiary and to the Supreme Court, are ineffective, all the law in the world will not help. So we propose a “pondering group.” . . .

I told [Goodrich] that the design of his committee seemed rather to contemplate a “club” committee. I did not think this venture would get anywhere unless it were composed of the best possible men from law, social science, psychiatry, and practitioners in the field of penology and judicial administration.<sup>88</sup>

Likely responding to Goodrich’s money concerns, Willits warned him about the limited nature of the Foundation’s commitment: “He understands, too, that we don’t propose to be Santa Claus to the American Law Institute.”<sup>89</sup> The presents weren’t bad, though: Goodrich applied for<sup>90</sup> and was granted \$20,000, nearly \$250,000 today, to ponder.<sup>91</sup>

The warning that came with that money was among the most consequential communications from the Foundation to the ALI, which would spend the next year and a half constructing its vision of the MPC to respond to them. That warning was delivered in a two-page letter from Willits to Goodrich on December 21, 1950, telling him that, “[t]he officers [of the Rockefeller Foundation] were not willing to go ahead with the recommendation originally submitted for several reasons.”<sup>92</sup> Speaking both for his colleagues and for himself, Willits suggested that he wasn’t sure the ALI should even be in charge of a reform of the kind Goodrich had proposed. “Where do the real problems essential to a model code lie?” he asked.<sup>93</sup>

Do they lie in the realm of a more nearly adequate law - to which a model code would contribute - or do they lie in the questions that still have to be answered more adequately by the behaviorist<sup>94</sup> sciences - in

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<sup>88</sup> Joseph H. Willits, *Memorandum of Joseph H. Willits* (Nov. 17, 1950) (unpublished), available at Rockefeller Archives Center, Rockefeller Foundation Records, RG 1.1, Series 200, Box 303, Folder 3609.

<sup>89</sup> *Id.*

<sup>90</sup> Herbert F. Goodrich, *Letter from Herbert F. Goodrich to Joseph H. Willits* (Nov. 20, 1950) (unpublished), available at the University of Pennsylvania, Biddle Law Library, American Law Institute Model Penal Code Records, Box 2, Folder 8, Page 1.

<sup>91</sup> Herbert F. Goodrich, *Letter from Herbert F. Goodrich to Flora Rhind* (Jan. 15, 1951) (unpublished), available at the University of Pennsylvania, Biddle Law Library, American Law Institute Model Penal Code Records, Box 1, Folder 2, Page 1.

<sup>92</sup> Joseph H. Willits, *Letter from Joseph H. Willits to Herbert F. Goodrich* (Dec. 21, 1950) (unpublished), available at the University of Pennsylvania, Biddle Law Library, American Law Institute Model Penal Code Records, Box 1, Folder 15, Page 1.

<sup>93</sup> *Id.*

<sup>94</sup> Though a fuller explanation of “behaviorism” or “behaviorist sciences” and their connection to this story must wait for a longer work, it is used by the correspondents here largely to denote developing understandings of what motivates human behavior and how it can be

the medical field and in the social sciences? Can the ethical and legal questions essential in the writing of a model code be answered without posing many questions first in these behaviorist sciences?<sup>95</sup>

Willits' letter does end on what appears to be a reassuring note for the lawyers: "The central task here is a law task. That is why I felt that the initiative and prime responsibility should rest in the field of law."<sup>96</sup> But they couldn't, from the Foundation's perspective do it alone:

One of the pet ideas that is, I suppose, implicit in this suggestion, is that here is an opportunity for different disciplines to work together in a broader examination of problems than is apt to occur if a single discipline undertakes them alone with collateral gestures in the direction of other fields.<sup>97</sup>

He therefore recommended that the ALI contemplate forming an interdisciplinary committee to consider the problems of criminal law and administration that could then make proposals to the Foundation, whose officers "would be glad to examine without commitment any recommendations that came from this committee."<sup>98</sup> "I do not need to stress the fact," Willits wrote, stressing the fact, "that the quality of the proposals is likely to be determined by the strength and catholicity of the committee and staff."<sup>99</sup> Willits closed with perhaps his sharpest caution: "At the same time, a grant was also made to the American Bar Association,"<sup>100</sup> which was also working on issues related to criminal law. Willits seemed to imply that there were other groups with different approaches to criminal legal reform that the Foundation might just as well consider funding<sup>101</sup> if the ALI couldn't commit to working with "the behaviorist sciences — medical and social."<sup>102</sup> If the ALI wanted to go ahead with its MPC project, it was imperative to answer these challenges.

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predicted and controlled. The Foundation was deeply interested in behaviorism at this time. Tim B. Mueller, *The Rockefeller Foundation, the Social Sciences, and the Humanities in the Cold War*, 15 J. OF COLD WAR STUD. 108, 113 (2013).

<sup>95</sup> Willits, *supra* note 92.

<sup>96</sup> *Id.* at 2.

<sup>97</sup> *Id.*

<sup>98</sup> *Id.*

<sup>99</sup> *Id.*

<sup>100</sup> *Id.*

<sup>101</sup> The seriousness of this warning can also be inferred from Willits' note in his diary that, during one of his meetings with Goodrich, "I told him also of the American Bar Association proposal." Joseph H. Willits, *Memorandum of Joseph H. Willits* (Nov. 17, 1950) (unpublished), available at Rockefeller Archives Center, Rockefeller Foundation Records, RG 1.1, Series 200, Box 303, Folder 3609.

<sup>102</sup> Willits, *supra* note 92, at 2.

*B. Choosing Herbert Wechsler*

While the Foundation had not committed to paying for the MPC, it had given the ALI sufficient funds to direct its attention in that direction. A key question to be resolved, of course, was: who would lead the pondering committee and then the eventual model code project? As it turned out, the ALI was able to convince the Foundation that Herbert Wechsler should be in charge before it was able to convince it that the MPC was a good idea. But Wechsler's elevation was far from obvious. Just as the ALI would have been happy to pursue other projects and the Foundation could easily have funded other criminal law reforms or none at all, the Model Penal Code might well have been under other leadership. There were more established scholars than Wechsler, who at that time was a relatively junior professor at Columbia Law School, albeit one with very significant criminal experience as Assistant Attorney General for the War Division and chief legal advisor to one of the U.S. judges at Nuremburg.<sup>103</sup> Many of those scholars had also been working with or making proposals to the ALI for reforms of the criminal law for years, reforms that included a model criminal code. No scholarship has significantly touched on the process of Wechsler's selection as the MPC's Chief Reporter — the title given to heads of ALI projects — so what follows is somewhat preliminary, but I believe it demonstrates several key features of that process: 1) Wechsler was no one's first choice; 2) he had a preexisting interest in the social sciences that was likely to attract Joseph Willits' approval; 3) it was then Wechsler's work in framing the model code as an undertaking that fit the Foundation's vision (which he explicitly set out to do) that secured Foundation funding for the whole enterprise.

The evidence strongly indicates that Herbert Goodrich did not initially envision Wechsler as head of the MPC. The first time Herbert Wechsler's name appears in ALI correspondence related to the MPC is April 18, 1950, when Goodrich wrote to him to ask him to “take a look at the enclosed prospectus for a study in criminal law,” though this clearly wasn't their first communication on the topic.<sup>104</sup> Goodrich, as always, stressed the money angle: “If the prospectus is fairly good all we need is some money to carry out the things it suggests.”<sup>105</sup> Wechsler responded with interest two days later, though with little sense of what his exact role might be: “I should like in every way I can to help to bring the project to fruition.”<sup>106</sup> At this

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<sup>103</sup> David Wolitz, *Herbert Wechsler, Legal Process, and the Jurisprudential Roots of the Model Penal Code*, 51 TULSA L. REV. 633, 640 n.50 (2016).

<sup>104</sup> Herbert F. Goodrich, *Letter from Herbert F. Goodrich to Herbert Wechsler* (Apr. 18, 1950) (unpublished), available at the University of Pennsylvania, Biddle Law Library, American Law Institute Model Penal Code Records, Box 2, Folder 8.

<sup>105</sup> Goodrich, *supra* note 73.

<sup>106</sup> Herbert Wechsler, *Letter from Herbert Wechsler to Herbert F. Goodrich* (Apr. 20, 1950) (unpublished), available at the University of Pennsylvania, Biddle Law Library, American Law Institute Model Penal Code Records, Box 2, Folder 8.

time, Goodrich wasn't mentioning Wechsler in his correspondence with other scholars asking about the status of the criminal law project,<sup>107</sup> likely because he was still a long way from having Wechsler in mind as the project's potential leader. Even four months later, Goodrich seemed to be leaning in a different direction. After he and Tweed went to make their initial pitch to Willits in August of 1950, Willits wrote, "I think there is a young man named Schwartz at the University of Pennsylvania Law School whom they think of as the central figure."<sup>108</sup>

But, as he had done with the MPC proposal itself, Willits was getting recommendations about its leadership from sources outside the ALI. The Rockefeller Foundation's archives hold a letter containing what I believe to be the first mention of Wechsler's name to Willits in this context, and it appears in no work of scholarship. On September 9, 1950, a few weeks after Goodrich and Tweed's visit, James Willard Hurst (1910–97) recommended Wechsler to Willits as a promising candidate to lead any kind of overhaul of the criminal law. Hurst's recommendation would have carried enormous weight, given his scholarly alignment with the Foundation's aims and the extent of his personal connection with Willits. Hurst taught at the University of Wisconsin, where he was, in the words of one scholar, an "entrepreneur for the field of law and social science."<sup>109</sup> In 1949, he had begun working with Willits in the latter's quest to reform American lawyers generally, sharing his concern that the "legal profession was not properly trained to assume its postwar leadership responsibilities."<sup>110</sup> Hurst's own programs at Wisconsin received significant Rockefeller support and, in the early 1950s, "still persuaded that the academic establishment needed some shaking up, Willits relied greatly on Hurst"<sup>111</sup> for recommendations in the legal field.<sup>112</sup>

In his letter responding to Willits' request for an opinion on the ALI's ideas, Hurst deplored the sorry state of American criminal law: "The study of criminal law and related problems has not attracted its fair share of outstanding men in the past generation. For lack of imaginative leadership, the field became identified mainly as one for the technician; men with philosophic interest have been conspicuously lacking."<sup>113</sup> However, "a notable exception, and a man who automatically springs to mind as a potential leader of the sort

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<sup>107</sup> Goodrich, *supra* note 73.

<sup>108</sup> This was Louis Schwartz, who would end up serving as one of the MPC's Associate Reporters, under Wechsler. Joseph H. Willits, *Joseph H. Willits interview with Harrison Tweed and Herbert F. Goodrich* (Aug. 17, 1950) (unpublished), available at Rockefeller Archives Center, Rockefeller Foundation Records, American Law Institute (1951–65), Projects (Grants), RG 1, SG 1.1, United States (Series 200), Social Studies (Subseries 200.S), Box 303, Folder 3609.

<sup>109</sup> Garth, *supra* note 66.

<sup>110</sup> *Id.* at 45.

<sup>111</sup> *Id.* at 53.

<sup>112</sup> *Id.*

<sup>113</sup> Willard Hurst, *Letter from Willard Hurst to Joseph H. Willits* (Sept. 9, 1950) (unpublished), available at Rockefeller Archives Center, RG 1, SG 1.1, United States (Series 200), Social Studies (Subseries 200.S), Box 303, Folder 3609.



of project outlined is Herbert Wechsler, of Columbia’s law faculty.”<sup>114</sup> Hurst’s suggestion of Wechsler was perfectly calculated to catch Willits’ attention, given the despair he had expressed in 1949 over the unphilosophical state of criminal law. Part of the problem with law, as he saw it, was the discipline’s insufficient consideration of its relationship to philosophy and ethics, perhaps as a result of its commitment to the case-based method of education.<sup>115</sup> Willits also felt keenly the need to train young men to take on leadership roles in post-war American society. Wechsler, in Hurst’s view, was part of that new generation,<sup>116</sup> which would be better able to integrate with the social scientists whose input the Foundation so badly wanted: “the inherent character of the work [the ALI proposes] would provide so hospitable an atmosphere for collaboration among social sciences.”<sup>117</sup> As will be discussed further,<sup>118</sup> Wechsler had given significant indications through his scholarly writing and the casebook he published with his Columbia colleague Jerome Michael that he agreed with Hurst and Willits about the need to revitalize the subject and study of criminal law via substantial engagement with the social sciences. Hurst’s recommendation indicates that he had recognized these qualities in Wechsler and knew that Willits would also find them appealing.

Another, less philosophical, reason that Wechsler may have been particularly attractive to both the ALI and the Foundation was that he was both a graduate of and professor at an elite, northeastern law school who had held a prominent government post. The ALI<sup>119</sup> and the Foundation’s trustees<sup>120</sup> were largely from similar regional, educational, and professional backgrounds. There were numerous other senior figures in the world of criminal law whose names were floated as potential heads of the MPC project, and several of them wrote repeatedly to Goodrich to try to be more involved.

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<sup>114</sup> *Id.*

<sup>115</sup> Joseph H. Willits, *Remarks at Williamsburg Meeting of RF Board of Trustees* (Dec. 7, 1949) (unpublished), available at Rockefeller Archives Center, Joseph H. Willits Collection, Box 3, Folder 27, Page 15.

<sup>116</sup> Hurst’s anti-establishment tendencies complicate the idea (discussed in the following paragraph) that elitist prejudice motivated Wechsler’s selection: Hurst’s “enemies in his strategic battles were typically Harvard, the established names, legal philosophy, and legal traditionalism, and his allies were typically social science, detailed micro-study, and the Midwest.” Garth, *supra* note 66, at 38. This suggests Hurst must have seen Wechsler as significantly anti-establishment, or believed that his connection to social science was more important: “At the same time, however, his tactical alliance with social science against legal traditionalism did not preclude him from drawing on all the prestige of law’s dominant institutions to assert the priority of law over social science.” *Id.*

<sup>117</sup> Willard Hurst, *Letter from Willard Hurst to Joseph H. Willits* (Sept. 9, 1950) (unpublished), available at Rockefeller Archives Center, RG 1, SG 1.1, United States (Series 200), Social Studies (Subseries 200.S), Box 303, Folder 3609.

<sup>118</sup> See *infra* Section III.B.

<sup>119</sup> Markus D. Dubber, *The American Law Institute’s Model Penal Code and European Criminal Law* (Feb. 26, 2011), <http://www.ssrn.com/abstract=1770664> [<https://perma.cc/6JUA-UBN3>].

<sup>120</sup> Inderjeet Parmar, *Foundations of the American Century: The Ford, Carnegie, and Rockefeller Foundations in the Rise of American Power* 48–49 (2012).

Goodrich generally tried to deflect those inquiries.<sup>121</sup> Strikingly, almost all of these scholars were educated and held faculty positions far from the East Coast institutions whose graduates and professors dominated the ALI and its funders. That this somewhat uncomfortable truth was generally felt may be seen from unpublished remarks Wechsler made in 1952, probably in May.<sup>122</sup>

I therefore say that I am happy in the Advisory Group. If it has any defect at all, perhaps I should say before someone else does that it may represent from some points of view an undue concentration of the talents that lie East of the Mississippi River and North of the Mason and Dixon Line. I wish to assure Judge Hutcheson that if that is so, the explanation lies more in consideration of railroad fare and the greater ease of bringing together a group living in closer proximity than in any other consideration.<sup>123</sup>

It's possible the ALI was genuinely concerned about the train fare, but it's hard to square with the other things they were doing with their money at the time.<sup>124</sup> It seems likelier that Wechsler's resume was particularly interesting

<sup>121</sup> For example, a May 1946 memo by William Draper Lewis summarized proposals to reform the "substantive criminal law" from Rollin Perkins, Jerome Hall, Alfred Gausewitz, and John Waite. William Draper Lewis, *Substantive Criminal Law* (May 6, 1946) (unpublished memorandum), available at the University of Pennsylvania, Biddle Law Library, American Law Institute Model Penal Code Records, Box 2, Folder 8. At least Hall and Gausewitz wrote to Goodrich (in letters cited elsewhere in this article) to inquire about the status of the MPC and were told little except that the ALI needed money.

<sup>122</sup> The remarks are undated except for the year, but other remarks in the same folder of unpublished materials are dated May of the years in which they were recorded; ALI annual meetings were often held in that month.

<sup>123</sup> Herbert Wechsler, *Herbert Wechsler, Unpublished Remarks* (1952) (unpublished), available at the University of Pennsylvania, Biddle Law Library, American Law Institute Model Penal Code Records, Box 4, Folder 16, Pages 55–56.

<sup>124</sup> In November of 1949, for example, Goodrich was corresponding with Justice Robert Jackson about the possibility of hosting an ALI function at the Supreme Court, writing, "I think the Institute can foot the caterer's bill and say nothing about it." Herbert F. Goodrich, *Letter from Herbert F. Goodrich to Robert Jackson* (Nov. 29, 1949) (unpublished), available at the University of Pennsylvania, Biddle Law Library, American Law Institute Model Penal Code Records, Box 5, Folder 85. This was hardly the ALI's only extravagance, proposed or actual. For one ALI event, the ALI's President Harrison Tweed wrote to a colleague to propose a baroque entertainment at an expensive DC hotel:

In connection with the tom-foolery at the dinner on Friday night, I am sending a chair to the Mayflower Hotel, addressed to Judge Goodrich care of the American Law Institute. Will you have this a little bit on your mind. In addition, it is going to be necessary to have the hotel construct a small platform to slide in from behind onto the dais at the same time that the chair is produced. The specifications are that the platform should be solid and a little over three feet square and twenty inches high, with an extra step up. On it we will place the chair, which is disguised as a baby's highchair, and more or less simultaneously the Senator will step up and sit in the chair.

Harrison Tweed, *Letter from Harrison Tweed to Paul Wolkin* (May 12, 1950) (unpublished), available at the University of Pennsylvania, Biddle Law Library, American Law Institute Model Penal Code Records, Box 5, Folder 85.

The fake highchair the ALI was planning to commission from the Mayflower was undoubtedly expensive. The MPC drafters didn't seem concerned about money: a few months before he spoke, a criminal law "survey" Wechsler was ostensibly leading had returned more than half of its grant. *Statement of Expenditures, Criminal Law Project 1951* (Jan. 9, 1952) (unpublished),

to his potential employers.<sup>125</sup> As Goodrich wrote to Tweed, to state the case for Wechsler’s selection as Reporter, “It is desirable also that he is a New Yorker.”<sup>126</sup>

Even with his philosophical and circumstantial similarities to the ALI and the Foundation, as well as Hurst’s recommendation to Willits, it took time and persuasion for his position to become secure. Goodrich wrote to Wechsler in January 1951 telling him that he had the job heading the “pondering committee” Willits had suggested if he agreed to the salary of \$500 a month (\$6,006.08 today).<sup>127</sup> It’s not entirely clear why. Between when Goodrich had reached out to Wechsler in April of 1950 and this request, ALI records suggest, Wechsler hadn’t yet done any work on the MPC. It’s also not clear how committed Goodrich was to Wechsler’s leadership, still refraining from mentioning it to curious criminal law scholars who wanted

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available at the University of Pennsylvania, Biddle Law Library, American Law Institute Model Penal Code Records, Box 1, Folder 3.

<sup>125</sup> It should be noted that, in at least one significant way, Wechsler didn’t fit the mold of a traditional East Coast elite: his Jewish heritage. When Wechsler took over the Directorship of the ALI from Herbert Goodrich in 1963, writes Geoffrey Hazard:

“It is not insignificant in the development of the character of the Institute, and of the profession at large, that Herb was Jewish . . . the ALI was a very ‘white shoe’ organization and employment of Jewish law graduates in some major law firms and some law faculties was still problematic through the 1950s. The selection of Professor Wechsler as Director of the Institute made a quiet but demonstrative contribution to eliminating that form of discrimination in the legal profession and, eventually and by example, other forms of discrimination as well.”

Geoffrey C. Hazard, *Tribute in Memory of Herbert Wechsler*, 100 COLUM. L. REV. 1362, 1363–64 (2000). It’s not clear, however, that Wechsler’s Jewishness played a role in his candidacy for leadership of the MPC project. For one thing, Hazard notes, “He himself never made a thing of that aspect of his identity.” *Id.* In addition, although there were avowed anti-Semites among the Rockefeller Foundation’s officers in the 1930s, many others labored to rescue Jewish scholars from Nazi persecution. Reinhard Siegmund-Schultze, *Rockefeller Philanthropy and Mathematical Emigration between World Wars*, 37 MATH INTELLIGENCER 10 (2015). Moreover, Joseph Willits, while not convinced that Foundation money should be used for exclusively humanitarian efforts, believed that such persecution presented a significant opportunity for the development of American knowledge: “The prime objective,” he wrote of the Foundation’s work to support these fleeing academics, “was to salvage for the world of scholarship anywhere the best of the refugee scholars. There may be a secondary specific purpose behind the program; namely, to broaden and make less provincial American scholarship by mixing in some of the best European scholars.” Cherry Schrecker, *Sociology at the New School for Social Research, an Intellectual and Pedagogical History* (2009), <https://hal.science/hal-01565855/document> [<https://perma.cc/5DZH-8RRH>] (citing Rockefeller Archives Center, Rockefeller Foundation Records, American Law Institute (1951–65), Projects (Grants), RG 1, SG 1.1, United States (Series 200), Box 383, Folder 4528). There is of course no guarantee that Willits or Goodrich weren’t nevertheless at least partly motivated by anti-Semitic prejudice, but I’ve found no evidence to support the idea that such a prejudice (if it existed) interfered with Wechsler’s selection as head of the MPC.

<sup>126</sup> Herbert F. Goodrich, *Letter from Herbert F. Goodrich to Harrison Tweed* (Sept. 17, 1951) (unpublished), available at the University of Pennsylvania, Biddle Law Library, American Law Institute Model Penal Code Records, Box 1, Folder 16.

<sup>127</sup> Herbert F. Goodrich, *Letter from Herbert F. Goodrich to Herbert Wechsler* (Jan. 15, 1951) (unpublished), available at the University of Pennsylvania, Biddle Law Library, American Law Institute Model Penal Code Records, Box 2, Folder 8.

to be involved.<sup>128</sup> His reticence may have come from the reluctance that Willits maintained about Wechsler's involvement. On January 5, 1951, just ten days before Goodrich offered Wechsler the position, Willits recorded in his diary a call from Tweed:

HT [Harrison Tweed] called to say that Goodrich and he were inclined to go forward with Herbert Wechsler as the chairman of the committee of the American Law Institute. I was noncommittal, having heard some dubious comments about Wechsler, which may be unfair. JWH [Hurst] will check but will not take the responsibility of participating in the choice.<sup>129</sup>

A few weeks later, Willits noted that Wechsler "is very able and knows criminal law, but he has no practical experience. When he came, he was under the wing of Jerome Michael (?),<sup>130</sup> but he is now trying to free himself. (This information given me by Harrison Tweed.)"<sup>131</sup> Though Willits' hesitation isn't directly reflected in any of the ALI's own records, it seems impossible that Goodrich would have failed to be aware of it.

It was particularly critical that Wechsler convince Willits that he was the right choice. Willits was exercising a great deal of influence over even the preliminary project of the pondering committee. For example, in the proposed budget that Goodrich sent to the Foundation for the "exploratory work," he noted that the estimated "[e]xpenses of conferences of lawyers and authorities in Medical and Social Sciences" was based on "a plan for at least three conferences of a type already discussed by Dr. Willits and the Director of the Institute."<sup>132</sup> This line was by far the largest part of the budget: \$7,500 out of the \$20,000 total (\$90,091.24 out of \$240,243.31 today). Willits, through his conversations with Goodrich, was heavily influencing where the money should be allocated, down to the particular type and composition of the conferences the ALI would hold.

Wechsler quickly set about the work of persuading the Foundation that he was the best candidate. An agenda produced in February — about a month

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<sup>128</sup> Jerome Hall, *Letter from Jerome Hall to Herbert F. Goodrich* (Jan. 15, 1951) (unpublished), available at the University of Pennsylvania, Biddle Law Library, American Law Institute Model Penal Code Records, Box 1, Folder 15.

<sup>129</sup> Joseph Willits, *Willits Diary* (Jan. 5, 1951) (unpublished), available at Rockefeller Archives Center, Joseph H. Willits Collection.

<sup>130</sup> Jerome Michael was Wechsler's senior Columbia Law School colleague, with whom he co-wrote a pair of influential articles on homicide law as well as a casebook (discussed in the Conclusion) that served as an influential model for criminal legal educational materials. See *infra* note 213.

<sup>131</sup> *Memorandum of Joseph H. Willits re: Herbert Wechsler* (Jan. 23, 1951) (unpublished), available at Rockefeller Archives Center, Rockefeller Foundation Records, American Law Institute (1951–65), Projects (Grants), RG 1, SG 1.1, United States (Series 200), Social Studies (Subseries 200.S), Box 303, Folder 3609.

<sup>132</sup> Herbert F. Goodrich, *Letter from Herbert F. Goodrich to Flora Rhind* (Jan. 15, 1951) (unpublished), available at the University of Pennsylvania, Biddle Law Library, American Law Institute Model Penal Code Records, Box 1, Folder 2.

after he was offered the job as head of the pondering committee — for the ALI Council’s March 14 meeting showed that he would be presenting “upon his progress as Chief Reporter for the Survey of the Criminal Law project.”<sup>133</sup> This is surprising considering the breadth of his remit: Wechsler was ostensibly in charge of a \$20,000 project (again, \$230,270.94 today) that Goodrich had pitched to the Rockefeller Foundation as a general exploration of “ideas in the field of crime”; the Foundation had strongly counselled him to think even *more* broadly (at least in terms of discipline), with Willits acknowledging that, “I know that this makes the task more difficult.”<sup>134</sup> Moreover, Wechsler doesn’t seem to have done anything related to the project during the months of his prior correspondence with the ALI. How much progress could he have made towards such ambitious goals between January 15 and March 14? Not much, it turns out.

Instead of making any kind of a survey of American criminal law or engaging a big discussion group to consider its problems, Wechsler had prepared a document arguing that he could get the Foundation on board. It was at this point that Willits’ December 21 letter — the list of warnings suggesting that the whole idea of a Model Penal Code might be misconceived and certainly wouldn’t be funded if it didn’t consider social science an equal partner in the endeavor — exerted its most powerful influence on the MPC’s framing. The ALI Council to whom Wechsler was presenting was well aware of this letter, because Goodrich’s report to them (which he presented the same day as Wechsler) reproduced it.<sup>135</sup> The minutes of the meeting *again* reiterate its importance: “The Director drew attention to a copy of Dr. Willits’ letter reproduced on pages 13 and 14 of his Report.”<sup>136</sup> In this context, it was vital that Wechsler respond to that letter, and he did, presenting an 18-page draft he titled, “The Proposal to Prepare a Model Penal Code,” in which he responded directly to Willits’ concerns and laid out how an MPC under his leadership would satisfy the Foundation’s aims.

Wechsler’s own aims are clear from the first paragraph of his draft, in which he presents a brief history of the ALI’s attempts to create an MPC.

Funds for the project had not been provided when the chance arose to grapple with one aspect of the problem, the treatment of youthful offenders over Juvenile Court age. A satisfactory result within this narrow but important area led naturally to revival of consideration

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<sup>133</sup> *Agenda for Meeting of Council* (Mar. 14–17, 1951) (unpublished), available at the University of Pennsylvania, Biddle Law Library, American Law Institute Executive Office Records, Box 6, Folder 3.

<sup>134</sup> Willits, *supra* note 88, at 2.

<sup>135</sup> Herbert F. Goodrich, *Director’s Report to the ALI Council* (Mar. 14, 1951) (unpublished), available at the University of Pennsylvania, Biddle Law Library, American Law Institute Council Records, Box 2, Folder 6, Pages 13–14.

<sup>136</sup> *Minutes of the American Law Institute Council Meeting* (Mar. 14, 1951) (unpublished), available at the University of Pennsylvania, Biddle Law Library, American Law Institute Council Records, Box 2, Folder 65.

of the larger undertaking. The model code proposal was accordingly renewed and the requirements for its financing were submitted to the Rockefeller Foundation.

The Foundation was apparently not satisfied upon a number of the issues posed in making the substantial grant involved. Do the real problems “lie in the realm of a more nearly adequate law — to which a model code would contribute” or “do they lie in the questions that still have to be answered more adequately in the behaviorists sciences?” Would “a model code written at once tend to ‘freeze’ what is, without plumbing these underlying questions?” Does the “main problem lie in the field of a more adequate law — important though that is — or does it lie in the human organization for administering the law . . . ?” These were the doubts suggested, coupled with a recognition that “the answer may be that attempting to write a model code is the best way to get at these questions.”<sup>137</sup>

These quotations are taken directly from Willits’ December 21 letter.<sup>138</sup> In Wechsler’s typewritten version, he states that, his proposal’s “object is to outline the essential propositions on which lawyers and the men from other disciplines ought to be willing to agree.”<sup>139</sup> In other words, it should address Willits’ central concern that the insularly legalistic ALI would never alone be able to address the problems of criminal justice that required interdisciplinary scientific study. But even this was not direct enough. That paragraph is scribbled over, to be replaced by a handwritten emendation making even more plain the true purpose of the proposal: “This memorandum is designed to state — for the consideration of the Committee — the grounds on which it is submitted that the model code proposal merits full support.”<sup>140</sup> Wechsler’s purpose was to show why the MPC deserved Rockefeller money, which he did by highlighting the importance of the social sciences:

[O]nly systematic study of the penal law and its pervasive problems can appraise the relevancy of behavior science to the field. What is required is sustained analysis, sorting the ethical, political, technical or practical aspects of problems from their scientific aspects, in the sense of the behavior sciences. Such an analysis has been too long delayed.

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<sup>137</sup> Herbert Wechsler, *Memorandum for Advisory Committee on Criminal Law: The Proposal to Prepare a Model Penal Code* (Mar. 1951) (unpublished), available at the University of Pennsylvania, Biddle Law Library, American Law Institute Model Penal Code Records, Box 2, Folder 8, Pages 1–2.

<sup>138</sup> See Joseph H. Willits, *Letter from Joseph H. Willits to Herbert F. Goodrich* (Dec. 21, 1950) (unpublished), available at the University of Pennsylvania, Biddle Law Library, American Law Institute Model Penal Code Records, Box 1, Folder 15, Page 1.

<sup>139</sup> *Id.* at 2.

<sup>140</sup> *Id.*



Given a sound analysis of this dimension, there is every reason to believe that proper canvass of the fruits of special medical and psychological knowledge will have important impact on the law.<sup>141</sup>

At the same time as repeatedly demonstrating the ways in which his proposal answered Willits' questions, Wechsler emphasized the importance of a strong central figure leading the project.

The best minds of the bar have had small genuine professional involvement with the law of crime. No Williston or Wigmore undertook to chart the contours of the subject, ordering its doctrines, rules and practice in the light of underlying policies and bringing critical intelligence to bear upon the whole.<sup>142</sup>

The implication, of course, was that he would be the next such figure.<sup>143</sup> The success of his twin efforts is reflected in the ALI Council resolution that resulted from his presentation:

The Council approves the project as outlined by Professor Wechsler and the preliminary work should proceed as rapidly as possible in such fashion as Professor Wechsler, Dr. Willits, the President and Director may . . . believe desirable.<sup>144</sup>

In their view, the formation of plans for the MPC was under the *joint* leadership of Wechsler and Willits.

### C. Wechsler's Success

The proposal that Wechsler presented to the ALI Council, the proposal so attuned to the specific anxieties of Joseph Willits and his Rockefeller colleagues, played the biggest role in cementing Wechsler's position. In June of 1951, Wechsler circulated another draft to potential members of the advisory committee. All the references to the Rockefeller Foundation and Willits' letter were still in it, making clear to the committee members that securing funding was still one of (if not the) primary aim to which their efforts should be directed.<sup>145</sup> Around the same time, Wechsler also wrote

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<sup>141</sup> Herbert Wechsler, *The Proposal to Prepare a Model Penal Code* (June 1951) (unpublished), available at University of Pennsylvania, Biddle Law Library, American Law Institute Model Penal Code Records, Box 2, Folder 8, Page 15.

<sup>142</sup> *Id.* at 3.

<sup>143</sup> As Dubber writes of the role Wechsler would eventually carve out for himself, “The ALI was a club of Great Men of the Law, and the Model Penal Code, as were the ALI's other projects, was the work of a Great Man among Great Men, with Wechsler assuming the role that Williston had played in the original Restatement of Contracts . . . .” Dubber, *supra* note 119, at 9.

<sup>144</sup> *Minutes of the American Law Institute Council Meeting* (March 14, 1951), *supra* note 136.

<sup>145</sup> See Wechsler, *supra* note 141.

and circulated a second memo to the advisory committee.<sup>146</sup> Wechsler sent both these memos to the Foundation in June or July of 1951. By that time, Wechsler was beginning to speak with a confidence that indicated both his sense of control over the project and his closeness with the Foundation.<sup>147</sup>

These memos impressed the Foundation. Of one meeting, Willits noted that “Professor Wechsler carried the brunt of the discussion, just as he apparently has done the bulk of the spadework.”<sup>148</sup> One of his colleagues commented, “Wechsler has done an admirable job (as Hurst foresaw) and the Committee has made a substantially good case for their type of project.”<sup>149</sup> This approval is hardly surprising, given that Wechsler’s memos had been formulated specifically to appeal to the Foundation. The ALI team also continued to solicit the Foundation’s input: As Willits wrote, Tweed, Goodrich, and Wechsler “took the view that their preliminary work was substantially concluded, leaving them in the position of merely seeking guidance as to how best to frame a formal application for a major grant to carry out their basically legal project.”<sup>150</sup> Foundation officers still worried that that this “basically legal project” lacked sufficient connection to the social sciences.<sup>151</sup> Nevertheless, they believed that “support for this project of the American Law Institute might well constitute a first step.”<sup>152</sup>

If Foundation officers were willing to entertain Wechsler’s proposals despite their reservations about his commitment to the social sciences (whose inclusion in the project was their whole reason for being involved), it was likely because they could recognize their own handiwork in his writing. As one of Willits’ correspondents wrote:

I have read the three Wechsler documents on the criminal law business. I have read them with admiration for the professional competence and insights they show. If you present this proposition and if it can be kept to a reasonable figure, I am going to be for it. Joe, you already have made a fine contribution to the subject.

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<sup>146</sup> Herbert Wechsler, *Letter from Herbert Wechsler to John Waite* (July 5, 1951) (unpublished), available at the University of Pennsylvania, Biddle Law Library, American Law Institute Model Penal Code Records, Box 2, Folder 9.

<sup>147</sup> *See id.*

<sup>148</sup> *Interview with Harrison Tweed, Herbert F. Goodrich, and Herbert Wechsler* (July 10, 1951) (unpublished), available at Rockefeller Archives Center, Rockefeller Foundation Records, American Law Institute (1951–65), Projects (Grants), RG 1, SG 1.1, United States (Series 200), Social Sciences (Subseries 200.S), Box 303, Folder 3610.

<sup>149</sup> *Id.*

<sup>150</sup> *Id.*

<sup>151</sup> *See id.*

<sup>152</sup> *Memorandum from RSM to Joseph H. Willits* (July 19, 1951) (unpublished), available at Rockefeller Archives Center, Rockefeller Foundation Records, American Law Institute (1951–65), Projects (Grants), RG 1, SG 1.1, United States (Series 200), Social Sciences (Subseries 200.S), Box 303, Folder 3610.

Just contrast these documents with the first submission. I am very pleased.<sup>153</sup>

Foundation officers agreed with this assessment, emphasizing their own influence over Wechsler’s subsequent revisions.

The most recent statement about this project seems to me to be a considerable improvement over the earlier ones. It appears to be a more modest proposal, focusing now on (1) reviewing the existing contradictions and confusions in criminal law in the country; (2) arranging for discussion among presumably qualified personnel about the more important problems relating to a criminal code; (3) trying to insure that experience, points of view, and knowledge of practitioners, legal scholars, and social scientists are brought to bear on the discussions; (4) preparing and publishing documents setting forth such agreements as can be arrived at in these discussions and stating the conflicting points of view where agreements are not reached.<sup>154</sup>

It undoubtedly didn’t hurt that, in addition to his writing, Wechsler (with Goodrich’s help) was working to improve Willits’ opinion of him. On numerous occasions over the course of 1951, Goodrich wrote to Willits, telling him what a good job Wechsler was doing<sup>155</sup> and inviting him to come see for himself.<sup>156</sup> Wechsler, meanwhile, was simultaneously developing his own relationship with Willits. When Willits wrote to Goodrich on May 9, 1951, to decline his invitation to an ALI dinner, he mentioned that, “I had a very good talk on Tuesday with Herbert Wechsler.”<sup>157</sup> It’s no surprise then that on September 17, 1951, Goodrich wrote to Harrison Tweed to

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<sup>153</sup> Henry Allen Moe, *Letter to Joseph H. Willits* (Aug. 7, 1951) (unpublished), available at Rockefeller Archives Center, Rockefeller Foundation Records, American Law Institute (1951–65), Projects (Grants), RG 1, SG 1.1, United States (Series 200), Social Sciences (Subseries 200.S), Box 303, Folder 3610.

<sup>154</sup> Leland DeVinney, *Letter to Joseph H. Willits* (Sept. 28, 1951) (unpublished), available at Rockefeller Archives Center, Rockefeller Foundation Records, American Law Institute (1951–65), Projects (Grants), RG 1, SG 1.1, United States (Series 200), Social Sciences (Subseries 200.S), Box 303, Folder 3610.

<sup>155</sup> Herbert F. Goodrich, *Letter to Joseph H. Willits* (Mar. 26, 1951) (unpublished), available at Rockefeller Archives Center, Rockefeller Foundation Records, American Law Institute (1951–65), Projects (Grants), RG 1, SG 1.1, United States (Series 200), Social Sciences (Subseries 200.S), Box 303, Folder 3610; Herbert Goodrich, *Letter to Joseph H. Willits* (May 21, 1951) (unpublished), available at Rockefeller Archives Center, Rockefeller Foundation Records, American Law Institute (1951–65), Projects (Grants), RG 1, SG 1.1, United States (Series 200), Social Sciences (Subseries 200.S), Box 303, Folder 3610.

<sup>156</sup> Herbert Goodrich, *Letter from Herbert F. Goodrich to Joseph H. Willits* (April 9, 1951) (unpublished), available at the University of Pennsylvania, Biddle Law Library, American Law Institute Model Penal Code Records, Box 2, Folder 8.

<sup>157</sup> Joseph Willits, *Letter from Joseph H. Willits to Herbert F. Goodrich* (May 9, 1951) (unpublished), available at the University of Pennsylvania, Biddle Law Library, American Law Institute Model Penal Code Records, Box 2, Folder 8.

recommend Wechsler as Chief Reporter.<sup>158</sup> With the help of a further recommendation from Hurst,<sup>159</sup> the campaign had succeeded by late 1951, when Goodrich wrote that, “Willits, himself, thinks highly of the proposal and also thinks very highly, indeed, of Wechsler. The latter has impressed him very much.”<sup>160</sup>

#### D. Foundational Influence

But Goodrich was right only about Willits’ view of Wechsler. On October 4, 1951, Willits recorded the dissatisfaction over the proposals for tackling the MPC submitted by other ALI leaders (including President Tweed) that he had communicated to Goodrich.

HFG [Goodrich] came in . . . to discuss their proposals in behalf of the American Law Institute. I explained to HFG that the attached two-page memorandum submitted by [the ALI leadership] was completely inadequate as an application. They have given no reasons for the funds asked for, no description of the method of handling, no clear organization, no statement of how the task is to be attacked. It appears that G [Goodrich] had sent them a statement which they did not use, but concocted their own instead.

I went into detail with HFG about the Committee. I congratulated him on Wechsler, but said that they were weak and inadequate on the associate side.<sup>161</sup>

They had sold Willits on Wechsler, but not on the rest of the project or its staff. In order to comply with Willits’ demand that the ALI submit a more formal application, Goodrich sent him a proposal largely based on Wechsler’s memo (first presented to the ALI Council in March, then circulated to the advisory committee in June).<sup>162</sup> In the estimation of Henry Moe of the Guggenheim Foundation, Willits’ pressure had an effect on the ALI team: “I think the most useful general comments I can make on Judge

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<sup>158</sup> See Goodrich, *supra* note 126.

<sup>159</sup> See Garth, *supra* note 66, at 48. I have not been able to find the letter Garth cites in the Rockefeller Foundation archives to confirm the nature of this second recommendation. In Garth’s account, Wechsler’s name was mentioned among many others whom Hurst was recommending for various projects.

<sup>160</sup> Herbert F. Goodrich, *Letter from Herbert F. Goodrich to Harrison Tweed and Timothy Pfeiffer* (October 8, 1951) (unpublished), available at the University of Pennsylvania, Biddle Law Library, American Law Institute Model Penal Code Records, Box 1, Folder 16.

<sup>161</sup> Joseph Willits, *Willits Diary* (Oct. 4, 1951) (unpublished), available at Rockefeller Archives Center, Joseph H. Willits Collection.

<sup>162</sup> See Herbert Wechsler, *The Possibilities of the Model Code Proposal* (1951) (unpublished), available at University of Pennsylvania, Biddle Law Library, American Law Institute Model Penal Code Records, Box 1, Folder 15.

Goodrich’s latest presentation, dated 12 October, are that you seem to be getting somewhere with him; and that I urge you to keep it up.”<sup>163</sup>

The problem, according to Willits, was that the proposal still didn’t envision a large enough role for social science. The ALI leadership took his disapproval very seriously: Goodrich and Wechsler agreed that the latter should pause working until they could figure out how to respond.<sup>164</sup> It was obvious to both, in other words, that there wasn’t any point in continuing with the MPC if it seemed they would be unable to satisfy the Foundation’s demands. The next day, Wechsler sent a memo to Goodrich, encouraging him to emphasize the work’s connection to the social sciences:

Along the line of my letter of yesterday, I suggest the following type of material in response to Mr. Willets’ [sic] suggestion: “The project will provide an opportunity to draw upon the present fund of insight and of knowledge in the social, medical, and psychiatric sciences \_ to the extent that they can now be of assistance in revision and improvement of the penal law. More than this, by articulating the precise respects in which advances in our knowledge of behavior and society will alter the prevailing premises of penal legislation or administration, the enterprise should prove a stimulus to future work on unsolved problems in these fields.”<sup>165</sup>

Much of this memo was incorporated into the final grant request Goodrich sent to Willits on October 22.<sup>166</sup> This request was at last successful. On December 5, 1951, Tweed received a letter informing him that a grant in the amount of \$222,500 (\$2,561,764.25 today) had been made to ALI, to be used by December 31, 1956.<sup>167</sup> Herbert Wechsler was appointed Chief Reporter at a December 19 meeting of the ALI Executive Committee.<sup>168</sup> The proposals on which the grant request was based were adapted largely

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<sup>163</sup> Henry Moe, *Letter to Joseph H. Willits* (Oct. 24, 1951) (unpublished), available at Rockefeller Archives Center, Rockefeller Foundation Records, American Law Institute (1951–65), Projects (Grants), RG 1, SG 1.1, United States (Series 200), Social Sciences (Subseries 200.S), Box 303, Folder 3610.

<sup>164</sup> Herbert Wechsler, *Letter from Herbert Wechsler to Herbert F. Goodrich* (Oct. 17, 1951) (unpublished), available at the University of Pennsylvania, Biddle Law Library, American Law Institute Model Penal Code Records, Box 2, Folder 8.

<sup>165</sup> Herbert Wechsler, *Memorandum for Judge Goodrich* (Oct. 18, 1951) (unpublished), available at the University of Pennsylvania, Biddle Law Library, American Law Institute Model Penal Code Records, Box 2, Folder 8, Page 1.

<sup>166</sup> See generally Herbert Goodrich, *Grant Proposal Draft with Handwritten Notes* (Oct. 19, 1951) (unpublished), available at the University of Pennsylvania, Biddle Law Library, American Law Institute Model Penal Code Records, Box 1, Folder 15.

<sup>167</sup> Flora Rhind, *Letter from Flora Rhind to Harrison Tweed* (Dec. 5, 1951) (unpublished), available at the University of Pennsylvania, Biddle Law Library, American Law Institute Model Penal Code Records, Box 1, Folder 2, Page 1.

<sup>168</sup> See Herbert F. Goodrich, *Letter from Herbert F. Goodrich to Herbert Wechsler* (Dec. 20, 1951) (unpublished), available at the University of Pennsylvania, Biddle Law Library, American Law Institute Model Penal Code Records, Box 2, Folder 8.

unchanged into an article Wechsler published in 1952 in the Harvard Law Review called *The Challenge of a Model Penal Code*,<sup>169</sup> a significant work to which scholars often turn for insight into the MPC's core principles.<sup>170</sup>

These scholars do not realize (or at least do not note) that this article is a grant request written and rewritten over many months of consultation with the Rockefeller Foundation to ensure that the fundamental plan for the MPC would comply with the Foundation's vision. This ignorance or reticence is to some extent understandable. When Wechsler published the article in 1952, all of his explicit references to Willits' letter were gone and his mention of the Foundation was reduced to a single sentence: "The Rockefeller Foundation has now granted funds which will permit the undertaking to proceed."<sup>171</sup> Having secured those funds, Wechsler reframed the work's goal, while leaving its content largely unchanged: "The purpose of this article is to describe the bases and the scope of the work planned. It is presented in the hope that it will fortify professional support for fundamental reexamination of the penal law."<sup>172</sup> The article claimed now to be aimed at convincing not the officers of the Foundation but Wechsler's colleagues in the legal profession. Countless articles on the MPC emulate Wechsler's presentation, confining mention of the Foundation's involvement to a single sentence, ensuring the silence of the Willits' revolution. Yet the article is clearly a product of its origins, dedicated to calming the Foundation's fears point by point.

Wechsler's title, *The Challenge of a Model Penal Code*, seems to respond directly to Willits' language and concerns. In his December 21, 1950 letter, the first question Willits asked — after explaining that the Foundation wasn't ready to fund the MPC as currently proposed — was, "Where do the real problems essential to a model code lie?"<sup>173</sup> Wechsler's framing thus takes up and explores Willits' query: you wanted to know what the problems were, so here they are. The article's contents show that this connection is more than rhetorical. Wechsler, somewhat surprisingly, uses the key word of his title ("challenge") quite sparingly, but when he does, it is about the challenge that the social sciences pose to the law, which is the same challenge Willits posed to the ALI: "The challenge is, in substance, that the penal law is ineffective, inhumane and thoroughly unscientific."<sup>174</sup> Wechsler promised to meet that challenge by adopting the social scientific findings so important to the Foundation: "To the extent — and the extent is large — that legislative choice ought to be guided or can be assisted by knowledge or insight gained in the medical, psychological and social sciences, that knowledge will be

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<sup>169</sup> See Herbert Wechsler, *The Challenge of a Model Penal Code*, 65 HARV. L. REV. 1097 (1952).

<sup>170</sup> See, e.g., DUBBER, *supra* note 1, at 8.

<sup>171</sup> Wechsler, *supra* note 169, at 1097.

<sup>172</sup> *Id.* at 1097–98.

<sup>173</sup> Willits, *supra* note 92, at 1.

<sup>174</sup> Wechsler, *supra* note 169, at 1103.



marshalled for the purpose by those competent to set it forth.”<sup>175</sup> Willits’ second question suggested that law and lawyers might not be the best response to the problems of criminality: “Do [the problems of a model code] lie in the realm of a more nearly adequate law . . . or do they lie in the questions that still have to be answered more adequately by the behaviorist sciences — in the medical field and in the social sciences?”<sup>176</sup> To this query, Wechsler offers a promise of cooperation on difficult issues, such as the identification of criminal behavior: “There is continued need here for sustained, collaborative thought by lawyers and psychiatrists prepared to work through the whole controversial area in search of common ground.”<sup>177</sup> Finally, Wechsler closes the article by writing, “It would, to be sure, be unfortunate if the enterprise should operate to ‘freeze’ existing law or practice into rigid mold without exploration of the larger underlying questions,” before reassuring his readers that the MPC is unlikely to have such an effect.<sup>178</sup> Whose concern was he actually assuaging? It was Donald Young, of the Russell Sage Foundation, who had written to Joseph Willits, who repeated the concern to Goodrich in his late-1950 letter that had prompted so much soul-searching at the ALI. *The Challenge of a Model Penal Code*, one of the texts crucial both to the MPC’s development and to our contemporary understandings of this major reform, remained a document directed at soothing the worries of its funders.

#### *E. Continued Pressure*

Finally, even after the Foundation had made such a mark on one of the MPC’s most crucial founding documents (and thus a crucial document in the history of American criminal law), it continued to push the ALI to adopt its views on the importance of social science. The awarding of the grant didn’t mean the end of Foundation pressure. At the 1951 board meeting in which the grant was approved, “the Trustees urged the great importance of the American Law Institute’s study not being just a ‘lawyers’ job.’ JHW [Willits] promised to discuss this with Goodrich and Wechsler before the venture started (lunch arranged for Friday, December 14).”<sup>179</sup> The Foundation’s President John Sloan Dickey (1907–91) said that,

The American Law Institute knows the problem of restatement, but in the field the problem is not a problem of restatement but one of

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<sup>175</sup> *Id.* at 1130.

<sup>176</sup> Willits, *supra* note 92, at 1.

<sup>177</sup> Wechsler, *supra* note 169, at 1120.

<sup>178</sup> *Id.* at 1133.

<sup>179</sup> *Thoughts on the American Law Institute* (Dec. 1951) (unpublished), available at Rockefeller Archives Center, Rockefeller Foundation Records, American Law Institute (1951–65), Projects (Grants), RG 1, SG 1.1, United States (Series 200), Social Sciences (Subseries 200.S), Box 303, Folder 3611.

knowledge well outside the law and outside the ken of the great body of lawyers. How to get and use that knowledge and not make gestures about using it is the problem to stress in the discussion with the American Law Institute officials.<sup>180</sup>

The President of the Rockefeller Foundation, in other words, was encouraging his officers to use their influence over members of the ALI to advance the Foundation's view of how best to proceed with the MPC. This was a far cry from Beardsley Ruml's use of the Memorial's funds, and it had an effect. Over the next few years, Goodrich continued to account to Willits for the actions and composition of the committee, taking care to emphasize its reliance on social science.<sup>181</sup> In responding to one such update, Willits wrote, "Even though we disappear after the grant is made, I do appreciate being kept informed."<sup>182</sup> However, his claim to disappearing was immediately belied by his next sentence:

I should confess to an "out of bounds" act of which I was guilty. I suggested to Henry Moe of the Guggenheim Foundation, a lawyer who used to teach at Columbia and who is a member of our Board, that he call up Herbert Wechsler sometime and give him any criticisms on the original documents which you laid out and which I showed to Henry; I hope you don't mind.<sup>183</sup>

It is hard to view Willits' continuing attachment to directing the MPC's development as a disappearance. While both the ALI and Foundation records suggest a significant drop-off in contact between the two after early 1952, the Foundation remained involved. In December, Goodrich updated Willits on the makeup and activities of the criminal law group, with an eye to asking for a funding increase.

Wechsler complains about lack of help and needing more money for it. I may well have to come back and try to squeeze out a little more from you. But do not consider this letter an application. I want to know more definitely about other needs before I ask Uncle Joe for a bigger allowance.<sup>184</sup>

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<sup>180</sup> *Id.*

<sup>181</sup> Herbert F. Goodrich, *Letter to Joseph H. Willits* (Feb. 11, 1952), Rockefeller Foundation Records, American Law Institute (1951-65), Projects (Grants), RG 1, SG 1.1, United States (Series 200), Social Sciences (Subseries 200.S), Box 303, Folder 3612.

<sup>182</sup> Joseph Willits, *Letter from Joseph H. Willits to Herbert F. Goodrich* (Feb. 14, 1952) (unpublished), available at the University of Pennsylvania, Biddle Law Library, American Law Institute Model Penal Code Records, Box 2, Folder 8.

<sup>183</sup> *Id.*

<sup>184</sup> Herbert F. Goodrich, *Letter from Herbert F. Goodrich to Joseph H. Willits* (Dec. 8, 1952) (unpublished), available at the University of Pennsylvania, Biddle Law Library, American Law Institute Model Penal Code Records, Box 1, Folder 16.

Goodrich’s characterization of the funding as an “allowance” — however tongue in cheek — hardly suggests an end to the Foundation’s influence. It was necessary for the ALI team to be able to prove that they were complying with the Foundation’s desires, so that they could return for more money when they needed it. Goodrich and Wechsler continued to correspond with Willits over money questions and the ALI eventually ended up asking for a further \$53,000 (\$605,647.08 today), which they were granted in May of 1953.<sup>185</sup> In response, Goodrich wrote a very short letter of thanks to Willits, containing the telling phrase: “We will try to deserve it.”<sup>186</sup>

It was clear that the Foundation was well-informed of the MPC’s progress and that its willingness to continue funding the project was based on its sense that it continued to comply with its original vision for it.<sup>187</sup> The ALI leadership was clearly cognizant that this was an ongoing relationship, over which the Foundation continued to exercise oversight in the form of its ability to grant or withhold staggering sums of money. When Leland DeVinney (1906–98), who would replace Willits as head of the Social Science Division in 1954, was considering whether he should attend an ALI discussion on progress on the MPC, he wrote to Willits to say, “I will be glad to cover this if you think it deserves the time required and does not smack too much of our intervention during the course of a project for which we have made a grant.”<sup>188</sup> Willits clearly saw nothing improper in his attendance: he wrote to Goodrich to let him know how much DeVinney was impressed.<sup>189</sup> The Foundation may have protested that it was not intervening, but the ALI kept coming back to it for a great deal more money as it continued to monitor the project, and Goodrich repeatedly invited DeVinney to come to its meetings.<sup>190</sup>

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<sup>185</sup> Herbert F. Goodrich, *Letter from Rockefeller Foundation to Harrison Tweed* (May 14, 1953) (unpublished), available at the University of Pennsylvania, Biddle Law Library, American Law Institute Model Penal Code Records.

<sup>186</sup> Herbert F. Goodrich, *Letter from Herbert F. Goodrich to Joseph H. Willits* (May 18, 1953) (unpublished), available at the University of Pennsylvania, Biddle Law Library, American Law Institute Model Penal Code Records, Box 1, Folder 16.

<sup>187</sup> Joseph Willits, *Letter from Joseph Willits to Herbert F. Goodrich* (Apr. 8, 1953) (unpublished), available at Rockefeller Archives Center, Rockefeller Foundation Records, American Law Institute (1951–65), Projects (Grants), RG 1, SG 1.1, United States (Series 200), Social Sciences (Subseries 200.S), Box 303, Folder 3612.

<sup>188</sup> Leland DeVinney, *Note to Joseph H. Willits* (Dec. 7, 1953) (unpublished), available at Rockefeller Archives Center, Rockefeller Foundation Records, American Law Institute (1951–65), Projects (Grants), RG 1, SG 1.1, United States (Series 200), Social Sciences (Subseries 200.S), Box 303, Folder 3612.

<sup>189</sup> Joseph Willits, *Letter to Herbert F. Goodrich* (Dec. 18, 1953) (unpublished), available at Rockefeller Archives Center, Rockefeller Foundation Records, American Law Institute (1951–65), Projects (Grants), RG 1, SG 1.1, United States (Series 200), Social Sciences (Subseries 200.S), Box 303, Folder 3612.

<sup>190</sup> Herbert F. Goodrich, *Letter to Leland DeVinney* (Jan. 6, 1955) (unpublished), available at Rockefeller Archives Center, Rockefeller Foundation Records, American Law Institute (1951–65), Projects (Grants), RG 1, SG 1.1, United States (Series 200), Social Sciences (Subseries 200.S), Box 303, Folder 3613.

But although Goodrich made sure DeVinney remained up to date on the MPC's impressive progress, DeVinney was not initially inclined to support the ALI request to essentially double the Foundation's grant in 1956.

We are glad to learn of the impact which the work thus far done on the Model Penal Code is making in legal circles and the interest which is developing in this work. We are inclined to agree with your view that it would be unfortunate not to carry the work forward if tasks of major importance remain to be done. It would be our hope that the substantial assistance already given to the project by this Foundation would have carried the work far enough, so that at least the bulk of the cost of continuing the work could be found in other quarters, not the least of which might be the legal profession itself. This does not mean, however, that we will not be interested in discussing your further plans with you or in possibly sharing some modest fraction of the cost of your further work if this is essential.<sup>191</sup>

So Wechsler had to write to DeVinney both ensuring him of the MPC's social science bona fides — the extent to which the lawyers were engaging with and being influenced by psychiatrists, in particular<sup>192</sup> — and playing up the positive reception the MPC was enjoying across the country.<sup>193</sup> Again, Wechsler was successful at convincing the Foundation that he was following the plan they had conceived together. The ALI was granted a further \$200,000 at a meeting of the Foundation's Board of Trustees on December 4 and 5.<sup>194</sup> As before, Wechsler continued to send updates to DeVinney after the second large grant,<sup>195</sup> and asked him to attend meetings.<sup>196</sup> And the ALI

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<sup>191</sup> Leland DeVinney, *Letter from Leland DeVinney to Herbert F. Goodrich* (Feb. 2, 1956) (unpublished), available at the University of Pennsylvania, Biddle Law Library, American Law Institute Model Penal Code Records, Box 1, Folder 2.

<sup>192</sup> *Interview with Herbert F. Goodrich* (May 8, 1956) (unpublished), available at Rockefeller Archives Center, Rockefeller Foundation Records, American Law Institute (1951–65), Projects (Grants), RG 1, SG 1.1, United States (Series 200), Social Sciences (Subseries 200.S), Box 303, Folder 3614.

<sup>193</sup> *Telephone Interview with Herbert Wechsler* (Nov. 29, 1956) (unpublished), available at Rockefeller Archives Center, Rockefeller Foundation Records, American Law Institute (1951–65), Projects (Grants), RG 1, SG 1.1, United States (Series 200), Social Sciences (Subseries 200.S), Box 303, Folder 3615.

<sup>194</sup> Flora Rhind, *Letter to Herbert F. Goodrich* (Dec. 6, 1956) (unpublished), available at Rockefeller Archives Center, Rockefeller Foundation Records, American Law Institute (1951–65), Projects (Grants), RG 1, SG 1.1, United States (Series 200), Social Sciences (Subseries 200.S), Box 303, Folder 3615.

<sup>195</sup> *Interview with Herbert Wechsler* (May 27, 1957) (unpublished), available at Rockefeller Archives Center, Rockefeller Foundation Records, American Law Institute (1951–65), Projects (Grants), RG 1, SG 1.1, United States (Series 200), Social Sciences (Subseries 200.S), Box 303, Folder 3616.

<sup>196</sup> *Interview with Herbert Wechsler* (Mar. 30, 1960) (unpublished), available at Rockefeller Archives Center, Rockefeller Foundation Records, American Law Institute (1951–65), Projects (Grants), RG 1, SG 1.1, United States (Series 200), Social Sciences (Subseries 200.S), Box 303, Folder 3616.

continued to ask the Foundation for flexibility, especially in extending the time by which grant monies were expected to be exhausted or returned, and by requesting additional smaller grants to cover unexpected costs.

To sum up, the officers of the Division of Social Sciences of the Rockefeller Foundation ensured the ALI would create a model criminal code framed to suit their preoccupations and overseen by someone who shared their concerns and much of their worldview. Should he have been tempted to entirely ignore the Foundation’s repeated calls for greater collaboration with social scientists, Wechsler might have found his many requests for vast sums of money or extensions of time considerably more awkward to navigate.

### III. DANGEROUSNESS

In the preceding section, I have described influence of a somewhat general kind: the Rockefeller Foundation put a great deal of pressure on the ALI to incorporate the findings of social scientists, both through making sure the MPC project was headed by a likeminded lawyer and by pushing him and the ALI to structure the project in ways of which they approved. To deal fully with all (or even most) of the specifics of this influence would require far more research, which I hope this article will inspire. The documents presented in Part II offer only the first glimpse at a long and complex relationship between the ALI and the Foundation, and much more work will be necessary to elucidate all its ramifications. In this section, therefore, I will discuss only one example of the Foundation’s effect on the MPC: focusing the criminal law on identifying and reforming dangerous people.

#### A. *Dangerous Children and the ALI*

From the late 19<sup>th</sup> century, Rockefeller money was paying for the development of a particular view of human nature that would find its zenith in the 1950s and 1960s. This view held that people’s characters were largely a function of nurture rather than nature. Such a view implied (at least) two things: 1) environments that produced personalities that would be dangerous to others could be identified and ameliorated; and 2) such dangerous personalities could be reformed via treatment. This perspective was particularly prevalent among some of the most influential midcentury thinkers about American criminal law, who interpreted it to mean that retribution was, for the most part, an outdated and even barbaric aspect of criminal law, which should be reoriented towards the scientifically confirmed purpose of reforming antisocial characters.

Some of the most important early promoters of this theory worked at and were supported by the institution that owed its existence to John D. Rockefeller’s early generosity: the University of Chicago. Thanks to its bankroll, the new University quickly established a preeminent academic position, especially in the field of psychology. “Rockefeller’s millions meant

that Chicago's president William Rainey Harper could lure some of the brightest minds in Europe and America to his faculty," and "Psychologists at the University of Chicago exercised particular influence: first shattering and then re-ordering the profession."<sup>197</sup> The selection of Beardsley Ruml (with his Chicago psychology PhD) to lead the Memorial was emblematic of how much these theories mattered to and were reinforced by Rockefeller's other philanthropic efforts. Moreover, Ruml used his position at the Memorial to invest heavily in research on child psychology: "One subject that the [Memorial] particularly encouraged trained social scientists to tackle was child study."<sup>198</sup>

This scholarship on children and adolescents was reshaping fundamental attitudes about human nature. Thanks to the Memorial's investments, there emerged a broad social scientific consensus in the early part of the 20<sup>th</sup> century that children who committed antisocial acts couldn't really be held criminally responsible and could be thoroughly rehabilitated. The "mantra" of the scientists who held this view was "that children were emotionally plastic and much more easily influenced by training than were adults."<sup>199</sup> Children, in other words, were neither inherently vicious nor (usually) irredeemable. One of most influential claims made by University of Chicago researchers and others whom the Memorial funded was to extend this idea about children to people in general; they argued that humans were essentially products of their environment. Unlike other animals, these psychologists held, humans were largely malleable creatures, enormously susceptible to the people and places that surrounded them. "There was," according to these researchers, "an immense gap between human behavior and even the behavior of the highest primates. Human and animals did not share a large pool of common instinctual responses. In fact, very little about human behavior was innate . . . concluding that nurture, not nature, determined human behavior."<sup>200</sup> Moreover, "virtually all human behavior consisted of 'conditioned reflexes' learned from environment and training."<sup>201</sup>

There is some quite limited evidence to suggest that it was this kind of social science that Ruml and his team at the Laura Spelman Rockefeller Memorial wanted the ALI to adopt in their writing of the Model Code of Criminal Procedure: one of William Draper Lewis' letters to Ruml attempted to answer his questions about how such a code might deal with issues arriving in juvenile court, perhaps indicating that Ruml wanted the ALI to think more about children.<sup>202</sup> As with much of the later correspondence between

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<sup>197</sup> SEALANDER, *supra* note 33, at 82.

<sup>198</sup> *Id.* at 85.

<sup>199</sup> JUDITH SEALANDER, *THE FAILED CENTURY OF THE CHILD: GOVERNING AMERICA'S YOUNG IN THE TWENTIETH CENTURY* 35 (2003).

<sup>200</sup> SEALANDER, *supra* note 33, at 82.

<sup>201</sup> *Id.* at 83.

<sup>202</sup> Lewis, *supra* note 56.



Joseph Willits and Herbert Goodrich, however, the exact contents of the social science under discussion were often not explicit. And in any case, the feeling among the Memorial officers was that they had been unsuccessful in getting the ALI to significantly adopt any social scientific findings.

But while the first large-scale Rockefeller effort to directly influence the direction of American legal reform largely ended in failure — from the Memorial’s perspective, at least — other Rockefeller-funded projects were having a subtler impact that would be felt only decades after the drafting of the Model Code of Criminal Procedure in the 1920s. In the early 1940s, the ALI formulated a Youth Correction Authority Act (YCAA), a model law for the treatment of youthful offenders.<sup>203</sup> The YCAA clearly incorporated the view championed by the University of Chicago academics that children should be understood as products of their environments rather than hopelessly evil malefactors. Given that psychological understanding, the Act’s basic premise was that responses to crime by minors should be based on their potential dangerousness, while stressing that such behavior should be met with treatment, not retribution.<sup>204</sup> From there (as shown in the excerpts below), the MPC’s drafters followed in the footsteps of the psychologists by suggesting that what was true of children was in fact true of everyone.

The significance of social scientific attitudes towards children for the Model Penal Code might not be immediately obvious to us — I cannot locate any scholarly references to this crucial fact — but it was to the MPC’s drafters and their advisors, who saw the ALI’s efforts to create a law governing youthful offenders as one of the model code’s most important philosophical prototypes. Although the psychological consensus on what children were like, how they should be treated, and what that meant for the understanding of human nature in general was fading after the Second World War,<sup>205</sup> it had already been enshrined in the ALI’s work. That is, the drafters of the MPC appear to have been convinced that the logical evolution in criminal law theory was to apply the ALI’s views on children to everyone else. This is partly a testament both to the long-game investments of the Rockefeller Foundation and its predecessors and the Foundation’s specific encouragement of the MPC team to more significantly avail itself of the ideas of social scientists.

The YCAA’s influence on the MPC hasn’t been hidden, but it hasn’t been much noted, either. Wechsler’s *The Challenge of a Model Penal Code* directly acknowledges that influence.

There has been some acceptance also of the larger point that penal law in general ought to concern itself with the offender’s personality, viewing his crime primarily as a symptom of a deviation that may

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<sup>203</sup> Jerome Hall, *The Youth Correction Authority Act: Progress or Menace?*, 28 AMERICAN BAR ASS’N. J. 317 (1942).

<sup>204</sup> William Draper Lewis, *The Youth Correction Authority Act: A Model*, 28 AMERICAN BAR ASS’N J. 322 (1942).

<sup>205</sup> SEALANDER, *supra* note 199, at 35.

yield to diagnosis and to therapy. This is the theory of the juvenile court and youth offender laws, which seek public protection mainly through a disposition calculated to effect reform of antisocial tendencies, with the offender being deprived of liberty only when and insofar as that is deemed essential pending the rehabilitation sought.<sup>206</sup>

In his foundational explanation of the nature and aims of the MPC project, Wechsler thus directly located the Code's focus on offender dangerousness in the YCAA. No scholar that I can find has noted the YCAA's influence on the MPC, and the question of the relationship between foundation-funded social scientific understandings of children and major American criminal law reform has gone almost completely unexplored. Why has no one picked up on Wechsler's explanation? Two primary reasons. First, the fact that the MPC is rarely located in its historical context means it's harder to see it as connected to larger trends of (often foundation-driven) academic developments in fields like psychology that make such a connection meaningful. Second, since few researchers concerned with the MPC have been interested in using either the ALI or Foundation archives, they haven't seen the letters that would otherwise make the connection stand out more starkly. For example, Alfred Gausewitz — the other scholar of criminal law Willard Hurst recommended to Joseph Willits of the Foundation — wrote in a letter in early 1951:

I took the position that the Institute has announced its philosophy by the Youth Correction Act . . . that the chief contribution of the code would be to express and carry out that philosophy in the adult field . . . that the code should be limited to acts indicative of a personality so dangerous as to justify the expense of disabling and rehabilitative treatment . . . that the real need is to provide a legal system that will permit the utilization of the knowledge gained by the other disciplines such as the social and medical sciences; and that the procedures and organization of the Youth Correction Act be reexamined in the light of the experience that has been had with it, for incorporation into the new code.<sup>207</sup>

An even clearer indication of the YCAA's influence on the MPC's overall approach is found in an (ultimately omitted) handwritten page of a draft proposal Goodrich was planning to send to Willits:

The treatment of convicted offenders — It is abundantly clear that confinement of convicted persons . . . falls short of what everyone

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<sup>206</sup> Wechsler, *supra* note 169, at 1104.

<sup>207</sup> Alfred Gausewitz, *Letter to Frank A. Ross* (Jan. 13, 1951) (unpublished), available at the University of Pennsylvania, Biddle Law Library, American Law Institute Model Penal Code Records, Box 2, Folder 8, Page 1.

would like to see accomplished, the rehabilitation of the prisoner. In the Youth Correction Authority act the Institute has provided for a treatment board for youthful offenders. Can society afford to make equally [. . .] provisions for all adult offenders as well?<sup>208</sup>

The MPC was thus significantly premised on adopting the views of human nature derived from psychological research on children most influentially undertaken at the Rockefeller-founded University of Chicago.<sup>209</sup> This is to say that they should be evaluated for the danger they might pose by focusing on their individual mental states.

### B. *Herbert Wechsler and the MPC*

The MPC’s focus on dangerousness was due to direct as well as indirect Foundation influence: the man that the Foundation ensured would lead the project had long espoused the same ideas about the proper focus of criminal law. It mattered, in other words, that it was Herbert Wechsler of whom the Foundation approved. Though a treatment of the other potential candidates<sup>210</sup> deserves and awaits further study to demonstrate the full significance of Wechsler’s selection, I will focus here on one key feature of his intellectual worldview that has had an enormous impact on the MPC: Wechsler was especially committed to crafting a penal law that responded to the dangerousness of an offender’s character rather than the heinousness of their act.<sup>211</sup> In this, he was not unique, but that vision helped orient the MPC and those tasked with its implementation towards evaluating individual psychologies.

As Russell Covey points out, Herbert Wechsler’s belief that the principal purpose of punishment was to protect society from those who threatened to harm it is visible at least as early as the 1937 articles he co-wrote with his Columbia Law School colleague Jerome Michael. As Covey sees it, these articles (*The Rationale of the Law of Homicide*, parts I and II) present the earliest indications of the project that would dominate Wechsler’s career, which was to rewrite the antiquated criminal law and “refound it based on sound, scientific principles.”<sup>212</sup> (It should, of course, be remembered that the scientific understandings of human personality and criminality for which the two Columbia professors hoped to make a place in the law had been in significant part funded by the Rockefellers.) That meant doing away with

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<sup>208</sup> Goodrich, *supra* note 166.

<sup>209</sup> I have found no evidence that the Rockefeller Foundation played any active role in the formation of the YCAA (though it’s possible that further research would reveal such a connection).

<sup>210</sup> John Waite, Rollin Perkins, Jerome Hall, Alfred Gausewitz, Louis Schwartz, and Sheldon Glueck, to name some.

<sup>211</sup> See Russell D. Covey, *Exorcizing Wechsler’s Ghost: The Influence of the Model Penal Code on Death Penalty Sentencing Jurisprudence*, 31 HASTINGS CONST. L. Q. 189, 209 (2004).

<sup>212</sup> *Id.* at 195.

what they saw as the antiquated notion of retroactive retaliation in favor of prospective protection: Wechsler and Michael saw themselves as “rejecting the contention that the penal law should serve the end of retribution, in favor of the view that the law . . . should endeavor to prevent behavior which is inimical to the common good.”<sup>213</sup> Their commitment to overthrowing retribution’s place in criminal law was so firm that they “avoid[ed] even uttering the word ‘punishment;’ they preferred the term ‘treatment.’”<sup>214</sup>

The main purpose of the criminal law, as Wechsler and Michael conceived of it, was to find and treat the most dangerous social threats. As “the proper disposition of a criminal offender depends on an understanding of the dangerousness of his character,”<sup>215</sup> they sought to move away from a strict consideration of the dangerousness of *acts* to a concern with the dangerousness of *people*. For example, they advocated abandoning the traditional common law emphasis on deliberation as a principal component in judging the seriousness of a murder. The common view was that the more deeply a murderer had considered their act, the more blameworthy they were and therefore should be more harshly punished. In Wechsler and Michael’s view, however, deliberation was largely insignificant because it revealed little about the defendant’s propensity to kill again in the future. Instead, the law should be looking for evidence about the killer’s actions and beliefs beyond the scope of the crime, because (in Covey’s phrase) “the proper indicia of the defendant’s dangerousness is not deliberation, but habituation.”<sup>216</sup>

Wechsler put this belief into most effective practice in the memos that, when shared with Joseph Willits, secured his position as Chief Reporter of the MPC and which were consolidated into his foundational *Challenge of a Model Penal Code*. The social scientific critique, he wrote, was that criminal law was oriented towards the wrong ends. All of its failings were “sometimes urged as evidence that penal law, whatever its exponents may avow as its philosophy and purposes, is actually animated largely by retributive objectives, constituting nothing more than vengeance in disguise.”<sup>217</sup> This would not be Wechsler’s approach: the bulk of the article is dedicated to how dangerous people should be identified and rehabilitated. Scholars writing about the Model Penal Code attest that Wechsler’s view of the criminal law’s purpose was written into the MPC, which was particularly and unusually focused on the dangerousness of offenders. For example, Markus Dubber asserts that the MPC is shot through with what he terms “treatmentism”: an apparently obsessive focus on offenders’ individual psyches in the hopes of

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<sup>213</sup> Herbert Wechsler & Jerome Michael, *A Rationale of the Law of Homicide: I*, 37 COLUM. L. REV. 701, 730 n.126 (1937).

<sup>214</sup> Covey, *supra* note 211, at 195.

<sup>215</sup> *Id.* at 197.

<sup>216</sup> *Id.* at 199.

<sup>217</sup> Wechsler, *supra* note 169, at 1103.

using the criminal process to determine a course of treatment.<sup>218</sup> He writes that, “To the extent there is a ‘principle’ in the Code it is the (remarkably, and almost scientifically) consistent commitment to gauging criminal liability by personal culpability.”<sup>219</sup> This “culpability” is not blameworthiness or immorality as the common law understood it, but an indication of dangerousness: “The Code’s ‘principle’ of ‘culpability’ is not a normative principle, a requirement of ‘morality’ or ‘justice,’ but an insistence on scientific accuracy: modes of culpability (varieties of intent or *mens rea*) capture the harmful tendency of an act insofar as they reflect the dangerousness of the actor.”<sup>220</sup> Wechsler and the MPC he oversaw were thus fully committed to a view of human nature derived from the early twentieth-century Rockefeller-funded psychological studies of children, in which the dangerousness of the defendant was the most important element on which the criminal law turned.

### C. *Dangerousness Today and Tomorrow*

To reiterate: By the mid-1950s, Rockefeller resources had for decades been supporting social scientists whose views included the firm belief that people’s antisocial tendencies were remediable and that they were thus largely in need of treatment rather than punishment. They had invested considerable effort and money in attempting to get legal groups like the American Law Institute to incorporate those views into the legal reforms they championed. Although the Memorial had been largely unsuccessful in that effort with the Model Code of Criminal Procedure, the YCAA demonstrated a new willingness on the part of the ALI and its members to adopt such attitudes to human behavior and its reform. In part due to the horror of the Second World War, the Rockefeller Foundation took a more interventionist approach in directing the activities of the ALI in the 1950s than the Memorial had taken in the 1920s. Unsurprisingly, therefore, the person chosen to head the MPC project had a long history of expressing similar outlooks and the model code he oversaw was very much a product of that vision. The MPC’s preoccupation with dangerousness and its reformation or incapacitation continues to influence American criminal law today.

Wechsler and the MPC were an important part of a general shift in American criminal law that was placing more emphasis on offender dangerousness.<sup>221</sup> During the mid-twentieth century, “the justice system’s

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<sup>218</sup> See Markus Dirk Dubber, *Penal Panopticon: The Idea of a Modern Model Penal Code*, 4 BUFFALO CRIM. L. REV. 53 (2000). It should be noted that this view is somewhat challenged in Walker, *supra* note 6.

<sup>219</sup> Markus Dirk Dubber, *The Model Penal Code, Legal Process, and the A legitimacy of American Penalty*, in FOUNDATIONAL TEXTS IN MODERN CRIMINAL LAW 239, 241 (Markus Dirk Dubber ed., 1st ed. 2014).

<sup>220</sup> *Id.*

<sup>221</sup> See Paul H. Robinson, *Punishing Dangerousness: Cloaking Preventive Detention as Criminal Justice*, 114 HARV. L. REV. 1429, 1447–48 (2001) (“The seeds of this shift from desert

focus . . . shifted from punishing past crimes to preventing future violations through the incarceration and control of dangerous offenders.”<sup>222</sup> In his 1978 overview of major trends in American criminal legal history, *Rethinking Criminal Law*, George Fletcher made a similar observation:

The emphasis in much recent thought is on the use of the criminal law to identify and confine potentially dangerous offenders. This is the explicit rationale in the Model Penal Code for assessing liability in cases of criminal attempts. The good of the whole is furthered by isolating a dangerous person in prison. And this is all that is thought necessary to justify the suffering of the individual confined.<sup>223</sup>

As Fletcher explains, the kind of dangerousness on which the MPC was focused was quite different from the criminal law principles that preceded it. The common law, in Fletcher’s account, discusses danger in terms of the hazards posed by particular criminal acts, such as when “Oliver Wendell Holmes, Jr., referred to the ‘nearness of the danger’ in working out the line between preparation and attempt.”<sup>224</sup> After the MPC, danger shifted from act to actor, “to the contemporary concern about whether the actor is the type of person whose confinement will serve the purposes of the criminal law.”<sup>225</sup>

Although Wechsler and those with whom he worked saw themselves as liberal modernizers, their innovations often produced results that would have contradicted their principles as the fundamental presupposition in American criminal law shifted from rehabilitation to retribution. The MPC itself was largely adaptable to that shift: “despite its driving treatmentist rationale, the Code since its publication has survived shifts from treatmentism as rehabilitation to treatmentism as incapacitation, and from treatmentism to retributivism, intact, adapting itself to each new orthodoxy along the way.”<sup>226</sup> The result has been, according to many scholars, profoundly damaging. Dubber claims that “all of the weapons of the crime war can be found in the Code, even if they are not apparent to the naked eye.”<sup>227</sup> Among the specific such weapons Dubber identifies are a greater reliance on (and heavier punishment of) inchoate crimes, the elimination of the defense of impossibility, and the harsh treatment of crimes of possession (both drugs and weapons). All of these, in Dubber’s view, derive from the MPC’s concern with offender dangerousness. Someone who has committed an inchoate crime like an attempt

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to dangerousness were planted at least as early as the 1950s with the rehabilitation movement. For example, the Model Penal Code, promulgated in 1962, generally grades inchoate offenses the same as substantive ones.”)

<sup>222</sup> *Id.* at 1429.

<sup>223</sup> GEORGE P. FLETCHER, *RETHINKING CRIMINAL LAW* xix (1978).

<sup>224</sup> *Id.* at 173.

<sup>225</sup> *Id.*

<sup>226</sup> DUBBER, *supra* note 1, at 12.

<sup>227</sup> Markus Dirk Dubber, *Policing Possession: The War on Crime and the End of Criminal Law*, 91 J. CRIM. L. & CRIMINOLOGY 829, 991 (2000).



isn't more blameworthy than someone who has succeeded in actually killing or robbing someone; if anything, they may be *less* blameworthy. The rationale for punishing attempts comparably to completed crimes — or for not allowing attempters to diminish their punishments by arguing that the thing they were trying to do was never possible in the first place — is that the attempter has demonstrated just as much dangerousness as the successful offender. Similarly, penalizing possession of objects that might cause harm like drugs or weapons is, at least on this theory, about preventing the harm that people might cause with those objects in the future rather than punishing the actual act of holding them. Paul Robinson likewise identifies three strikes laws and the lowering of ages at which juveniles can be prosecuted as adults as functions of a dangerousness-focused criminal system.<sup>228</sup>

Even more consequential than these, Dubber argues, is the fundamental shift in the criminal law's orientation that the MPC helped bring about, turning it into:

a system of criminal law geared toward the identification and disposal of criminal deviants. . . . The war on crime, in the end, reveals itself not as an aberration from the principled path of Anglo-American criminal law, but as the culmination of the progressive project to reform the barbaric practice of punishment in light of ill-considered social science. This project can be traced back to the early decades of this century and found its most influential manifestation in the Model Penal Code.<sup>229</sup>

The effects of the widespread influence of the MPC's focus on the dangerousness of defendants can be devastating: “dangerousness” is a quality that is often assessed according to the potentially prejudiced beliefs and experiences of the decision-makers. As Luis Chiesa writes, “[w]ith its emphasis on punishing actors for their wicked will rather than for their harmful acts, the pattern of subjective criminality is particularly susceptible to generating a racist and repressive kind of criminal law.”<sup>230</sup> There is “an uncanny resemblance between people who are perceived to be dangerous and groups that the ruling classes are prejudiced against.”<sup>231</sup>

This principle can operate to hide prejudicial decisions (even from the people making those decisions) at all levels of the criminal justice system. While acknowledging that, “[t]he aim of the new Model Penal Code formulations was, of course, to be more humane and lenient,” V.F. Nourse suggests, “[i]magine, for example, that some believed that African Americans were more aggressive than others and it was this aggression that suggested

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<sup>228</sup> See Robinson, *supra* note 221, at 1449.

<sup>229</sup> Dubber, *supra* note 227, at 839.

<sup>230</sup> Luis Chiesa, *The Model Penal Code, Mass Incarceration, and the Racialization of American Criminal Law*, 25 *GEORGE MASON L. REV.* 605, 607 (2018).

<sup>231</sup> *Id.* at 647.

the depravity of a particular killing.”<sup>232</sup> Jurors who think in this way are not only more likely to give free reign to their prejudices when asked to make determinations on the basis of offenders’ dangerousness; they are more likely to think they’re doing so for good reasons, because the prejudice “will be buried in the concept of something that purports to be natural.”<sup>233</sup>

Research on how judges and juries actually engage with the question of dangerousness has demonstrated just how pernicious the concept’s influence can be. In the context of death penalty cases, “capital sentencers appear to focus on the more concrete (but counterfactual) question: does this defendant pose a risk to me, my family, or my community?”<sup>234</sup> Depressingly, if unsurprisingly, “[j]urors, judges, and the prosecutors that control the charging decision plainly answer that question more often in the affirmative when the victim of the crime is like them (meaning, usually, that he or she is white).”<sup>235</sup> Our courts impose capital sentences more often on non-white offenders because they are asked to consider how dangerous they think those offenders are.<sup>236</sup>

Dangerousness as a cornerstone of adjudication — and the risk of hard-to-spot prejudice that comes along with it — is ever-more-firmly embedded in the American criminal justice system, in part thanks to the now-routine use of tools that purport to predict how dangerous someone is. Bernard Harcourt writes that “one of the most striking trends in law enforcement and punishment at the turn of the twenty-first century” is the fact that “actuarial methods have grown exponentially in the criminal justice system.”<sup>237</sup> Harcourt explains that:

Risk assessment, algorithms, and criminal profiles now permeate the field of crime and punishment. The same trend is present in a number of other criminal law contexts, including the increased popularity of selective incapacitation, use of risk assessment for setting bail, predictions of future dangerousness in capital sentencing, and the

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<sup>232</sup> V.F. Nourse, *Hearts and Minds: Understanding the New Culpability*, 6 BUFFALO CRIM. L. REV. 361, 384 (2002).

<sup>233</sup> *Id.*

<sup>234</sup> Covey, *supra* note 211, at 252–53.

<sup>235</sup> *Id.* at 253.

<sup>236</sup> Many other works discuss the nature and consequences of this shift in focus without explicitly mentioning the MPC, though they often point to the same period as the highwater mark of rehabilitation reforms. For example, Sandra Mayson writes that, “[u]ntil the 1960s, the stated function of the pretrial system was to ensure the appearance of the accused at trial.” Sandra G. Mayson, *Dangerous Defendants*, 127 YALE L.J. 490, 502 (2017). However, during the 1960s, “the system underwent a profound shift” so that today “authorities on pretrial law and policy . . . now universally identify a second purpose of the pretrial system: protecting the public from harm at the hands of dangerous defendants.” *Id.* Some scholarship even views the move towards zero-tolerance school discipline policies as a reflection of these shifts. See Ronnie Casella, *Zero Tolerance Policy in Schools: Rationale, Consequences, and Alternatives*, 105 TCHRS. COLL. REC. 872, 879–80 (2003).

<sup>237</sup> BERNARD E. HARCOURT, AGAINST PREDICTION: PROFILING, POLICING, AND PUNISHING IN AN ACTUARIAL AGE 16 (2006).

notorious three-strikes laws passed in California and elsewhere. As Jonathan Simon notes, actuarial risk assessment “has become a largely uncontested aspect of a much-expanded criminal process, and it has been entrusted to a range of criminal justice actors, including prosecutors, juries, judges, and administrative appointees.” Prediction of criminality has become *de rigueur* in our highly administrative law enforcement and prison sectors — seen as a necessity, no longer a mere convenience.<sup>238</sup>

Much has been made of the potential of this algorithmic adjudication, in which a defendant’s criminal propensities are assessed by a variety of formulas for the purpose of determining bail or sentencing. The practice has also been roundly criticized, because of the easy way in which it replicates preexisting racial and economic disparities.<sup>239</sup> Moreover, the ever-greater sophistication of artificial intelligence technologies risks further entrenching these disparities even more decisively and invisibly into our legal decision-making processes.<sup>240</sup> This increasingly ubiquitous routinization of assessments of dangerousness is the long legacy of a particular social scientific movement that owes its power and longevity to the choices of a few ultra-wealthy private groups.

#### CONCLUSION

To the extent that the MPC is ever historically contextualized, the influence of the midcentury social science whose principles it so clearly reflects is generally described as a natural phenomenon. All the scientists were lining up in one direction, so it was only to be expected that the MPC’s drafters would follow their lead. But there was nothing natural about it: as this article has shown, the overall direction had been set through strategic foundation investments over decades and the Rockefeller Foundation’s principal aim in its oversight of the MPC project was to push the ALI to adopt particular social scientific ideas. The Rockefeller Foundation, among other wealthy philanthropies, created both the background conditions and the specific pressure points that directed the development of the Model Penal Code by the ALI, another private group. One of the many effects of this influence was to ensure that the MPC enshrined a focus on offender dangerousness into American criminal law. That view, despite its progressive origins, has had some deleterious unintended consequences, including lending largely invisible support — another silent revolution — to America’s regime of discriminatory sentencing.

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<sup>238</sup> *Id.* (internal citation omitted).

<sup>239</sup> See Bernard E. Harcourt, *Risk as a Proxy for Race*, 27 *FED. SENT’G REP.* 237, 237 (2015).

<sup>240</sup> See Chelsea Barabas, *Beyond Bias: Re-Imagining the Terms of “Ethical AI” in Criminal Law*, 12 *GEO. J. L. & MOD. CRITICAL RACE PERSP.* 83 (2020).

One way in which these effects continue to be reinforced, and thus one of the biggest reasons all this history has been hard to see, is our criminal law curricula: the way we teach criminal law in American law schools is a direct reflection of Herbert Wechsler, the Model Penal Code, and the social scientific theories that both absorbed through the investments and pressure of those with lots of Rockefeller money to spend. The casebook written by Wechsler and his colleague at Columbia, Jerome Michael, has become a major, if largely unacknowledged, model for the materials we use today.<sup>241</sup>

Wechsler and Michael's casebook was revolutionary in both form and message. Most strikingly, it abandoned the strict focus on cases of the most popular textbooks at the time.<sup>242</sup> Instead, they supplemented their reproductions of caselaw with a variety of related material designed to provoke students to consider the normative questions raised by each paradigmatic instance of criminal adjudication.<sup>243</sup> Beyond encouraging philosophical inquiry, the effect of this change was also to weaken students' confidence in the traditional common law and promote the necessity of centralized projects of rationalization like the MPC.<sup>244</sup> (Wechsler himself had lived through the repeated frustrations of New Deal efforts aimed at repairing the catastrophe of the Great Depression, which shaped his antipathy for the unruliness of common law judges.<sup>245</sup>) This shift in focus was precisely the change that Joseph Willits had hoped to see in legal education when he spoke to the Rockefeller Foundation board in 1949 about the problem of the unphilosophical lawyers produced by the case method (and may have been part of the reason he favored Wechsler to head the MPC). This transformation in criminal legal education was cemented by the completion of the MPC: "While the drafting of the MPC provided Wechsler with an opportunity to bolster his innovative approach to teaching criminal law, the completion of the MPC in 1962 canonized it. Suddenly, the idea of teaching criminal law as a common law course, without attention to public law solutions or policy considerations seemed completely out of step with real world trends."<sup>246</sup>

The consequence of this transformation in criminal legal education has been, some scholars argue, to subtly persuade students that the MPC or the laws derived from it are neutral and natural principles of adjudication, so that it rarely occurs to them to identify the law itself as a source of the criminal justice system's inequities. Through his casebook and the MPC, Wechsler "identified many ways in which existing law was irrational, but he tried to demonstrate that the problems could be fixed; criminal law could

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<sup>241</sup> Anders Walker, *The Anti-Case Method: Herbert Wechsler and the Political History of the Criminal Law Course*, 7 OHIO STATE J. OF CRIM. L. 217, 244-45 (2009).

<sup>242</sup> *Id.* at 228.

<sup>243</sup> *Id.* at 230.

<sup>244</sup> *See id.* at 237.

<sup>245</sup> *Id.* at 245.

<sup>246</sup> *Id.* at 238.

be made into the grand and essential instrument that society so desperately needed. And importantly, this reform project began with substantive law, or, still more strongly, counted as *law* only the substantive definitions of crimes and not the enforcement process.”<sup>247</sup> Weschler’s mode is often how we teach criminal law in American law schools today: a required first-year course on, essentially, the philosophy of criminal responsibility, with classes on how that philosophy actually affects people’s lives relegated to electives. In that philosophy class, students are taught “a framework that claims a special status and importance for criminal law, arguing that for certain kinds of problems, criminal law is necessary and there simply is no alternative response.”<sup>248</sup> This approach emphasizes both criminal law’s centrality and, in some sense, its goodness: “It is a framework that recognizes the great burdens imposed by criminal law but nonetheless proclaims the nobility and dignity of those imposing those burdens.”<sup>249</sup> Because students are taught to view the most acute moments of human crisis — such as murders, rapes, and robberies — through the lens of criminal legislation, they may more easily believe that “the burdens of policing and punishment can be limited to the deserving (or the sufficiently suspicious) by well-designed substantive law.”<sup>250</sup> They may come to feel that our legislators have in general risen to Herbert Wechsler’s challenge, sweeping away the incomprehensible barbarisms of the common law to be replaced by sober interventions against those defendants whose dangerousness we still assess according to the best practices of modern psychology. Why agitate for change in a system that is simultaneously necessary and trying its best?

The kind of influence I describe in this article is not the result of a sinister cabal scheming to control the world for its own benefit. Many of their goals — such as the desire to treat children and then all people as redeemable — were obviously progressive ones with which many liberal observers might still agree. The prominent civil rights attorney Bryan Stevenson, for example, has made famous the maxim that, “each of us is more than the worst thing we’ve ever done,” an eloquent appeal to the power of rehabilitation.<sup>251</sup> Many leading progressives today believe, consistent with the midcentury MPC, that people’s criminality is largely a product of their environment and that treatment is a far more appropriate response to their behavior than punishment. But we need to be aware of how even such progressive visions can produce regressive results.

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<sup>247</sup> Alice Ristroph, *An Intellectual History of Mass Incarceration*, 60 B.C. L. REV. 1949, 1977 (2019).

<sup>248</sup> *Id.* at 2008.

<sup>249</sup> *Id.*

<sup>250</sup> *Id.*

<sup>251</sup> BRYAN STEVENSON, *JUST MERCY: A STORY OF JUSTICE AND REDEMPTION* 290 (Spiegel & Grau trade paperback edition ed. 2015).

Beyond these specific unintended consequences, we must also take account of philanthropy's warping effects on democratic decision-making when it gets involved with legal reform. Such private charities have the power to establish the themes of our public discourse, which has always been their aim.

Under the umbrella of a general mission — such as the Rockefeller Foundation's commitment to “the well-being of mankind” — future generations of trustees and staffers would direct funds toward new programs and adjust priorities to changing conditions. Foundations became significant funders of schools and universities, academic research, public health initiatives, agricultural reform, and cultural outreach, both in the United States and abroad. An overlapping leadership cadre, educated at East Coast prep schools and connected though military and national security service during World War II, shuttled between high-level positions in the federal executive branch and in private foundations, bringing ideas back and forth between them and using local, foundation-funded initiatives as prototypes for new federal programs.<sup>252</sup>

As Peter Seybold writes of the Ford Foundation's immense success in directing the academic focus of political scientists beginning in the 1950s, the “rise to prominence” of the particular perspective favored by the Foundation “did not signal the victory of a particular perspective in the marketplace of ideas; rather, it demonstrated the very significant influence that institutional support by major foundations can have on the production of ideas in our society.”<sup>253</sup>

That's what's going on here: institutions with lots of money aren't necessarily banding together to defraud us of our wealth or liberty, but they are constraining our ability to imagine different worlds for ourselves by setting the terms of debate without our knowledge. Seybold explains that successful academic ideas may simply reflect where the money is. In the case of the Ford Foundation, “[t]he funds involved in these efforts were earmarked for” the kinds of research the Foundation cared about.<sup>254</sup> “[T]hey were not available to researchers or students with other interests or viewpoints. This channeling greatly influenced the career choices of students, as well as the research programs of both individual scholars and institutes.”<sup>255</sup> When that happens, the idea that the foundation wants to promote becomes baked into our conceptual architecture.

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<sup>252</sup> MAYEUX, *supra* note 17, at 111.

<sup>253</sup> Peter Seybold, *The Ford Foundation and the Transformation of Political Science, in THE STRUCTURE OF POWER IN AMERICA: THE CORPORATE ELITE AS A RULING CLASS* 185, 186 (Michael Schwartz ed., 1987).

<sup>254</sup> *Id.* at 195.

<sup>255</sup> *Id.*



As a network of institutions grows it becomes part of the “natural order of things.” The very existence of a center for international affairs or metropolitan politics at a prestigious university tends to define the appropriate boundaries for inquiry. As the institutional base for producing social science research matures, it becomes somewhat independent of the funding sources that gave it life. Ultimately, this independence leads to a drifting away from the founder’s mandates, but the research is still infused with the founder’s assumptions.<sup>256</sup>

Seybold also acknowledges that, “There is no conspiracy, for this is not a secret war. . . . But the forces which shape intellectual discourse in this country are nevertheless too often hidden from public view.”<sup>257</sup> And those forces continue to exert their influence many years after their initiators are dead and almost forgotten: “Twenty years down the road, a set of institutions exist which are prestigious and prominent, and they are the ‘natural’ organizations to which knowledge consumers turn for new research.”<sup>258</sup> That’s the situation we find ourselves in now, living in a society governed in significant part by the forgotten and invisible authority of the Rockefeller Foundation and its Model Penal Code.

American criminal law is increasingly administered by private businesses, and most people don’t think that’s a good thing. “When punishment of offenders passes from public to private, there are a wide variety of consequences, and none of them are good. As the history of private incarceration illustrates, private corrections in this country were built over a quicksand of racism, slavery, and profit.”<sup>259</sup> Beyond the obvious potential consequences for the people subject to systems of privatized corrections, the community relinquishing control over punishment is harmed, too. “When the actual imposition of sentence and punishment is taken away from local governments and given to faceless, privatized companies, everything and everyone suffers. . . . this power to for-profit privatizers exacts a heavy cost on community rights, legitimate punishment, and local, democratic control.”<sup>260</sup> The privatization of criminal justice has been broadly condemned.<sup>261</sup> But, amid all this justified concern, what hasn’t been noticed is that a great deal of American criminal law *itself* is substantially the product of the decades-long efforts of a single private actor. Moreover, this kind of private influence continues today, as a variety of wealthy institutions or individuals continue

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<sup>256</sup> *Id.* at 196–97.

<sup>257</sup> *Id.* at 197.

<sup>258</sup> *Id.*

<sup>259</sup> Laura I. Appleman, *Cashing in on Convicts: Privatization, Punishment, and the People*, UTAH L. REV. 579, 612 (2018).

<sup>260</sup> *Id.* at 620.

<sup>261</sup> For an overview, see Dae-Young Kim, *Prison Privatization: An Empirical Literature Review and Path Forward*, 32 INT’L CRIM. JUST. REV. 24 (2022).

to direct large sums towards legal reform efforts in ways that are still not systemically understood.<sup>262</sup>

We don't have to let private organizations change our law in such profound ways; in other contexts, many of us recoil from the thought. The same legal academic establishment that generally praises the MPC — or at least sees it as a largely unobjectionable bedrock of American criminal law — has much more to say on the subject of, for example, the American Legislative Exchange Council. It would of course be disingenuous to imply that there aren't massive differences between the ALI and ALEC, the right-wing organization dedicated to advancing conservative causes by lobbying state legislators to adopt model legislation. "Not all private lawmakers are created equal," writes one scholar deploring the "private lawmaking" of ALEC and the NRA, while celebrating the ALI as a "prestigious legal organization" that works "to clarify, modernize, and improve the law, while maintaining some level of transparency regarding their processes."<sup>263</sup> But it would be equally disingenuous to ignore or deny (as many scholars do) that there isn't something similar about wealthy, elite, private institutions with similar demographics, if dissimilar politics, taking huge amounts of money from private funders to encourage sweeping changes in American law.<sup>264</sup>

Other countries do this differently:<sup>265</sup> in almost every country that has an official body dedicated to legal reform, that body is a part of the government rather than a private actor.<sup>266</sup> Measuring the relative successes and

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<sup>262</sup> See, e.g., Press Release, Pershing Square Foundation, The Pershing Square Foundation Supports Innocence Project's Groundbreaking Criminal Justice Policy Agenda With \$1 Million (Feb. 8, 2013) (announcing a \$1 million donation to criminal justice advocacy organization the Innocence Project from the Pershing Square Foundation, founded by hedge-fund manager Bill Ackman), <https://pershing-square-foundation.org/2013/02/08/the-pershing-square-foundation-supports-innocence-projects-groundbreaking-criminal-justice-policy-agenda-with-1-million/> [<https://perma.cc/TW2X-LYDM>].

<sup>263</sup> Barak Orbach, *Invisible Lawmaking*, UNIV. OF CHICAGO L. REV. DIALOGUE 1, 2 (2012).

<sup>264</sup> Some scholars have noted the influence of outside money on particular ALI projects. See, e.g., Jeffrey Stempel, *Hard Battles Over Soft Law: The Troubling Implications of Insurance Industry Attacks on the American Law Institute Restatement of the Law of Liability Insurance*, 69 CLEV. STATE L. REV. 605 (2021); Jonathan R. Macey, *The Transformation of the American Law Institute*, 61 GEO. WASH. L. REV. 1212 (1993); William T. Barker, *Lobbying and the American Law Institute: The Example of Insurance Defense*, 26 HOFSTRA L. REV. 573 (1998); Elizabeth Laposata, *Tobacco Industry Influence on the American Law Institute's Restatements of Torts and Implications for Its Conflict of Interest Policies*, 98 IOWA L. REV. 1 (2012); Michelle J. Anderson, *Backwards: The ALI on Consent and Mens Rea for Rape*, 76 NYU ANNUAL SURVEY OF AMERICAN LAW (2020), <https://annualsurveyofamericanlaw.org/wp-content/uploads/2022/01/76.2-Anderson.pdf> [<https://perma.cc/G94E-9Y6R>]. This is necessary work that should encourage further critical appraisals.

<sup>265</sup> For an overview, see ASIF H. QURESHI, *LAW REFORMS AROUND THE WORLD: PERSPECTIVES FROM NATIONAL AND INTERNATIONAL LAW* (2023). There is, of course, ample criticism of non-American law reform models. See, e.g., JEREMY HORDER, *HOMICIDE AND THE POLITICS OF LAW REFORM* (2012). But there is little systematic comparison of the relative strengths and demerits of these various processes of legal reform, and I believe such comparison would be immensely fruitful.

<sup>266</sup> International Law Reform Bodies, LAW REFORM COMMISSION OF IRELAND, <https://www.lawreform.ie/useful-links/international-law-reform-bodies.132.html>.

failures of these different approaches to legal reform is a tricky business, and one only rarely attempted.<sup>267</sup> But that doesn't mean it shouldn't be: We should be thinking about how our legal reform processes compare to those of other nations. We might, after consideration of potential alternatives, decide (demographics and unintended consequences aside) that it's preferable to live under a regime of criminal law many of whose major shifts are driven by a small group of unelected rich people and the recipients of their largesse. But we should know that that's the choice we're making.

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<sup>267</sup> See Angela Melville, *Conducting Law Reform Research: A Comparative Perspective*, 28 ZEITSCHRIFT FÜR RECHTSSOZIOLOGIE 153 (2007).

