

The Rockefeller Foundation's Model Penal Code: Probing the Private Origins of American Criminal Law)

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The drafting and publication of the Model Penal Code (MPC) in 1962 by the American Law Institute put in motion one of the most consequential reforms in American criminal law in the last century, setting off codification projects and other statutory enactments in the majority of states to emulate the MPC's provisions and approaches to defining crimes. But major details of its drafting are only just beginning to be understood, thanks to previously unexamined materials in the archives of the American Law Institute, the Rockefeller Foundation, and of the Code's Chief Reporter, Herbert Wechsler.^[1] These materials reveal that the Rockefeller Foundation had a great deal of influence over the direction and content of the MPC, which would likely never have existed without Foundation support.

The MPC: It Could Have Been Anything Else

In the late 1940s and early 1950s, the American Law Institute (ALI) didn't seem to have a very clear idea of what it was supposed to be doing. "It is easy," wrote its President, Herbert Goodrich, "to make about the American Law Institute the suggestion that having completed its work it now looks around for things to do to keep itself going."^[2] What it needed most to keep itself going was money, and the ALI was open to doing anything it could get support for. One of the people Goodrich solicited most frequently for funding was Joseph Willits, the head of the Rockefeller Foundation's Division of Social Sciences. There was no particular coherence to the projects Goodrich suggested to Willits, which included an unsuccessful proposal for a wholesale reform of legal education and a study of "the ethical concepts of the Lord Chancellors and the Courts of Equity," for which the ALI received \$20,125 (\$261,817 today)^[3] from the Foundation in December of 1949.^[4] Goodrich's correspondence with Willits suggests that he would have been happy for the ALI to work on any project the Rockefeller Foundation—or any other institution, for that matter—was prepared to fund.

This openness extended to criminal law reform. The ALI was interested in the project of a Model Penal Code, but was by no means committed to it. The ALI had been talking about reforming the substantive criminal law for

decades, ever since the Laura Spelman Rockefeller Memorial financed the ALI's drafting of a Model Code of Criminal Procedure in the 1920s. Several leading criminal law scholars had even put together an extensive proposal for an MPC that the ALI was prepared to back in the mid-1930s, but, likely due to the Depression, the Rockefeller Foundation lacked the resources to consider it seriously. By the early 1950s, when those scholars were writing to Goodrich to say they assumed that the MPC was "completely dead,"[5] money was still the issue: "If you could find us a Santa Claus to back the work," Goodrich responded, "we should start the week after next." [6]

That Santa Claus would be the Rockefeller Foundation. Even though Joseph Willits specifically wrote of Goodrich that "[h]e understands . . . we don't propose to be Santa Claus to the American Law Institute," [7] the Foundation gave the ALI \$225,000 (\$2,590,548 today) in 1951, followed by a second grant of \$200,000 (\$2,230,355) in 1956.

Herbert Wechsler: It Could Have Been Anyone Else

The most consequential personnel choice in which the Rockefeller Foundation had a hand was the selection of the Model Penal Code's Chief Reporter, Herbert Wechsler. Had the Foundation been in a position to fund the MPC in the 1930s, when the ALI submitted its first proposal, it might very well have been largely under the direction of Rollin Perkins at the University of Iowa, the author of a widely used criminal law casebook at the time.

While most accounts of the MPC's origins either present Wechsler as a natural choice to lead the project or don't discuss the question of leadership at all, Joseph Willits's records show that the Foundation wasn't initially impressed with Wechsler: Willits thought he was too inexperienced, noting that he "is very able and knows criminal law, but he has no practical experience." [8] Willits had to be convinced to back Wechsler.

There were likely several factors that changed Willits's mind about Wechsler, but one of the most important was almost certainly that Wechsler created a proposal for the MPC that responded directly to Willits's concerns. After the ALI pitched Willits on a model code in August of 1950, he wrote to a number of lawyers, social scientists, and counterparts at other foundations to solicit their opinions, which were largely of a piece: the ALI is basically proposing a restatement, which won't do anything to encourage the major rethinking of American criminal law that recent developments in social science have shown is so badly needed. Willits compiled these concerns and his own into a bluntly worded letter to the ALI in December of 1950.

This stern warning about the MPC's direction—in addition to repeated recommendations from Herbert Goodrich and legal academics working closely with the Rockefeller Foundation—allowed Wechsler to cement the

Foundation's support for both the MPC and his leadership. In March of 1951, Wechsler presented a document laying out his vision of the MPC in which he directly acknowledged the Foundation's hesitation. "The Foundation," he wrote, describing its reaction to the ALI's initial proposal, "was apparently not satisfied upon a number of the issues posed in making the substantial grant involved."^[9] As a result, his foundational proposal for the MPC would be aimed at convincing the Foundation that this was a project in keeping with its goals and that Wechsler was the right man for the job: "This memorandum is designed to state," wrote Wechsler, "the grounds on which it is submitted that the model code proposal merits full support."^[10] (This sentence was actually handwritten over a crossed-out typed paragraph that Wechsler apparently thought didn't go far enough in speaking directly to the Foundation.) The proposal quoted liberally from Willits's letter of warning and framed the MPC to respond to its concerns, particularly [highlighting the role social scientists would play in its creation](#).

This memo and another Wechsler wrote in the following months did the trick. By July of 1951, Willits was writing in his journal about his meetings with senior ALI figures things like: "Professor Wechsler carried the brunt of the discussion, just as he apparently has done the bulk of the spadework."^[11] Willits's colleagues at other foundations—who previously had been dubious of the ALI—also approved. Henry Allen Moe of the Guggenheim Foundation wrote to Willits: "I have read the three Wechsler documents on the criminal law business. I have read them with admiration for the professional competence and insights they show."^[12] But it wasn't just Wechsler's work that caught Moe's eye: "Joe, you already have made a fine contribution to the subject. Just contrast these documents with the first submission. I am very pleased."^[13]

Rockefeller All the Way Down

The pressure the Rockefeller Foundation put on Wechsler and the ALI was always directed at a singular goal: getting them to work more closely with social scientists. As Willits wrote in his diary of the ALI's first proposal: "I did not think this venture would get anywhere unless it were composed of the best possible men from law, social science, psychiatry, and practitioners in the field of penology and judicial administration."^[14] Wechsler's framing of the MPC clearly took this pressure on board, promising that, "To the extent—and the extent is large—that legislative choice ought to be guided or can be assisted by knowledge or insight gained in the medical, psychological and social sciences, that knowledge will be marshalled for the purpose by those competent to set it forth."^[15]

It might be argued that this pressure was unnecessary: the general trend of American law in the 20th century was towards social science, rendering the influence the Foundation wielded over the ALI superfluous. But the very existence and prevalence of the social science on which law came

increasingly to rely was *itself* a function of the efforts and money of private foundations like Rockefeller. Beginning in the late 19th century, the Rockefeller Foundation began establishing and supporting academic centers dedicated to the study and promotion of particular social scientific approaches: it even made a sizeable grant to Columbia Law School that “aimed to establish links between criminal law and a body of facts in sociology”[16] in 1927, the year before Wechsler enrolled as a student there.

To take one consequential example, Rockefeller money established the University of Chicago in the 1890s and then largely funded its sociology department, along with those at other universities. Throughout the first half of the twentieth century, these departments played a large role in changing American conceptions of children and adolescents: they argued “that children were emotionally plastic and much more easily influenced by training than were adults”[17]; children, in other words, were neither inherently vicious nor (usually) irredeemable. This view was generally influential in law and particularly so among the members of the ALI, which drafted a Youth Correction Authority Act (a model law for the treatment of youthful offenders) in the 1940s. This act, as both published and archival materials demonstrate, was a major source of inspiration for the MPC’s conceptual orientation. One senior criminal law scholar who for years had been involved with the ALI’s criminal law projects wrote:

I took the position that the Institute has announced its philosophy by the Youth Correction Act; . . . that the chief contribution of the code would be to express and carry out that philosophy in the adult field; . . . that the [code should be limited to acts indicative of a personality so dangerous as to justify the expense of disabling and rehabilitative treatment](#)[18]

Early Rockefeller investments in academic institutions and departments led to their support for the particular ideas of childhood plasticity; these ideas were adopted by the ALI in their proposed treatment of youthful offenders. Finally, Wechsler and his team generalized from these views of children to the conviction that adult offenders were not malicious free agents deserving of punishment, but rather products of their environment in need of treatment, an ethos that defined the MPC’s overall approach to crime.

Private Action, Public Punishment

Archival materials reveal an unknown story about the origins of a great deal of American criminal law today: in the mid-1950s, the Rockefeller Foundation made sure the drafters of the Model Penal Code incorporated into their work the conclusions of social scientists whom the Foundation and its predecessors had been funding for nearly three quarters of a

century. The full implications of this story await further elaboration. As one example, the child-derived model of human behavior helped focus the MPC's authors on the dangerousness of offenders rather than the reprehensibility of their actions, since they thought the major function of criminal law was to restrain and correct dangerous behavior. This focus on offender dangerousness may now underlie prejudiced conviction and sentencing decisions, since juries are more likely to see as dangerous people they perceive as different from themselves. For now, what's clear is that a good deal more of American criminal law is the result of concerted private action than has been understood. This story should, among other things, make us more sensitive to the impact of funding sources on legal reform projects in the United States and around the world.

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[1] Herbert Wechsler (1909–2000), long-time professor at Columbia Law School, was one of the most cited American legal scholars of the 20th century and made significant contributions to criminal law, constitutional law, and other areas of law. Chartered in 1913, the Rockefeller Foundation is the second-oldest American philanthropic institution. The American Law Institute is an organization of judges, lawyers, and law professors founded in 1923 "to promote the clarification and simplification of the law and its better adaptation to social needs, to secure the better administration of justice and to encourage and carry on scholarly and scientific legal work."

[2] Walter Gordon, *Strict Legal Liability, Upper Class Criminality, and the Model Penal Code*, 26 *Howard Law Journal* 781, 783–84 (1983).

[3] As of Oct. 18, 2023 (all conversions done using the US. Bureau of Labor Statistics CPI Inflation Calculator: https://www.bls.gov/data/inflation_calculator.htm).

[4] Flora Rhind, Letter to Herbert Goodrich, Dec. 9, 1949, in *Model Penal Code Records*, Box 1, Folder 2, American Law Institute Archives, ALI.04.005, Biddle Law Library, University of Pennsylvania Carey Law School, Philadelphia, PA (hereinafter UPenn MPC).

[5] Alfred Gausewitz, Letter to Herbert F. Goodrich, Apr. 19, 1950, in UPenn MPC, Box 2, Folder 8.

[6] Herbert F. Goodrich, Letter to Alfred Gausewitz, Apr. 28, 1950, in UPenn MPC, Box 2, Folder 8.

[7] Memorandum of Joseph Willits, Nov. 17, 1950, in Rockefeller Archive Center (hereinafter RAC), RG 1.1, Series 200, Box 303, Folder 3609.

[8] Memorandum of Joseph Willits re: Herbert Wechsler, Jan. 23, 1951, in RAC, RG 1.1, Series 200, Box 303, Folder 3609.

[9] Herbert Wechsler, Memorandum for Advisory Committee on Criminal Law: The Proposal to Prepare a Model Penal Code, Mar. 1951, at 1–2 (1951).

[10] *Id.* at 2.

[11] Interview with Harrison Tweed, Herbert Goodrich, and Herbert Wechsler, July 10, 1951, in RAC, RG 1.1, Series 200, Box 303, Folder 3610.

[12] Letter from Henry Allen Moe to Joseph Willits, Aug. 7, 1951, in RAC, RG 1.1, Series 200, Box 303, Folder 3610).

[13] *Id.*

[14] Memorandum of Joseph Willits, *supra* note 7.

[15] Herbert Wechsler, The Challenge of a Model Penal Code, 65 *Harvard Law Review* 1097, 1130 (1952).

[16] *Id.* at 200.

[17] Judith Sealander, The Failed Century of the Child: Governing America's Young in the Twentieth Century 35 (2003).

[18] Alfred Gausewitz, Letter to Frank A. Ross, Jan. 13, 1951, in UPenn MPC, Box 2, Folder 8. Wechsler's article made the connection equally explicit. See Wechsler, *supra* note 15, at 1104.

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