

Revising the Model Penal Code: Keeping It Real

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I. INTRODUCTION

The thesis of this talk can be simply stated: In any serious discussion of revising the Model Penal Code (MPC), the object of the game cannot be revising the MPC itself. Rather, the object of any revision of the Code is to promote the reform of the nation's *actual* criminal codes, as adopted by the state legislatures and Congress.

II. WHAT IS THE MODEL PENAL CODE?

In deciding whether to reform or revise a document or institution, one must first address what the subject of the reform effort *is*. Before deciding whether the institution is serving its purposes well or badly, in other words, we must ask ourselves what purposes it is supposed to serve. The MPC is and does a number of things, though I suspect its predominantly academic audience of today is constitutionally predisposed to underappreciate its primary role, as intended by its authors and as it actually functioned in history. As all criminal law scholars understand, the Model Penal Code is one of the great intellectual accomplishments of American legal scholarship of the mid-twentieth century. In many ways, it marks the culmination of a project of re-interpreting and systematizing the common law of crimes that began with Wechsler and Michael's *A Rationale of the Law of Homicide* in 1937,¹ itself recently celebrated as one of the most important law review articles of the last 100 years.² Surveying hundreds of years of common-law evolution in the criminal law, identifying underlying principles, and formulating rules that represented the best of the thinking of judges who had grappled over that period with the violent and destructive results of the unruly passions of humankind, the drafters of the Code, marshaled by the incredible energy, formidable intelligence, and sheer will of the great Herbert Wechsler, developed an intellectually coherent approach to this mass of material, and created a body of rules not only doctrinally consistent, but drafted for easy adoption by legislative bodies.

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¹ Herbert Wechsler & Jerome Michael, *A Rationale of the Law of Homicide: I*, 37 COLUM. L. REV. 701 (1937); Herbert Wechsler & Jerome Michael, *A Rationale of the Law of Homicide: II*, 37 COLUM. L. REV. 1261 (1937).

² See Alan C. Michaels, "Rationales" of Criminal Law Then and Now: For a Judgmental Descriptivism, 100 COLUM. L. REV. 54, 56 (2000) (part of an issue devoted to the most significant articles to have appeared in the journal's 100-year history).

This last point is crucial. Unlike other influential projects of the American Law Institute (ALI), which were formulated as restatements of the common law—general statements of principle digesting the state of the common law, intended to be consulted by judges as guides to case-by-case decision making, and projected to be revised or re-restated periodically as the law evolved—the MPC was conceived as a model statute, a true code that was intended to be adopted, as modified to fit the individual circumstances of particular states, by legislatures throughout the United States. As such, its roots stretch back to the codification movement of the early nineteenth century, and it represents one of the last of the great codes that largely superseded judicial law-making in the nineteenth and twentieth centuries in important fields like procedure, commercial law, and evidence.

This recognition, however, points up another remarkable fact about the MPC. For unlike many other monuments of legal scholarship, the MPC was also one of the most successful law reform projects in American history. The Code did not simply lie on a library shelf, to be studied by academic lawyers. Rather, it sparked a wave of legislation that lasted over a decade. It produced revised, modernized penal codes in a substantial majority of the states, all recognizably derived from the work of Wechsler and his colleagues, and nearly all adopting the structure and many of the formulations they invented.³

This wave of law reform came to an end in the late 1970s with the failure of the federal criminal code reform effort. Since then, the MPC has lived on as a monument of scholarship and as a teaching tool. Essentially every criminal law coursebook in widespread use in American law schools reprints the MPC, rather than any state's actual code, as the one example of an integrated criminal code students are exposed to in substantial completeness. Professors draw freely on the Code's provisions to illustrate the problems that arise in defining criminal conduct, and (in most subject areas) to offer the best, or at least serious if flawed, solutions to those problems. If the MPC's force as a law reform effort is spent, and its phenomenal success in that respect a matter of historical fact rather than current political importance, the Code lives on as the document through which most American lawyers come to understand criminal law.

Of the three major functions of the MPC—scholarly compendium of the best thinking of its era about criminal law, practical reform project, and criminal law textbook—most criminal law professors encounter the Code primarily in the first and third. Most younger and middle-aged academics themselves learned criminal law from the MPC or MPC-influenced texts, and effectively all of us use the Code in the classes we teach. No one addressing a substantive criminal law subject in a scholarly article can ignore how the MPC treats the issues addressed, or can fail to make use of its commentaries as a guide to the literature up to the late middle twentieth century and to the principal legislative solutions that existed at that time. Only the older members of our guild were professionally active during the code reform efforts of the 1960s, however, and few indeed have actual experience with practical penal code

³ See Herbert Wechsler, *Foreword*, MODEL PENAL CODE AND COMMENTARIES, at xi (1985).

draftsmanship. It is no wonder, then, that many criminal law scholars are unfamiliar with the Code's potential as a law reform instrument, and come to the idea that the MPC is in need of revision from a primarily academic standpoint.

III. REVISING THE CODE AS TREATISE AND TEXTBOOK

It is a remarkable tribute to the success of the Code's drafters (or perhaps it is simply a consequence of the fact that criminal law deals with virtually timeless human problems, so that the pace of its evolution is slow) that the Code remains a valuable teaching tool, and that so many of its formulations remain the definitive statement of what remains conventional wisdom about criminal law. But a half-century is a long time in any field of law.

The Code is aging. Two generations of academic scholarship have unearthed chinks in the intellectual structure. More importantly, a powerful upsurge in crime and social disorder brought criminal law to the forefront of national concern. The reactionary political response to the crime wave of the 1970s and 1980s was largely focused on the courts and on constitutional criminal procedure, and not on the substantive criminal law reforms of the MPC as such. Nevertheless, the political need to do something about crime led to a vast increase in precisely the sort of *ad hoc* criminal legislation that had, over two centuries, created the need for codification in the first place. Moreover, that legislation tended to reflect an understanding of criminal law somewhat at odds with the utilitarian, rehabilitationist consensus that dominated the mid-twentieth century, and that provided the basic assumptions of the MPC drafters. The most comprehensive intellectual attacks on that consensus, and the most structurally significant criminal legislation of the late century—that relating to sentencing—shared a significantly retributivist, just deserts perspective on the purposes of punishment that is quite distinct from the perspective of the drafters of the Model Penal Code.

Within the legal academy itself, new intellectual approaches have appeared. As the tenure crunch of the late 1960s and 1970s squeezed out many who in other days might have joined arts and sciences departments, and the boom in legal pay drove law professors' salaries to higher levels than those of their colleagues in philosophy, sociology and economics, the legal academy opened to a new generation of refugees from those fields. Law faculties stopped being enclaves of brilliant lawyers who were at best amateurs in other academic fields, as the new wave professors developed new theories from the most sophisticated ideas in other disciplines. The same era saw a rapid increase in the numbers of law professors from previously-excluded population groups, and the concerns and insights of women and minorities raised new questions and challenged old assumptions. A great deal that was assumed by Wechsler and his colleagues is now questioned or rejected. It is not surprising that it is widely felt that the Code is due for an overhaul, or that a group of law professors should convene and ask, forty years on, whether a revised code is needed.

A doubter may wonder, however, whether the enormous effort that would be involved in a massive revision of the Code is justified by the need for a new treatise or

school text. First, for all the new thinking that has emerged in criminal law and in legal theory generally over the past two generations, the intellectual monument that is the MPC still largely stands. Forty years after its promulgation, the MPC is still the basic teaching tool in substantive criminal law courses in every law school in the country. And the part of it that is primarily taught—the great Wechslerian achievement of the general part and the law of homicide—is, amazingly, still taught by most of us as representing correct principles of law, for the most part well and effectively drafted. Those portions of the general part of the Code that are widely regarded as failures by academics, such as the excessively complex complicity provisions or the awkwardly-drafted portions of the attempt statute—provisions which, by the way, were also widely rejected by legislatures—are the exception, rather than the rule.

Moreover, the core provisions of the Code stand up remarkably well despite the resurgence of retributivism or just deserts thinking. If anything, indeed, they have solidified. Although Wechsler and Michael's seminal work on homicide was explicitly utilitarian in emphasis, the general part of the Code Wechsler produced is quite consistent with Kantian notions of fairness and desert. The emphasis on subjective wrongdoing that dominates the Code's general part, its reluctance to admit strict liability, its insistence on careful judgments of culpability—all of this can be and is accepted by theorists across the intellectual spectrum. And all of it remains a lesson and a reproach to the thoughtlessly punitive responses of legislators who too often do not even consider issues of culpability in drafting political responses to the tabloid crime *du jour*.

Second, there are few successful precedents for revisions of monumental academic reference works such as the Code became. Many such works (think of the great legal treatises like *Wigmore on Evidence* or *Corbin on Contracts*) are continually updated by successor editors, though the valuable work of such editors rarely rises (except perhaps by slow increments) to the level of a comprehensive overhaul that has the impact on a new generation that their first editions did on those who encountered the original. Others are simply superseded, as creative scholars undertake the work of building a new comprehensive treatise based on the premises of a new age or the insights of new generations. Most of these works, of course, are those of individual authors or small groups of co-authors, not projects that undertake to enlist the broad range of academics and practical thinkers to state not an individual intellectual accomplishment, but the consensus of the profession. Those few projects that do undertake radical revision have a mixed history of success. From the *New Grove* to the new *Encyclopedia Britannica*, such efforts range from valuable modern reference works to dismal failures, but one is hard put to think of an example that lived up to the intellectual power of its predecessor. Moreover, with law in particular, the age of the great treatise sometimes seems to be altogether past.

But if there is a need for a new comprehensive text on criminal law, I doubt that the will exists to produce a consensus-type document to fill that gap. Consensus is hard to come by in today's academy, not only on a practical, political or legislative agenda, but even on what questions are important or what intellectual approaches are

valuable in answering them. Our post-modern era values diversity and fragmentation in intellectual life more than it values consensus and middle-of-the-road “common sense.” The skeptic wonders not only whether it is worthwhile to commission a new compendium of the current conventional wisdom on criminal law, but even whether it would be possible to create such a document.

Third, there is not much practical value to revising the MPC as a teaching tool. It is questionable whether we really want to teach from a document (even assuming one could be created) that could be presented to students as containing the comprehensive and accepted correct answers to problems. The fact that the MPC is in some respects out of step with contemporary thinking hardly inhibits casebook authors or course instructors in presenting newer ideas to students—as in every other field, course materials are regularly revised to incorporate new developments in case law, scholarship, and legislation. Where the MPC is so hopelessly out of date that it is not even a contender in current controversies, as in the law of rape and sexual offenses,⁴ there is no need to teach it, and most contemporary casebooks barely refer to it. There is even a potential advantage to the fact that portions of the MPC have been superseded by more recent thinking. The Code’s time-bound errors serve as a useful reminder that the law is not static, and that today’s conventional wisdom will in many respects be superseded as well. At any rate, as noted above, the MPC remains significant in most of the areas that are at the heart of conventional courses in substantive criminal law.

For these reasons, to produce a Model Penal Code Second for the sake of its academic uses hardly seems worth the candle. Of course, developing new treatises and course materials is valuable work, but there is strong reason to doubt that any such work could or should bear the kind of consensus imprimatur that the Model Penal Code bore in its time.

IV. THE NEED FOR PENAL CODE REFORM

If there is little need for another treatise or new teaching materials, there is a pressing need for penal code reform. The case for such reform is comprehensively laid out in Paul Robinson’s contribution to this symposium,⁵ and I will return below to some specific issues on which a Code revision project can make a practical contribution. Here I will merely sketch out some factors in the development of criminal law since the completion of the MPC that have created the need for reformed codes.

First, as successful as the MPC was as a reform project, a third of the states and the federal government failed to adopt comprehensive reform in the wave of code revision that followed its promulgation. In those jurisdictions, the desperate need for

⁴ See Deborah W. Denno, *Why the Model Penal Code’s Sexual Offense Provisions Should Be Pulled and Replaced*, 1 OHIO ST. J. CRIM. L. 207 (2003).

⁵ Paul H. Robinson & Michael T. Cahill, *Can a Model Penal Code Second Save the States From Themselves?*, 1 OHIO ST. J. CRIM. L. 169 (2003).

code reform that drove the MPC project in the 1950s has not disappeared since then, nor has any subsequent wave of reform improved matters. As Paul Robinson and his colleagues have documented, the jurisdictions that failed to adopt the MPC in its heyday have the worst and most confusing codes today.⁶ Yet it can hardly be expected that a movement to reform these codes can be mobilized behind the banner of the 1962 MPC. The reformist enthusiasm generated by the MPC is long since spent, and the aging of the Code since its original adoption makes it an uneven model for any present day code reform. A new MPC might not generate a new reform movement, but it could at least provide a product that new reformers could rally around with more confidence than they could embrace the original, superannuated MPC.

Second, those codes that were adopted in the wake of the MPC have not remained in stasis since then. Of course, no code would or should remain unamended over forty years of legal experience, and many of the changes in criminal law during that period represent improvements on the thinking of the 1950s ALI. But popular discontent with rising crime rates from the 1960s to the 1990s created an urgent political pressure for legislative tinkering that predictably affected criminal codes for the worse. Although the populist demand for tougher law enforcement did not for the most part attack the structure of MPC-influenced substantive criminal law (the political focus was more on criticizing the Supreme Court's expansion of the procedural rights of criminal defendants and on seeking increased penalties), some MPC-supported liberalizations (as in the area of the insanity defense) were directly attacked.

More significantly, however, as crime became a hot-button issue, legislators desperate to show their constituents that they could take action adopted hundreds of criminal statutes in response to real or perceived new or increased criminal threats. Many of these statutes were duplicative of or inconsistent with existing general criminal law, and few of them were carefully drafted to make use of the general definitions and careful structures of the existing comprehensive penal codes. The predictable result was a return to the same patchwork criminal law that had led to the demand for codes in the first place. That the patchwork is now superimposed on a reformed criminal code, which could have provided the template for a more careful response to any genuine need for new legislation, is little comfort. Most criminal law scholars, who pay surprisingly little attention to the actual state of the law, let alone to the condition of the penal codes of particular states, have barely noticed the extent to which this slow process of entropy has debilitated existing codes.

Finally, genuinely productive impulses for change have met with spotty legislative success and have resulted in inconsistent formulations of popular reforms. To take just one example, enhanced political power for women has led to widespread changes in the law of sexual assault and self-defense. But the process of piecemeal reform in a period of rapidly changing political consensus has produced a wide variety

⁶ See Paul H. Robinson et al., *The Five Worst (and Five Best) American Criminal Codes*, 95 NW. U. L. REV. 1, 61 (2000).

of legislative models. States that were quickest to change have not kept up with subsequent developments. Statutes drafted *ad hoc* in individual states were not always known to, or adopted by, other states addressing the same problem. Not all of the salutary reform notions were embodied in technically sound statutes. Reforms initially greeted enthusiastically turned out to present unforeseen problems that either left the law in an unsatisfactory state or produced a reaction that led to additional patchwork fixes by legislatures or courts.

After all of this activity, in reformed as well as unreformed jurisdictions, the need for code reform is great. A new MPC, if it focused on the areas in which a real need and demand for reform has arisen, could be of great value to those seeking to reform our criminal codes. We don't need a revised MPC for its own sake; we need a revised MPC, if we need one at all, as a new model code for the sake of the new penal codes it could influence.

V. OBSTACLES TO PENAL CODE REFORM

What made the MPC so successful as a blueprint for practical law reform? The impact of the Code was intended by its drafters, but its success was the product of circumstances unusually favorable to penal law reform. First, there was a widespread understanding, not merely on the part of academics carping from the sidelines, but also on the part of practicing lawyers, judges and even political figures, that the criminal law of the American jurisdictions was a mess. Largely though not exclusively statutory, American criminal law circa 1950 represented an overlay of random statutes, adopted from time to time over nearly 200 years, on top of "codes" that sought to approximately formulate, or sometimes merely to incorporate by reference, concepts developed by English common-law judges. The resulting stew included archaic and outdated laws, inconsistent treatment of similar acts, wildly disparate penalties, and incomprehensible and unjust prohibitions. The field was objectively ripe for reform, and was widely understood to be so.

Second, public and political opinion was receptive to law reform. The radical rethinking of law spurred by the Great Depression and the New Deal engendered a widespread public understanding that law was a product of policy that could and should be rewritten to further the common good. The apparent success of Roosevelt's reformers, so many of them lawyers and law professors, inspired a confidence that laws could be changed and improved by earnest effort.

But if the New Deal provided a model and a liberal engine for legal reform, and the victory in World War II and the phenomenal post-war prosperity built a spirit of confident, can-do practicality, the essential conservatism and conformity of the 1950s also contributed to the possibility of reform. A consensus model of politics and history, the absence or suppression of threatening domestic radicalism, a widespread trust in experts and leaders (perhaps modeled on the trust necessarily reposed in the generals who had won the war and the scientists who were daily generating new technology in weapons, space exploration, health and domestic convenience), and the dominance of politics by a largely homogeneous group of white, male Protestants

with largely similar life experiences and intellectual assumptions, all contributed to an atmosphere in which a group of serious reformers could meet and thrash out agreement on principles to guide a reform effort, secure in the knowledge that their product would receive a respectful hearing from the largely similar folks in legislative chambers, and from an electorate that had little occasion to meddle in technical matters. If these features of the macro-political climate were favorable to legal reform generally, so were factors more narrowly relevant to the Model Penal Code effort itself. One was the state of legal scholarship. Legal academics were by and large drawn from the ranks of practicing lawyers. Their demographics and intellectual assumptions were also similar to those of the power elite, and their experiences and aspirations were sufficiently similar to those of the bench and bar that academic lawyers were able to speak effectively to the concerns that led judges and practitioners to demand reform and to those of legislators who sought to provide it.

Finally, and perhaps in retrospect most importantly, crime rates were at historic lows. The tumultuous birth pangs of the urban industrial society had passed, the discipline of depression and war had generated the prosperity of the post-war era and created a uniquely hard-working and optimistic citizenry, and social order reigned. When officials in New York City point out that homicide rates there today are comparable to those of the early 1960s, their pride reflects not merely the magnitude of the recent sustained reductions in crime, but also the fact that the period to which they are pointing was something of a golden era, often treated by criminologists as an anomaly in modern history.

This fact was critical to the success of criminal law reform. It meant that crime was not a hot-button electoral issue and was not in the forefront of political debate. As the last years of the MPC-inspired wave of reform suggests, comprehensive criminal law reform is fatally threatened by contentious, narrow-focused, politically-motivated public debate. I don't merely mean that high crime rates generate a demand for repressive or ill-thought-out quick fixes inconsistent with more reflective action, although that is certainly true. But the fate of the effort to reform the federal criminal code illustrates a subtler political dynamic. A massive bill with hundreds of carefully formulated, delicately balanced provisions governing the daily work of federal law enforcement, few of which were yet then controversial, foundered largely as a result of Vietnam-era ideological conflict over a small number of provisions relating to the protection of official secrets which, in the wake of the Pentagon Papers case, had become an uncompromisable issue dividing proponents of open government from those who feared wholesale and virtually treasonous release of sensitive information. Comprehensive reform cannot easily survive when aspects of the proposed code—even ones relatively peripheral to the concerns of the reformers—implicate the real or symbolic political interests of closely-competitive ideological movements.

But the times, as the Bard tells us, have a-changed. The confident post-war liberal consensus died in Watts, My Lai, and Chicago. Nostalgic yearning for order and revived respect for authority may be strong enough to bring narrow electoral majorities to conservative political parties, but these factors have not regenerated a trust in technocratic expert reform. On the right as well as on the left, among both the

intellectual elite and the popular majority that ignores electoral politics altogether, there exists a widespread and profound mistrust of experts and leaders, and a general assumption that politicians and intellectual leaders equally are motivated by self-interest and partisan power-seeking. The hegemony of the old elites is shattered, and has not yet been replaced by a new, more demographically representative and widely trusted, ruling class. The legal academy, and indeed the professoriat generally, has withdrawn into itself. In the 1950s, the myth that the universities were dominated by dangerous leftists was powerful precisely because it was shocking (and, as it happens, false) to imagine that these citadels of the establishment were secretly being undermined by hidden subversives. Today, of course, radical professors themselves tell us that intellectual elites are not to be trusted. The populist right takes it as a given that universities are the preserve of loopy leftists totally out of touch with the people, and the academy has largely lost both the interest in practical reform and the popular respect necessary to give it influence. Left or right, the writings of the most influential legal academics rarely deal with the practical law-reform issues that concerned their predecessors. And while the crime wave of the late twentieth century has (somewhat mysteriously) receded, its memory, and the politics it generated, are still with us, in a way that keeps criminal law reform a dangerous minefield for politicians.⁷

Finally, unlike the 1950s and 1960s, there is no general belief among legislators that overall criminal reform is needed. Those legislators who are not themselves lawyers (a growing number) have little understanding of the technical issues of statutory draftsmanship or general principles of criminal law. Those legislators who are lawyers were taught in law school that, at least in those jurisdictions that adopted MPC-derived codes two generations ago, the task of codification was long-since accomplished. I hope Paul Robinson is correct that legislators themselves are increasingly aware of the havoc that *ad hoc* politically-motivated legislation has wrought over the last thirty years,⁸ but I see little evidence of it.

The times, then, are not propitious for a convocation of wise men (even if today it includes wise women, and its wisdom is drawn from a much more diverse and demographically representative group) to generate political reform simply by calling attention to the technical inadequacy of existing law.

VI. A PLAN FOR REFORM

The existence of these various obstacles does not mean that reform is impossible. Rather, it means that the momentum for reform needs to be carefully built, and that initial reform efforts should focus not on the issues most compelling to academics, or on an effort to restate and refine basic principles from which others can be deduced, or

⁷ Witness the failure of New York's governor and legislature, after years of carefully preparing the ground for a revision of the excessively punitive Rockefeller drug laws, to pull the trigger on any actual change.

⁸ See Robinson & Cahill, *supra* note 5, at 175.

on a patient, long-term effort to create a new complete code. To overcome these obstacles, it is necessary that a reform movement begin with issues where the conditions for law reform are more propitious. To my mind, we must begin by addressing areas in which the need for reform *is* widely perceived, where a political and intellectual consensus has begun to develop not only on the sense that something must be done, but on a general direction for change, and where there is some reason to think that expert drafters could put together reform proposals that could be adopted. Moreover, it is my belief that many areas that meet these criteria are ones where the original code was itself inadequate, or has been overtaken by events.

Where is the Code in need of shoring up? Yes, there are places, known to all criminal law scholars, where we could do better than the drafters originally did, thanks to the many years in which scholars have taught, reflected, and written on the core provisions of the Code.⁹ But these are for the most part minor technical changes in those portions of the MPC that for the most part have stood the test of time, and where political forces have had little impact—in other words, in the general part of the Code. I would submit that the intellectual weaknesses of the MPC are mostly to be found precisely in those areas where criminal law theorists have been least active, and where the need for practical reform is greatest: in the sentencing provisions of the Code, in the definitions of particular crimes that make up its special part, and in those areas of criminal law that either were neglected by the drafters altogether or that did not exist when the Code was created. Let me try, then, to identify some priority areas for reform, and also some things I think should not be high on the agenda.

A. Sentencing

The most radical and systematic criminal reform statutes of the past thirty years, the ones that reflect not just a desire to increase punishment or respond to topical crises, but a profound philosophical movement, are those that replace broad judicial sentencing discretion with systems of mandatory sentences or sentencing guidelines, of which the federal Sentencing Reform Act of 1984 is the best known. The MPC's sentencing provisions were dominated by a rehabilitationist penal philosophy, which assumed that the primary purpose of criminal punishment was the reform of the offender, and accordingly provided for broad judicial discretion over sentences (to permit the punishment to be tailored to the offender and not merely the offense) and for indeterminate terms of imprisonment (because the judge at sentencing could not know *ex ante*, as the parole and prison authorities would later learn, how much time was actually necessary to accomplish this goal). The MPC was not the most radical embodiment of this philosophy, but its sentencing provisions and, as I have written elsewhere,¹⁰ even the structure of its criminal prohibitions, accept the basic framework

⁹ Ken Simons' contribution to this Symposium suggests some examples. See Kenneth W. Simons, *Should the Model Penal Code's Mens Rea Provisions Be Amended?*, 1 OHIO ST. J. CRIM. L. 179 (2003).

¹⁰ Gerard E. Lynch, *Towards a Model Penal Code, Second (Federal?): The Challenge of the Special Part*, 2 BUFF. CRIM. L. REV. 297, 300–11 (1998).

of rather broadly defined crimes, wide judicial discretion over punishment within substantial maximum sentences attached to those crimes, and indeterminate sentences whose actual length would be determined by penal authorities rather than by judges or legislatures.

The ALI has correctly decided to focus first on replacing these provisions of the Code. The area is ripe for substantial revision on virtually every criterion. First, as noted above, it is one of the few areas in which the Code's provisions reflect a set of philosophical or policy assumptions that have been widely questioned, both in popular and academic literature, over the past quarter-century. The view underlying the Code has been subjected to serious attack, and it is past time for a thoughtful effort either to defend the ramparts or to accept and work out the implications of the new order.

Second, that attack has had uncertain and incoherent effects on the law of most jurisdictions. Most of the states retain the superstructure bequeathed by the rehabilitationist paradigm and embodied in the Code. Yet in virtually every state, that structure is substantially modified in practice by a host of mandatory minimum sentences for particular crimes, three-strikes laws and other recidivist statutes, and vast *ad hoc* increases in the punitive sanctions attached to particular crimes. In addition, a variety of alternative sanctions, restitutionary remedies, and forfeiture laws have been grafted onto the basic prison-and-probation scheme that was at the heart of the Code. The law of sentencing, in most states, is in precisely the state of decay and overgrowth as the penal law generally was when Wechsler began his work.

Third, if the law of sentencing is ripe for reform, reformist ideas are also widespread. A few states and the federal government have adopted comprehensive sentencing reforms (often, alas, along with any number of the same *ad hoc* constructions that have bedeviled their sister jurisdictions). Virtually all of those reforms feature more narrowly-defined sentencing categories that produce guideline sentences that to a greater or lesser extent reduce or eliminate the discretion of judges and parole boards. Such efforts have enough in common to suggest a coherent reform strategy, which has been endorsed in a general way by the American Bar Association.¹¹ But they also differ in their details in a sufficiently substantial way to account for wide differences in their public and professional acceptance, from the widely reviled federal guidelines to more romantically embraced state guidelines in such disparate states as North Carolina, Pennsylvania, and Minnesota. The drafters of a model sentencing scheme thus have both a general paradigm that represents a tentative consensus among reformers, and several different versions of such reforms available for comparison and empirical study. Surprisingly little academic work has been done on these guideline regimes, but the pace of research is picking up, and the intellectual groundwork for thinking seriously about sentencing has been laid. Thus, while it cannot be said that there is a universal consensus about sentencing, there is certainly a sufficiently accepted framework for reform, coupled with enough variation and uncertainty concerning the effective implementation of that framework, to make

¹¹ ABA STANDARDS FOR CRIMINAL JUSTICE: SENTENCING (3d ed. 1994).

an expert group's recommendations about the details of implementation potentially influential.

Fourth, sentencing reform offers some hope of practical acceptance. Politically, a consolidation and codification of the messy sentencing "reforms" of the last twenty years can be presented as a genuine collation of a variety of initiatives of that era, and not a wholesale rejection of them or retrenchment to an earlier view that legislatures and voters have, for good or ill, blamed for rampant crime and accordingly repudiated. Even the politicians can see that their relatively random efforts to put floors under sentences of dangerous criminals have resulted in a patchwork of inconsistent laws, overpopulated prisons, and the continuation in many jurisdictions of parole institutions that have lost their rationale. And the widely publicized reduction in crime rates of recent years, coupled with the shift in political focus from street crime to concerns about terrorism, education and health, and economic policy, has opened an opportunity to think about sentencing in terms of how and why, rather than simply how severe.

The chance that a model sentencing statute could result in actual adoption by legislatures is significant, and any effort to generate a new *Model Penal Code* must focus on areas where such change is possible.

B. Rape

The law of rape is the best example, and the one most studied in the academic literature, of the problems with the special part of the Code to which I've alluded. The problems addressed in the general part of a penal code are, if not timeless, at least deeply embedded in the very nature of the western institutions of criminal law. How do we distinguish criminal law from other mechanisms of social control? When is punishment appropriate? What principles of justice are intrinsic to the very idea of criminal punishment? Even the rapid political and social change of the last forty years has not deeply affected our thinking about these questions, or altered the basic principles and practices embodied in our answers.

But the particular social problems to which these principles and practices are applied can change quite rapidly, as economic and social institutions evolve and political regimes break down and are replaced. Feminism has been the most explosive engine of social change in our lifetimes, and has resulted in the most profound reconsideration of our basic institutions of family, reproduction, and economic activity. The *Model Penal Code* arrived just before this transformation, and thus, it is at its most outdated where the law touches the most violent edge of sexual interaction, the crime of rape.

My purpose here is not to catalogue the ways in which the MPC's provisions on rape and sexual assault are inadequate to current mores, or the number of legislative and judicial reforms that have rendered its provisions irrelevant, in a way that none of its other specific crime definitions are, to criminal law as it actually exists today.¹²

¹² That is the subject of Deborah Denno's contribution to this forum. See Denno, *supra* note 4.

Nor do I seek to propound or defend any particular modernized or reformed version of a rape statute. For present purposes, it is enough to argue that conditions are ripe for a body like the ALI to propose an effective model statute, and to make a genuine intellectual and practical contribution by doing so. Of course, rape is a hot-button issue, and one can expect any particular reform proposal to be attacked from the left as inadequately protective of women's sexual autonomy, from the right as incompatible with traditional patriarchal family values, and from all sides as insufficiently punitive. But here, as in sentencing, quite a variety of statutes have been implemented or proposed, addressing in inconsistent ways a significant number of distinct issues, solving or causing a host of interpretive questions, penal problems, and social consequences. And here, too, the general trend of those reforms suggests that there are principles and attitudes that, whatever the disagreement at the level of detail, are widely agreed upon. An effort to collect, compare, and evaluate these efforts, and to form a consensus about what has worked and what has not, is surely due. A model statute on sexual assault could thus address a real problem with real hope of success.

My only disagreement with Deborah Denno's excellent analysis of this problem reflects my proposed emphasis on practical reform. It is actually of little importance that the MPC's provisions on rape, let alone the commentaries that attempted to explain them at a time when they were already being questioned, seem embarrassingly outdated. It would matter if those provisions constituted a model that might have a negative impact on contemporary legislation, or on the ideas of future generations of law students. But the MPC's sexual assault article is so far removed from the current debate as to be irrelevant. It matters very little to me whether a model sexual assault law is propounded as part of a comprehensive effort to revise the MPC, or as a revised MPC component to be dropped into the existing MPC, or as a stand-alone Model Sexual Assault Law independent of the MPC. What matters is that legislatures be given a text that represents the best thinking of a cross-section of experts on problems that legislators have shown they want to address, but that has so far frustrated their efforts to develop a well-drafted, comprehensive reform that can generate acceptance across jurisdictional lines. Developing such a model law would have independent value apart from any MPC revision, and if we were to have a full revision of the Code, this would be an excellent place to start to build practical respect for the project.

C. Narcotics

When the MPC was promulgated, the "war on drugs" had not yet been declared.¹³ Narcotics offenses were punished much less severely, and those convicted

¹³ I think I first heard the "war" metaphor in the late 1960s when the rock group Steppenwolf, not otherwise known for its influence on the policy choices of Republican presidents, sang "If I were the president of this land. . . I'd declare total war on the pusher man," in a song called "The Pusher." STEPPENWOLF, *THE PUSHER* (Irving Music 1968). It should come as little surprise that a drug policy based on rock lyrics has not proved all that successful.

of possession and sale of narcotics made up a much smaller portion of the prison population, than is now the case. The drafters of the MPC simply left narcotics prohibitions out of their Code, not by recommending decriminalization of narcotics as a desirable policy, but simply by defining the whole sordid subject as beneath their notice. As penalties for drug dealing have escalated, and drug statutes have become more elaborate, academic attention has remained averted, limited at best to the abstract question of legalization of drugs, with virtually no discussion of the appropriate nature of drug statutes or penalties in the real world in which legalization is not a politically respectable option.

A revised Code cannot responsibly follow this path. The role of criminal law in discouraging the consumption of dangerous drugs cannot be ignored by anything that pretends to be a model criminal code for jurisdictions that devote a larger portion of their law enforcement budgets to narcotics enforcement than to almost any other type of crime. If narcotics laws are to be left out of a revised MPC, that omission must be deliberate, the result of a conscious decision that some other approach to the problem of drugs is preferable.

I doubt, however, that a truly serious approach to the narcotics problem would conclude that complete decriminalization is the preferred course. Our society suffers enough from abuse of the drugs we already make relatively freely available, and the criminal law plays a part in the control even of the legal drugs (for example, limiting sale to minors or prohibiting the smuggling of untaxed liquor and cigarettes). Some form of criminal regulation will surely be desired as part of a comprehensive drug policy,¹⁴ but what should it look like?

Even proponents of legalization, moreover, should take a lesson from the treatment of another controversial subject in the original MPC. Many of the drafters of the MPC opposed capital punishment, but they recognized that a code that did not include a death penalty would not be taken seriously. So the Code offered an option of abolition, and as an alternative, a novel approach to the imposition of the death penalty through structured jury discretion.¹⁵ The MPC approach did not initially attract much political support, but in the wake of the Supreme Court's revolutionary decision in *Furman v. Georgia*, invalidating on constitutional grounds capital punishment as then administered in the United States, followed by its retrenchment and approval of structured jury discretion statutes, the MPC's approach has essentially become the law of the land in jurisdictions that continue to use the death penalty.¹⁶ Both conservatives critical of the Supreme Court's intervention and liberal abolitionists have a stake in pretending that no good came of this development, but there is little question in my mind that, whatever ineradicable problems of fairness, finality and human rights continue to make capital punishment controversial, the

¹⁴ A good source on the substantive trade-offs that will have to be part of any serious effort to reform our approach to drugs of all kinds is MARK KLEIMAN, *AGAINST EXCESS: DRUG POLICY FOR RESULTS* (1992).

¹⁵ See MODEL PENAL CODE § 210.6 (Proposed Official Draft 1962).

¹⁶ *Furman v. Georgia*, 408 U.S. 238 (1972); *Gregg v. Georgia*, 428 U.S. 153 (1976).

MPC's system both restricts and to some degree rationalizes the use of the death penalty in ways that the former death penalty regime could not. A similar reform of narcotics laws, however unsatisfactory to ideologues on all sides of the debate, might well be possible if academics and practitioners seriously debated a model narcotics statute.

Academic lawyers have made little contribution to the study of criminal narcotics statutes, either by addressing the most effective role for criminal law in the suppression of dangerous drugs or by considering technical issues of statutory draftsmanship. Existing penal codes, perhaps in consequence, are quite diverse, despite a general agreement that severe punishment is the best reaction to the sale of illegal narcotics. Moreover, while there is little evidence of a broad popular demand for decriminalizing narcotics use, in a world in which prison expenses are mounting and public acceptance of non-criminal alternatives for many narcotics offenders is growing, a serious reform that de-emphasized criminal sanctions without threatening to turn the streets into legalized drug marts might prove attractive to many jurisdictions.

Once again, whether this is phase two of a comprehensive MPC revision or a stand-alone project, a Model Controlled Substances Act would potentially be a major contribution to the debate that could stand a significant chance of passage in jurisdictions that are considering reform in this area.

D. Domestic Violence, Bias Crime, and the Problem of Specificity

The powerful feminist influence on criminal law issues has not been limited to the law of sexual assault. Domestic violence is another area that was of little concern to male opinion leaders at the time the Code was promulgated, but that has since become a prominent area of law reform. Similarly, the special concerns of minorities or disempowered groups were not on the criminal law agenda in the 1950s; today, those concerns prompted widespread adoption of (among other laws) hate crime statutes. These topics are of concern to MPC reformers not only because, as in the other areas I've discussed above, the MPC is silent or inadequate about them, but also because they represent a paradigm of a broader criminal law trend that requires consideration in a revised MPC.

The Code makes no specific reference to domestic violence or hate crimes, and does not treat assault or homicide within the family unit or against disfavored targets any differently than such crimes committed in other contexts. Over the past twenty years, legislatures, courts, and police departments have repeatedly addressed domestic violence and bias crimes as topics of specialized concern, adopting policies and statutes particularly designed to address these problems. Looked at narrowly, one can see the Code's lack of specific provisions about these subjects as simply another instance of the Code's failure to anticipate the success of the feminist revolution in reconceptualizing the public and private domains, and in elevating issues affecting women and children to the forefront of the political agenda. On this ground alone, the subject requires rethinking in a revised MPC. Even on the utilitarian premises of the

Code, revised information about the differential utility of strategies of criminal intervention in dealing with different types of assaultive conduct suggests revised attention to those categories.

But the Code's submersion of domestic assault within larger, more abstract categories reflects a larger issue of penal code drafting, and one that lies at the crossroads of two explosive changes in the political climate generally and the philosophy of criminal law in the years since the MPC appeared. First, the sentencing philosophy of the MPC, as noted above, dictated the drafting of broad criminal prohibitions. The Code offers only two categories of assault—not surprisingly, because it only offers three levels of felony altogether. If punishment is not to be determined primarily by the offense of conviction, but rather by the personal characteristics of the offender (e.g., recidivism, and amenability to reform), there is little reason to discriminate the very many gradations of seriousness of particular assaults (e.g., type of weapon used, degree of harm inflicted, and nature of victim). All of this is “merely” a matter of grading, relevant not to the wrongfulness of the conduct, but to the sentence to be imposed. Under the Code's sentencing scheme, such matters will all be left to the judge, to be balanced against the various offender characteristics that will also determine punishment in the particular case.

But in a world of just deserts retributive punishment, where the legislature or a sentencing commission attempts to dictate a more precise punishment based primarily upon the degree of harm, special attention to the precise degree of wrongfulness of particular species of assault becomes crucial. Is an assault on a child that causes little physical harm worse than one on an adult that causes a more serious injury? Is that assault worse if it is committed in the home by the child's caregiver rather than on the street by a stranger? Looked at in this way, the new emphasis on domestic violence is part of a broader set of questions about the desirability of more narrowly-drawn statutes that make subtler gradations of wrongdoing than the broad-stroke classifications of the MPC.

Second, it is no accident that domestic violence, and the somewhat related notion of provisions enhancing punishment for bias crime, are principal examples of the demand for more specific criminal prohibitions and gradations. The political movement of previously-marginal groups to obtain equal respect and to advance their too-often-ignored interests has marked American politics over the past forty years, and has had a profound and controversial impact on actual criminal codes. The debate over hate crimes exemplifies this controversy. Even without the movement for sentencing more specifically tailored to wrongdoing, the disagreement between those who believe that the criminal law should specially recognize crimes motivated by racial or other group animosity, and those who believe that violence is violence regardless of the motivation of the offender or identity of the victim, has great symbolic importance. For minorities who have been the victims of institutionalized violence, the special recognition of such crimes constitutes a directive to law enforcement to take them seriously, and a necessary counterweight to social attitudes that tolerate or ignore the extent of such violence. When that symbolic need is mixed with concrete increases in punishment, the issue becomes all the more important.

Such statutes, however, are attacked by their opponents as special interest laws that at best overcomplicate the law and at worst provide “special” status for some victims, the overt converse of the hidden prejudice that makes it more likely that the murderer of a wealthy white woman will be executed than the killer of a poor black man. Even supporters of bias crime laws must acknowledge that the opponents’ caricature is premised on a genuine concern. After all, even a “hate crime” statute is a generalization—more specific than a prohibition on assault of all kinds, but more general than other statutes that could be imagined. Any group can fight for special attention to its particular needs, and insist on its particular dignity. Do we need a special statute for assaults against the elderly? Against immigrants? Against women? Advertisements in the New York City subways remind us that the New York Legislature recently passed a law raising simple assaults against subway conductors or bus drivers to the same felonious level as assaults on police officers, firefighters, and emergency service workers. “Where do you draw the line?” may not be a good argument against specification; it is nevertheless a question that must be asked about any particular effort to refine the Code’s categories.

The question of specificity and refinement in criminal statutes is not limited to victim groups. Over the past twenty years, legislatures have responded to various novel (or at least newly-publicized) methods of committing crimes by adding new (and usually redundant) criminal prohibitions, or by creating new subcategories of traditional crimes with enhanced punishments. Is fraud committed with a computer more serious or more threatening than other types of theft? Is seducing a child by e-mail worse than doing so in a schoolyard or a confession? Is armed robbery *really* a different and more serious kind of crime when the property stolen is a car, and a cute neologism (carjacking) can be coined to describe it?

These are not intended as rhetorical questions. In recent years, legislatures have adopted all kinds of new statutes, responding to new situations and perceived new social problems. No doubt many of these are politically-motivated responses to sensational press coverage of particularly lurid crimes, which add nothing of value to traditional penal codes. But some of them may have merit, at least in a Code that may have to attempt, in light of new theories of punishment, to draw more degrees and distinctions within traditional crimes than the MPC did. In any comprehensive project for a revised MPC, one of the most important projects will be deciding the extent to which the Code should incorporate more gradations of punishment, and specify a greater number of aggravated and mitigated degrees of offenses than the MPC drafters thought necessary.

E. RICO, Money Laundering, and Terrorism

Led by the United States Congress, legislative bodies have radically transformed the approach to organized criminal enterprises by developing new forms of accessorial liability. To a considerable extent, these new statutes ignore traditional formulations of culpability for the acts of others, and strike out in their own directions to develop new forms of prosecution that match the increasingly proactive investigative

techniques of undercover infiltration, electronic surveillance, and the use of informers and turncoat cooperating witnesses, which in turn have developed to attack crime that is systematic and organized rather than episodic and chaotic. The RICO statute, adopted in 1970, expanded conspiracy law in novel ways, permitting prosecution of organized criminals (and terrorists or members of other organized illegal enterprises) for involvement in organizations whose members commit a diverse range of crimes. Money laundering laws, which first appeared in the 1980s, created new substantive crimes that could be conceived as a specialized kind of accessory-after-the-fact liability, analogous to specialized preparatory crimes that fill gaps in attempt law.

The expansion of global terrorism has produced not only innovative (or threatening) revisions of traditional investigative methods, but also new substantive crimes. The scope of the novel crime of providing material support to terrorist organizations has received little academic attention. Could the allegations against defendants like John Walker Lindh or the Buffalo-area Arab Americans or representatives of Arab- or Muslim-oriented charities have produced liability under traditional criminal statutes? If the answer is no, does that reflect the inadequacy of traditional statutes or the impropriety of the innovative prosecutions? Do the new, expansive statutes violate our longstanding principles of criminal liability? And if new forms of liability *are* necessary to impose deserved punishment in such cases, how should the statutes be drafted?

These are vitally important questions, which call into question principles of criminal liability long thought fundamental. Would-be revisers of the MPC can ignore them and worry about refining the Code's solutions to traditional dilemmas of self-defense doctrine or mistake of law that have proved essentially adequate, or they can attempt to provide meaningful assistance to legislatures grappling with new forms of criminal activity.

My discussion of these five areas at best sketches a partial agenda for a revised MPC, but it suggests the difficult and important intellectual work that could be done, work that addresses issues that are actually on the political agenda of lawmakers. No doubt others can come up with additional problems of the same ilk.

VII. THE ANTI-AGENDA

If these are the affirmative priorities for a revised MPC for the twenty-first century, what are the negative priorities, the traps that we must avoid falling into? What I have proposed is an agenda for revised criminal statutes that addresses real political and law enforcement issues, that sees a revised MPC as an opportunity to address today's law reform needs as the original Code did those of its era. The flip side of that agenda is to avoid—at least in the immediate future—a focus on purely academic concerns that would distract the effort from real problems. There are two complementary pitfalls to avoid, each of which has considerable attractions for academics: thinking too big and thinking too small.

A. *The Perils of Radical Reform*

A Model Penal Code revision project should avoid the temptation to rethink the Code's basic organization and approach. Such an effort could generate considerable interest among academics. Fundamental premises of the Code have been vigorously criticized, most prominently by George Fletcher,¹⁷ and it would be natural for a serious discussion of a new criminal code to begin at the beginning, debating the merits of those criticisms. Paul Robinson, who has defended the substance of the MPC against Fletcher's critique,¹⁸ has also proposed a radically different organization of a criminal code, one that would dramatically simplify the conduct rules addressed to the general population.¹⁹ It would be equally natural for a group of academics to consider the merits of such an innovative approach.

Quite apart from the merits of these arguments, a revised model code that adopted either approach would be a demoralizing waste of effort. The purpose of the MPC, or of any revised version of it, is to be a *model* for actual legislation. The original MPC was a great success not only because of its intellectual merit, but because American legislatures felt a need for codification, and because the product presented to them was essentially consistent with lawyers' and legislators' understanding of what a code should look like and what the common law of crimes with which they were familiar provided. To the extent that the MPC revised or reformed prevailing American criminal law norms, it did so incrementally, for the most part by explaining how its formulations fit better with the general assumptions of those norms than the formulations they replaced.

Today, there is little market for extensive criminal law reform. Popular grumblings about "the failed criminal justice system" have little to do with the issues of substantive criminal law that preoccupy academics. Such discontent appears to have reflected general unhappiness with rising crime rates, and to have subsided somewhat as the incidence of crime declined in the latter 1990s. At any rate, nothing indicates that legislatures or courts or criminal lawyers believe that the basic organization of the codes they work with requires upheaval. Moreover, the moral and intellectual authority of academic advisory bodies is surely far lower than it was in the 1960s. A revised code that proposed dramatic changes in the organizing principles of criminal law could only be greeted as a typically unrealistic product of the ivory tower.

I confess that I would probably strike a different balance if I were more enthusiastic about the merits of Fletcher's or Robinson's arguments. To that extent, my argument perhaps depends on an implicit intellectual defense of the existing structure of the Code, which this is not the place to elaborate. But I suspect that my

¹⁷ See, e.g., George P. Fletcher, *Dogmas of the Model Penal Code*, 2 BUFF. CRIM. L. REV. 3 (1998). See generally GEORGE P. FLETCHER, *RETHINKING CRIMINAL LAW* (1978).

¹⁸ Paul H. Robinson, *In Defense of the Model Penal Code: A Reply to Professor Fletcher*, 2 BUFF. CRIM. L. REV. 25 (1998).

¹⁹ PAUL H. ROBINSON, *STRUCTURE AND FUNCTION IN CRIMINAL LAW* (1997).

lack of enthusiasm for these proposals is widely shared, and that time spent debating such revolutionary change in penal codes would not, in the end, lead to their adoption even by an academic advisory body, let alone to their implementation by legislatures. My point is that whatever chance there is to influence actual law depends on addressing issues that *are* on the real-world agenda, and on doing so in a way that respects, rather than seeks to overturn, conventional legal and moral assumptions. Thus, my own hopes for development of a revised code would begin with specific model statutes in areas in need of concrete reform, which could be adopted by a legislature within an MPC-based Code, and to gradually build a revised Model Code that would take the same general form as its great predecessor.²⁰

B. *The Danger of the Arcane*

Another potential pitfall is one familiar to law school curricular reformers. Such reforms tend to begin, logically enough, at the beginning, focusing first and primarily on the first-year curriculum. Somehow, despite a general consensus that the most unsatisfying part of the law school program is in the latter years, curricular reform discussions bog down in yet another revision of the part of the curriculum that works best. The tendency to tinker with the least-failed parts of the program is driven by factors that would also affect comprehensive penal code reform: principally, the desire to begin at the beginning, debating fundamental premises before matters of detail, and the fact that the issues are more familiar to the participants and thus easier to debate than issues that were never adequately articulated in the first place.

The most important problems with the MPC are in the special part. Changing social and political conditions have a more rapid impact on this highly contingent portion of the criminal law, only more slowly changing basic notions of culpability. The latter, however, are far more interesting to academic theorists, precisely because of their timeless quality. But probably for this very reason, the general part of the Code, despite any number of sites of potential improvement, was more satisfactory from the beginning.

I don't mean to suggest that possibilities for improvement should be ignored. But once again, concerns of priority in the allocation of intellectual resources demand a different focus for any immediate reform project. Legal academics can continue to talk about what they want to talk about, and to have as much effect on policy deliberations as they have had over the past quarter-century. That does not require a revised MPC project. But the issues I have proposed above are ones that serious students of criminal law *should* be addressing in a law reform project. Perhaps it is already unrealistic to think that legislators could be brought to systematically and thoughtfully revisit the reactive improvisations of the past few decades. But that is a

²⁰ Paul Robinson's report on his work with the Illinois and Kentucky penal code reform projects strongly implies that when it comes to concrete reform, he too is prepared to put to one side more radical experiments in form in favor of a structure familiar to legislators and based in large part on the MPC. See Robinson, *supra* note 6, at 173.

far more important and promising project than revising aspects of a model code that were embraced by legislatures when general recodification was on the public agenda (and thus would be hard to generate interest in changing, now that such general reform is not a major public issue) or that failed adoption in the first place for lack of practical appeal.²¹ In short, a reform program that concentrated on technical fixes to the relatively arcane concepts of interest to academics would lack any urgency or political appeal. It might generate an “improved” MPC for use in classrooms, but it would squander whatever opportunity might exist to address serious problems with existing penalty codes.

VIII. CONCLUSION: LAW REFORM AND LEGAL SCHOLARSHIP

I am not here concerned with the purposes or nature of legal scholarship, though I hope I have set out a number of questions that would repay significant scholarly inquiry. What I have tried to do, rather, is to insist that the MPC was, and that any revision must also be, a law reform project, not primarily or solely a work of scholarship. The first Code succeeded admirably in some of its primary reform objectives. If a second is to have any comparable success, its drafters must focus, as their predecessors did, on those areas of criminal law where the need for reform is greatest, because the original Code was unsatisfactory, or silent, or failed to anticipate developments that have rendered its original provisions antiquated. In seeking those areas, our best guides will not be those academics who have written about the core issues of criminal law that have largely been settled, as a practical matter, by the MPC, but the legislative bodies who for a quarter-century have been churning out criminal statutes addressing what they and their constituents regard as the pressing criminal law problems of our time. If we follow those guides, we will find statutes that are often thoughtless, poorly-drafted, and counterproductive, but that identify genuine problems that the Model Code of the 1950s and 1960s did not adequately solve. Could there be a more fertile ground for reform, or a more important set of issues for criminal law scholars to address?

²¹ Ken Simons' contribution to this forum is a good example of the kinds of reforms I would *not* make a priority. See Simons, *supra* note 9. This is not a matter of disagreement with any or all of his particular criticisms of the Code's culpability rules; I find some of his suggestions appealing and others not, and his discussion is a significant contribution to the debate over these issues. It is simply that a project to debate his proposals for reform could easily spend years in interesting discussion, only to produce a document that would stand little chance of adoption—not because legislatures found it substantively less attractive than the existing MPC-based formulations, but simply because there is (for good reason) little sense that the existing formulations are causing confusion or injustice in their practical application in the real world.

