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## REFORMING AMERICAN PENAL LAW

MARKUS DIRK DUBBER\*

This article develops a new code-based, comparative, and comprehensive program for American penal law. Without this fresh start, the discipline of American penal law will play no significant role in the inevitable reconsideration of arational penal legislation accumulated during the war on crime of the past two decades.<sup>1</sup> Already, the writing of reform is on the wall. The American Law Institute is considering a revision of its Model Penal Code.<sup>2</sup> The pressure on the federal government to revise its anachronistic, bloated, and incoherent criminal code is mounting.<sup>3</sup> And even Draconian drug laws, the vanguard of the war on crime, have begun to come under attack.<sup>4</sup>

To have a voice in this much-needed legislative reform, American penal law scholarship must first reform itself. Without a sophisticated account of codified penal law that reflects the variety and scope of modern penal law within and across jurisdictions, American penal law scholars will remain largely irrelevant to the making of penal law in this country, and rightly so.<sup>5</sup>

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<sup>1</sup> On the concept of arational lawmaking, see Markus Dirk Dubber, *Recidivist Statutes as Arational Punishment*, 43 BUFF. L. REV. 689, 689-90, 714-24 (1995).

<sup>2</sup> Cf. Symposium, *The Model Penal Code Revisited*, 4 BUFF. CRIM. L. REV. 1 (forthcoming 2000).

<sup>3</sup> See, e.g., WILLIAM H. REHNQUIST, THE 1998 YEAR-END REPORT OF THE FEDERAL JUDICIARY (1999); Symposium, *Toward a New Federal Criminal Code*, 2 BUFF. CRIM. L. REV. 1 (1998); *The Federalization of Criminal Law*, 1998 A.B.A. Crim. Just. Sec., TASK FORCE ON THE FEDERALIZATION OF CRIMINAL LAW (1998).

<sup>4</sup> See, e.g., Alan Finder, *Top New York Judge Calls for Easing Some Drug Laws*, N.Y. TIMES, Feb. 9, 1999, at B5.

<sup>5</sup> See Sara Sun Beale, *What's Law Got To Do With It? The Political, Social, Psychological and Other Non-Legal Factors Influencing the Development of (Federal) Criminal Law*, 1 BUFF. CRIM. L. REV. 23 (1997); Samuel H. Pillsbury, *Why Are We Ignored? The Peculiar Place of Experts in the Current Debate About Crime and Justice*, 31 CRIM. L. BULL. 305 (1995).

The age of the common penal law is over. Penal law now is made in codes by legislators, not in court opinions by judges. To deserve a say in penal legislation, American penal law scholars must become experts in penal legislation. And to have the ear of legislators, American penal law scholars must address legislators, not judges.

The reform of American penal law will require a sustained effort to reshape the attitudes of all those who affect and operate the various aspects of the penal system. To influence the praxis of its subject matter, the discipline of American penal law must make a place for itself in this effort. Scholars and teachers of American penal law must begin to perceive themselves as participants in the penal system itself, both by recognizing themselves as contributors to—rather than as mere observers of—the making and application of penal law, and by instilling in present and future system officials a sense of obligation to achieve and maintain the legitimacy of their coercive actions. In other words, the discipline of American penal law must come to see itself as part and parcel of its subject, the praxis of American penal law.

To prepare itself for this formidable and absolutely crucial task, the discipline of American penal law must integrate itself both internally and externally. This means that the discipline, first, must shatter the artificial distinctions between its three subdisciplines, substantive penal law (“criminal law”), procedural penal law (“criminal procedure”), and prison law, and, thus reconstructed, place itself within the larger context of law. The subdisciplines of penal law exist in inexcusable isolation not only from the praxis of penal law, but also from one another; the discipline of penal law itself muddles along in almost complete ignorance of other areas of law. American penal law has yet to develop a satisfactory account of its relation to the law of torts or contracts, or for that matter, to the law of taxation or bankruptcy. As a result, American penal law has the least to say about the very issues that matter most in penal lawmaking—namely the proper role of penal law in public policy, and the proper scope and definition of offenses within that role. Put

another way, no theory of the special part of American penal law currently exists.

The remainder of this article, in Part I, outlines a general program for the reform of all aspects of the discipline of American penal law, including teaching, scholarship, and public service. Part II then shows how one might begin to put that program into action. It works out a new, integrative approach to the analysis of American penal law, with particular emphasis on substantive criminal law. Against the background of this code-based, comparative, and comprehensive approach, Part III lays out the plans for a new kind of penal law resource that draws on the scope, flexibility, and interconnectedness of the web medium to capture both modern penal law's enormous breadth and complexity, while at the same time exposing its potential for internal and external integration—that is, its essential “webness.”

Over the past year, I have begun putting the plans for such a penal law web into action.<sup>6</sup> Readers are invited to sample this prototype as they move through the discussion in Part III. It is important to keep in mind, however, that this illustrative version of a penal law web captures the integration of only one aspect of the penal law, substantive penal law (“criminal law”). To realize the full integrative potential of penal law, the current model would have to be located within a wider web of webs dedicated, internally, to other aspects of the penal law as well as, externally, to other areas of the law within and eventually across jurisdictions, countries, and legal systems. The construction and maintenance of this network of webs will require a sustained coordinated effort among a large group of legal experts.

Part IV closes by exploring the ways in which the outlined web resource could help shape the critical attitudes of participants at all levels of the penal law system. A web, however, can only lay the groundwork for the legitimacy critique of penal law by collecting and categorizing data. In the long run the legitimacy of the most facially illegitimate of state practices, punish-

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<sup>6</sup> Markus Dirk Dubber, *Penal Law: A Web*, <<http://wings.buffalo.edu/law/bclc/web/cover>>.

ment, can only be achieved and preserved if the integrative potential of penal law is first realized and then fulfilled. Otherwise, penal law will remain that ever-expanding morass beyond the pale of comprehension and critique which it is today.

### I. REFORMING AMERICAN PENAL LAW

The internal and external integration of American penal law must reach every aspect of the discipline, from teaching to scholarship to public service.

#### A. TEACHING

No area of the law, no mode of governance, requires legitimation more urgently than the threat and actual infliction of punishment in the name of penal law.<sup>7</sup> And this process of legitimation through public critique must begin in the classrooms of our law schools. This means, first and foremost, that it is no longer enough to teach law students to think like lawyers. Instead, students must be taught to think like legislators, like the producers and not merely like the consumers of law. Only then will they come to appreciate the systematic complexity of the codes that lie at the foundation of modern law, and of modern penal law in particular. Only then will they come to develop the sense of authorship and responsibility required for that continuous critical analysis of state lawmaking which is the only possible source of legitimacy for the modern state's coercive governance of its presumptively self-governing constituents.<sup>8</sup>

Reforming penal law teaching will also require expanding the role of penal law in the law school curriculum. To restrict the subject of substantive criminal law, for example, to a single semester in the first year of study is unacceptable for two reasons: first, the explosion of criminalization over the last decades has transformed the always challenging task of covering this sub-

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<sup>7</sup> See Robert M. Cover, *Violence and the Word*, 95 YALE L.J. 1601 (1986). I prefer the term "penal law" to the vaguer "criminal law" precisely because it drives home the point that the state practice governed by this branch of law is always also about punitive pain, no matter what other benefits society, or the offender herself, might derive from it.

<sup>8</sup> Cornelius Castoriadis, *The Imaginary: Creation in the Social-Historical Domain*, in *WORLD IN FRAGMENTS* 3, 17-18 (David Ames Curtis ed. & trans., 1997).

ject in one semester into an impossible one; second, the traditional function of the first year curriculum condemns the substance of any subject, including substantive criminal law, to incidental significance. If the legitimacy, not to mention the soundness, of penal law is to be achieved and assured, law schools can no longer regard the teaching of penal law as a means to the ill-defined and shortsighted end of teaching incoming students how "to think like a lawyer." Penal law, a subject central to the legitimacy of state governance, must become more than a convenient source of hypotheticals on which beginning law students can cut their adversarial teeth.

The teaching of substantive criminal law therefore should be extended beyond a single semester of the first year. At the very least, the course must be extended to cover two semesters, with the first semester dedicated to the general part and the second to the special part of criminal law. This year-long course should then be supplemented with advanced courses and seminars dedicated to specific topics in criminal law as well as to the further exploration of issues in the general and special parts that did not receive adequate attention in the introductory course.

One class, for example, might be dedicated to a long ignored subject, the constitutional foundations and limits of substantive criminal law. Paradoxically, while the teaching of substantive criminal law in American law schools virtually ignores constitutional law, procedural criminal law classes deal with nothing but constitutional law. Today, a law student can take a wide selection of courses on criminal procedure without ever learning the first thing about the praxis of criminal procedure. Instead of teaching their students about the criminal process—mainly plea bargaining—our law schools every day create new courses dealing with the constitutional law of yet another aspect of an increasingly fictitious process culminating in a trial by a jury of one's peers. As the United States Supreme Court has continued to make constitutional law on this subject, with the obligatory fall out among the lower courts, so teaching materials on criminal procedure have evolved from a chapter in casebooks on constitutional or criminal law into their very own

casebooks and, most recently, into multi-volume casebooks series.<sup>9</sup>

Criminal procedure therefore must be wrested from the titillating, but merely marginally relevant, context of constitutional jurisprudence. Once this subdiscipline of penal law has shed its constitutional pretensions, the study of the criminal process can be subjected to principled analysis. Currently, there is no theory of the criminal process, apart from whatever increasingly dim light general constitutional theory sheds on some of its peripheral aspects. A non-constitutional theory of the criminal process would integrate it into a comprehensive approach to penal law. Such a theory, to deserve the attention of lawmakers, must go beyond the invocation of tokens like "adversariness," "convicting the guilty and acquitting the innocent," or even "truth."<sup>10</sup>

The lack of a non-constitutional account grounding the American criminal process became painfully obvious in a recent federal case. In *United States v. Singleton*,<sup>11</sup> a panel of the Tenth Circuit discovered that the "federal criminal code" (title 18 of

<sup>9</sup> On the current state of American criminal procedure, see Markus Dirk Dubber, *American Plea Bargains, German Lay Judges, and the Crisis of Criminal Procedure*, 49 STAN. L. REV. 547, 601-05 (1997).

<sup>10</sup> The leading work on non-constitutional criminal procedure is still HERBERT PACKER, *THE LIMITS OF THE CRIMINAL SANCTION* (1968), which itself was an anomaly. Since then the literature has been sparse, despite the occasional appearance of thoughtful articles, beginning with John Griffiths' provocative critique of Packer's useful but unambitious book. See John Griffiths, *Ideology in Criminal Procedure or A Third "Model" of the Criminal Process*, 79 YALE L.J. 359 (1970); see also Richard P. Adelstein, *Institutional Function and Evolution in the Criminal Process*, 76 NW. U. L. REV. 1 (1981); Peter Arenella, *Rethinking the Functions of Criminal Procedure: The Warren and Burger Courts' Competing Ideologies*, 72 GEO. L.J. 185 (1983); Craig M. Bradley, *Two Models of the Fourth Amendment*, 83 MICH. L. REV. 1468 (1985). Recently, non-constitutional criminal procedure scholarship has begun a promising recovery in the wake of the disintegration of constitutional criminal procedure jurisprudence under the Rehnquist Court. See, e.g., Dan M. Kahan & Tracey L. Meares, *The Coming Crisis of Criminal Procedure*, 86 GEO. L.J. 1153 (1998); Christopher Slobogin, *The World Without a Fourth Amendment*, 39 UCLA L. REV. 1 (1991); William J. Stuntz, *The Substantive Origins of Criminal Procedure*, 105 YALE L.J. 393 (1995); see also CHRISTOPHER SLOBOGIN, *CRIMINAL PROCEDURE: REGULATION OF POLICE INVESTIGATION* (2d ed. 1998); RONALD F. WRIGHT & MARC L. MILLER, *CRIMINAL PROCEDURE: CASES, STATUTES, AND EXECUTIVE MATERIALS* (1999).

<sup>11</sup> *United States v. Singleton*, 144 F.3d 1343 (10th Cir. 1998), *rev'd en banc*, 165 F.3d 1297 (10th Cir. 1999).

the U.S. Code) contained, in § 201(c)(2), a broadly defined felony of "giving, offering, or promising anything of value to a witness for or because of his testimony."<sup>12</sup> The court then proceeded to overturn a conviction that had been obtained based on testimony by a witness who had been promised leniency by the prosecutor in return for his testimony.<sup>13</sup>

This panel opinion sent shock waves through the country's criminal justice system and the national media.<sup>14</sup> That system was sure to collapse, it was said, if prosecutors no longer could offer leniency in exchange for a guilty plea and testimony. Quickly, these fears were allayed when the en banc court vacated the panel opinion on the ground that the statute "does not apply to the United States or an Assistant United States Attorney functioning within the official scope of the office," despite the fact that the statute contains no such limitation and, in fact, explicitly applies to "whoever."<sup>15</sup>

More noteworthy than the en banc court's conclusion, however, was its reasoning. Searching in vain for guideposts in the barren landscape of statutory criminal procedure, the court found itself invoking the spirit of the prosecutor as "alter ego" of the United States, which in turn revealed itself to the appellate judges as an "inanimate entity, not a being," thus removing the prosecutor-United States from the scope of "whoever" in § 201(c)(2), which, according to the court, "connotes a being."

*Singleton*, of course, exposed not only the poverty of criminal procedure, but also that of substantive criminal law, not to mention the sorry state of the so-called federal criminal code. This, after all, should have been an easy case of substantive criminal law. The procedural issue was merely a subsidiary, remedial question. The underlying issue was one of statutory interpretation of a provision in the special part of a criminal code. Unfortunately, however, American substantive criminal law has so little to say on this issue that the court did not even recognize

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<sup>12</sup> 18 U.S.C. § 201(c)(2) (1999).

<sup>13</sup> *Singleton*, 144 F.3d at 1343.

<sup>14</sup> See, e.g., William Glaberson, *Ruling Puts Leniency, a Top Tool For Prosecutors, Under Scrutiny*, N.Y. TIMES, Oct. 27, 1998, at A1.

<sup>15</sup> *Singleton*, 165 F.3d at 1297.



its substantive nature. At least two substantive approaches suggested themselves. First, the court might have read the statute in light of a theory of the special part of federal criminal law. Such a theory would identify the interests protected by federal criminal law and then illustrate how each offense in the federal criminal law's special part protects one of these interests. No such theory exists. As a result, *Singleton* can happen any day since the special part of American penal law is treated as a mere grab bag of unconnected offense definitions, to be invoked at the unreviewable discretion of prosecutors or, as in *Singleton*, the reviewable discretion of defense attorneys.

Second, the court could have recognized that the application of the statute to the prosecutor's action might trigger a justification defense, according to which the violation of the statute might be not unlawful in light of some overriding societal interest, such as the smooth operation of the criminal justice system or the conviction of the guilty. (Of course, the effect, if any, of the possible justification of the prosecutor's facially criminal conduct on the admissibility of the bribed witness's testimony is another question altogether.) At any rate, the general balancing in the context of the justification question would then have forced the court to consider the theory of the functions of the criminal process, which, as we just saw, does not exist. The court, however, did not even reach this inquiry since it failed to identify the issue as one of the *prosecutor's* substantive criminal liability in the first place.

So much for the teaching of substantive and procedural criminal law. The third subdiscipline of penal law deals with the actual infliction of punitive pain. The infliction of punishment is that aspect of the penal law which most urgently requires legitimation, yet it is also that aspect which receives the least attention in teaching and scholarship. It has attracted so little pedagogic and scholarly attention that it has not been assigned a name. The subject of "prison law" comes closest to addressing the praxis of punishment infliction.<sup>16</sup> Despite the central im-

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<sup>16</sup> The label "law of corrections" is also often used. Given the abandonment of any attempt at rehabilitative treatment in our prisons, however, this label is anachronistic at best, and hypocritical at worst.

portance of imprisonment as a mode of punishment in American penal law, "prison law" by definition excludes a large part of the praxis of punishment infliction, including "boot camps," probation and parole, mediation, reconciliation and restitution, community service, house arrest, "intensive supervision," drug treatment, sex offender treatment, as well as corporal penalties such as chemical or physical castration and, of course, the infliction of capital punishment, which as the paradigmatic "execution" has evolved into a highly complex administrative ritual beyond the reach of legal rules.

Even in this severely limited form, the law of punishment infliction barely survives on the outskirts of the law school curriculum and generates virtually no scholarship. As in the case of criminal procedure, whatever attention the infliction of punishment has managed to attract has been devoted almost entirely to questions of constitutional law. It has become clear, however, that it makes no more sense to read the Constitution as a code of prison law than it does to read it as a code of criminal procedure.<sup>17</sup> It is symptomatic of the neglect of this crucial subject that the entire second half of the Model Penal Code, the most comprehensive and integrated treatment of what the Code calls the law of "treatment and corrections," has been largely ignored by scholars and legislatures alike.<sup>18</sup>

Once penal law has been assigned its proper place in the guts of the law school curriculum, it must be taught using an approach that subjects the praxis of penal law in this country to critical analysis.

This means, first, that a class on penal law must have something to do with the praxis of penal law. Most immediately, penal law can no longer be taught as a common law subject, almost forty years after the codification of American penal law in the wake of the Model Penal Code. Moreover, the teaching of penal law can no longer ignore the evermultiplying so-called regulatory offenses, which today easily outnumber the offenses

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<sup>17</sup> See Henry J. Friendly, *The Bill of Rights as a Code of Criminal Procedure*, 53 CAL. L. REV. 929 (1965).

<sup>18</sup> Note also that the American Law Institute's Commentaries, whose influence rivals that of the Code itself, cover only the first half of the Code.

traditionally covered in a penal law class, homicide chief among them.

Second, teachers must move beyond the mere reporting of selected curious and curiouser quirks of penal law. The praxis of penal law must be subjected to constant critique from the perspective of certain principles. Law students—our nation's future prosecutors, public defenders, judges, and legislators, law commissioners, committee staffers—must be given the analytic tools required for the much needed and difficult work of continuously revisiting and revising the penal law.

#### B. SCHOLARSHIP AND PUBLIC SERVICE

These tools for the critical analysis of the penal law, however, must be developed before they can be passed on. This will require the transformation of penal law scholarship into a praxis oriented, and in this sense positivistic, discipline. Once penal law is thus reconceived, the distinction between scholarship and public service falls away and the question of the relevance of penal law scholarship is resolved.

The new discipline of penal law begins and ends with praxis. It begins with an analysis of the legal rules governing the penal law. It continues with the internal and external critique of the penal law. It ends with proposals for reform.

The analytic aspect of penal law scholarship, long neglected, attains greater significance every day as modern penal law continues to expand. Today the mere assembly of a list of all criminal offenses in a given jurisdiction, not to mention the entire United States, would constitute a major scholarly contribution. Contemporary penal law scholars simply do not know enough about the positive penal law to warrant special consideration in the making of penal law. The doctrinal expertise of today's penal law scholars tends to be of little if any practical relevance. It often is limited to the anachronistic remnants of a body of penal law that retains mostly historical significance, the "common law,"<sup>19</sup> or to a deliberately incomplete draft penal

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<sup>19</sup> On the contemporary irrelevance of common penal law, see *infra* Part II.A.

code published some four decades ago, the Model Penal Code.<sup>20</sup> Even within the common law and the Model Penal Code, expertise clusters around the least practically significant portion, the general part.

The analysis of the rules of penal law must take into consideration their application. Still, that consideration should not come at the expense of considering the rule itself. In fact, disregarding the rule makes an important aspect of internal critique, namely the comparison of rule and application, impossible. The other aspect of internal—or first-order—legitimacy critique is consistency among rules. By contrast, in external—or second-order—critique, the rules themselves are scrutinized under general principles of legitimacy. These principles may be formal (e.g., participation) or substantive (e.g., privacy). Careful analysis and critique then form the basis for proposals to reform either the rules themselves or their application.

This Article outlines a conceptual and institutional framework for the transformation of penal law. It does not attempt to resolve the substantive question of what principle or principles should guide the critical analysis of penal praxis. Yet one thing is clear: to carry critical significance, these principles must be drawn from the purposes and limits of penal law in a modern democratic state, rather than from the murky depths of the English common law. A slogan like "*ignorantia juris non excusat*," for example, is an historical oddity without any contemporary critical relevance whatsoever. The same holds for the eternally repetitive debate about the "justifications" of punishment, carried on under the misleading heading of punishment theory. Such tired labels as "retributivism" or "consequentialism" pack no legitimating punch unless they are directly rooted in some theory about the legitimate functions and powers of the state. If the enlightenment has taught us anything, it is that legal theory belongs to political theory, rather than moral theory alone.

The critical analysis of penal law cannot occur in a vacuum. As only one among many modes of governance employed by the

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<sup>20</sup> On the anachronism and limited scope of the Model Penal Code, see *infra* Part II.B.

state, a full account of penal law must integrate itself into a wider account of state governance, and of law in particular. As a species of law, penal law must be distinguished from other modes of governance, most importantly regulation or exercises of the power to police.<sup>21</sup> In addition, penal law must be distinguished from other legal modes of governance, including both so-called public and private law. The relation of penal law to other areas of law tends to be discussed in abstract terms, if at all. So one occasionally finds general explorations of the distinction between civil penalties and criminal punishments, or between civil and criminal law, or between torts and criminal law.<sup>22</sup> These probings, though often insightful, tend to have little practical significance. At best, they may result in proposals for a procedural distinction between areas of law whose substantive distinction remains unresolved.<sup>23</sup>

A more promising approach, better grounded in the positive law, might explore the obvious doctrinal points of contact between penal law and other areas of law. To pick an elementary example, we still do not have a satisfactory account of the relation between the central concepts in penal law and tort law, including—in the general part of penal law—act,<sup>24</sup> commission through omission,<sup>25</sup> harm,<sup>26</sup> voluntariness,<sup>27</sup> intention,<sup>28</sup> recklessness,<sup>29</sup> negligence,<sup>30</sup> strict liability,<sup>31</sup> causation,<sup>32</sup> mistake,<sup>33</sup> rea-

<sup>21</sup> See ERNST FREUND, *THE POLICE POWER: PUBLIC POLICY AND CONSTITUTIONAL RIGHTS* (1904); WILLIAM J. NOVAK, *INTELLECTUAL ORIGINS OF THE STATE POLICE POWER: THE COMMON LAW VISION OF A WELL-REGULATED SOCIETY* (1989).

<sup>22</sup> See, e.g., Symposium, *The Intersection of Tort and Criminal Law*, 76 B.U. L. REV. 1 (1996).

<sup>23</sup> See, e.g., Kenneth Mann, *Punitive Civil Sanctions: The Middleground Between Criminal and Civil Law*, 101 YALE L.J. 1795, 1871-73 (1992).

<sup>24</sup> Compare RESTATEMENT (SECOND) OF TORTS §§ 2, 3 (1965) with MODEL PENAL CODE § 2.01 (1985).

<sup>25</sup> Compare RESTATEMENT (SECOND) OF TORTS §§ 4, 284 with MODEL PENAL CODE § 2.01(3).

<sup>26</sup> Compare RESTATEMENT (SECOND) OF TORTS § 7 with MODEL PENAL CODE § 1.02(1)(a).

<sup>27</sup> Compare RESTATEMENT (SECOND) OF TORTS § 2 with MODEL PENAL CODE § 2.01(2).

<sup>28</sup> Compare RESTATEMENT (SECOND) OF TORTS § 8A with MODEL PENAL CODE § 2.02(2)(a) & (b).

<sup>29</sup> Compare RESTATEMENT (SECOND) OF TORTS § 500 with MODEL PENAL CODE § 2.02(2)(c).

sonableness,<sup>34</sup> justification,<sup>35</sup> public and private necessity,<sup>36</sup> self-defense,<sup>37</sup> use of force in law enforcement,<sup>38</sup> consent,<sup>39</sup> excuse,<sup>40</sup> insanity,<sup>41</sup> infancy,<sup>42</sup> attempt,<sup>43</sup> as well as (in the special part) protected interests<sup>44</sup> and the host of torts paralleling criminal offenses, such as assault,<sup>45</sup> battery,<sup>46</sup> false imprisonment,<sup>47</sup> trespass on land,<sup>48</sup> and trespass to chattels,<sup>49</sup> and so on and so on. At best, a discussion of these concepts in either area of law will be preceded by a passing preference to the distinction between penal and tort law, which in the end does no more than sound a note of caution not to commit the fundamental error of daring to think that the definition of a given concept in one area might

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<sup>30</sup> Compare RESTATEMENT (SECOND) OF TORTS §§ 282, 283A, 283B, 283C, 284 with MODEL PENAL CODE § 2.02(2) (d).

<sup>31</sup> Compare RESTATEMENT (SECOND) OF TORTS § 519 with MODEL PENAL CODE § 2.05.

<sup>32</sup> Compare RESTATEMENT (SECOND) OF TORTS § 9 with MODEL PENAL CODE § 2.03.

<sup>33</sup> Compare RESTATEMENT (SECOND) OF TORTS §§ 55-57, 78 with MODEL PENAL CODE § 2.04.

<sup>34</sup> Compare RESTATEMENT (SECOND) OF TORTS §§ 11, 283 with MODEL PENAL CODE §§ 1.13(16), 2.02(2) (d), 2.09(1).

<sup>35</sup> Compare RESTATEMENT (SECOND) OF TORTS §§ 288A, 296 with MODEL PENAL CODE §§ 3.01, 3.02.

<sup>36</sup> Compare RESTATEMENT (SECOND) OF TORTS §§ 262-263 with MODEL PENAL CODE § 3.02.

<sup>37</sup> Compare RESTATEMENT (SECOND) OF TORTS §§ 63-76, 261 with MODEL PENAL CODE § 3.04.

<sup>38</sup> Compare RESTATEMENT (SECOND) OF TORTS §§ 117-118 with MODEL PENAL CODE § 3.07.

<sup>39</sup> Compare RESTATEMENT (SECOND) OF TORTS § 10A with MODEL PENAL CODE § 2.11.

<sup>40</sup> Compare RESTATEMENT (SECOND) OF TORTS §§ 288A, 296 with MODEL PENAL CODE §§ 2.04(3), 2.08, 2.09, 2.10.

<sup>41</sup> Compare RESTATEMENT (SECOND) OF TORTS § 283B with MODEL PENAL CODE § 4.01.

<sup>42</sup> Compare RESTATEMENT (SECOND) OF TORTS § 283A with MODEL PENAL CODE § 4.10.

<sup>43</sup> Compare RESTATEMENT (SECOND) OF TORTS §§ 22-23 with MODEL PENAL CODE § 5.01.

<sup>44</sup> Compare RESTATEMENT (SECOND) OF TORTS § 1 with MODEL PENAL CODE § 1.02(1) (a).

<sup>45</sup> Compare RESTATEMENT (SECOND) OF TORTS § 21 with MODEL PENAL CODE § 211.1.

<sup>46</sup> Compare RESTATEMENT (SECOND) OF TORTS §§ 13, 15 with MODEL PENAL CODE § 211.1.

<sup>47</sup> Compare RESTATEMENT (SECOND) OF TORTS § 35 with MODEL PENAL CODE § 212.3.

<sup>48</sup> Compare RESTATEMENT (SECOND) OF TORTS ch. 7 with MODEL PENAL CODE § 221.2.

<sup>49</sup> Compare RESTATEMENT (SECOND) OF TORTS ch. 9 with MODEL PENAL CODE §§ 222-224.

have something to do with the definition of that concept in the other.<sup>50</sup> Generally, however, the connection between these obviously related areas of law is simply ignored.

The relationship between penal law and other areas of law remains unarticulated even if the doctrine of penal law makes specific reference to non-penal law. For example, the availability of justification defenses in the penal law generally turns on the concept of "lawfulness" in two ways.<sup>51</sup> First, as a general theoretical matter, to say that a facially criminal conduct is justified is simply another way of saying that it is lawful, or at least not unlawful. So conduct that is criminal (i.e., violative of the penal law, insofar as it violates a norm protected by the penal law in a particular offense definition) goes unpunished because it is not unlawful (i.e., not violative of the law generally speaking, insofar as it manifested another, higher order norm, which may or may not be codified in a provision of the penal law).

Second, particular provisions defining the conditions that would justify a facially criminal act often explicitly invoke the concept of lawfulness.<sup>52</sup> For example, a consent justification is available for the criminal infliction of bodily harm provided the harm is a foreseeable consequence of participating "in a lawful athletic contest or competitive sport."<sup>53</sup> In fact, the Model Penal Code includes a general justification provision entitled "execu-

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<sup>50</sup> One finds this phobia not only in scholarly commentary, *see, e.g.*, WILLIAM L. PROSSER, *HANDBOOK OF THE LAW OF TORTS* 7-14 (4th ed. 1971), but also in jurisprudence, *see, e.g.*, *People v. Kibbe*, 35 N.Y.2d 407, 412 (1974), and, perhaps most perplexingly, in model legislation. Only this fire wall between torts and penal law can explain how the American Law Institute's drafters of a Restatement of Torts and of a Model Penal Code could complete their work in virtual isolation.

<sup>51</sup> Similar problems of demarcation arise when the concept of lawfulness appears elsewhere in the general part, such as in the definition of insanity, *see, e.g.*, MODEL PENAL CODE § 4.01, as well as in the special part, such as in the definition of particular offenses criminalizing various "unlawful" acts, *see, e.g.*, John C. Coffee, *Does "Unlawful" Mean "Criminal"? Reflections on the Disappearing Tort/Crime Distinction in American Law*, 71 B.U. L. REV. 193 (1991).

<sup>52</sup> Consider, for example, how often the Model Penal Code's justification provisions rely on the concept. *See, e.g.*, MODEL PENAL CODE §§ 2.09(1), 2.10, 2.11(2)(b), 3.03, 3.04(1), 3.04(2)(a)(i), 3.04(2)(a)(ii)(A), 3.04(2)(a)(ii)(B), 3.04(2)(c), 3.06(1)(a), 3.06(1)(b), 3.06(3)(c), 3.06(6), 3.07(1), 3.07(4)(a), 3.07(4)(b), 3.07(5)(a), 3.09 (1985).

<sup>53</sup> *Id.* § 2.11(2)(b).

tion of public duty," which applies to conduct "required or authorized" by various provisions outside the penal law, including "the law defining the duties or functions of a public officer or the assistance to be rendered to such officer in the performance of his duties," "the law governing the execution of legal process," "the law governing the armed services or the lawful conduct of war," or, most broadly, "any other provision of law imposing a public duty."<sup>54</sup>

Yet the Model Penal Code also provides that the availability of a justification defense (i.e., a finding that the facially criminal conduct was not unlawful) "does not abolish or impair any remedy for such conduct which is available in any civil action."<sup>55</sup> In other words, the facially criminal, yet not unlawful conduct may turn out to be unlawful after all.<sup>56</sup>

The discipline of penal law of course is not alone to blame for its failure to integrate itself into the discipline of law. That failure instead reflects the collapse of the discipline of law itself. No attempt at a comprehensive account of American law has emerged since the demise of the legal process school some thirty years ago. The comprehensive, yet hardly sophisticated, conceptualist approach associated with Langdell was ridiculed by the legal sociologists and the legal realists.<sup>57</sup> After World War II the ambitious, and more sophisticated, legal process project similarly fell victim to attacks on the autonomy of law by resurrected and radicalized legal sociology ("law and society") and legal realism ("critical legal studies"), and eventually and most persistently applied economics ("law and economics").<sup>58</sup>

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<sup>54</sup> *Id.* § 3.03.

<sup>55</sup> *Id.* § 3.10.

<sup>56</sup> *Id.* §§ 3.01(2), 3.10.

<sup>57</sup> See, e.g., Felix Cohen, *Transcendental Nonsense and the Functional Approach*, 35 COLUM. L. REV. 809 (1935); Oliver Wendell Holmes, *The Path of the Law*, 10 HARV. L. REV. 457 (1897); Oliver Wendell Holmes, *Review of Langdell, Summary of Contracts*, 14 AM. L. REV. 233 (1880); Roscoe Pound, *Mechanical Jurisprudence*, 8 COLUM. L. REV. 605 (1908); Roscoe Pound, *The Need for a Sociological Jurisprudence*, 31 ABA REP. 911 (1907).

<sup>58</sup> MARK KELMAN, A GUIDE TO CRITICAL LEGAL STUDIES 186-212, 242-68 (1987); Robert W. Gordon, *Critical Legal Histories*, 36 STAN. L. REV. 57 (1984); Cass R. Sunstein, *The Autonomy of Law in Law and Economics*, 21 HARV. J.L. & PUB. POL'Y 89 (1997). This is not to say, of course, that these critiques of the once dominant legal process school



Stripped of its last remaining scientific pretensions, law today survives no longer as an autonomous subject discipline, but as the object phenomenon studied by other disciplines.

Without a general account of law as a mode of state governance, rather than as social or moral or economic datum, penal law cannot be integrated into such an account.

The formidable foundational task of constructing such a general account of law might be approached from the pragmatic perspective of codification. Codification suggests itself as the basis of a new comprehensive account of law for at least three reasons. First, after the momentous codification debates of the nineteenth century, the code is not only the desired but in most cases also the actual form of contemporary law. In other words, codification suggests itself as a promising framework for research because it is, formally speaking, the smallest common denominator of all branches of modern law.

Second, and more specifically, codification promotes the integration of law. The history of law both in the United States and elsewhere makes it plain that the enterprise of codification—the systematic, accessible, and public statement of the rules governing a given area of law—is crucial for the internal and external integration of modern law. It is no surprise that a codification project, the American Law Institute's Model Penal Code, generated the most integrated and comprehensive system of penal law in the United States.<sup>59</sup>

Codification promotes integration in various ways. It crystallizes possible connections. To return to the example of the distinction between penal law and tort law, any attempt to codify the definition of a given concept in one area would have to consult the definition of that concept in the other, and vice versa. Any discrepancies would have to be justified in light of different functions performed by the two modes of legal governance.

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were limited to its assumptions regarding the autonomy of law. As a pragmatic approach to policymaking, legal process instead suffered from a failure to investigate its underlying assumptions generally speaking.

<sup>59</sup> See Herbert L. Packer, *The Model Penal Code and Beyond*, 63 COLUM. L. REV. 594, 594 (1963).

Codification also preserves long-term integration. A systematic code will force the lawmaker to integrate amendments into its existing structure. Insofar as that structure is clearly connected to the underlying functions of the state in general, and of an area of law in particular, the code thereby frames debates about the propriety and legitimacy of future legislation.

Finally, and most importantly, codification focuses attention on the praxis of law. A code that addresses irrelevant topics is useless at best and confusing at worst. So is a code that addresses relevant topics in such a way that it fails to guide the actions of its official and non-official audience. To study law from the perspective of codification is to study law from the perspective of the legislator, the maker of law. A code-based approach to law therefore facilitates the transition from critical analysis to reform, from theoretical irrelevance to practical political impact.

This final step from scholarship to public service is crucial if the discipline of American penal law is to play a role in the reform of its subject matter. Once the discipline has reformed itself as proposed and has begun to accumulate practically significant expert knowledge, it must find ways to translate that knowledge into law, thus reforming rather than simply observing its subject matter.

The outlined conceptual transformation of American penal law into a practical discipline will not be achieved without an accompanying institutional transformation. I already have touched on the changes in the law school curriculum that must accompany the proposed reform in the teaching of penal law. The reform of American penal law *scholarship* must be similarly facilitated by institutional innovation. Once the enormity and complexity of the task facing a modern discipline of penal law has been recognized, it becomes clear that nothing short of a coordinated effort by the community of penal law scholars will suffice to do justice to this subject which goes to the core of the legitimacy of state coercion in the name of law. And even if the isolated and sporadic exploration of certain topics would advance penal law in one way or another—if the enormity of the scholarly task alone would not require coordination—the trans-

lation of these scholarly advances into political action would be impossible without consolidating the voices of individual scholars into organizations and groups of various scopes and objectives.

The scholarly coordination of the discipline requires new resources and fora for focused and sustained exchange. This article, in Part III, describes a new kind of web-based resource designed as a framework for the teaching, study, practice, and, eventually, reform of penal law. This law web exposes the connections within and among legal subdisciplines and disciplines without sacrificing their integrity. This interconnectivity is complemented by a flexibility far beyond that of the print medium, so that the law web can easily be updated and adapted to the needs of a particular user, thus tightening its connection to the praxis of penal law. In the end, the penal law web would consist of various subwebs, created and maintained by experts in a particular jurisdictional or doctrinal component of penal law. Eventually, the penal law web itself would then be integrated into a series of higher order law webs dedicated to the entire law system of a particular jurisdiction or to penal law in various jurisdictions.

Supplementing this new type of penal law resource, new fora for focused and sustained scholarly exchange would include faculty-edited journals with various topical scopes, ranging from specialty journals covering specific legal disciplines, such as penal law, to general journals covering issues of general interest across legal disciplines and jurisdictions.<sup>60</sup> These journals would join existing fora for scholarly exchange, such as the recently launched e-mail discussion group for criminal law professors<sup>61</sup> and an electronic abstract service for working papers and forthcoming publications,<sup>62</sup> to facilitate the development of a

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<sup>60</sup> Some journals of this kind, with widely varying missions, have begun to emerge in recent years. See, e.g., *BUFF. CRIM. L. REV.* (launched in 1997); *CRIME, HISTOIRE & SOCIÉTÉS/CRIME, HISTORY & SOCIETIES* (same); *PUNISHMENT & SOC'Y* (1998); see also *FED. SENTENCING REP.* (1988).

<sup>61</sup> See *CRIMPROF*, <crimprof@chicagokent.kentlaw.edu> (Stephen Sowle ed.) (launched in 1995).

<sup>62</sup> See *Criminal Law and Procedure Abstracts*, <criminal-law@publishers.ssrn.com> (Dan Kahan & Paul Robinson eds.) (launched in 1996).

discipline of penal law by fostering a continuous dialogue among penal law scholars at a high level of sophistication. As the slumber of American penal law since the heady, but brief, period of pragmatic collaboration resulting in the completion of the Model Penal Code in 1962 makes clear, no discipline can hope to make progress if its contributions are limited to sporadic publications in journals edited by and for non-experts.

The written exchange in these new specialty journals must be complemented by oral exchange in specialty conferences, dedicated to specific, praxis-oriented topics. The contributions to these conferences could then be published in the new specialty journals, as well as in another currently underdeveloped forum for disciplinary development, monograph series dedicated to penal law.<sup>63</sup> Rather than compose mammoth journal articles, the vast bulk of which provides background information to the non-expert editors and non-expert audiences of today's journals, penal law scholars would be better off writing in-depth monographs on specific topics in penal law. At the same time, the potential impact of books addressed at the general, non-academic, public should not be underestimated. Since the non-academic public pays no attention to articles, the current practice of writing articles for non-expert academics thus manages to address neither the relevant academic nor the non-academic audience, thus condemning the discipline of penal law to both scholarly stagnation and political insignificance.

To publish sophisticated monographs on penal law, however, one must first train scholars capable of writing them. The embryonic state not only of American penal law practice, but also of American penal law scholarship, is largely a function of the cursory treatment the subject receives in our law schools. The proposed reform of the law school curriculum therefore would take a first step toward elevating the quality of the discipline.<sup>64</sup> In addition, advanced degree programs in criminal law

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<sup>63</sup> The few existing monograph series tend to mix legal with policy analysis. *See, e.g.,* OXFORD MONOGRAPHS ON CRIMINAL LAW AND JUSTICE (Oxford Univ.); OXFORD STUDIES IN CRIME AND PUBLIC POLICY (Oxford Univ.); STUDIES IN CRIME & JUSTICE (Univ. of Chicago).

<sup>64</sup> *See supra* Part I.A.

must be created, as they already exist in dozens of other disciplines.<sup>65</sup>

So much for the institutional and organizational framework necessary to promote scholarly coordination. Once scholarly coordination has yielded scholarly achievements, *political* coordination will be needed to translate these achievements into praxis. This means the organizational consolidation of penal law scholars, ranging in scope and function from a general American Society for Penal Law, open to all penal law scholars, to working groups dedicated to the drafting of a new provision for one penal code or another.<sup>66</sup> These groups would vary not only in scope and function, but also in permanence. The Society for Penal Law could function as the permanent institutional framework for the assembly of smaller groups, which may address topics of short or long term relevance.<sup>67</sup>

The ultimately political and practical nature of the reformed discipline of penal law will help protect it against the dangers of over-specialization, which has afflicted so many highly developed penal law systems, such as the German science of penal law (*Strafrechtswissenschaft*), which continues to exert great influence in civil law countries throughout the world. To achieve and retain practical significance, American penal law scholarship must always also address its non-expert audience, from the non-expert voter, to the non-expert legislator, and,

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<sup>65</sup> Currently, very few U.S. law schools offer general LL.M. programs with a concentration in penal law—the University of San Diego is one example. Only one law school, the State University of New York at Buffalo, offers a specialized advanced degree in criminal law.

<sup>66</sup> See, for example, the group of German criminal law scholars who regularly meet, supported by a private foundation, to draft reform proposals, ranging in scope from an entire new penal code to, most recently, a provision on victim-offender mediation. ALTERNATIV-ENTWURF WIEDERGUTMACHUNG: ENTWURF EINES ARBEITSKREISES DEUTSCHER, ÖSTERREICHISCHER UND SCHWEIZERISCHER STRAFRECHTSLEHRER (Jürgen Baumann ed., 1992) (draft proposal for partial reform of the German Penal Code with commentaries).

<sup>67</sup> In addition to contributing to the political coordination of American penal law scholarship—that is, the transformation of scholarship into public service—the proposed Society for Penal Law could also help coordinate penal law scholarship by performing some of the functions outlined above, by publishing a specialty faculty-edited journal (a Review of American Penal Law) and by hosting conferences on penal law topics.

most importantly, the non-expert juror. Unlike its hypertrophied German counterpart, the American discipline of penal law does not enjoy the dubious luxury of addressing itself to expert professional judges who justify their verdict in often elaborate written opinions. Despite the practical insignificance of jury trials in our current plea bargaining system, the jury therefore may retain an important function by symbolizing the crucial importance of communicating acquired expert knowledge: any theory of American penal law is only as good as its jury instructions.

Having outlined a program for the comprehensive transformation of American penal law into an integrated practical discipline, it is now time to show in greater detail how one might go about filling in the sketch. The following part, Part II, narrows the focus to one of the three aspects of penal law—substantive criminal law. Part III then outlines a new kind of comprehensive resource, a penal law web, whose integrative and transformative impact on the discipline as well as the praxis of penal law is explored in Part IV.

## II. A NEW INTEGRATED APPROACH TO AMERICAN PENAL LAW

### A. CODE-BASED

Decades after the wave of codification set in motion by the Model Penal Code project (1953 to 1962), American penal law is still conceived of largely as a common law subject. The casebook remains the most commonly used instructional tool, although it must be admitted that the criminal law casebook has become something of a misnomer as no casebook today does without statutory materials. These penal code sections (or parts thereof), however, appear much like statutory provisions in common law opinions, usually inserted in passing, tucked in safely between more extended discussions of more authoritative court opinions. Code snippets, in other words, join newspaper clippings and necessarily truncated excerpts from scholarly pronouncements through the ages to enliven the otherwise rather relentless procession of statements of fact and conclusions of law composed by appellate judges who found them-

selves confronted with the extraordinary case that requires an extended trip to the library in chambers and inevitably finds expression in a carefully reasoned opinion befitting their judicial erudition and temperament.

It is high time for the penal code to be placed at the center, rather than at the periphery, of the study and teaching of penal law. In particular, teaching materials must do more than simply increase the proportion of statutory provisions to court opinions; they must attempt to expose the systematic unity of a given body of penal law, or lack thereof, by preserving the integrity of the code at its foundation. Complaints about the shortcomings of American criminal law scholarship, practice, and legislation are as old as American criminal law itself. This should surprise no one who considers the way in which American criminal law continues to be taught. Few students will muster much intellectual or moral respect for a subject presented as a hodgepodge of rulings and rules from various jurisdictions at various times in the history of the United States and its fellow common law countries (mostly England of course).

The cross-temporal and cross-jurisdictional sweep of American criminal law casebooks is nothing short of breathtaking. There one might find the nineteenth century lucubrations of an Oklahoma judge pro tem next to the 1960s riffs of a California appellate court. As a result, one might learn that indeed Arkansas courts in the 1920s took a different approach to the law of rape in a case involving a black defendant and a white woman than did, say, the New York Court of Appeals might in a 1990 case of statutory rape involving a 13-year-old victim and a 12-year-old defendant. Intrajurisdictional inconsistencies abound in any area of law; there is no reason to expect that crossing state borders will alleviate the inconsistencies.

Combining these interjurisdictional differences with intertemporal ones creates a cornucopia of rules that might amuse the perennial Legal Realist; as a teaching tool, this combination has a usefulness that is as merely preliminary as the significance of Legal Realism in the history of American law: once the point that legal rules are sensitive to time and place has been made, it is time to move on and familiarize oneself

with the body of law that is the object of one's study or, perhaps, even concern.

And the backbone of the body of modern penal law is the penal code. In the wake of the Model Penal Code, American penal codes—with some exceptions, most notably Title 18 of the United States Code, the so-called Federal Criminal Code—were revised or at least reconsidered in an attempt to provide the penal law, the state's most intrusive means of interfering with the life plans of its constituents, with a principled foundation. Some codes were more successful than others. Even the Model Penal Code is open to critique. The point is that a critical analysis of American penal law presumes an intimate familiarity with the state-as-lawmaker's most concerted effort to legitimize the exercise of its awesome punitive power. A teacher and scholar who merely points out the obvious inconsistencies in American penal law across time and space shoots fish in a barrel, which may prove entertaining to one's audience (and requires little preparation), but provides no long-term intellectual gratification for either student or teacher. It also does nothing to improve the much bemoaned quality of penal law in this country. The monopoly of law schools over legal education is secured and the influence of lawyers on all branches of government unchallenged; this means that the quality of American penal law is largely determined by those who at one point had to sit through at least one semester of a law school class on "criminal law."

Considering the variety of sources of legal rules across space and time that one finds in today's criminal law casebooks, it might be useful to think of these materials as comparative law or legal history casebooks. Both comparative law and legal history are, of course, interesting and worthwhile subjects. It is not clear, however, why the traditional course on *criminal law* should be devoted primarily to their study. This arrangement would be more sensible if it were intentional, or at least knowing. There is nothing wrong with teaching criminal law from a comparative or historical perspective. As any serious student of comparative law or legal history knows, however, cross-jurisdictional and cross-temporal comparison is easy to do, but hard to do well.



Anyone can marvel, with little effort, at the multitude of law across space and time. To understand, or even to describe, not to mention to judge, across the jurisdictional or historical divide, however, takes more than a breezy romp through a mish-mash of court opinions from here and there, and now and then.

There is one view of the law, of course, that would find no flaw in the accumulation of judicial opinions with no regard for the complications (as opposed to the mere existence) of spatial and temporal difference. It is the view to which the adulators of the Common Law have subscribed for centuries, namely that time and space lose their relevance in the Common Law's world of timeless and spaceless Reason. The grand ventriloquist Reason may speak at one moment through an English Lord in the eighteenth century, at another through a Nevada trial judge two centuries later. The voice of Reason is the same, no matter when or where it makes itself heard. This view of the law, one may safely assume, has been placed on the garbage heap of legal history. It is particularly odd, therefore, to see it at the bottom of so much modern-sounding sensitivity to the influence of time and space upon the penal law.

#### B. COMPARATIVE

If the common-law-as-reason-eternal-and-universal cannot justify the random collection of judicial opinions, only the comparative-historical approach to penal law remains as a possible explanation, though of course not as a justification, since no unintentional assembly can be justified. Penal law teaching materials should consciously adopt and develop this approach, with a particular emphasis on the comparative analysis of penal norms across space and, to a lesser degree, across time. This comparative approach would complement the code-based approach outlined above in several ways. First, the study and teaching of American penal law, as opposed to the penal law of a given state, simply must be comparative. Penal law in the United States still is primarily state law. This is so not only because the majority of criminal cases are, in fact, processed by the criminal justice systems of the various states, but also because there is no federal criminal code to speak of. As will be discussed in greater

detail below, the condition of the federal criminal code today resembles that of state penal codes prior to their reform in the wake of the completion of the American Law Institute's Model Penal Code some four decades ago.<sup>68</sup>

Not only is there no legislatively created national penal code; the judicial branch of the federal government has proved no more interested in the subject of substantive penal law than has its legislative branch (thus leaving the executive largely to its own devices, with predictable results). Unlike in the area of criminal procedure, the Supreme Court has made no effort to create a uniform code of substantive criminal law by judicial lawmaking. Finally, no commentator or group of commentators has managed to create and sustain a consistent, systematic, and comprehensive body of national penal law scholarship on the basis of which the study and teaching of penal law could proceed. The American Law Institute's official Model Penal Code commentaries, combined with the detailed provisions of the Model Penal Code itself, have most closely approximated such an authoritative account.<sup>69</sup> That project, however, was abandoned in the late 1970s and suffered from the inherent limitations of an officially sanctioned statement of the Code drafters' motivations. Even a more critical analysis of the Model Penal Code's provisions, however, could not have resulted in a comprehensive treatment of American penal law in its entirety due to the limitations of the Model Penal Code project itself, to be discussed in greater detail below.

Without a unifying code, legislative or judicial, and without a unifying body of commentary, penal law in the United States today can only be taught in two ways: locally or comparatively. It is astonishing to see how rarely the local approach to penal law teaching has been adopted. Not a single basic casebook of penal law currently devotes itself to the penal law, not to mention the penal code, of a given state. Strung together by the thin thread of a decades old Model Penal Code that no jurisdic-

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<sup>68</sup> For the best introduction to federal criminal code reform, see Ronald L. Gainer, *Federal Criminal Code Reform: Past and Future*, 2 *BUFF. CRIM. L. REV.* 45 (1998).

<sup>69</sup> *MODEL PENAL CODE AND COMMENTARIES: OFFICIAL DRAFT AND REVISED COMMENTS* (1985).

tion in the United States (or elsewhere) has adopted in its entirety and without significant amendments, these casebooks stake an ill-supported claim to national significance; the teaching of state penal law and of the codes upon which it is based is left to state bar review courses and the practicing bar.

It is particularly inappropriate for the subject of penal law to be taught with so little regard to the actual law in force today. No other branch of law is steeped as deeply as the penal law in reality, particularly the reality of the infliction of violence by and upon penal norm violators. The teaching of unenacted model provisions therefore can at best help lay the foundation for the teaching of real penal law; its teaching at the expense of the penal law in force cannot be justified.

It is the very success of the Model Penal Code that limits its significance as a teaching tool today. Inspired and guided by the Model Penal Code, most American legislatures have subjected their penal codes to principled reform. These often radically revised penal codes manifest a degree of systematic coherence comparable to that of the Model Penal Code and are certainly capable of providing a solid foundation for the study and teaching of penal law. Moreover, these penal codes by now have been interpreted by decades of jurisprudence, which supplements them to form a comprehensive and stable body of code-based penal law.

Still, all pretensions of a national American penal law aside, it is desirable to complement the focus on local actual penal law with a comparative approach. This is so not merely because virtually every American law school nowadays has the ambition of training its students for practice anywhere in the nation and even abroad, ready to apply their lawyerly thinking to any set of laws they may encounter in the national, even global, legal marketplace. The danger of fragmented parochialism in penal law is real, not the least because the Supreme Court appears to have come to the conclusion that the federal Constitution contains precious little in the way of unifying principles of penal law.

A comparative approach also has important benefits for the study and teaching of penal law. Insofar as considered reflection on the penal law, as on any matter of justice, also means the

identification of presuppositions and prejudices, nothing further than reflection more than the recognition of alternative approaches to a particular question. It is the comparative spectrum of considered judicial judgment, reflected in the give and take of majority and dissent, that makes opinions of common law courts far better teaching tools than those of civil law courts, which continue to struggle with the notion that disagreement about the proper (re)olution of a case is possible.

A comparative approach reveals, for example, the diametrically opposed approaches to penal jurisdiction that underlie the Proposed New Federal Criminal Code of 1971 and the Uniform Code of Military Justice. The Proposed Code defines its reach almost exclusively in territorial terms, finding application to any person within that territory.<sup>70</sup> By contrast, the Uniform Code laconically provides that it "applies in all places," but devotes several lengthy sections to the scope of its personal jurisdiction.<sup>71</sup> Underneath these jurisdictional provisions lie radically different conceptions of punishment, one supracommunal in the tradition of enlightenment penal law, the other fiercely intracomunal reminiscent of pre-modern penalty. The comparative contrast thus alerts the scholar and the student to the abstract supracommunal conception of punishment underlying every modern American penal code, a conception so deeply ingrained that it is sure to go unnoticed otherwise.

Another basic, but (or perhaps therefore) often unrecognized, feature of American penal law emerges after even the most cursory comparison of the general parts of, say, the Model Penal Code and the German Penal Code. The dominance of process over substance, of administration over legislation, of imposition and infliction over definition, and of the executive and judiciary over the legislative branch of government, comes through even in the most concerted effort to exert legislative control over the entirety of penal law, the Model Penal Code. This procedural orientation of American substantive penal law is reflected in its very conceptualization as divided into "offense"

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<sup>70</sup> NATIONAL COMMISSION ON REFORM OF FEDERAL CRIMINAL LAWS, FINAL REPORT: A PROPOSED NEW FEDERAL CRIMINAL CODE §§ 210-219 (1971).

<sup>71</sup> UNIFORM CODE OF MILITARY JUSTICE §§ 802-805 (1950).

elements, on the one hand, and “defenses,” on the other. In the Model Code's general and special parts, one therefore finds an abundance of provisions governing the administration of its provisions, including several sections that determine the method and propriety of prosecution in a particular case,<sup>72</sup> define, assign, and then shift the burden of proof onto the defendant who asserts an affirmative defense such as a justification or an excuse,<sup>73</sup> and establish evidentiary presumptions.<sup>74</sup> The Model Penal Code article on responsibility is almost entirely composed of purely procedural provisions.<sup>75</sup> By contrast, the German Penal Code addresses none of these topics.

Code-based comparison proves similarly fruitful when it is extended beyond the boundaries of penal law. For instance, a casual look at Article 1 (“general provisions”) of the Uniform Commercial Code reveals significant structural, formal, and substantive parallels to the general part of a modern penal code, such as the Model Penal Code. Like the general part of a penal code, Article 1 features provisions pertaining to purposes,<sup>76</sup> rules of construction,<sup>77</sup> and jurisdiction.<sup>78</sup> Like the Model Penal Code, the UCC rejects the principle of strict construction in favor of an interpretation of code provisions in light of underlying purposes.<sup>79</sup> Yet only the UCC explicitly authorizes agreements to vary the effects of its provisions,<sup>80</sup> a provision that would be unthinkable in a penal code, which is not to say, of course, that the vast bulk of American penal law as a matter of fact—if not of code—consists precisely in such local variations under the name of plea bargaining.

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<sup>72</sup> MODEL PENAL CODE §§ 1.07-11, 2.12 (1985).

<sup>73</sup> *Id.* §§ 1.12, 2.04(4), 2.08(4), 2.09(1), 2.10, 3.01-11, 212.4(1), 212.5, 213.6, 221.2(3), 223.1(1), 223.4, 223.9, 230.3, 242.5.

<sup>74</sup> *Id.* §§ 1.03(4), 1.12(5), 5.03(7), 5.06(2)-(3), 5.07, 210.2(b), 211.2, 212.4, 223.6(2), 223.7(1), 223.8, 224.5, 251.2(4), 251.4.

<sup>75</sup> *Id.* §§ 4.02-09.

<sup>76</sup> Compare U.C.C. § 1-102 (1998) with MODEL PENAL CODE § 1.02 (1985).

<sup>77</sup> Compare U.C.C. § 1-102 with MODEL PENAL CODE § 1.02.

<sup>78</sup> Compare U.C.C. § 1-105 (“territorial application”) with MODEL PENAL CODE § 1.03 (“territorial applicability”).

<sup>79</sup> Compare U.C.C. § 1-102(1) with MODEL PENAL CODE § 1.02(3).

<sup>80</sup> U.C.C. § 1-102(3).

In general, as students place themselves in the position of legislators, the makers of penal norms in a post-common law age, their understanding of a codificatory problem will be significantly enhanced by the consideration of the—by now—considerable variety of principled legislative approaches to virtually any question of criminal law. Legislative approaches here are considered principled insofar as they—unlike rules generated by judges bound by the limits of the case or controversy before them—manifest identifiable principles of penal law and of penal codification and apply these principles throughout the entirety of the penal code and all other legislative pronouncements relating to the state's power to punish, including codes dealing with criminal procedure, evidence, the infliction of punishment, and lesser offenses, whether they appear in a separate code of infractions<sup>81</sup> or are dispersed throughout non-penal codes, agency regulations, and local ordinances.

### C. COMPREHENSIVE

The study and teaching of penal law must adopt a comprehensive approach that aims to capture the enormous range and variety of penal norms characteristic of modern penal law. Penal law, as that term is used here, refers to the entirety of law dealing with the state's punishment of its constituents; as such, it disregards traditional distinctions among fields of study and of legislative activity. Penal law is considered as a unified system composed of three aspects—definition, imposition, infliction—all of which are governed by certain fundamental principles. These principles serve in two ways to legitimate the state's awesome punitive power over the persons for whose benefit it exists and of whom it is constituted: first, through the consistency of any punitive state action with them, and, second, through their consistency with the purpose or purposes of the state. It is the primary objective of the teaching and study of penal law to facilitate the critical analysis of the first- and second-order legitimacy of state punishment.

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<sup>81</sup> See, e.g., GERMAN CODE OF ORDER CONTRAVENTIONS (GESETZ ÜBER ORDNUNG-SWIDRIGKEITEN, OWiG); Canada Contraventions Act, R.S.C., ch. C-38.7 (1992) (Can.).

Manifestations of the state's punishment power have, through a gradual process of delegation guided by considerations other than fidelity to the principles of legitimate punishment, spread through a variety of official rules deriving from all branches and all levels of modern government.<sup>82</sup> In the United States today, no collection of the penal norms of a single state jurisdiction exists.<sup>83</sup> It would be foolhardy to attempt such a compilation, if only because new norms are added constantly to the already immeasurable array of offenses defined in penal codes, non-penal codes, rules and regulations, county codes, city codes, town codes, and village codes. (Merely listing all existing sources of penal norms in a given state jurisdiction proves difficult.) At every level and branch of government, officials have an apparently unquenchable thirst to define rules the violation of which calls for punishment of one sort or another. The mass of penal norms is overwhelming even if one disregards borderline cases and accepts the legislature's own, generally rather limited, definition of what constitutes crime or punishment (as opposed to, say, a "civil" "violation" subject to a "remedial" "measure"), and counts only misdemeanors and felonies and threats of imprisonment. (This is not to say, of course, that there are not many fines which are punitive in purpose and effect.)

If it is, for all these reasons, impossible to create penal law materials of truly comprehensive scope, one can at least adopt a

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<sup>82</sup> On this dissipation of responsibility, see Markus Dirk Dubber, *The Pain of Punishment*, 44 BUFF. L. REV. 545 (1996); see also Cover, *supra* note 7.

<sup>83</sup> For an attempt to compile a list of all New York state criminal offenses see <<http://wings.buffalo.edu/law/bclc/nycriminaloffenses.htm>>. Even this extensive compilation includes only offenses promulgated by the New York State Legislature in its consolidated and unconsolidated laws. It does not include offenses promulgated by the legislatures of lower level governmental entities within the state (e.g., counties, cities, towns, and villages), or the state's executive branch (including various administrative agencies, such as the Department of Motor Vehicles, the Banking Board, the Civil Service Commission, the Department of Corrections, the Department of Economic Development, the Department of Education, the Board of Elections, the Department of Environmental Conservation, the Department of Transportation, the Office of Parks, Recreation & Historic Development, the Department of Health, the New York State Racing and Wagering Board, the State Board of Real Property Services, the Department of Taxation and Finance, and the Workman's Compensation Board).

comprehensive approach to this unwieldy subject. It is particularly important that penal law materials include various examples of penal norms that are generally excluded from the scope of the teaching and study of penal law, including norms in non-penal codes, agency regulations, and local laws. To the extent that they reach beyond the general part at all, traditional penal law materials include what is vaguely thought of (a thought rarely made explicit and never justified) as the core provisions of the special part, mostly as illustrations of specific topics in the general part.

As a result, traditional teaching materials fail to give the student a sense of the enormous scope of a given legal community's penal code, never mind the entirety of its penal law. The only code (penal or otherwise) that one may find reproduced at any length in any of the traditional materials is the Model Penal Code (though even here, only the first two of the Model Penal Code's four parts are included, sometimes *in toto*, sometimes not). While the Model Penal Code's coverage of the general part of penal law is emphatically comprehensive—codifying so much that it may appear more like a penal law textbook than a penal code—its special part fails to cover a wide range of penal norms codified in modern American penal codes, not to mention penal norms defined elsewhere by the state legislature, by different branches of state government, or by subsidiary governmental entities.

For example, the Model Penal Code does not deal with drug offenses, a class of norms that occupies substantial portions of modern penal and non-penal codes, and accounts for much of the business of American prosecutors' offices, courts, and prisons (the institutions of imposition and infliction of punishment, respectively).<sup>84</sup> Likewise, the Model Penal Code knows nothing of RICO and the various federal and state norms it has spawned, nor does it address such recent legislative phenomena

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<sup>84</sup> Drug offenses are mentioned only in a note appended to the special part of the Proposed Official Draft of the Code, where the drafters remarked that "a State enacting a new Penal Code may insert additional Articles dealing with special topics such as narcotics, alcoholic beverages, gambling and offenses against tax and trade laws." MODEL PENAL CODE 241 (Proposed Official Draft 1962).



as the codification of hate crimes, computer crimes, and car-jacking. It goes without saying that the Model Penal Code—and the casebooks that are based upon it, however loosely—does not deal with a single non-penal code penal norm, a group of offenses that by now dwarves the “core of the penal law”<sup>85</sup> so much so that the exception of penal norms outside the penal code proper has long swallowed the rule of penal norms within the penal code.

Perhaps most problematic, the Model Penal Code says nothing about what may be the most significant development in American penal law since its completion in 1962: the promulgation of a comprehensive set of mandatory determinate sentencing guidelines by a federal quasi-agency, the U.S. Sentencing Commission. The U.S. Sentencing Guidelines provide a particularly momentous example of penal law outside the penal code and outside the Model Penal Code in particular. Here we have not a subject specific agency (such as the Environmental Protection Agency) defining subject specific regulations backed by penal threats. Here we have a *sui generis* administrative body making the law of punishment for all of federal law, within the broad limits found in the fifty titles of the U.S. Code, a wildly unsystematic collection of thousands upon thousands of provisions amassed by the federal legislature over the past two centuries, complemented by thousands upon thousands of penal regulations promulgated by the vast array of federal administrative agencies that have emerged during the past century. The legislative limits upon the Commission’s power to make punishment law are broad at best with respect to both the punishment appropriate for the violation of federal penal norms and the definition of the norms themselves. The one title of the U.S. Code explicitly dedicated to penal norms, title 18, arranges its dramatically underinclusive collection of federal crimes in alphabetical order, with no general provision on jurisdiction, voluntariness, actus reus, mens rea, causation, mistake, entrap-

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<sup>85</sup> However this might be defined, and it is rarely defined other than by a lazy and unprincipled open string such as “homicide, rape, robbery, burglary, theft, etc.”—an entirely unacceptable state of affairs if penal law teaching and scholarship is to discharge its function of facilitating critical analysis of penal law’s legitimacy.

ment, duress, infancy, justification, self-defense, or inchoate offenses. The only subject of penal law that has found a comprehensive treatment in the U.S. Code is that of the insanity defense,<sup>86</sup> which Congress in 1984 saw fit to reform and codify with considerable dispatch and specificity both as to substance and as to process after John Hinckley's acquittal by reason of insanity for his botched assassination attempt on President Reagan in 1981.

Faced with this enormous mess of crimes and punishments, the U.S. Sentencing Commission proceeded to ignore the results of the most recent legislative revision of the body of federal crimes. The 1948 alphabetization of crimes in title 18, "for which the spadework was done," wrote Henry Hart in 1958, "by the hired hands of three commercial law-book publishers, on delegation from a congressional committee desirous of escaping the responsibility of hiring and supervising its own staff,"<sup>87</sup> was replaced by a classificatory scheme of eighteen offense categories.<sup>88</sup> It is this scheme upon which the Guidelines are based, not the legislative definitions of penal norms found in the U.S. Code. Instead of merely linking punishments to legislatively defined crimes, an impossible task given the calamitous state of federal crime definitions, the Commission thus created an entirely novel system of federal crimes, clustered around the Commission's definition of certain groups of basic offense conduct. The legislative definitions of penal norms appear in the Guidelines only as an appendix—literally—to facilitate the process of linking up Guidelines categories to actual federal of-

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<sup>86</sup> 18 U.S.C. § 17 (1998).

<sup>87</sup> Henry M. Hart, Jr., *The Aims of the Criminal Law*, 23 LAW & CONTEMP. PROBS 401, 432 n.70 (1958).

<sup>88</sup> Offenses Against the Person; Offenses Involving Property; Offenses Involving Public Officials; Offenses Involving Drugs; Offenses Involving Criminal Enterprises and Racketeering; Offenses Involving Fraud or Deceit; Offenses Involving Prostitution, Sexual Exploitation of Minors, and Obscenity; Offenses Involving Individual Rights; Offenses Involving the Administration of Justice; Offenses Involving Public Safety; Offenses Involving Immigration, Naturalization, and Passports; Offenses Involving National Defense; Offenses Involving Food, Drugs, Agricultural Products, and Odometer Laws; Offenses Involving Prisons and Correctional Facilities; Offenses Involving the Environment; Antitrust Offenses; Money Laundering and Monetary Transaction Reporting; Offenses Involving Taxation; Other Offenses. UNITED STATES SENTENCING COMMISSION, GUIDELINES MANUAL (1997) [hereinafter U.S.S.G.].

fenses, which are notoriously uncategorized (except, of course, alphabetically).<sup>89</sup>

In constructing this new foundation for the federal law of punishment, the Commission found it necessary also to draft certain general provisions pertaining to the federal law of crime. Thus one finds dispersed throughout the Guidelines provisions on mens rea, complicity, duress, intoxication, mistake, consent, necessity, and inchoate crimes, all subjects covered at best cursorily in the U.S. Code.<sup>90</sup>

The U.S. Code has provided the Commission with no more guidance on punishment than it has on crime. The Code generally assumes virtually unlimited discretion on the part of the sentencing judge. Its sentencing provisions are accordingly sporadic and vague.<sup>91</sup> The Code contains no general law of punishment applicable to all federal offenses. Punishment provisions instead are attached to particular offense definitions, thus suffering from the problems of inconsistency and inaccessibility that plague the offense definitions themselves.

As a result, federal criminal law practice today largely begins and ends with the Sentencing Guidelines. The Guidelines' superior organization, comprehensiveness, and accessibility, combined with their determinate and mandatory nature, have turned them into a shadow code of federal penal law that shapes actual practice while federal legislators enjoy unfettered discretion in continuously adding offenses to the U.S. Code, secure in the knowledge that ultimate responsibility for the making of penal law rests with the Sentencing Commission. Today, the Code definitions of penal norms, which often combine vagueness and wordiness (the apparently only apparently incon-

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<sup>89</sup> *Id.* at app. A (statutory index).

<sup>90</sup> *See, e.g., id.* §§ 1A2, 1B1.1, 2X1.1, 2X2.1, 2X3.1, 2X4.1, 2X5.1, 2A1.4 (app. nn. 1 & 2), 3B1.2, 5H1.1, 5H1.3, 5H1.4, 5H1.7, 5K2.9, 5K2.10, 5K2.11, 5K2.12, 5K2.13, 8A1.2.

<sup>91</sup> On the few occasions where the Code does contain specific punishment provisions, such as in the case of mandatory minimum punishment for certain drug offenses, these provisions lead to sentences so patently unjust in particular cases that the Commission has found it difficult to consider them in its attempt to draft a principled law of punishment. *See UNITED STATES SENTENCING COMMISSION, SPECIAL REPORT TO THE CONGRESS: MANDATORY MINIMUM PENALTIES IN THE FEDERAL CRIMINAL JUSTICE SYSTEM* (1991).

sistent twin virtues of legislative pronouncements in the heyday of the common law), retain a largely ceremonial significance as Code sections are ritually invoked—generally in mercifully truncated form—in the indictment and, once again, at the conclusion of the proceedings (almost all of which by now end without a jury trial) when the court's judgment is announced.

The general irrelevance of codified crime definitions has resulted in a general paradigm shift from the guilt phase of a criminal proceeding to the sentencing phase. Consequently, even in the few federal cases that still make it before a jury, the decisive findings of fact often occur not at the trial, but at sentencing. At sentencing, however, the judge is free to consider all "relevant conduct,"<sup>92</sup> including, among other things, uncharged conduct and charged conduct of which the defendant was acquitted. The all important sentencing trial, however, is not subject to the strict laws of evidence that govern the guilt trial, especially in the rare guilt trial before a jury. For example, the burden of proof at the sentencing bench trial is preponderance of the evidence, not beyond a reasonable doubt. Ironically, it is precisely this lowering of the burden of proof from guilt to sentencing trial that is said to justify the reconsideration by the sentencing judge of fact findings made at the guilt trial, either by him- or herself or, worse yet, by a jury. A fact that could not be proved beyond a reasonable doubt may still be provable by a preponderance of the evidence, so the argument goes, though it may of course be difficult to tell whether the determinative distinction between guilt and sentencing trial is not the different burdens of proof, but the different finders of the facts, with judges being traditionally more conviction prone than juries.

In light of these facts of contemporary federal penal law, penal law materials should prominently feature the U.S. Sentencing Guidelines both because they are a new *de facto* federal code of crimes and because they show the insignificance of a federal code of crimes in a penal law system driven by the definition of punishments, not of crimes. The Sentencing Guide-

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<sup>92</sup> U.S.S.G., *supra* note 88, § 1B1.3.

lines, in other words, are the most glaring illustration that the study and teaching of penal law can no longer ignore penal law outside the core of the penal code.

Another unfortunate effect of focusing exclusively on the core of penal law—which in fact means that the vast bulk of traditional criminal law materials (and scholarship) is dedicated to the law of homicide—is the transformation of the penal law into a species of administrative law, or worse, of the law of war. Historically, it is understandable that the distinction between capital and non-capital offenses, a distinction that eventually became limited to that between capital and non-capital homicides, would occupy the minds of the makers, applicers, and students of penal law. It is no accident that the foundation of the Model Penal Code, and therefore of much of modern American penal law, should have been laid in a monumental 1937 article on the penal law of homicide.<sup>93</sup> Homicides surely make for riveting reading. Another pedagogic advantage of fact heavy common law opinions may well stem from the fact that a well spun tale of capital murder is so much less tedious to read than the section soup that—preceded by an impatiently curt recitation of what defendant A did to B—one finds in the syllogistic exercises of courts in civil law countries.

Still, the virtually exclusive focus on serious and especially heinously violent crime has another, less salutary, effect on the teaching of penal law: it eventually erodes the ability of students and teachers alike to identify with the objects of state punishment. Without the basic ability and willingness to recognize the offender as similar, punishment turns into the regulation of nuisances and is deprived of its ethical foundation. Perceived as the infliction of pain upon outsiders, whether these non-insiders are conceptualized as members of another group, outsiders *simpliciter* (outlaws), or simply threats to the insider community whose humanity is of merely incidental significance, punishment no longer is subject to ethical constraints. Punishment so perceived becomes an extralegal affair, subject only to considerations of costs and benefits. Punishment so perceived

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<sup>93</sup> Jerome Michael & Herbert Wechsler, *A Rationale of the Law of Homicide* (pts. 1 & 2), 37 COLUM. L. REV. 701, 1261 (1937).

is transformed from a species of law to a form of regulation. In fact, one might go so far as to say that it ceases to be punishment at all, insofar as punishment implies ethical condemnation for assigned blame, which in turn implies blameworthiness, that is, the ability to generate, perceive, and follow the norms of a given ethical community.<sup>94</sup>

It may well be that as a matter of fact, penal *law* is a misleading misnomer if applied to much of what punitive pain the state in fact inflicts upon its constituents, either openly in the name of punishment or behind a definitional veil in the name of civil commitment, treatment, correction, and other euphemistic attempts to escape the constraints of penal law. The mere fact, however, that legislatures still find it necessary, at least occasionally or initially, to avoid the punishment label for certain particularly questionable exercises of punitive pain<sup>95</sup> suggests that principles of penal law still enjoy some currency, if only as rules honored in their pervasive breach.

The appreciation of these principles of penal law—which are ultimately principles of the state—as ethical and therefore intracommunal, however, becomes difficult if not impossible if those who stand to derive the most immediate benefit from their application are perceived as non-members of the students' (and teachers') ethical community. Franz von Liszt once famously referred to the penal code as the criminal's Magna Charta.<sup>96</sup> A century later, principled penal codes still embody the constraints upon the state's punitive power; the problem is that today criminals are perceived as outsiders. As a result, the

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<sup>94</sup> Markus Dirk Dubber, *The Right to Be Punished: Autonomy and Its Demise in Modern Penal Thought*, 16 LAW & HIST. REV. 113 (1998); Markus Dirk Dubber, *Rediscovering Hegel's Theory of Crime and Punishment*, 92 MICH. L. REV. 1577, 1601-21 (1994); R.A. Duff, *Inclusion and Exclusion: Citizens, Subjects and Outlaws*, in LEGAL THEORY AT THE END OF THE MILLENNIUM 241 (M.D.A. Freeman ed., 1998); R.A. Duff, *Law, Language and Community: Some Preconditions of Criminal Liability*, 18 OXFORD J. LEGAL STUDIES 189 (1998); P.F. STRAWSON, *Freedom and Resentment*, in FREEDOM AND RESENTMENT, AND OTHER ESSAYS 1 (1974).

<sup>95</sup> See, e.g., *Kansas v. Hendricks*, 521 U.S. 346 (1997) (outlining the controversy over the indefinite preventive detention of the "sexual predator," a paradigm of the modern outlaw).

<sup>96</sup> Franz von Liszt, *Die deterministischen Gegner der Zweckstrafe*, in 13 ZEITSCHRIFT FÜR DIE GESAMTE STRAFRECHTSWISSENSCHAFT 325, 357 (1893).

penal code's ultimately ethical principles no longer make any sense since, by definition, they do not apply to outsiders. Thus deprived of its basis, the penal code (or any other body of penal law principles, such as the principles of criminal procedure established by the Warren Court) appears as a non-sensical collection of loopholes to be exploited by outsider-outlaws—precisely by those for whose benefit the rules of penal law were not designed. To the extent that these rules retain any ethical legitimacy, that legitimacy derives not from their immediate beneficiaries, but from the beneficiaries' insider representative, the defense attorney. As defense attorneys, however, come to be perceived as combatants in a war on crime unconstrained by intracommunal ethical principles, their (and therefore their clients') membership in the ethical community of legislators, judges, teachers, and students of penal law becomes increasingly tenuous. It does not help matters, of course, that the defense attorneys' "enemies" in the war on crime are disproportionately represented in the legislature and on the bench.

Moreover, it is important to recognize that it is the penal code which explicitly exculpates and—most significantly—justifies the everyday violation even of norms at the very core of penal law. So, for example, it is the penal code's provision on justification that shields the operating surgeon from liability for assault or homicide and similarly exculpates the disciplining parent, teacher, warden, or airline pilot.<sup>97</sup> Rather than merely defining "offenses" and "defenses," the penal code stakes out and asserts the universe of norms underlying the penal law by specifying the consequences, which range from affirmation to condemnation, of their violation.

It is also the penal code that provides for the possibility of exculpating the civil rights demonstrator, the conscientious objector, and all other "civil disobedients." Some thirty years ago, the gap between students and those who stood accused of penal norm violations seemed far easier to bridge, as some of the greatest icons of identification that defined American society at the time found themselves at odds with the penal law, not to

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<sup>97</sup> See, e.g., MODEL PENAL CODE § 3.08 (1962); N.Y. PENAL LAW § 35.10 (McKinney 1999).

mention the sizable proportion of law students who found themselves more or less openly defying state norms backed by often considerable punitive threats, be it by participating in illegal student protests, burning draft cards, or consuming illicit drugs.

In the end, it is the penal code that justifies the state's exercise of its punishment power in the first place. The legitimate infliction of punishment itself is merely the justified violation of a penal norm. The state's exercise of its punishment power is itself criminal if it fails the requirements of first- and second-level legitimacy. To characterize the penal code as the criminal's Magna Charta, therefore, is not misleading only if the state's constituents—punishers and punished alike—view themselves as potential criminals, thus recognizing the identity of the subject and the object of penal law upon which the legitimacy of penal law, as of all modern law, ultimately rests.

To prevent the pernicious disjunction between teacher and students, on the one hand, and offenders, on the other, penal law materials must include less heinous norm violations, the mere contemplation of which does not open up a gulf of difference to their perpetrator. The enormous variety and number of penal norms defined by the modern state render it highly unlikely that any of its constituents would have managed to refrain entirely from penal norm violations. Upon reflection it is doubtful that an adult resident of the United States today will have escaped the dense net of, say, provisions covering every aspect of the use of public streets—whether these provisions appear in the penal code, the vehicle and traffic code, the various rules and regulations promulgated by the various agencies charged with the enforcement of the laws of traffic or the operation of motor vehicles, or local ordinances—not to mention penal provisions covering shoplifting, theft (or unauthorized use) of office equipment, misrepresentation of business expenses or tax liabilities, or mistreatment of pets.

### III. PENAL LAW'S WEB

The new code-based, comparative, and comprehensive approach to penal law outlined in Parts I and II may well require



the creation of a new, more powerful resource that can capture and communicate the potential for internal and external integration of modern penal law. Part III presents such a resource, a web of penal law. Part IV then illustrates how a penal law web may facilitate the continuous integration, and therefore legitimation, of penal law through those who contribute to its praxis in all of its aspects, from teaching and scholarship to the making and application of penal law norms, and including, most importantly, the general public.<sup>98</sup>

#### A. SCOPE

To remedy the limitations of existing teaching materials in penal law, the traditional format of the casebook must be abandoned along with its traditional substance, cases. The book medium, even if stretched beyond the one-thousand page threshold, suffers from inherent limits that can no longer accommodate the sprawling mass of modern penal law.

A web does not suffer from the space (and weight) limitations of a casebook, or for that matter of any other book or set of books. Since virtually anything can be included, the selection of materials must proceed from a careful reconsideration of the scope and shape of their subject, the penal law, as well as of the objectives of its study and teaching. Some preliminary results of such a reconsideration appear in Part II of this article.

Most obvious, a penal law web could take a comprehensive view of its subject by exploiting its virtually unlimited scope to provide its users with a sense of the enormous scope of modern penal law.<sup>99</sup> For example, it might feature not only a given state code—such as the New York Penal Law—in its entirety, but also excerpts from other sources of penal norms in that state, such as, moving from the general to the particular, the New York Vehicle and Traffic Law, the Regulations of the New York State Commissioner of Motor Vehicles, the Erie County Charter and Administrative Code, the Buffalo City Code, and the Amherst Town Code.

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<sup>98</sup> For an illustration of many of the functions described in Part III, see *Penal Law: A Web*, *supra* note 6.

<sup>99</sup> See *supra* Part II.C.

The all-but-borderless web medium also makes room for approaching penal law from a comparative and code-based perspective.<sup>100</sup> So a penal law web easily could provide the user with on-line access to the penal codes of various U.S. and foreign jurisdictions, along with codes of criminal procedure, evidence, and so on. Using a basic search engine, the web also could permit the user to analyze and compare penal codes by topic or in their entirety.<sup>101</sup>

#### B. FLEXIBILITY

In addition to its virtually unlimited scope, a law web has two other useful characteristics: flexibility and interconnectedness. Unlike a paper casebook, which remains frozen in time and space between editions, a law web can be altered, expanded, contracted, and updated at any time. Even more importantly, the flexibility of a law web permits its users to customize it to their particular interests and needs. Users could customize a penal law web in two ways: by choosing among its contents and, slightly more ambitiously, by changing its contents. For example, a penal law professor at a Pennsylvania law school might decide to adapt a penal law web to revolve around the Pennsylvania Crimes Code, perhaps assigning the Model Penal Code or the Texas Penal Code for comparison and contrast. Then again, perhaps she will decide to pick and choose among on-line accessible court opinions on penal law, indexed alphabetically, by jurisdiction, or by topic.

In a more adventurous mood, our exemplary professor may decide that merely choosing among the various components of the penal law web is not enough. Using basic features of any standard web browser, she could delete, add, or alter parts of

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<sup>100</sup> See *supra* Part II.A-B.

<sup>101</sup> Thanks to the built-in features of today's standard web browsers (e.g., Netscape and Internet Explorer), all of the materials included in the web materials would be fully searchable (by choosing the "find" command in the "edit" menu), downloadable, and even printable, for those who want to get their hands (rather than merely their eyes) on at least part of the web.

the web to fit her precise requirements.<sup>102</sup> She may decide that an annotation (or an entire code) should be added, deleted, or at least amended, that a case requires further editing, and so on and so on. In the end, she could transform the original law web into her very own web, which might include, among other things, a fully annotated version of the Pennsylvania Crimes Code. And the same goes for penal law teachers in all states (and even outside the United States), eventually generating a penal law interweb composed of webs tailored to the penal law of a particular jurisdiction or, at least, to the interests and insights of a particular teacher. In more traditional terms, the end result could be a national (maybe even international) web digest of penal law that remains sensitive to the local reality of penal law.<sup>103</sup>

### C. INTERCONNECTEDNESS

Perhaps even more significant than a law web's flexibility and adaptability is its interconnectedness, its very "webness," so to speak. The various components of a penal law web could be interconnected through a myriad of hyperlinks, allowing the user to jump from one component to another with a simple click of the mouse. Hyperlinks might be used in two basic ways: first, to highlight the connections among different parts within a single legal text (such as a penal code) and across multiple texts, and, second, to underlay the web of primary legal texts with a web of secondary materials, such as annotations and commentary.

#### 1. *Primary Web*

The primary web could highlight both the unity of a penal code within itself and the unity of the law system to which it belongs.

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<sup>102</sup> This could be done simply by, first, downloading the entire web or any of its components and, second, editing the downloaded files using either the built-in editing function of the web browser or a separate web editing program.

<sup>103</sup> See *supra* Part II.B.

a. Intracode Connections

For example, internal links within the New York Penal Law might point the user toward the definition of a technical term, such as “knowingly” or “deadly force,” elsewhere in the same code. The presence of a hyperlink—ordinarily marked by a colored underline—by itself would identify the linked term or phrase as significant for one reason or another, encouraging students and other users to explore its significance by following the link. Besides cross-links to relevant definitions elsewhere in a given code, the primary internal web also would follow all important explicit cross references within a code, to another subsection, section, chapter, or part.

Beyond these fairly obvious cross-references, which largely reinforce interconnections envisioned by the code drafters, the primary web also could contain links that establish more subtle connections within the code structure. As an illustration, consider the following excerpt from section 1.02 of the Model Penal Code.

SECTION 1.02. PURPOSES; PRINCIPLES OF CONSTRUCTION.  
(1) The general purposes of the provisions governing the definition of offenses are: (a) to forbid and prevent conduct that unjustifiably and inexcusably inflicts or threatens substantial harm to individual or public interests; . . . .<sup>104</sup>

Hyperlinks integrated into this provision—accessible by a click of the mouse and here marked by an underline—would help illuminate this central provision of the Model Code, first, by clarifying its limited scope, and, second, by exposing its considerable significance within that scope. Section 1.02(1) applies only the “provisions governing the definition of offenses,” as opposed to section 1.02(2), which applies to “the provisions governing the sentencing and treatment of offenders.” This crucial distinction, and thus the limited scope of section 1.02(1), is all too easily overlooked if there is no indication, as there is none in traditional penal law casebooks, that the Model Code contains parts III and IV, dealing with “treatment and correction” and

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<sup>104</sup> MODEL PENAL CODE § 1.02 (Official Draft 1962) (emphasis added).

“organization of correction,” respectively. This confusion could simply be avoided by inserting a link connecting section 1.02(1)’s phrase “the provisions governing the definition of offenses” with a list of the provisions to which it refers. The compilation of this list itself is instructive as its scope is not immediately obvious. While it would clearly include all of the Code’s special part,<sup>105</sup> along with article 5<sup>106</sup> of the general part,<sup>107</sup> and—though less obviously—articles 1 through 4 of the general part,<sup>108</sup> it probably should exclude the remaining two articles of the general part, entitled “authorized disposition of offenders”<sup>109</sup> and “authority of court in sentencing,”<sup>110</sup> respectively.

The remaining links could flesh out the rich significance of section 1.02’s apparently bare statement of the Code’s dominant preventive purpose, “to forbid and prevent conduct that unjustifiably and inexcusably inflicts or threatens substantial harm to individual or public.” In addition to explicitly stating prevention as its primary objective (or, more precisely, of its special part and most of its general part), section 1.02(1)(a) encapsulates the Code’s basic approach to penal law and its codification.

First, we find a definition of crime: “conduct that unjustifiably and inexcusably inflicts or threatens substantial harm to individual or public interests.”<sup>111</sup> This definition includes the voluntary act requirement (“conduct”), as well as the two general levels of exculpation for a voluntary act, justification (“unjustifiably”) and excuse (“inexcusably”), followed by a general delineation of the reach of penal law in terms both of the “individual” and “public” “interests” it protects and the degree of protection it accords them (by also reaching conduct that merely “threatens,” but does not actually “inflict[.]” harm on these interests, although the scope of penal law is at the same

<sup>105</sup> *Id.* pt. II (“Definition of Specific Crimes”).

<sup>106</sup> *Id.* art. 5 (“Inchoate Crimes”).

<sup>107</sup> *Id.* pt. I (“General Provisions”).

<sup>108</sup> *Id.* arts. 1-4 (entitled “Preliminary,” “General Principles of Liability,” “General Principles of Justification,” and “Responsibility,” respectively).

<sup>109</sup> *Id.* art. 6.

<sup>110</sup> *Id.* art. 7.

<sup>111</sup> *Id.* § 1.02(1)(a).

time constrained by limiting it to the prevention of "substantial harm" to these interests).<sup>112</sup>

Second, section 1.02(a) provides an overview of the structure of the Model Code itself (or at least, of the "provisions governing the definition of offenses" in its first two parts). So section 1.02(a)'s definition of crime moves from the Code's "general principles of liability" in part I, article 2 ("conduct"), to its "general principles of justification" in part I, article 3 ("unjustifiably") and its treatment of "responsibility" in article 4 ("inexcusably," though the Code does not maintain a strict separation of justification and excuse), and finally to part II, the "definition of specific offenses" (defining that conduct which "inflicts or threatens substantial harm to individual or public interests,"<sup>113</sup> although the general limitation to "substantial" harm also underlies the provision on de minimis infractions in part I).<sup>114</sup>

The various links embedded into section 1.02(a) could help to expose it as reflecting the general three-level approach to the analysis of penal liability underlying the Code. So links might connect the reference to "conduct" in section 1.02(1)(a) with the Code's section on the voluntary act requirement,<sup>115</sup> while "unjustifiably" in section 1.02(1)(a) may be linked to the Code's article on "General Principles of Justification"<sup>116</sup> and to specific

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<sup>112</sup> See *id.* Significantly, this definition of crime does not include a reference to mental states (presumably to make room for absolute liability offenses), nor does it define the general or specific nature of the interests to be protected. Section 1.02(1)(a) originally referred to "individual *and* public interests." See MODEL PENAL CODE § 1.02(1)(a) (Tentative Draft No. 4, 1955) (emphasis added). The crucial change from "and" to "or" was made shortly before the completion of the Model Code to "eliminate an ambiguity" mentioned in the proceedings of a 1960 conference on "law and electronics." See MODEL PENAL CODE AND COMMENTARIES: OFFICIAL DRAFT AND REVISED COMMENTS § 1.02, n.3 (1985), citing Layman E. Allen, *Logic and Law, in LAW AND ELECTRONICS: THE CHALLENGE OF A NEW ERA—A PIONEER ANALYSIS OF THE IMPLICATIONS OF THE NEW COMPUTER TECHNOLOGY FOR THE IMPROVEMENT OF THE ADMINISTRATION OF JUSTICE 187-98* (Edgar A. Jones Jr. ed., 1962). In the current Section 1.02(1)(a), there is also no mention of punishment, a term the Model Code is careful to avoid. Throughout, the Code prefers to speak of treatment, or of correction, instead. See, e.g., MODEL PENAL CODE pts. III & IV (Official Draft 1962) (entitled "Treatment and Correction" and "Organization of Correction," respectively).

<sup>113</sup> MODEL PENAL CODE § 1.02(1)(a).

<sup>114</sup> *Id.* § 2.12.

<sup>115</sup> *Id.* § 2.01.

<sup>116</sup> *Id.* art. 3.

justification defenses defined in the special part,<sup>117</sup> and “inexcusably” in section 1.02(1)(a) to excuse defenses both in the Code’s general and its special part,<sup>118</sup> and so on.

Additional examples of ways in which hyperlinks could highlight and reinforce connections within and among the Model Penal Code’s general part and special part can easily be generated. For instance, the provision on omission liability<sup>119</sup> could be linked to all omission offenses in the Code, as well as to all other provisions addressing the question of omissions;<sup>120</sup> the provisions on absolute liability<sup>121</sup> and negligence liability<sup>122</sup> to all absolute liability offenses<sup>123</sup> and negligence offenses, respectively;<sup>124</sup> and the provision on consent<sup>125</sup> to all offense definitions in the special part providing for a separate consent defense,<sup>126</sup> and so on and so on.

#### b. Intercode Connections

A penal law web, however, might highlight not only the connections among various elements of a given penal code. It could also locate a penal code within the totality of law. Again, most obviously, explicit references in a given penal code to other sources of legal norms could be linked, thus permitting the user easy access to other legislative materials related to the penal code, including, for instance, codes of criminal procedure and of evidence, along with specific subject matter codes, such as vehicle and traffic, environmental, and tax codes.

These explicit cross references could be complemented by links that make the implicit explicit. For example, the New

<sup>117</sup> *Id.* §§ 212.4, 212.5, 223.4, 230.3, 242.5.

<sup>118</sup> *Id.* §§ 2.04, 2.08-11, 210.3(b), 212.4, 212.5, 213.6(1), 221.2, 223.1(3)(c), 223.9, 242.5, 3.02(2), 3.09, 4.01.

<sup>119</sup> *Id.* § 2.01(1).

<sup>120</sup> *Id.* §§ 1.03, 2.07(1)(b), 2.07(3)(b), 2.07(6)(b), 220.1(3), 220.2(3), 223.3(3)-(4), 223.5, 223.8, 230.4, 230.5, 242.6(2), 242.8, 250.1(2), 250.7, 251.2(2)(g), 5.01(1), 5.01(b).

<sup>121</sup> *Id.* § 2.05.

<sup>122</sup> *Id.* § 2.02(2)(d).

<sup>123</sup> *Id.* §§ 220.3(2), 221.2, 250.2(2), 250.5-7, 251.2(5).

<sup>124</sup> *Id.* §§ 210.4, 211.1(b), 220.3(1)(a).

<sup>125</sup> *Id.* § 2.11.

<sup>126</sup> *Id.* §§ 211.1, 212.1, 223.1(3)(c), 223.9, 250.12.

York Penal Law's general definition of "offense" as "conduct for which a sentence to a term of imprisonment or to a fine is provided by any law of this state or by any law, local law or ordinance of a political subdivision of this state, or by any order, rule, or regulation of any governmental instrumentality authorized by law to adopt the same"<sup>127</sup> might contain a link to various sources of non-penal code penal norms in New York State.

Similarly, the definition of a concept in a penal code could be linked to the definition of that concept, or a related concept, in another code or systematic digest of law. So, for example, the definition of "negligence" in the Model Penal Code could be linked to the definition of "negligence" in the Restatement of Torts.<sup>128</sup>

Most ambitious, in the special section of the penal code, each offense definition could be linked both to every corresponding offense definition elsewhere in the statutory law of the jurisdiction—for instance, criminal provisions in tax codes—and to every corresponding non-criminal remedy covering the same conduct—for instance, civil provisions in tax codes as well as civil tort or contract remedies. So every offense definition, such as assault, in the Model Penal Code might be linked to a tort definition in the Restatement of Torts.<sup>129</sup> The resulting web would clarify the currently murky relation between penal code and non-penal code offenses as well as between penal law and other areas of law, and thereby lay a sorely lacking foundation for discussions about the redundancy and arbitrariness of the current penal regime as well as the role of penal law among the state's arsenal of modes of governance, with obvious implications for penal law reform.<sup>130</sup>

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<sup>127</sup> N.Y. PENAL LAW § 10.00(1) (McKinney 1998).

<sup>128</sup> See MODEL PENAL CODE § 2.02(2)(d); RESTATEMENT (SECOND) OF TORTS § 282 (1965). See also *supra* notes 24-49 and accompanying text (providing a selection of other obvious links between the general part of the Model Penal Code and the Restatement of Torts).

<sup>129</sup> See, e.g., MODEL PENAL CODE art. 211 (entitled "Assault; Reckless Endangering; Threats"); RESTATEMENT (SECOND) OF TORTS §§ 13-24 (covering battery and assault).

<sup>130</sup> See *infra* Part IV.C.



### c. Interjurisdictional Comparison

A law web would also not be limited to facilitating intrajurisdictional analysis. Links across jurisdictions of course would not serve to illustrate the (at least presumptive) unity of law within a given jurisdiction; instead they would permit the sort of fruitful interjurisdictional comparison discussed in Part I.B. A network of links connecting particular provisions in one jurisdiction with those in another could be supplemented by a search engine that would allow users to compare penal codes by topic, side by side on a split screen. Even without such a search engine, it would of course always be possible simply to compare different penal codes by accessing them individually from the penal law web's collection of fully searchable penal codes. Topics for comparison could range from the broad (e.g., the entire general part) to the specific (e.g., the definition of driving while intoxicated). In this way it would be possible to compare on a single screen not only the "how" of penal codification—by comparing, say, the specific definition of self-defense in the German Penal Code and the Texas Penal Code—but also the "what"—by comparing the tables of contents of various codes. Such a comparison would quickly reveal significant structural similarities and differences among codes, including the placement of certain provisions within the general or the special part,<sup>131</sup> the choice of interests thought to require penal protection, along with the definition and ordering of these interests in the special part,<sup>132</sup> as well as the classification of particular offenses within

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<sup>131</sup> For example, inchoate offenses appear in the general part of the Model Penal Code, but in the special part of the New York Penal Law. Compare MODEL PENAL CODE art. 5 with N.Y. PENAL LAW arts. 100-115 (McKinney 1998).

<sup>132</sup> Whereas the special part of the French Penal Code begins with crimes against the person, the special part of the German Penal Code and the Model Penal Code first define crimes against the state. See C. PÉN. bk. 2; §§ 80-163 StGB; MODEL PENAL CODE art. 200 (Proposed Official Draft 1962). Even within a set of provisions dedicated to the protection of a particular interest, different penal codes have adopted different ordering principles. So, many American penal codes and the French Penal Code order crimes against the person in descending order of seriousness, while the New York Penal Law moves from the less serious to the more serious. See MODEL PENAL CODE art. 210 (Official Draft 1962); C. PÉN. art. 211-1; N.Y. PENAL LAW arts. 120, 125 (McKinney 1998).

the framework of protected interests<sup>133</sup> or outside that framework altogether,<sup>134</sup> not to mention the decision whether or not to define a particular offense,<sup>135</sup> group of offenses,<sup>136</sup> or class of offenses<sup>137</sup> within the penal code.

A comparative analysis of these questions may lead to the development of a much-needed theory of the special part of American penal law—the norms requiring penal enforcement and their manifestation in specific offense definitions. Such a theory has yet to emerge as American penal law scholarship tra-

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<sup>133</sup> For example, the New York Penal Law classifies abortion as a crime against the person whereas the Model Penal Code classifies abortion as an offense against the family. See N.Y. PENAL LAW §§ 125.40-60 (McKinney 1998); MODEL PENAL CODE § 220-3.

<sup>134</sup> See, e.g., CONN. GEN. STAT. §§ 53a-250 to -261 (West 1994) (addressing computer-related offenses); N.Y. PENAL LAW §§ 156.00-50 (McKinney 1998) (addressing offenses involving computers); 18 U.S.C. §§ 1961-1968 (1994) (addressing racketeer influenced and corrupt organizations); N.Y. PENAL LAW §§ 460.00-80, 470.00-20 (McKinney 1998) (“The Organized Crime Control Act”); CONN. GEN. STAT. §§ 53a-211 to -222 (West 1994) (addressing miscellaneous offenses). The federal legislature has found it impossible even to remain within the non-systematic, alphabetical, framework of the special part of its penal code. See 18 U.S.C. §§ 2701-2711, 2721-2725 (1994).

<sup>135</sup> So homosexual sex is an offense in some penal codes, but not in others. See, e.g., TEXAS PENAL CODE ANN. § 21.06 (West 1994) (defining homosexual conduct).

<sup>136</sup> For example, offenses of drug possession and distribution occupy two entire articles of the New York Penal Law, but appear nowhere in the German Penal Code, which addresses narcotics (other than alcohol) only in prohibitions against intoxication in general and against intoxication while operating “any vehicle engaged in rail, suspension rail, water or air traffic.” See N.Y. PENAL LAW §§ 220.00-65, 221.00-55 (McKinney 1998); §§ 315a, 323a StGB. Offenses of drug possession and distribution in Germany are instead defined in a separate code. See GERMAN CRIMINAL LAW: THE CRIMINAL CODE, THE NARCOTICS LAW 211-245 (Gerold Harfst et al. eds., 1989); Gesetz über den Verkehr mit Betäubungsmitteln v. 28.7.1981 (BGB1. I S.681, 1187); see also Cornelius Nestler, *Constitutional Principles, Criminal Law Principles and German Drug Law*, 1 BUFF. CRIM. L. REV. 661 (1998). New Jersey also defines offenses of drug possession and distribution in a separate code. N.J. REV. STAT. ANN. §§ 24:21-1 to :21-53 (West 1997) (“New Jersey Controlled Dangerous Substances Act”).

<sup>137</sup> For example, most American penal codes include some, but not all, minor offenses. Infractions, violations, and the like instead are defined in a variety of other state codes, state regulations, and the laws promulgated by lower-level governmental entities, including counties, cities, towns, and villages. The German Penal Code, by contrast, deals with these offenses in a separate code, the CODE OF ORDER CONTRAVENTIONS (GESETZ ÜBER ORDNUNGSWIDRIGKEITEN, OWiG), which contents itself with defining only a small subset of existing minor offenses and establishing general provisions to govern the definition and application of all others. See also CONTRAVENTIONS ACT, R.S.C., ch. 47, §§ 2-86 (1999) (Can.).

ditionally has focused almost exclusively on the general part of penal law, specifically as applied to the offense of homicide. It is, however, precisely a theory of the special part that provides a systematic framework for penal law reform, which concerns itself primarily with questions of what, where, and how to codify the penal law.

## 2. *Secondary Web*

Beneath the primary web of penal norms would lie the secondary web of case annotations and commentary. The primary materials could contain links to court opinions, grouped under topic headings such as “absolute liability” or “causation.” For instance, the concept of causation, recognized by all modern penal codes as a constituent element of result offenses, goes undefined in many penal codes (including the New York Penal Law and the German Penal Code, though not the Model Penal Code).<sup>138</sup> In these codes, references to the concept of causation could be linked to a collection of court opinions defining it. Obviously, individual provisions and parts thereof could also be linked to court opinions interpreting them, down to the interpretation of a single statutory term, such as “reckless” or “consent.”

The secondary web also could contain commentary on certain basic principles not treated as such in a given code. For example, the reference to “fair warning” in section 1.02 of the Model Penal Code, discussed above,<sup>139</sup> might be linked to commentary fleshing out that principle—commentary which in turn could be connected to annotations on the various aspects of the fair warning principle, such as legislativity (the principle of legality), specificity (the prohibition of vagueness), lenity (the rule of strict construction or the prohibition of analogy), and prospectivity (the prohibition of retroactivity), including relevant provisions of the U.S. Constitution as interpreted by leading Supreme Court cases.

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<sup>138</sup> See MODEL PENAL CODE § 2.03.

<sup>139</sup> See *supra* Part III.C.1.a.

In sum, the web medium makes it possible to accomplish apparently contradictory objectives: illustrate a penal code's interconnection with other primary and secondary materials while, at the same time, maintaining its integrity as a code. As contemporary casebooks make clear, a code quickly disintegrates into an unconnected collection of pronouncements on various and sundry topics of penal law. While the Model Penal Code's provision on attempt,<sup>140</sup> for example, may well be profitably studied on its own—especially if placed alongside the confused wranglings of a nineteenth-century frontier judge unschooled in the penal law—the true accomplishment of the Model Code, as of any principled code, lies not in its thoughtful resolution of particular puzzles in the doctrine of penal law, but in the unified structure, the integrity, it manages to impose on its scattered subject. No student will appreciate a penal code's integrity if the code is truncated, dissected, and its segments rearranged for insertion somewhere in the more or less systematic sequence of chapters in a traditional casebook.

Even currently available commentaries, though focused on a single code, often surrender the systematic unity and comprehensiveness of their subject code to a piecemeal analysis of its particular components. Take, for example, the standard commentaries on the German Penal Code, widely considered as a masterwork of simple conceptual unity. These commentaries have long ago broken the thousand-page barrier, with a ratio of commentary to code so high that code provisions are largely reduced to sudden interruptions of the never-ending flow of small print dissertations on penal law subjects, written by teams of authors who may or may not share a single view of the penal code, or for that matter of penal law in general.

In addition to placing penal codes within a web of connections while, at the same time, retaining its systematic unity, a penal law web can achieve another set of apparently inconsistent goals: focus the teaching and study of penal law on the comprehensive reality of an actual system of penal law without descending into blind parochialism. So an American penal law

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<sup>140</sup> MODEL PENAL CODE § 5.01.

web might be constructed around two nodes, the Model Penal Code—as the one penal code that can claim truly national significance—and a significant state code, such as the New York Penal Law.

Although any state code can be selected, the New York Penal Law recommends itself for two reasons. First, it was radically revised five years after the completion of the Model Code, by a commission that included Herbert Wechsler, the drafter of the Model Code. The Penal Law follows the Model Code in many respects, though the careful student will soon discover differences of lesser and greater significance. The Penal Law, for example, does not codify certain topics treated, often at considerable length, in the Model Penal Code (e.g., causation).<sup>141</sup> On the other hand, the Penal Law's special part is significantly bulkier than the Model Penal Code's, both because it includes offenses not found in the Model Penal Code (e.g., drug offenses, computer crimes, RICO) and because it adopted a far greater variety of offense degrees than did the Model Penal Code and separately defined each degree of each offense.

Second, the New York Penal Law has been subjected to three decades of judicial interpretation. The combination of the New York Penal Law, filled with internal hyperlinks as well as with external hyperlinks to other relevant New York legal texts, and a selection of trial and appellate court opinions applying the Penal Law to a multitude of factual scenarios thus would generate a comprehensive web of a well-developed Model-Penal-Code-based American penal law system in action.

#### IV. THE PENAL LAW WEB IN THE PRAXIS OF AMERICAN PENAL LAW

Now that the unique integrative potential of a penal law web has been illustrated, let us take a quick look at how that potential can be realized by participants in the various aspects of the praxis of penal law. The value of a law web, as of any law resource, lies after all in its ability not merely to display the conceptual integrity of its subject, but to make that integrity a reality.

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<sup>141</sup> MODEL PENAL CODE § 2.03.

## A. TEACHING

The particular pedagogic use to which a law web is put would depend entirely on the preferences of the teacher and the contours of her chosen subject. Given its flexibility, a law web could easily be adapted for a variety of courses, some more traditional than others. Among the obvious candidates is the traditional first-year course on "criminal law," which covers—at least in theory—the entirety of the general and special parts of all of American penal law in a single semester. The materials could also be used for a—less traditional but more sensible—two-semester first-year course, with the first semester focusing on the general and the second semester focusing on the special part. Other pedagogic applications of a code-based, comparative, and comprehensive penal law web might include upper-class seminars or courses in advanced penal law, which again may be dedicated to the general or the special part or perhaps to more specific topics in penal law, such as "The Law of Self-Defense (or some other such topic) in Comparative Perspective," simply "The Model Penal Code" (or of course "New York Penal Law" or "Florida Criminal Law"), or even a course on federal criminal law, federal sentencing, or on "Criminal Law in the Supreme Court" or "Constitutional Criminal Law."

Once a penal law web has been adopted or adapted for a particular class, it could function as a primary or as a secondary teaching tool. As a primary teaching tool, a law web could be projected onto a screen during class, with the teacher using a computer with internet access to select from the law web's various components. For example, in preparing for class she may select code sections or court opinions to illustrate certain points during her presentation. During class, she would also be free to draw on the web's collection of materials to illustrate and pursue an unanticipated line of inquiry or to frame and address a student question.<sup>142</sup>

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<sup>142</sup> Depending on available classroom equipment and the teacher's preference, students could either observe the teacher as she moves around the law web or access the law web themselves by using portable or built-in computers with internet access, already available at many law schools throughout the country.

In this way, a law web would give the teacher immediate access to an extensive library of penal law materials before, during, and after class, a library that her students can visit and revisit at any time. Moreover, unlike a paper library or even a collection of slides or overheads, materials in a law web are not static and do not require extensive pre-class preparation, thus supporting rather than constraining the teacher's pedagogic creativity in the act of teaching. Perhaps most important, the components of a law web are interconnected, thus allowing the teacher to demonstrate her thought processes throughout the class as her students follow her as she pursues links among the various materials in the primary and secondary webs, regardless of whether she is lecturing or engaging students in a pedagogic give-and-take. As a result, she can communicate to the students not merely a set of rules, but also their interconnectedness in a system.

As a primary teaching tool, a penal law web would replace the traditional casebook.<sup>143</sup> Alternatively, a penal law web could be used as a supplementary teaching tool. For example, students might access the law web at their convenience from home or at school to prepare for class or to deepen their understanding of a particular topic. As students discover and follow the links embedded in the law web, they may come to appreciate the systematic sophistication and enormous scope of penal law, while remaining free to pursue their interest in a particular aspect of the subject, whether this is the distinction between reck-

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<sup>143</sup> Depending on her interests and her approach to the subject, the penal law teacher nonetheless may decide to have her students work with a supplement including selected codes or code excerpts, court opinions, or secondary materials, which may or may not be included in the law web. Some teachers may feel that, even if there is no need to go beyond the sources collected in the law web, students will find it difficult to work without the customary paper materials. Here it is important to keep in mind that a law web as outlined above would use only the most basic web technology; anyone who can surf the internet can use a law web. Moreover, already today—and increasingly tomorrow—the web sophistication of law students matches and, in many cases, exceeds that of their teachers.

lessness and negligence in the North Dakota Criminal Code<sup>144</sup> or the definition of genocide in the French Code Pénal.<sup>145</sup>

#### B. SCHOLARSHIP

The use of a code-based, comparative penal law web to any scholar exploring a comparative approach to penal law, domestically or internationally, is apparent. A law web that would attempt to capture the tremendous variety and scope of modern penal law within a given jurisdiction may encourage even the scholar whose research interest is confined to a single jurisdiction to expand her inquiry beyond the traditional heartland of American penal law—the general part as applied to the law of homicide—to the continuously expanding mass of so-called regulatory offenses.

The comparative study of codes across areas of law and even across jurisdictions may lead to the rediscovery of a general science of codification, which had briefly emerged in the late eighteenth and early nineteenth centuries and found its most enthusiastic and prolific exponent and practitioner in Jeremy Bentham.<sup>146</sup> Code drafters, no matter what their jurisdiction or their subject, face similar questions of why, what, where, and how to codify, though these questions may of course find different answers from system to system, and from code to code, as the comparative analysis of the general parts of the Model Penal Code and the Uniform Commercial Code above has shown.<sup>147</sup>

#### C. LAWMAKING

The comprehensive interconnectedness of a penal law web within a given jurisdiction could guide representative lawmakers in deciding—as they must often decide—whether (and, if so, how) the penal law might be employed to deal with a particular

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<sup>144</sup> Compare N.D. CENT. CODE § 12.1-02-02(c) (1997) with N.D. CENT. CODE § 12.1-02-02(1)(d).

<sup>145</sup> C. PÉN. art. 211-1.

<sup>146</sup> See JEREMY BENTHAM, AN INTRODUCTION TO THE PRINCIPLES OF MORALS AND LEGISLATION (1789); JEREMY BENTHAM, THE THEORY OF LEGISLATION (1802); see also 1 JEREMY BENTHAM, *Principles of Penal Law*, in THE WORKS OF JEREMY BENTHAM 365, 390-524 (John Bowring ed., 1842).

<sup>147</sup> See *supra* notes 76-80 and accompanying text.



policy matter. For instance, by providing a comprehensive overview of the entirety of a jurisdiction's penal provisions and by interconnecting penal code provisions addressing related topics, a law web might help to stem the recent tide of arational—haphazard, duplicative, inconsistent, and generally un-systematic—penal lawmaking. Such an overview alone may give lawmakers pause before continuing the current trend of wholesale and undifferentiated penalization.

Similarly, lawmakers might use a penal law web's selection of American and international penal codes, supplemented by a search engine for the comparison of penal codes by topic, to gain an overview of the approaches that other jurisdictions have taken to general and specific issues of penal codification, ranging from the scope and structure of a penal code to the formulation of a particular provision. In this way, a penal law web would dramatically simplify the enormous comparative task facing any American lawmaker unwilling or unable to reinvent the wheel in parochial isolation.<sup>148</sup>

#### D. LAWAPPLYING

Not only legislators and their various aides and consultants (including legislative staffers and members of law revision commissions), but also other participants in the various aspects of the American penal system may turn to a penal law web as a systematic collection of penal norms, supplemented by the workhorse of American legal practice, "precedent." Most immediately, a penal law web should be of use to those who work with any of the law web's penal codes that have been annotated by internal and external hyperlinks. Using links embedded in such a code, the practicing lawyer or judge may be able to rec-

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<sup>148</sup> For example, a massive 16-volume treatment of all major penal law subjects from a domestic and comparative perspective was compiled in connection with the (unsuccessful) attempt to reform the German Penal Code at the beginning of this century. *VERGLEICHENDE DARSTELLUNG DES DEUTSCHEN UND AUSLÄNDISCHEN STRAFRECHTS: VORARBEITEN ZUR DEUTSCHEN STRAFRECHTSREFORM* (Karl Birkmeyer et al. eds., 1908). Examples from the United States include the three volumes of preparatory research published by the federal criminal code commission, *NATIONAL COMMISSION ON REFORM OF FEDERAL CRIMINAL LAWS, WORKING PAPERS* (1970), and of course the six volumes of commentaries on the Model Penal Code, *MODEL PENAL CODE AND COMMENTARIES* (1985).

ognize systematic connections among provisions within the Penal Law as well as among the Penal Law and other related codes, such as the Vehicle and Traffic Law or the Criminal Procedure Law. This greater appreciation of the systematic context of a given provision may permit her to develop a more sophisticated analysis of a given case or controversy, which may ultimately result in a more consistent body of penal jurisprudence.

## V. CONCLUSION

The principled reform of the American penal law system after the war on crime will be possible only if official and non-official participants in the system come to regard state punishment as a system of rules and practices that can and must be integrated within itself and within the wider system of state governance in the name of law. A penal law web may facilitate this process of integration.

In the long run, however, the legitimacy of American penal law can only be achieved if the penal law is brought home to its ultimate object-subjects, the very citizens who constitute the state that threatens and eventually inflicts punitive pain upon them in the name of penal law. In fact, the legitimacy of American penal law will only be guaranteed if the distinction between official and non-official participants in the communal praxis of punishment is discarded, that is, if all members of the American political community recognize the state's penal law as *their* penal law.<sup>149</sup>

As a publicly accessible resource, a penal law web would enable this long-term legitimation of American penal law by cutting through the layers of official system participants whose expert knowledge threatens to insulate the penal law from the constant public critical analysis it must undergo to achieve and retain legitimacy. No matter what their objective, preventive or retributive, penal norms may not be addressed merely to a specially trained subgroup of the state's constituents. The same holds for the basic principles of their definition, imposition,

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<sup>149</sup> Markus Dirk Dubber, *The Pain of Punishment*, 44 *BUFF. L. REV.* 545, 608-11 (1996).

and infliction. Otherwise, the infliction of pain in the name of punishment becomes an illegitimate manifestation of superior power by some person against another or some group against outsiders.

The proliferation and dispersal of penal norms far beyond the boundaries of the penal code, their official depository, has made public scrutiny of the state's punitive power virtually impossible. A penal law web could take a small step toward using a modern medium to harness modern penal law. Spread across the entirety of modern law as an enforcement mechanism adaptable to any area of state regulation, penal norms can no longer be contained within the covers of a single book, called a penal code.

It would seem to be possible, however, to open modern penal law to continuous first- and second-order legitimacy scrutiny by, first, systematizing it around a common core of general principles (perhaps contained in the penal code) and, second, exposing and tightening the precise connection between all penal norms to these core principles. Second-order (or external) legitimacy critique thus could focus on the penal code, whereas first-order (or internal) legitimacy scrutiny could be applied to any penal norm defined anywhere in the vast field of modern law.

To reform modern penal law, therefore, is to transform it into a web. The interdependency of penal law, however, implies the interdependency of those who shape it. Teachers and scholars of American penal law in particular must acknowledge their responsibility for the state of American penal law. They must abandon their comfortable habits of engaging in idle speculations on applied moral theory or charting doctrinal developments in the lawapplying courts. Instead they must refocus their pedagogic and scholarly attention on the source of penal law, the legislatures and their penal codes, as they had some thirty years ago when the Model Penal Code swept the nation.<sup>150</sup>

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<sup>150</sup> See, e.g., Symposium, *Rethinking Federal Criminal Law*, 1 BUFF. CRIM. L. REV. 1 (1997); Symposium, *Toward a New Federal Criminal Code*, *supra* note 3. See also MAKING CRIMINAL LAW CLEAR AND JUST (Donald Stuart ed., 1999) (draft proposals for compre-

It is important to recognize that the responsibility of penal law scholars for American penal law derives not primarily from their status as experts. At bottom, this responsibility springs from their status as self-governing constituents of a free state. Along with the power to participate in the generation of law comes the responsibility for its substance. The expert status claimed by those who enjoy the leisure of contemplating modern penal law to its full extent and complexity merely augments that burden of responsibility for its continued legitimation which all state constituents must carry.

Today, the Model Penal Code's legislative impact has long subsided and American penal codes still await sustained scholarly analysis, either within or across jurisdictions. The much bemoaned irrelevance of American penal law scholars or "experts" is largely self-imposed. American penal law scholarship cannot expect to shape penal lawmaking as long as it fails to come to grips with the fact that the power to make penal law has for decades rested with American legislatures, not the courts. Scholars continue to ponder the distinction between "the common law rule" and "the Model Penal Code rule" on any given subject, long after that convenient distinction has become meaningless in the reality of American penal law, which is defined instead by the codes governing particular jurisdictions.

Experts of American penal law must integrate themselves into the web of penal law by reforming themselves as experts of American penal codes. Only then will they be in a position to contribute to the reform and legitimation of penal law in a given—*their*—jurisdiction and ultimately in the country as a whole.

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hensive reform of Canadian penal law with commentaries); ALTERNATIV-ENTWURF WIEDERGUTMACHUNG, *supra* note 66 (draft proposal for partial reform of the German Penal Code with commentaries).

