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Herbert Wechsler, Legal Process, and the Jurisprudential Roots of the Model Penal Code

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HERBERT WECHSLER, LEGAL PROCESS, AND THE JURISPRUDENTIAL ROOTS OF THE MODEL PENAL CODE

David Wolitz*

“If we have erred in the details, we do submit at least that the philosophy is right.”
- Herbert Wechsler on the Model Penal Code**

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I. INTRODUCTION

Herbert Wechsler was hailed as a “giant of the law” when he passed away in 2000.¹ His achievements spanned legal academia, legal practice, and legal reform. And, at

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** Herbert Wechsler, *The American Law Institute: Some Observations on Its Model Penal Code*, 42 A.B.A. J. 321, 394 (1956).

1. Tamar Lewin, *Herbert Wechsler, Legal Giant, Is Dead at 90*, N.Y. TIMES, April 28, 2000, at C21.

the height of his career, he sat at the apex of three doctrinal fields: criminal law, Constitutional law, and federal courts.² In legal historiography, Wechsler is conventionally—and correctly, I believe—grouped together with Henry Hart, Albert Sacks, and Lon Fuller, as an architect of the Legal Process School of jurisprudence, an approach which came to dominate the elite legal academy in the 1950s and 1960s.³ Wechsler’s work in Constitutional law and federal courts has long been understood as emblematic, even generative, of the Legal Process approach more generally. But the connection between his work in criminal law and Legal Process jurisprudence has received significantly less attention.⁴ This is understandable because, as its name implies, the Legal Process approach emphasized issues of procedural regularity and institutional competence over substantive doctrine. Yet Wechsler’s proudest achievement was the decade-long systematic reformation of *substantive* criminal law doctrine which culminated in the publication of the Model Penal Code.

The Model Penal Code project lasted from 1952 until 1962 and, on Wechsler’s account, took up the bulk of his scholarly energy during that period⁵—a period during which he also published three classics of the Legal Process approach unrelated to criminal law: *The Federal Courts and the Federal System*,⁶ *The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government*,⁷ and *Toward Neutral Principles of Constitutional Law*.⁸ On the one hand, it seems unlikely that Wechsler’s criminal law work was unaffected by his more general jurisprudential

2. Henry Paul Monaghan, *A Legal Giant Is Dead*, 100 COLUM. L. REV. 1370, 1370 (2000).

3. It may be useful to distinguish between a first generation of Legal Process scholars and a second generation, although such listings are necessarily a matter of debatable judgment, and this one does not pretend to be authoritative. Nevertheless, any list of the first generation of Legal Process scholars would have to include—in addition to Herbert Wechsler, Henry Hart, Albert Sacks, and Lon Fuller—Paul Freund, Louis Jaffe, Edward Levi, and (perhaps more controversially) Karl Llewellyn. See Bruce Ackerman, *Law and the Modern Mind by Jerome Frank*, 103 DAEDALUS 119, 128-29 n.26 (1974). In addition to this Harvard-heavy list, one should add a group of scholars at the University of Wisconsin: James Willard Hurst, Lloyd K. Garrison, Carl Auerbach, and Samuel Mermin. See William N. Eskridge, Jr., *Willard Hurst, Master of the Legal Process*, 1997 WIS. L. REV. 1181, 1187-88 (1997). The second generation of Legal Process scholars was much larger, and with no pretense of comprehensiveness, I would count among them Alexander Bickel, George Packer, Harry Wellington, Paul Bator, Paul Mishkin, John Hart Ely, Henry Paul Monaghan, Philip Kurland and (perhaps more controversially) Ronald Dworkin and Robert Bork. The influence of the Legal Process approach has, of course, continued beyond that second generation and is still robust today in the professoriate and in the judiciary. Current Justices Breyer, Ginsburg, and Kennedy (as well as the late Justice Scalia) all took the Legal Process course at Harvard Law School. See William N. Eskridge, Jr. & Philip P. Frickey, *The Supreme Court, 1993 Term, Foreword: Law as Equilibrium*, 108 HARV. L. REV. 26, 27 (1994).

4. One exception to this general lack of attention is Markus Dubber’s treatment of the Legal Process provenance of the Code. See Markus D. Dubber, *The Model Penal Code, Legal Process, and the Alegitimacy of American Penalty*, in FOUNDATIONAL TEXTS IN MODERN CRIMINAL LAW 239, 239-61 (Markus D. Dubber ed., 2014) [hereinafter *Alegitimacy*]; MARKUS D. DUBBER, CRIMINAL LAW: MODEL PENAL CODE 7-11 (2002); Markus Dirk Dubber, *Penal Panopticon: The Idea of a Modern Model Penal Code*, 4 BUFF. CRIM. L. REV. 53, 53, 63-64 (2000). See also Michael Willrich, Criminal Justice in the United States, in THE CAMBRIDGE HISTORY OF LAW IN AMERICA, VOL. 3, 195, 213 (Michael Grossberg & Christopher Tomlins eds., 2008) (noting that the Model Penal Code “bore the unmistakable imprint” of the Legal Process approach).

5. Norman Silber & Geoffrey Miller, *Toward “Neutral Principles” in the Law: Selections from the Oral History of Herbert Wechsler*, 93 COLUM. L. REV. 854, 918 (1993) [hereinafter *Oral History*] (“From 1952 until the Code was completed—that is to say, for ten years—the development of the Model Penal Code absorbed every bit of time and energy that I had.”).

6. HENRY M. HART, JR. & HERBERT WECHSLER, *THE FEDERAL COURTS AND THE FEDERAL SYSTEM* (1953)

7. Herbert Wechsler, *The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government*, 54 COLUM. L. REV. 543 (1954).

8. Herbert Wechsler, *Toward Neutral Principles in Constitutional Law*, 73 HARV. L. REV. 1 (1959) [hereinafter *Neutral Principles*].

views.⁹ On the other hand, it is not immediately obvious what a Legal Process approach to substantive criminal law would entail. What connects Wechsler, the great Legal Process thinker, with Wechsler, the great criminal law reformer? There is a further puzzle to Wechsler's work on criminal law. Despite his unparalleled importance in twentieth century criminal law reform and criminal law scholarship, Wechsler's name is not identified today with any particular theory of criminal law. What *was* the Wechslerian theory of criminal law?

The answers to these puzzles are, I believe, connected. Wechsler's work on criminal law was, in fact, thoroughly saturated in Legal Process jurisprudence, just as his work on Constitutional law and federal courts was. But the Legal Process approach itself eschewed the kind of single-value, idealistic normative theorizing that we often expect from criminal law theorists.¹⁰ The Legal Process approach, contrary to much legal thinking that came before and after it, was not focused on building up idealistic abstractions and demanding that the positive law conform to those ideals. Moreover, Wechsler did not see the task of legal reform as an exercise in remaking the law from a blank slate according to any single overarching normative theory of criminal law. Rather, Wechsler and his fellow Legal Process thinkers believed that reformers should start with a thorough examination of the existing and often competing values embedded in the law and try to craft reasonable and workable doctrines that reflect, preserve, and when possible, reconcile all of the legitimate values at stake.¹¹ The project of rationalization that Wechsler undertook in the Model Penal Code was thus not a philosophical project of justification or a total reconstruction from first principles of the entire field of criminal law.

Nor did Wechsler believe that rigorous application of reason could solve all controversies in the criminal law. Wechsler, like Henry Hart, understood the field of criminal law to contain multiple and often competing values, and he did not pretend that reason alone could determine the outcome of difficult value choices.¹² The rationalization project Wechsler understood himself to be undertaking involved making criminal law doctrine as internally coherent as possible and crafting the doctrines of the criminal law so as to match means (doctrines) and ends (values) as effectively as possible. At the same time, Wechsler's commitment to a rational and principled body of criminal law matched his commitment to prudent legal and social reform.¹³ The Model Penal Code project thus did not aim to remake criminal law from whole cloth, or to subject every doctrine to a single ideal. Consistent with the Legal Process approach, Wechsler's Model Penal Code project was more modest. As Henry Hart put it, describing legal decisionmaking in general, it was a project of "Where-do-we-go-from-here?"¹⁴ In drafting the Code, Wechsler was deter-

9. And vice versa. It seems unlikely that Wechsler's jurisprudential views were unaffected by his work on the doctrinal problems of substantive criminal law.

10. This is not to say that Legal Process theory lacked philosophical foundations. See Charles L. Barzun, *The Forgotten Foundations of Hart & Sacks*, 99 VA. L. REV. 1 (2013). It is to say that Legal Process theory tended to eschew idealistic exhortation in favor of prudential reform.

11. See discussion *infra* Part IV.C-D.

12. See discussion *infra* Part IV.C. The commentaries to the Model Penal Code reveal intense philosophical debates about doctrinal choices.

13. See discussion *infra* Part IV.D.

14. HENRY M. HART, JR. & ALBERT M. SACKS, THE LEGAL PROCESS: BASIC PROBLEMS IN

mined to articulate doctrines that could fit in with deeply held and widely accepted expectations of the criminal law. His somewhat paradoxical aim was to create both a principled corpus of coherent criminal law doctrine (a principled Code) and a model set of politically achievable and administratively workable doctrinal reforms (a prudent Code). The central drama of the drafting process and of the resulting Code, then, was a tension between Wechsler's dual commitments to principle and to prudence, the two great Legal Process watchwords.

Wechsler's approach to criminal law reflected practically all the major themes of Legal Process jurisprudence. Legal Process theory conceptualized law not as a set of rules, but rather as a system for managing the persistent problems of human interdependence through institutional processes, which create norms, apply them, and resolve disputes accordingly.¹⁵ As the Hart and Sacks casebook explained, complex societies inevitably divide these functions among a variety of specialized institutions, giving rise to legislatures, executive agencies, courts, and many other official and unofficial bodies.¹⁶ The legal process writ large is constituted by the regularized interactions of all these institutions, each of which operates according to its own internal procedures.¹⁷ Writers in the Legal Process tradition thus focused careful attention on the proper allocation of decisionmaking authority among different institutions, as well as to the regularized interactions between and within different legal bodies.¹⁸ This focus on process has misled some commentators into thinking that Legal Process jurisprudence eschewed any substantive evaluation of the law;¹⁹ in fact, the Legal Process approach analyzed legal processes and institutions as a means of appraising whether they were actually achieving the ultimate social ends of the law.²⁰ The core Legal Process concern, Wechsler's ultimate aspiration, was to match the doctrines, processes, and institutions of law with the full panoply of legitimate social values.²¹

For Wechsler, substantive criminal law was simply that subsection of official norms establishing baseline prohibitions against "the deepest injuries that human conduct can inflict on individuals and institutions."²² It requires for its creation and application the proper functioning of legislatures, courts, police, prosecutors, departments of correction, parole boards, and other official bodies. Hence, one of the major themes of Wechsler's work in criminal law, as of Legal Process theory more generally, was the proper allocation

THE MAKING AND APPLICATION OF LAW 111 (William N. Eskridge, Jr. & Philip P. Frickey eds., 1994) (an unedited version of the unpublished 1958 Tentative Edition).

15. *Id.* at cxxxvii, 3.

16. *Id.* at 4.

17. *Id.*

18. *Id.* at cxxxvii.

19. *See, e.g.*, Gary Peller, *Neutral Principles in the 1950s*, 21 U. MICH. J.L. REFORM 561, 589 (1988) (arguing that Legal Process made "ultimate questions of legal legitimacy depend on a vision of process divorced from substance").

20. For Hart and Sacks, there is an ultimate purpose to the legal process—stated negatively, it is the avoidance of violence and social disintegration; stated positively, it is the maximum possible satisfaction of valid human desires. HART & SACKS, *supra* note 14, at 104.

21. *See, e.g., id.* at 105-07, 111; JEROME MICHAEL & HERBERT WECHSLER, CRIMINAL LAW AND ITS ADMINISTRATION: CASES, STATUTES AND COMMENTARIES 4-6 (1940) (identifying the "ordering of means and ends" as the chief task of legal evaluation and reform).

22. Herbert Wechsler, *The Challenge of a Model Penal Code*, 65 HARV. L. REV. 1097, 1098 (1952) [hereinafter *Challenge*].

of authority among the many official bodies charged with decisionmaking related to criminal law.²³ For Wechsler, the task of drafting a substantive criminal code was inseparable from determining where to lodge the various decisionmaking functions required of a criminal justice system.²⁴

The very choice to draft a Model Penal Code reflected Wechsler's—and the Legal Process School's—commitment to the primacy of the democratic legislature in setting overall criminal law policy and doctrine. For Wechsler, the work of crafting substantive criminal law was primarily a legislature's work, not a judicial or executive branch function.²⁵ The Model Penal Code was meant to provide legislators with a technically sophisticated model, which, upon deliberation, they could adopt *in toto*, borrow pieces from, or simply use as a resource for state-specific reform.²⁶ It was emphatically not meant to be a uniform code demanding wholesale adoption.²⁷ Indeed, Wechsler was clear that national uniformity was not a goal of the project and would not even be desirable given real and legitimate differences in the values of different state populations.²⁸ Value pluralism was thus presumed, and in Wechsler's view, it fell to the people of the states acting through their legislatures—and not to judges or to expert panels—to make the value choices required by criminal codification.

Nevertheless, on Wechsler's view, expert legal guidance could aid legislatures in creating a code actually suited to achieving the ends desired by the polity. First, legal knowledge is necessary to describe the present state of the law so that a proper appraisal of existing doctrines and functions can be made.²⁹ Second, Wechsler believed that the special competence of lawyers in the precise use of language should be harnessed to make the Code as precise and intelligible as possible.³⁰ Legal analytical expertise would be useful to systematize a series of discrete doctrines into a coherent, systematic code—one in which different provisions build upon and interact with one another in predictable, consistent, and uniform ways. Most importantly, and most consistently with a key Legal Process theme, Wechsler had faith in the distinctive competence of good lawyers to take on the concrete problems of human affairs and work through them with practical wisdom until viable and just solutions manifest themselves.³¹

23. See discussion *infra* Part IV.A.

24. Herbert Wechsler, *American Law Institute II - A Thoughtful Code of Substantive Law*, 45 J. CRIM. L. CRIMINOLOGY & POLICE SCI. 524, 524 (1954-55) [hereinafter *Thoughtful Code*] (discussing the symbiotic relationship between “administration of criminal justice” and the substantive law of crime).

25. Wechsler expected that gaps and ambiguities in the code would require judicial elaboration, and he understood that executive branch interpretation of the code would have significant consequences. Nevertheless, Wechsler saw the legislature as the primary—though not exclusive—body suited to make substantive criminal law and policy. See discussion *infra* Part IV.B.

26. See *Thoughtful Code*, *supra* note 24, at 525.

27. *Id.*

28. See Herbert Wechsler, *The Codification of Criminal Law in the United States: The Model Penal Code*, 68 COLUM. L. REV. 1425, 1427 (1968) [hereinafter *Codification of Criminal Law*] (“[I]t was not the purpose of the Institute to achieve uniformity in penal law throughout the nation.”); Herbert Wechsler, *The American Law Institute: Some Observations on Its Model Penal Code*, 42 A.B.A. J. 321, 321 (1956) [hereinafter *Some Observations*] (“By ‘model,’ . . . we mean nothing more than formulations that may be suggestive and commend themselves to legislative imitation.”).

29. See Herbert Wechsler, *Legal Scholarship and Criminal Law*, 9 J. LEGAL EDUC. 18, 22 (1956) [hereinafter *Legal Scholarship and Criminal Law*].

30. See *id.*

31. See discussion *infra* Part IV.D-E.

Social science, too, had a role to play in this major legal reform effort. Scientists could help determine whether the real-world operation of certain legal processes, in fact, brought about the desired results, or instead produced unintended consequences. Wechsler also believed that sociology, psychology, and economics may help illuminate whether certain assumptions, implicit in the law, about how people act and think are accurate or not.³² What social science could not do, on Wechsler's account, was determine the ends of criminal law or replace legal concepts with social scientific ones. In addition, Wechsler fiercely defended the legal profession's prerogatives against any attempted encroachments by social science onto the traditionally legal turf of doctrinal reform. Wechsler's attitude toward social science—openness to its insights coupled with resistance to any submission of law to social science—was consistent with the Legal Process School's generally pragmatic engagement with the human sciences.³³

Finally, Wechsler remained humble about the power of substantive criminal law, even the most up-to-date code, to achieve broad social aims.³⁴ For him, invocation of the criminal law was a last-ditch effort to punish an already harmful violation of social norms. Achieving the overall goals of public order and personal security, Wechsler maintained, cannot depend on the criminal law alone; other laws and policies are much more important than the precise articulation of criminal law.³⁵ “[T]he most satisfactory method of crime prevention,” he maintained, “is the solution of the basic problems of government—the production and distribution of external goods, education and recreation.”³⁶

Seeing the Model Penal Code as a distinctively Legal Process project helps clear away some misconceptions about the Model Penal Code that have arisen over the years:

First, the Code has often been presented as a code of substantive criminal law only, when it is, in fact, just as much concerned with the key Legal Process theme of the allocation of power within the legal system as it is with substantive doctrine.³⁷

Second, the Code has often been seen as thoroughly utilitarian in its theory of punishment, with some emphasizing the Code's invocation of the deterrence rationale³⁸ and others emphasizing its commitment to “treatmentism”³⁹ or the rehabilitative ideal. In fact, the Code reflects the value pluralism of Wechsler and the Legal Process School throughout, and it does not subscribe to any single normative theory of punishment.⁴⁰

Third, the Code has been cast as an elitist project bent on thwarting popular retributivism. While there is no denying the elite status of the American Law Institute and

32. See *Challenge*, *supra* note 22, at 1130 (“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.”).

33. See discussion *infra* Part IV.E.

34. See *Challenge*, *supra* note 22, at 1133 (noting the “the intrinsic limitations of the penal law, as distinguished from other and less oppressive, more constructive methods of protection and control”).

35. See generally Herbert Wechsler, *A Caveat on Crime Control*, 27 AM. INST. CRIM. L. & CRIMINOLOGY 629, 637 (1937) [hereinafter *Caveat*].

36. *Id.* at 637 (1937).

37. See discussion *infra* Part IV.A.

38. See, e.g., Gerald Leonard, *Toward a Legal History of American Criminal Theory: Culture and Doctrine from Blackstone to the Model Penal Code*, 6 BUFF. CRIM. L. REV. 691, 813-15 (2003).

39. DUBBER, *supra* note 4, at 11.

40. See discussion *infra* IV.C.

the drafters of the Code, Wechsler was a committed democrat who, in good Legal Process style, believed in legislative primacy in setting criminal law policy.⁴¹

Fourth, some commentators have alleged that the Code aimed to ambitiously remake the criminal law along scientific and technocratic lines while taking its cues from then-fashionable theories in the social sciences, particularly in psychiatry.⁴² To the contrary, Wechsler had a very humble sense of what the Code could accomplish and never saw the natural or social sciences as models for law to emulate.⁴³ Although he welcomed relevant social science findings, Wechsler pushed back against the radical critiques of criminal law emanating from some social scientists, particularly from psychiatrists, and against attempts to render legal issues in the terms of other disciplines. He had a very Legal Process faith in the virtue of lawyerly practical wisdom and a concomitant skepticism of thoroughly empiricist or theoretical social science.⁴⁴

Finally, the Code has been presented as hyper-systematic and almost formalistic in its close hewing to a few axiomatic principles,⁴⁵ while at the same time it has stood accused of being overly pragmatic in its accommodations to pre-existing doctrines.⁴⁶ These two opposing misconceptions together do point to a real tension in the Code, a clash between the Code's principled and prudential aspirations. Some of the Code's provisions reveal Wechsler's genuine commitment to *principle*, while others reveal his temperamental *prudence*. Looking at the Code as a whole, one can see this pervasive tension between principle and prudence as a reflection of the two diverging lodestars of Legal Process thought.⁴⁷

In these days when criminal justice reform is again a pervasive topic of conversation in the legal profession and in the wider public sphere,⁴⁸ revisiting the animating philosophy of the Model Penal Code has particular import. Beyond the specific doctrinal articulations of the Code itself, it is the approach that Wechsler and his colleagues took to criminal law reform that is particularly instructive.⁴⁹ That approach combined the juridical virtues of principled *and* practical reasoning, receptivity to insights from other disciplines and professions, and sincere humility about both the role of legal elites in legislative reform and the achievable aims of any single program of doctrinal revision. If the legal profession hopes to have any distinct influence on the course of contemporary criminal justice reform, it would do well to revisit the most successful criminal law reform effort in American history.

41. See discussion *infra* IV.B. The Code is also shot through with retributivist rationales in addition to utilitarian ones. See discussion *infra* notes 78, 196, 199, 203, 251, 260 and accompanying text.

42. See, e.g., Dubber, *Penal Panopticon*, *supra* note 4, at 83 ("The legitimacy of a model code can no longer flow as naively and directly from science as it did in the days of the original Code.").

43. See discussion *infra* Part IV.E.

44. *Id.*

45. See DUBBER, *supra* note 4, at 17-18.

46. See, e.g., Erik Luna, *Principled Enforcement of Penal Codes*, 4 BUFF. CRIM. L. REV. 515, 518 (2000) (lamenting the Code's "continuing criminal ban on prostitution, underage sexuality, seduction, plural marriages, and other 'victimless' crimes").

47. See discussion *infra* Part IV.D.

48. See generally Jennifer Steinhauer, *Bipartisan Push Builds to Relax Sentencing Laws*, N.Y. TIMES, July 29, 2015, at A1.

49. See *Some Observations*, *supra* note 28, at 394 ("If we have erred in the details, we do submit at least that the philosophy is right.").

II. WECHSLER, LEGAL REALISM, AND CRIMINAL LAW BEFORE THE WAR

Herbert Wechsler (1909-2000) was the quintessential mid-twentieth century figure in American law. Legal Realist and New Dealer in the 1930s, wartime administrator in the 1940s,⁵⁰ Legal Process scholar in the 1950s and early 1960s, and Warren Court-era civil rights/civil liberties litigator⁵¹—Wechsler managed to embody the elite legal ethos of every decade of the mid-twentieth century. In this Part, I will briefly provide some background on Wechsler’s career in the 1930s, during which Wechsler’s work on criminal law reflected many of the jurisprudential currents associated with American Legal Realism, and laid the groundwork for his post-War work on criminal law amid the flowering of Legal Process Theory.

By his own account, Wechsler’s entrée into legal academia came amid the larger intellectual transition from Langdellian formalism to a newly self-conscious Legal Realist movement.⁵² When Wechsler matriculated there in 1928, Columbia Law School was on the front lines of the rocky shift to Realism.⁵³ Already in 1923, Herman Oliphant had urged the Law School to shift the focus of its legal training from the Langdellian caselaw model to a more “functional” and social science-heavy approach.⁵⁴ Oliphant and other like-minded faculty members proposed a radically transformed curriculum free of the traditional common law topics and organized around broad “functional” subject matters (Familial Relations, Political Relations, and Business Relations) corresponding to the social science disciplines of sociology, political science, and economics.⁵⁵ The debate over the new curriculum, along with a controversy over replacing the dean—Oliphant himself had hoped to lead the Law School—ended in disappointment for Oliphant and his faction of radical reformers.⁵⁶ The curricular proposal was not implemented; Oliphant was passed over for the deanship; and soon thereafter, Oliphant and three other prominent social science-inclined colleagues left Columbia.⁵⁷

Though Oliphant’s proposed refashioning of the Law School failed, the intellectual ferment of the 1920s did not die out at Columbia, for those who remained, including

50. Starting in 1940, Wechsler held a number of positions in the U.S. Department of Justice before being confirmed as Assistant Attorney General in charge of the War Division. Immediately following the War, Wechsler served as chief legal advisor to the American judge Francis Biddle at the International Military Tribunal at Nuremberg. Malick W. Ghachem & Daniel Gordon, *From Emergency Law to Legal Process: Herbert Wechsler and the Second World War*, 40 SUFFOLK U. L. REV. 333, 337, 372 n.240 (2007).

51. Wechsler successfully represented the New York Times in the landmark civil rights and First Amendment case *New York Times v. Sullivan*, 376 U.S. 254 (1964). See generally David A. Anderson, *Wechsler’s Triumph*, 66 ALA. L. REV. 229 (2014).

52. See *Oral History*, supra note 5, at 857-64.

53. See ROBERT STEVENS, *LAW SCHOOL: LEGAL EDUCATION IN AMERICA FROM THE 1850S TO THE 1980S* 137 (1983) (“[T]he frontier of legal scholarship during the 1920s was at Columbia.”).

54. See JULIUS GOEBEL, *A HISTORY OF THE SCHOOL OF LAW: COLUMBIA UNIVERSITY* 298-99 (1955).

55. See generally WILLIAM TWINING, *KARL LLEWELLYN AND THE REALIST MOVEMENT* 48-54 (2d ed. 2012) (first edition published in 1973); see also JOHN HENRY SCHLEGEL, *AMERICAN LEGAL REALISM & EMPIRICAL SOCIAL SCIENCE* 15-17 (1995).

56. See TWINING, supra note 55, at 52-55.

57. See *id.*

most prominently Karl Llewellyn, were Legal Realists themselves.⁵⁸ A defense of Langdellian formalism was conspicuously lacking at Columbia during the curriculum debate of the 1920s. Rather, the schism pit two visions of Realism against one another: the dedicated social science empiricism of Oliphant against a broader anti-formalism orientated toward rethinking doctrinal categories and critiquing orthodox depictions of legal reasoning.⁵⁹ Wechsler was dubious of the more radical faction associated with Oliphant and those who left.⁶⁰ Instead, he pointed to Llewellyn and two relative newcomers to the faculty—Julius Goebel and Jerome Michael—as his foremost influences during his time as a law student.⁶¹ Wechsler’s identification with Llewellyn, Goebel, and Michael is thoroughly consistent with his (and their) brand of Realism, which was dedicated to doctrinal reform and critique, but not to the kind of full-fledged social science research agenda promoted by Oliphant and others.

What exactly constituted the essence of the broad Legal Realist movement, with which Wechsler associated himself during the 1930s, remains highly contested to this day,⁶² but Wechsler’s own articulation of the “four articles of faith” he developed as a law student (and maintained throughout his career) represents at least one recognizably Realist platform. These four articles, as expressed by Wechsler, were:

- (1) “frontal challenge to the concept of the common law as a closed system”;
- (2) “judicial receptivity to statutory changes of the common law and sympathetic treatment of administrative agencies entrusted with new regulatory functions”;
- (3) “unqualified disdain for the then-dominant interpretation of the Constitution by the Supreme Court”; and an
- (4) “affirm[ation] that legal understanding is imperfectly attained, so long as law is treated as an independent discipline consisting solely of an ordering of rules and doctrines drawn from statutes and decisions.”⁶³

58. See *id.* at 56. Much of this institutional drama was playing out just before and during the years that Wechsler was a standout student at Columbia Law School (1928-1931). See *Oral History*, *supra* note 5, at 856-64. Wechsler edited the Columbia Law Review and graduated in 1931, the year that his professor Karl Llewellyn published the canonical defense of Legal Realism against criticism by Roscoe Pound. *Id.*; Karl Llewellyn, *Some Realism About Realism—Responding to Dean Pound*, 44 HARV. L. REV. 1222 (1931).

59. Twining dubbed the two factions as the Scientists (Oliphant, William Underhill Moore, William O. Douglas, Hessel E. Yntema, and Leon C. Marshall, etc.) and the Prudents (the rest of the reformist faculty, including Karl Llewellyn). See TWINING, *supra* note 55, at 54. It would also be accurate to say that the schism at Columbia pit two visions for the future of Columbia Law School against one another. The empiricists championed a thoroughly academic research institution, while the remainder of the faculty, though favoring curricular reform, held fast to Columbia’s function as an elite professional training institute. See SCHLEGEL, *supra* note 55, at 17. The division between academic and professional orientations remains a deep source of tension at elite American law schools to this day.

60. See *Oral History*, *supra* note 5, at 861.

61. See *id.* at 863.

62. Indeed, in the article usually cited as providing the most cogent articulation of Realism at the time, Llewellyn already rejected the suggestion that there was any “school” of Realists or any Realist “creed.” See Llewellyn, *supra* note 58, at 1233 (“There is no school of Realists.”). He insisted that disagreements among so-called Realists were as great as those which the Realists had with Langdell. *Id.* at 1234. Instead, he characterized Realism as a “movement in thought and work about law”—a skeptical “method of attack” on traditional dogmas that shared some overlapping “points of departure” and exhibited some “cross-relevance.” *Id.* at 1234-35.

63. *Oral History*, *supra* note 5, at 864. For a slightly more detailed elaboration of these four theses, see Herbert Wechsler, *The Law Schools and the Law*, HARV. L. SCH. BULL., June 1967, at 4-7. The fourth thesis,

One may debate whether Wechsler's four articles of faith perfectly capture the essence or "core claim" of Legal Realism.⁶⁴ But there is no doubt that they place Wechsler firmly in the mainstream of the Realist camp and even more clearly in opposition to Langdellian formalism and the legal laissez-faire of the *Lochner* Era Supreme Court, the two *bêtes noires* of American Legal Realism.⁶⁵

Wechsler's work on criminal law in the 1930s bears all the markings of the broad Realist movement with which he identified—a commitment to rethinking traditional common law doctrinal categories; a reformist urge to modify the law via legislation; and an interest in non-legal materials, primarily social science, to understand the social problems law seeks to regulate, as well as the consequences of existing legal practices.⁶⁶ American substantive criminal law in the 1930s was considered an intellectual backwater,⁶⁷ and in practice, it retained a jumble of poorly defined common law concepts inherited from England and a century-and-a-half's accretion of post-Revolutionary reforms, all overlaid with ad hoc legislative reactions to the crime wave following Prohibition.⁶⁸ As a subject matter, it lacked professional or academic prestige and was not even taught at Columbia when Wechsler joined the faculty.⁶⁹ It was thus somewhat surprising that Wechsler devoted the bulk of his scholarly energy to criminal law during his first decade as a legal academic. Nevertheless, upon becoming a professor, Wechsler worked with his mentor Jerome Michael to develop a new mandatory first-year course in criminal law, a project which would ultimately result in the publication of the watershed criminal law casebook by Wechsler and Michael.⁷⁰ At the same time, Wechsler and Michael co-wrote a "monumental" two-part article on the law of homicide which set the groundwork for many of the most prominent features of the Model Penal Code project.⁷¹

whose meaning is somewhat cryptic on first reading, was in fact a demand for "more and better information than the law reports revealed about what actually happened in the name of the law, including the effects of legal processes and institutions on the people and society they are designed to serve." *Id.* at 5. In short, the fourth thesis expressed Wechsler's interest in social science and other empirical reports insofar as they bear on legal matters.

64. See, e.g., BRIAN LEITER, *Rethinking Legal Realism: Toward a Naturalized Jurisprudence*, in NATURALIZING JURISPRUDENCE: ESSAYS ON AMERICAN LEGAL REALISM AND NATURALISM IN LEGAL PHILOSOPHY 15, 21, 24 (2007) (arguing that the "core claim" of Legal Realism is that "judges respond primarily to the stimulus of facts," which is to say that "the judge has non-legal reasons . . . for deciding the way she does").

65. Wechsler himself recognized that the Realists were more "united in terms of what they were against" than in terms of what they were for. *Oral History*, *supra* note 5, at 871.

66. See *id.* at 872 ("The part of the [Realist] movement that was vital and significant was the part that focused not on more accurate empirical description, but on better normative determination.").

67. See *Challenge*, *supra* note 22, at 1098-1100.

68. See *id.*; see also Sanford H. Kadish, *Fifty Years of Criminal Law: An Opinionated Review*, 87 CAL. L. REV. 943, 947 (1999) (describing early twentieth century American criminal law as "archaic, inconsistent, and unprincipled"); Leonard, *supra* note 38, at 809 (noting consensus that the "inherited criminal law was a chaotic, irrational, arbitrary, leftover mélange of ad hoc case law and badly drafted statutes").

69. See Anders Walker, *The Anti-Case Method: Herbert Wechsler and the Political History of the Criminal Law Course*, 7 OHIO ST. J. CRIM. L. 217, 227-28 (2009); see also KARL LLEWELLYN, *THE BRAMBLE BUSH: THE CLASSIC LECTURES ON THE LAW AND LAW SCHOOL* (Steve Sheppard ed., 2008) (discussing the low prestige of criminal law as a professional specialty and as a subject in law school).

70. See Walker, *supra* note 69, at 226-30.

71. Charles Fried, *Keynote Speaker: Charles Fried '60*, COLUM. L. SCH. (May 21, 2015), <http://web.law.columbia.edu/graduation/2015/keynote-address>; Herbert Wechsler & Jerome Michael, *A Rationale of the Law of Homicide: I*, 37 COLUM. L. REV. 701, 703-08 (1937) [hereinafter *Rationale I*]; Jerome Michael & Herbert Wechsler, *A Rationale of the Law of Homicide II*, 37 COLUM. L. REV. 1261 (1937) [hereinafter *Rationale II*].

Published in two parts in 1937, “A Rationale for the Law of Homicide,” co-authored by Wechsler and Michael, is one of the most influential articles in criminal law of the twentieth century.⁷² The task Wechsler and Michael set themselves was a fundamental rethinking of the two basic questions of homicide law: What homicides or homicidal behavior ought to be criminalized, and how should the criminal law differentiate among homicide crimes for purposes of classification and treatment (punishment)?⁷³ The method they chose to attack those questions was notable, for they did not start with a philosophical blank slate and try to build up a normative theory of criminal law or punishment generally. Rather, they began with an analytical description of American and English homicide law as it then existed, trying to divine the purposes animating the law and to determine whether the doctrine was well suited to achieving those purposes.⁷⁴ Finding the existing doctrinal distinctions “shadowy”⁷⁵ at best, they proceeded to lay out the “considerations” they deemed most pertinent to constructing an efficacious homicide code.⁷⁶ The result was neither a work of abstract philosophy, nor a work of advocacy for any concrete proposal for legislative reform.⁷⁷ Rather, Wechsler and Michael wrote in an almost conditional tense: *If these* are the ends we seek from our homicide law—e.g., deterrence, reformation, or incapacitation—then *these* are the distinctions our law of homicide needs to make.⁷⁸ So although Wechsler and Michael did not set out to justify the normative ends of homicide law or determine the precise doctrinal means for achieving such ends, they insisted that *matching doctrinal means to ends* was the task at hand.⁷⁹ The “one thing which can be

72. Yale Kamisar, *I Remember Professor Wechsler*, 7 OHIO ST. J. CRIM. L. 249, 249 (2009) (describing the *Rationale I & II* as “an overpowering two-part article on the law homicide, probably the longest article, and certainly the most significant one, ever written on the subject”).

73. See *Caveat*, *supra* note 35, at 630 (“The two major problems of the substantive law are those of determining what behavior should be declared to be criminal and what to do with persons who are convicted of engaging in such behavior.”).

74. See *Rationale I*, *supra* note 71, at 702-29.

75. *Id.* at 721.

76. See *Rationale II*, *supra* note 71, at 1263 n.8 (“Our purpose is to formulate the problems, and so far as possible, to state the governing critical considerations, not to construct an ideal system.”).

77. And it certainly did not involve any empirical work of the kind Oliphant had championed.

78. Wechsler and Michael explicitly eschewed retributive theory in this article. See *Rationale I*, *supra* note 71, at 730 n.126 (“[W]e are, of course, rejecting the contention that the penal law should serve the end of retribution.”). For more discussion of Wechsler’s evolving views regarding retributive theories of criminal law, see generally Anders Walker, *American Orestia: Herbert Wechsler, the Model Penal Code, and the Uses of Revenge*, 2009 WIS. L. REV. 1017 (2009).

79. *Oral History*, *supra* note 5, at 869 (noting that the goal was to make “a good deal of progress towards systemization, clarification and improvement” of the criminal law). Of course, to say that Wechsler and Michael did not propose a particular scheme of homicide law is not to say that they did not make any substantive conclusions. To the contrary, assuming that “the protection of life” was the primary purpose of homicide law, the authors made a number of inter-related arguments about what kinds of acts ought to be criminalized pursuant to a homicide statute, as well as what types of factors ought to affect the classification of homicidal behavior and its punishment. Indeed, many of the key concepts later employed by the Model Penal Code were presaged in the article’s discussions of mental states, volition, and affirmative defenses. The most notable attempt to summarize their conclusions was the chart within the article setting forth the “factors” they deemed to be “of major significance in ordering the severity of punitive treatment of persons who have engaged in criminally homicidal behavior.” *Rationale II*, *supra* note 71, at 1300. There is nothing like a model piece of legislation setting out the range of homicide crimes and related sentencing in the article. But Wechsler and Michael explicitly stated their hope that the article would have some “larger value of clarifying the task of penal code revision as a whole,” *Rationale I*, *supra* note 71, at 702, and years later, Wechsler made clear that they were specifically trying “to influence” the ALI’s nascent efforts to draft a Model Penal Code, a project which would in fact start up in earnest only when Wechsler himself took the helm in 1952. *Oral History*, *supra* note 5, at 869.

said with certainty about any body of criminal law,” they wrote, “whatever its characteristics: the discriminations which it makes ought to be well adapted to their purposes.”⁸⁰

As much as Wechsler believed that criminal law reform was necessary and overdue by the mid-1930s, and as much as he was committed to the heavy lifting it would require, he was also quite cognizant of the limits of legal reform in general and of substantive criminal law reform in particular. As he explained in a short article published in 1937, the correct articulation of the substantive law of homicide was only one, and probably not the most important, means for protecting society against unlawful killings.⁸¹ The ends of the criminal law, as Wechsler conceived them, were best pursued through general policies of social amelioration—including the provision of better education, employment, and recreation opportunities to all citizens.⁸² According to Wechsler, the immediate “crime problem” of the 1920s and 1930s—i.e., the surge in criminality following Prohibition—was a mixed blessing for the critical and overdue project of substantive criminal law reform. On the one hand, it led to “vociferous enthusiasm for getting something done.”⁸³ On the other hand, the public frenzy stirred up by the crime wave, and especially its sensationalization by the press and by Hollywood, increased the expectations for criminal law reform to result in quick and dramatic drops in anti-social behavior.⁸⁴ In the face of popular demands for more punitive criminal laws and for more spectacular law enforcement action, Wechsler urged caution. The social forces that cause upticks in criminal activity, he suggested, could not necessarily be reversed by reforms to criminal law or its enforcement.⁸⁵ And even if certain criminal activity could be marginally mitigated by more aggressive policing or by harsher criminal laws, Wechsler pressed his readers to consider whether the costs of such policies were really worth the amelioration in crime rates.⁸⁶ Those costs, according to Wechsler, included not only the possibility of corruption and abuse on the part of newly empowered law enforcement officers, but also, even absent such corruption or abuse, a general diminution of individual freedom and the criminalization of socially worthwhile activity.⁸⁷ It is not that Wechsler doubted the usefulness of criminal law reform; to the contrary, he was committed to it. However, he was particularly dubious of the anti-crime crusades of FBI director J. Edgar Hoover, New York Governor Herbert Lehman, and special prosecutor Thomas Dewey.⁸⁸ He wanted to emphasize that criminal law, even coupled

80. *Rationale II*, *supra* note 71, at 1305. It would be difficult to find a better formulation of the functional approach to law shared by most American anti-formalists and described by Llewellyn as “an insistence on evaluation of any part of law in terms of its effects.” Llewellyn, *supra* note 58, at 1237.

81. *See Caveat*, *supra* note 35, at 636-37.

82. *Id.*

83. *Id.* at 630.

84. *Id.* at 629-30 (arguing against the “popular faith” in criminal law reform and expressing doubt that such reforms can “cut as deeply into the tough tissues of crime as the public has been led to suppose”).

85. *Id.* at 636.

86. *Caveat*, *supra* note 35, at 635. (“Such measures may make it easier to catch criminals; they may also achieve other results ranging from the industrial blacklist and the shooting of wrongly suspected persons to the facilitation of a fascist coup d’etat.”).

87. *See id.* at 632.

88. *See id.* at 629; *see also* BURTON PERETTI, NIGHTCLUB CITY: POLITICS AND AMUSEMENT IN MANHATTAN 158-59 (2007) (detailing Gov. Lehman’s “proposed draconian crime-prevention reform” and describing the prosecution of mobsters brought by Thomas Dewey).

with its proper enforcement, was only one part of the much larger social picture that affected the amount of anti-social activity.⁸⁹ “There is,” he wrote,

a genuine sense in which a society can justify its use of the rigorous methods of the criminal law only to the extent that it makes as full use as possible of less rigorous methods of preventing crime, including those inherent in the promotion of economic justice, education and the like, ends which are desirable in themselves as well as desirable as a means to the prevention of crime.⁹⁰

For Wechsler, improving the substantive criminal law was important, but he insisted that such reform, while necessary, could not be sufficient to achieving the aims of criminal law. This emphasis on the limits of black-letter law would stay with Wechsler throughout his career as a legal academic and doctrinal reformer.

Two other features of Wechsler’s writings on criminal law in the 1930s deserve notice: his value pluralism and his attitude toward social science. First, he was emphatic that the aims served by the criminal law were plural.⁹¹ While clearly more sympathetic to deterrence theory over other rationales, Wechsler nevertheless noted that the legitimate ends of punishment are multiple and that it is impossible to rationally reconcile them all. For instance, “the best methods of terrifying potential offenders are likely to be the worst means for reforming actual offenders.”⁹² Hence, the debate between deterrence and reformation was one that “represents a genuine antinomy,” Wechsler and Michael wrote.⁹³ As both prevention and rehabilitation constitute legitimate ends of punishment, “there is no answer to this problem [of reconciling them] for all times and all places if, indeed, there is one for any time and place.”⁹⁴ The best policymakers can do is endeavor to prudently balance between them.⁹⁵

Wechsler’s writings in the 1930s also reveal both a deep interest in social science for the insights it could contribute to legal reform *and* a corresponding skepticism about the credibility of social science’s claims to expertise.⁹⁶ Wechsler did not believe that understanding law, much less reforming it, was simply a matter of understanding empirical reality. He worried that the nascent American Law Institute effort to draft a Model Penal

89. See *Caveat*, *supra* note 35, at 637 (“[T]he most satisfactory method of crime prevention is the solution of the basic problems of government—the production and distribution of external goods, education and recreation.”); *Rationale I*, *supra* note 71, at 731-32, n.128 (noting that the only “means [to reducing undesirable behavior] that can be employed on a wide scale are measures designed to promote education, health, recreation, and economic security”).

90. See *Rationale II*, *supra* note 71, at 1299 n.93.

91. See *id.* at 1262 (noting the “obvious multiplicity of treatment ends”).

92. See *Caveat*, *supra* note 35, at 634.

93. See *Rationale II*, *supra* note 71, at 1325.

94. *Id.*

95. *Id.* (“The problem is not whether the compromise shall be made but what its terms shall be.”). See also *id.* at 1262 (“[N]o program for the determination of methods of treatment, no set of criteria for their evaluation, can ignore this obvious multiplicity of treatment ends.”).

96. See *Oral History*, *supra* note 5, at 861, 871 (criticizing what Wechsler called the “more extreme group at Columbia” that focused primarily on “the need for elaborate empirical examination . . . [a]s if the ultimate purpose of the enterprise was to facilitate a more accurate prediction of what judges do”).

Code in the 1930s was based on “literally fantastic conceptions” that “somehow . . . the reordering of criminal law involved a great empirical exercise.”⁹⁷ What was needed for substantive criminal law reform was not some elaborate quantitative account of observable facts—“as though this was going to increase your insight as to whether forcible sexual intercourse is something that a good society should try to protect people against”⁹⁸—but rather a clear articulation of value choices and a careful attempt to craft doctrine consistent with the value(s) chosen.⁹⁹

At the same time, Wechsler was eager to consult social science where it could helpfully illuminate empirical questions germane to legal analysis and reform.¹⁰⁰ Indeed, the casebook he and Michael published in 1940 was precedent-setting in the amount of social science materials it included and its forthright acknowledgement that such materials ought to bear on the issues of criminal law.¹⁰¹ To this end, the casebook cited the leading social scientific studies aimed at surveying the roots of crime and the efficacy of various crime control techniques.¹⁰² And its critical reception, both positive and negative, focused on the unprecedented amount of social science materials included in the casebook.¹⁰³

But such materials could not, Wechsler maintained, determine one’s evaluation of any piece of doctrine or legal practice. First, social science itself could not deliver—at least not yet—determinate factual answers to many of the most pressing questions about the roots of crime or the efficacy of various crime control measures. As Wechsler and Michael wrote, “knowledge of matters of facts, particularly of the crucial sociological and psychological facts of law, consists of opinions the relative validity of which it is difficult

97. *Id.* at 869 (“I never got very clear on what it was that you were going to count and look at, but the techniques of sociology were going to be conscripted.”).

98. *Id.*

99. *See id.* at 872 (“The important point is to be aware of what the value choices are, and so far as possible, to be able to articulate the reasons that lead to choosing A rather than B. Why? So that accurate statement can enable the next person to know whether he or she goes with you or against you.”).

100. JEROME MICHAEL & HERBERT WECHSLER, CRIMINAL LAW AND ITS ADMINISTRATION: CASES, STATUTES AND COMMENTARIES 6 (1940) (“In the ordering of means and ends one must obviously employ whatever knowledge there is of the adaptation of particular means to particular ends, and the question of adaptation of means to ends is . . . a question of fact.”); *see also Oral History*, *supra* note 5, at 870 (“[Y]ou try to get all the information you can get.”).

101. For a masterful study of the Michael & Wechsler casebook and its pedagogical roots and effects, see Walker, *supra* note 69, at 218 (“Herbert Wechsler and Jerome Michael, *Criminal Law and Its Administration* became the first law school casebook to successfully synthesize social science materials with cases, inspiring a generation of criminal law teachers to organize their courses along similar lines.”).

102. *See* MICHAEL & WECHSLER, *supra* note 100, at 1337-60 (listing the secondary sources, many of them social science reports, cited by Michael and Wechsler in the casebook).

103. The casebook won high praise from David Riesman, then a law professor and soon to be a leading sociologist, for tackling “the job of social science integration” with law so well. David Reisman, *Law and Social Science: A Report on Michael and Wechsler’s Classbook on Criminal Law and Administration*, 50 YALE L. J. 636, 636 (1941). Indeed, Riesman wrote that “Michael and Wechsler make law a social science by being steadily comparative, legislative, and jurisprudential—drawing upon the resources of the other social sciences to explain comparisons, assist legislation, and give content to jurisprudence.” *Id.* at 645. In particular, Riesman appreciated that “Michael and Wechsler have ransacked the [relevant social science] literature with exceptional thoroughness and imagination.” *Id.* Compare George Wilfred Stumberg, *Book Review*, 89 U. PA. L. REV. 1123, 1125 (1940) (praising the casebook for its emphasis on “social thinking by lawyers”), with Roscoe Pound, *Introduction to the First Edition*, ROLLIN M. PERKINS, CASES AND MATERIALS ON CRIMINAL LAW AND PROCEDURE xiv (1952) (implicitly criticizing the Michael & Wechsler casebook for containing too many non-legal materials at the expense of more practical instruction in doctrine).

or impossible to measure.”¹⁰⁴ Despite the claims of psychiatrists, sociologists, and others to understand the key factors driving crime and how to diminish it, “they all overstate their knowledge and take only a partial view of the problem. The unwelcome truth may be that there is no genuine solution to the ultimate dilemmas of treatment, because there is no knowledge sufficient to guide a rational choice.”¹⁰⁵ Second, even in those areas where one could rely on factual or common-sense assumptions about human behavior, disagreements about values would remain. As they explained, “that life imprisonment is well adapted to rendering the persons subjected to it incapable of committing crimes outside of prison is obviously indicated by common knowledge,”¹⁰⁶ but “whether or not the incapacitation of persons convicted of crime . . . is desirable, undesirable, or more or less desirable than some alternative state of affairs is a question of value rather than of fact.”¹⁰⁷ For such value questions, factual resolution was conceptually impossible and the “assertion, evaluation, and exploration of such propositions is the province of politics and also of ethics.”¹⁰⁸

In sum, given both the limits of empirical social science and the philosophical dilemmas of value pluralism, Wechsler in the 1930s urged his fellow criminal law reformers to be humble regarding their ability to achieve dramatic social change. Moreover, Wechsler maintained that even a perfectly reformed code of criminal law could provide only a limited tool for achieving its aims. Nevertheless, Wechsler felt that public-oriented lawyers like himself had a deep obligation to “clarify” the law as best they could using all the ethical, analytical, and empirical tools they could muster toward good judgment.¹⁰⁹ Along with his caution and sense of humility, Wechsler of the 1930s was very much an unapologetic legal reformer and a proud New Deal supporter.

III. THE POST-WAR MOOD AND THE SHIFT TO LEGAL PROCESS

The demands of government service took Wechsler away from any sustained work on substantive criminal law reform for the bulk of the 1940s, and the American Law Institute’s own efforts at convening a Model Penal Code project was put on hold throughout this time.¹¹⁰ Nevertheless, some account of the shift in mood in elite legal academia between the 1930s and the 1950s is in order, for the transition from Legal Realism to Legal

104. MICHAEL & WECHSLER, *supra* note 100, at 6. As an example, Wechsler wrote that the science of psychology still cannot tell us which criminals are “corrigible”—i.e., capable of reformation—and which are not. *Id.* at 15 n.42. And in *Caveat*, Wechsler wrote scornfully that “crime conferences fostered the belief that because they were attended by ‘scientists’ and ‘experts’ any proposals made by them proceeded from a fund of knowledge adequate, or nearly adequate, to solve the practical problems of crime control.” *Caveat*, *supra* note 35, at 629. Needless to say, Wechsler did not believe that the fund of knowledge brought by “experts” and “scientists” was sufficient.

105. *Caveat*, *supra* note 35, at 634.

106. MICHAEL & WECHSLER, *supra* note 100, at 4.

107. *Id.* at 5.

108. *Id.* Wechsler and Michael went on to discuss whether there were answers to questions of value that were “anything more than a personal preference.” *Id.* Somewhat murkily, they concluded that, yes, one can make value choices on some “broader basis than personal preference” if “it is possible, as we think it is, to achieve some grasp of the fundamental and permanent in human desires.” *Id.*

109. *Rationale I*, *supra* note 71, at 702 (identifying “the larger value of clarifying the task of penal code revision as a whole”).

110. See *Oral History*, *supra* note 5, at 917.

Process theory is subject to considerably different interpretations.¹¹¹ Indeed, one could tell a story of Legal Realism's demise and the subsequent rise of Legal Process as a tale of two distinct and opposing approaches to law.¹¹² But the narrative one grasps through tracing Wechsler's career is not one of the eclipse of Realism by Process theory, but rather Process theory as a post-New Deal, post-War elaboration of certain Realist themes.

The experience of living through the Great Depression, the New Deal, and World War II in rapid succession must be counted among the many factors involved in the generational transition from Legal Realism to Legal Process theory. Importantly, there was a sense on the part of many Realists that, by the early 1940s, their approach had triumphed.¹¹³ Wechsler's Four Theses had been vindicated in the collapse of *Lochner* Era Constitutional jurisprudence, the proliferation of New Deal statutes and regulations, and the mainstreaming of legislative and social science perspectives into the law school curriculum.¹¹⁴ Many prominent Realists went to Washington to serve in the Roosevelt administration, often taking leading roles in the construction of the New Deal regulatory state and, later, in the war effort.¹¹⁵ By the end of World War II, Realists occupied the commanding heights of the federal courts, regulatory agencies, and—as they trickled back to campus—legal academia. A shift in emphasis, a jump to new areas of interest, was thus natural for Realist-identified lawyers.¹¹⁶

In particular, for many of the Realists who had served in Washington during the New Deal or during the war, the process of governance itself became a focus of attention. By the end of World War II, the American government was larger, more complex, and seemingly more powerful and effective than it had ever been. But how exactly the proliferating parts of the New Deal state fit together into an integral system of governance—which institutions were responsible for which official acts—was still very much a work in progress. The New Deal and war mobilization put stress on familiar understandings of federalism, separation of powers, and the role of federal and state courts in resolving disputes spawned by the newly empowered regulatory state. Wechsler and Henry Hart of Harvard Law School both served in Washington through the war,¹¹⁷ and upon their return to legal academia, they set about to reconsider the state of American federalism generally

111. See generally NEIL DUXBURY, PATTERNS OF AMERICAN JURISPRUDENCE 205-299 (1995) (offering an intellectual history of Process jurisprudence as one that “parallels if not precedes legal realism itself”); G. Edward White, *The Evolution of Reasoned Elaboration: Jurisprudential Criticism and Social Change*, 59 VA. L. REV. 279 (1973) (providing the first thorough interpretation of the shift from Realism to “Reasoned Elaboration”).

112. See DUXBURY, *supra* note 111, at 212 (“Why . . . is the move toward process thinking regarded generally as a response to the failure of realism?”).

113. There was also a sense that Realism as a critical project had run its course. See White, *supra* note 111, at 282. But Wechsler certainly believed that his four theses were vindicated during the mid-twentieth century. See Herbert Wechsler, *The Law School and the Law*, HARV. L. SCH. BULL., July 1967, at 4, 5 (“These articles of faith sustained me in my youth, and I make bold to say that they have won acceptance in the intervening years.”).

114. See *id.*

115. See BRIAN TAMANAHA: BEYOND THE FORMALIST-REALIST DIVIDE 94 (2010) (listing the many Realists who took government roles during the 1930s, 1940s, and thereafter).

116. The 1947 call by Myres McDougal at Yale “to emerge from the destructive phase of legal scholarship—indispensable though the destruction was—and to center [the law school’s] energies upon conscious efforts to create the institutions, doctrines and practices of the future” seems to capture the post-War mood of Realist-identified legal academics. Myres S. McDougal, *The Law School of the Future: From Legal Realism to Policy Science in the World Community*, 56 YALE L.J. 1345, 1349 (1947).

117. During the War, Hart served as associate general counsel of the Office of Price Administration. See William N. Eskridge & Philip P. Frickey, *The Making of the Legal Process*, 107 HARV. L. REV. 2031, 2036 (1994).

and, in particular, the federal judiciary's place in the transformed American system of governance. In this new mood, questions related to the special competence of federal courts, their internal organization, and the relationship of the federal judiciary to other official bodies (federal and state) took center stage.¹¹⁸ Just as Wechsler and Michael's Criminal Law casebook took a legislative perspective on the issues of substantive criminal law, so too did Hart and Wechsler set out to tackle "issues of legislative policy" entrusted to Congress "without depreciating the importance of the problems facing courts."¹¹⁹ The resulting *Federal Courts and the Federal System* casebook not only defined a new field in legal academia, it was widely hailed at the time and thereafter as "beautiful and brilliant—probably the most important and influential casebook ever written."¹²⁰

The publication of Hart and Wechsler's casebook in 1953 and its reception signaled the decisive shift to a new process-oriented mood of legal inquiry, especially at Harvard and Columbia Law Schools.¹²¹ Through his collaboration with Henry Hart, Wechsler was up-to-date on jurisprudential developments at Harvard Law School where Hart, Lon Fuller, Paul Freund, Louis Jaffe, and Albert Sacks were all working on books and articles with similar themes. These scholars did not self-consciously set out to form a new jurisprudential school, nor did they promulgate any collective manifesto or mission statement.¹²² Indeed, it was not until a 1974 article by Bruce Ackerman that the label "Legal Process School" came to be used explicitly to denote their work and the prevalent attitude among many leading legal academics of the 1950s and 1960s.¹²³ What was that attitude?

Fixing their attention on the newly enlarged and ever more convoluted post-War American state, the Legal Process approach saw law as an "ongoing, functioning, purposive process" coordinating the activities of a great variety of official and unofficial actors.¹²⁴ Law, on this account, is not a set of substantive rules, but is rather a series of

118. HART & WECHSLER, *supra* note 6, at xii ("In varying context we pose the issue of what courts are good for—and are not good for—seeking thus to open up the whole range of questions as to the appropriate relationship between the federal courts and other organs of federal and state government.")

119. *Id.* at xi, xii.

120. Akhil Amar, *Law Story: Hart and Wechsler's The Federal Courts and the Federal System*, 102 HARV. L. REV. 688 (1989) (book review).

121. My claim is not that the Hart & Wechsler casebook was the start of the Legal Process School, which others have traced back to the late 1930s or even earlier. See DUXBURY, *supra* note 111, at 210-12. The claim is simply that the publication of the *Federal Courts* casebook was a singularly high-profile event that cemented and reflected Legal Process theory's status as the reigning mode of elite legal academia. Hart and Albert Sacks began their collaboration on the Legal Process materials the year after the Hart & Wechsler casebook was published. See Eskridge & Frickey, *supra* note 117, at 2041.

122. Though it is now studied as the most authoritative elaboration of Legal Process theory, the Hart & Sacks materials of 1958 do not purport to speak for any new jurisprudential movement or school. "Process jurisprudence was never packaged as a discrete theory," Neil Duxbury observed. DUXBURY, *supra* note 111, at 206. It was instead "founded on attitude rather than strategy . . . an attitude which lent itself perfectly to the tackling of legal problems" but also makes Legal Process as a theory "remarkably difficult to pin down." *Id.* at 207.

123. Ackerman, *supra* note 3, at 123. The quest for a definition or short summary of American Legal Realism has raised similar difficulties, but at least the term Realism was adopted more or less contemporaneously by some of those theorists we now commonly deem Realists. See Llewellyn, *supra* note 58, at 1226-27 n.18, 1235-38 (listing twenty academics and judges among the ranks of Realists and setting out nine "common points of departure" or theses shared by Realists). There is no analogous document from the 1950s announcing the existence of a Legal Process School or its members.

124. HART & SACKS, *supra* note 14, at cxxxvii. It thus aimed to transcend the debates between formalists and realists on the one hand and natural lawyers and positivists on the other. Law, on the Legal Process account, is neither a closed system of coherent substantive rules (formalism), nor a branch of moral philosophy (natural law), nor a prediction of how officials might act (realism), nor a mere sociological fact (positivism).

processes for coping with the inherent difficulties of human interdependence.¹²⁵ Regularized processes are necessary to legitimate the creation, enforcement, and adjudication of communal norms, and in larger societies, a plethora of official bodies are involved in carrying out and coordinating these multiple processes.¹²⁶ Writers in the Legal Process tradition thus focused on the following inter-related themes:

- (1) *Allocation of Discretion among Legal Institutions*: Careful attention must be paid to the proper allocation of decisionmaking authority (discretion) among different institutions and between different levels of government, as well as to the interactions among these institutions.¹²⁷
- (2) *Law as a Purposive Enterprise*: The law is purposive; it aims to achieve social ends and should be evaluated according to how well it ultimately achieves those ends.
- (3) *Value Pluralism*: The purposes of law—the range of legitimate social ends—are multiple and may come into conflict.
- (4) *Prudence*: Because law is purposive, legal decisionmakers ought to be prudent (practically wise) regarding the particular choices they face, recognizing the limits of their knowledge, power, and authority.
- (5) *Rational and Principled Decisionmaking*: Legal decisionmakers, particularly judges, ought to clearly articulate and neutrally apply the principles justifying their decisions.¹²⁸
- (6) *A Limited Role for Social Science in Law*: Insights from the social sciences should be consulted when they can help make legal processes and outcomes better, but legal questions cannot be reduced to empirical or scientific questions.
- (7) *Commitment to Democracy*: Ultimately, the sovereign citizenry ought to dictate the ends to be pursued via law; hence, democratic legislatures are the supreme policy-making organs.
- (8) *Legitimacy through Procedural Regularity*: If an institution appropriately tasked with making a certain decision follows its own duly established processes, then its decision should be accepted as legally legitimate, even if it is substantively wrong, until such decision is changed by duly established processes.¹²⁹

These eight themes are not meant to be an exhaustive or necessary list of the concerns, attitudes, or assumptions of the Legal Process approach to law. Different Legal

125. *Id.* at 2.

126. *Id.* at 4.

127. Institutional competence is the shorthand often used for this theme. See, e.g., Jeffrey Rudd, *The Evolution of the Legal Process School's "Institutional Competence" Theme: Unintended Consequences For Environmental Law*, 33 *ECOLOGY L.Q.* 1045, 1052-54 (2006).

128. The phrases "reasoned elaboration," HART & SACKS, *supra* note 14, at 146, and "neutral principles," *Neutral Principles*, *supra* note 8, are often used to denote this theme.

129. This is known as the "principle of institutional settlement" in the Hart & Sacks casebook. HART & SACKS, *supra* note 14, at 4.

Process authors emphasized different theses, and perhaps none of them would have endorsed all of the items on this list. Nevertheless, these eight themes constitute a set of features that many Legal Process thinkers argued for, debated, or assumed.¹³⁰

As suggested in Part I, Wechsler's writings on substantive criminal law in the 1930s already exemplified a number of these themes—value pluralism, a limited role for social science, and a certain humility about the project of legal reform. His work in the 1950s would press these themes in the areas of federal jurisdiction and Constitutional law, as well. But it was the great decade-long criminal law reform project in which these theses would reveal themselves most pervasively.

IV. THE MODEL PENAL CODE AS LEGAL PROCESS PROJECT

In 1951, the American Law Institute revived its long-delayed plans for a major criminal law project, and Herbert Wechsler was asked to lead the effort, first as chair of an advisory committee and then as Chief Reporter.¹³¹ Wechsler laid out his vision of the project in a short article in the *Harvard Law Review* in May of 1952, which he hoped would “fortify professional support” for the giant project he was about to lead.¹³² Stressing the need for a comprehensive model penal code project, the article rehearsed many of the points Wechsler and Michael had made about the sorry state of criminal law doctrine in the 1930s—that the subject had remained neglected for too long by reformers and scholars in the United States and that the current doctrine was full of common law-derived anachronisms, conceptual confusions, and inexplicable quirks. Recognizing that some worthwhile reforms had been attempted “unevenly”¹³³ here and there in the area of criminal procedure and in sentencing policies, Wechsler argued that the time was ripe—perhaps now even overdue—for a comprehensive and systematic re-examination of substantive criminal law. Criminal law “should surely be as rational and just as law can be,” wrote Wechsler. “Nowhere in the entire legal field is more at stake for the community and the individual.”¹³⁴

The Model Penal Code project occupied the bulk of Wechsler's professional energy for a solid decade—from 1952 until the publication in 1962 of the Proposed Official Draft.¹³⁵ Wechsler was the Chief Reporter and acknowledged lead drafter of the Code, but Wechsler also recruited a large, eminent, and diverse cast to serve as special consultants, research associates, and advisory committee members. The group included leading legal academics, judges, prosecutors, defense counsel, corrections officials, psychiatrists, criminologists, and professors of sociology and social work.¹³⁶ Small groups were set up to

130. Indeed, some of these features appear to be in tension with one another, a theme I will explore in Part IV.D.

131. See *Oral History*, *supra* note 5, at 917-18.

132. *Challenge*, *supra* note 22, at 1098. The article was itself based on two memoranda he prepared for the American Law Institute advisory committee over the previous year. See *Oral History*, *supra* note 5, at 918.

133. *Challenge*, *supra* note 22, at 1099.

134. *Id.* at 1098.

135. See *Oral History*, *supra* note 5, at 918 (“From 1952 until the Code was completed—that is to say, for ten years—the development of the Model Penal Code absorbed every bit of time and energy that I had.”). This is an amazing statement given what else Wechsler accomplished during those years.

136. MODEL PENAL CODE iv-vi (AM. LAW INST., Proposed Official Draft 1962) [hereinafter MPC] (list of the Reportorial Staff). One surprising name on the list is the literary and cultural critic Lionel Trilling. *Id.* at vii.

handle particular issues, and draft proposals of various sections were released almost annually up until the complete Proposed Official Draft was published in May of 1962.¹³⁷ Throughout the decade of work, Wechsler published occasional updates on the project, and more remarkably, remained as productive as ever in legal-academic work unrelated to criminal law.

The years between 1952 and 1962 were also the prime years of Legal Process theory's reign in American legal academia.¹³⁸ Indeed, one could well argue that two Wechsler productions bookended the golden age of the Legal Process—if Hart & Wechsler's 1953 *Federal Courts* casebook signaled the ascendancy of Legal Process, many commentators have cited Wechsler's *Neutral Principles* article of 1959 as the moment when the Legal Process consensus began to fracture.¹³⁹ It is no surprise, then, that the Model Penal Code reflects the major themes of the Legal Process approach to law, and in this section I will show why the Code may justly be described as the "greatest legislative achievement of the 'legal process' school of thought in American law."¹⁴⁰

A. *Division of Functions among Legal Institutions*

Laying out the substantive issues to be considered by the project, Wechsler listed three overarching questions he and the Code drafters would endeavor to answer: (1) What behavior ought to be criminalized, (2) how should the criminal law differentiate among crimes for purposes of classification and treatment (punishment), and (3) what methods of treatment of offenders ought to be authorized, and in what agency or agencies should discretion with respect to methods of treatment be lodged?¹⁴¹ The first two questions echoed exactly the questions Wechsler had articulated back in 1937; only this time the scope encompassed all of criminal law, rather than homicide laws specifically.¹⁴² The third question, however, revealed the new post-War turn in Wechsler's thinking. First, it showed that Wechsler's ambition was not limited to rationalizing and systematizing the substantive definition and gradation of crimes, but rather extended to sentencing and methods of punishment as well. Even more pertinently, it demonstrated Wechsler's application to criminal

Markus Dubber has pointed out that there were no professional academic philosophers or historians involved in the project. See *Alegitimacy*, *supra* note 4, at 241.

137. Paul H. Robinson & Markus Dubber, *The American Model Penal Code: A Brief Overview*, 10 *NEW CRIM. L. REV.* 319, 323-24 (2007).

138. All of the "classic" works of Legal Process scholarship identified by Charles Barzun, date from this decade. See Barzun, *supra* note 10, at 9-10.

139. The Legal Philosophy Discussion Group of 1956 at Harvard Law School was arguably the epicenter of Legal Process jurisprudence, including as it did Harvard professors Henry Hart, Albert Sacks, Lon Fuller, Paul Freund, and visiting professors Herbert Wechsler, H.L.A. Hart, and Julius Stone. See Geoffrey C. Shaw, *H. L. A. Hart's Lost Essay: Discretion and the Legal Process School*, 127 *HARV. L. REV.* 666, 689-93 (2013).

140. Harold Edgar, *Herbert Wechsler and the Criminal Law: A Brief Tribute*, 100 *COLUM. L. REV.* 1347, 1355 (2000). Markus Dubber made a similar, if more critical, point in considering the ratio of substantive criminal law to administrative organization in the Model Penal Code: "Rather than a criminal code with an administrative suffix, [the Model Penal Code] is an administrative code with a criminal prefix." *Alegitimacy*, *supra* note 4, at 252.

141. *Challenge*, *supra* note 22, at 1104-05.

142. See *Caveat*, *supra* note 35, at 630 (1937) ("The two major problems of the substantive law are those of determining what behavior should be declared to be criminal and what to do with persons who are convicted of engaging in such behavior.").

law of the central Legal Process concern with the allocation of discretion across legal institutions. It confirmed the shift in emphasis to the key post-War question: Who should decide and how?

Legal Process authors accepted the Realist insights that legal adjudication places a significant amount of discretion in the hands of legal decisionmakers and that extant legal rules do not always rationally determine the outcome of legal disputes. But, for Legal Process authors, the existence of discretion was not a fatal problem to the legitimacy of legal outcomes because, on their account, the legitimacy of any one decision does not depend on its substantive accord with some ideal outcome, but rather on its procedural legitimacy.¹⁴³ Procedural legitimacy, in turn, depends on whether the dispute was heard by the right official in the right institution and decided pursuant to the right decision procedures.¹⁴⁴ For Legal Process authors, the merit of a legal system was not that it landed on precisely the right substantive outcome to all disputes it faced—such perfection was impossible in theory and in fact—but rather that it channeled disputes toward the most appropriate resolution mechanisms, including both official and unofficial dispute resolution procedures.¹⁴⁵ Accordingly, Wechsler and his Legal Process cohort focused great energy on determining where discretion ought to reside for various types of legal decisions. That interest gave rise to a focus on comparative institutional competence,¹⁴⁶ for discretion ought to be lodged within the institution best capable of rendering informed and fair decisions.¹⁴⁷ As Richard Fallon pointed out regarding the *Federal Courts* casebook, “[a]s defined by Hart and Wechsler, the central, organizing question of Federal Courts doctrine involves allocations of authority.”¹⁴⁸

In laying out the aims of the Model Penal Code project in his 1952 article, Wechsler put precisely this question of the allocation of authority front and center. In particular, with regard to sentencing, Wechsler posed the question this way: “Since much discretion as to treatment is inevitable and desirable, the most important question to be faced is in what agency or agencies it ought to be reposed.”¹⁴⁹ Wechsler noted that the

143. See HART & SACKS, *supra* note 14, at 4 (describing the “principle of institutional settlement”). The legitimacy of the system of legal processes, however, does rest on its overall promotion of substantive human ends—e.g., the maintenance of social order and the maximization of the “total satisfactions of valid human wants.” *Id.* at 104-05.

144. See *id.* at 4.

145. See Michael C. Dorf, *Legal Indeterminacy and Institutional Design*, 78 N.Y.U. L. REV. 875, 920 (2003) (“For Hart & Sacks, the purpose of judges, indeed of law itself, is to allocate decisionmaking authority among competing institutions.”).

146. See MORTON J. HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW, 1870-1960: THE CRISIS OF LEGAL ORTHODOXY* 254 (1992).

147. Related to this interest in the allocation of discretion, Legal Process authors also recognized the important distinction between black-letter rules and more open-ended standards. See HART & SACKS, *supra* note 14, at 139-41. Wechsler too paid careful attention to this distinction in criminal law, both in the drafting of the Model Penal Code and even before in the Michael & Wechsler casebook. See Edgar, *supra* note 140, at 1351 (praising the Michael & Wechsler casebook’s explicit treatment of the “advantages and disadvantages of deciding issues by rules, as against leaving them to judicial and administrative discretion”); See *Legal Scholarship and Criminal Law*, *supra* note 29, at 21 (noting that the caselaw is a “gold mine of experience bearing on that most difficult of legislative issues—how much to attempt to settle by a solid rule, how much to leave to standards that must gain their largest content in their application”).

148. Richard H. Fallon, Jr., *Reflections on the Hart and Wechsler Paradigm*, 47 VAND. L. REV. 953, 962 (1994).

149. *Challenge*, *supra* note 22, at 1127.

drafters would need to consider the relative competences of “courts and other organs of administration, *e.g.*, prison authorities, parole boards and correction departments, [and] the chief executive.”¹⁵⁰ Even novel proposals for completely new institutions ought to be discussed—for instance, “a “dispositions board that might include the judge but would draw personnel of equal weight from social works, psychiatry, penology, and education.”¹⁵¹ The focus on the distribution of discretion, the same focus animating the *Federal Courts* casebook, was unmistakable. “What is involved,” Wechsler wrote, “is not alone the question of who ought to be empowered to make the decisive judgments as to treatment[,] but also when such judgments should be made, the data on which they ought to be founded and the policies and objects that should be pursued.”¹⁵² In other words, *who should decide and how?*

In the end, the completed Code made good on Wechsler’s promise to devote considerable attention to the allocation of institutional responsibilities within the criminal justice system, particularly with respect to sentencing and related matters.¹⁵³ The Code devotes one of its four major parts to the “Organization of Correction”—detailing how state departments of correction, along with independent boards of parole, ought to be organized, what responsibilities each board or division should have, and what criteria each board or division should apply to decisions within their discretion.¹⁵⁴ Though they were the least influential parts of the Model Penal Code, the sections on sentencing and the organization of corrections evinced a meticulous concern with the distribution of authority regarding the imposition of punishment (or “treatment” in the preferred terms of the Code). Too detailed to describe in full here, the basic sentencing scheme created by the Code for felony convictions allowed the judge to impose indeterminate sentences within certain prescribed ranges, but generally favored lenient minimum sentences.¹⁵⁵ The judge’s primary roles in sentencing, then, were determining whether imprisonment would actually be imposed, and

150. *Id.*

151. *Id.* at 1128.

152. *Id.* A few years later, in describing the Code project, Wechsler concluded as follows:

The framework that I have described is offered as a means to the sound distribution of responsibility and function among legislature, courts and organs of correction, taking account of the judgments each is best equipped to make, given the time when it must act, the nature of its actions, the type of information that it has available for judgment and the dangers of unfairness or abuse. If we have erred in the details, we do submit at least that the philosophy is right.

Some Observations, supra note 28, at 394.

153. Wechsler by and large attempted to stay clear of issues traditionally deemed within the province of criminal procedure and already codified as part of the American Law Institute’s Code of Criminal Procedure of 1930. Consequently, the Model Penal Code has relatively little to say about the role of police officers, prosecutors, and defense counsel at the “front end” of the criminal process. However, the Model Penal Code has much to say about the role of judges and correctional institutions on the “back-end” of the criminal process. *See* MPC Parts III-IV. And the Code does contain a few provisions covering topics generally thought of as criminal procedure—*e.g.*, burden of proof, evidentiary presumption, and competency to stand trial provisions. Robinson & Dubber, *supra* note 137, at 324.

154. The four parts of the Code were General Provisions, Definition of Specific Crimes, Treatment and Correction, and Organization of Correction. *See* MPC ix-xxii (Table of Contents).

155. Importantly, it allowed for suspension of sentence or probation in every case (other than capital cases), and in fact, required the court to forego imprisonment unless it is “of the opinion that . . . imprisonment is necessary for the protection of the public.” MPC § 7.01. To find imprisonment necessary, the court must be of the opinion that (a) there is an undue risk that the defendant may commit another crime, (b) the defendant is in need of rehabilitation through commitment, or (c) “a lesser sentence will depreciate the seriousness of the defendant’s crime.” *Id.*

if so, choosing a minimum sentence from within the Code-authorized range of minimums for the relevant gradation of the offense. After that, the key decisions related to imprisonment conditions and parole were left to the department of corrections and an independent board of parole respectively.¹⁵⁶ The Code allowed for parole any time after completion of the minimum sentence (usually one year) and set out both the composition of the parole board¹⁵⁷ and the criteria the board should employ in making parole determinations.¹⁵⁸ The detailed provisions related to sentencing and the allocation of carefully guided discretion to each official actor in the correction system consumed the largest portion of time and energy of the whole project.¹⁵⁹ It was “because [the Code] engages the issues of who should be deciding what in such pervasive fashion,” that Harold Edgar called the Model Penal Code “the greatest legislative achievement of the ‘legal process’ school of thought in American law.”¹⁶⁰

B. Legislative Primacy

The very choice to draft a model code reflected the Legal Process School’s deep commitment to the primacy of the democratic legislature’s role in setting overall criminal law policy and doctrine. It is worth disentangling at the outset two distinct, but related points: (1) Wechsler’s insistence on legislative reform, as opposed to judicial or prosecutorial reforms and (2) Wechsler’s commitment to ultimate democratic control of crime and punishment policy. Since the 1930s, Wechsler’s approach to criminal law had been marked by a distinctively legislative point of view, in contradistinction to a traditional common-law judge-centric view.¹⁶¹ He wanted his students of criminal law, as well as his reformist colleagues, to consider the fundamental questions of criminal doctrine—e.g., what behavior ought to be criminalized in the first place—as legislators would, rather than simply take inherited criminal doctrines as givens in the manner of practicing judges, lawyers, or administrators.¹⁶² By the twentieth century, the norm of legality in criminal law (*nulla poena sine lege*) was widely accepted, and most crimes were in fact laid out in legislation.¹⁶³ But the codification of common law crimes had occurred haphazardly over the years. And, as

156. Wechsler argued that the “organs of correction” rather than the courts “are best equipped to make decisions” about how long a prisoner should be incarcerated beyond the statutory minimum because they have more specific knowledge “in light of experience and observation” about “the period required for the process of correction to realize its optimum potentiality” and the “risk of further criminality” for each convicted person. Herbert Wechsler, *Sentencing, Correction, and the Model Penal Code*, 109 U. PA. L. REV. 465, 476 (1961).

157. MPC § 402.1.

158. *Id.* § 305.9.

159. MPC Parts III-IV.

160. Edgar, *supra* note 140, at 1355.

161. This is not to say that Wechsler found the work of judges or criminal law practitioners unproblematic. To the contrary, he encouraged reforms in criminal law administration by judges, prosecutors, defense counsel and other interested parties. But he argued that criminal law administration could only ever be as good as the substantive law it was set up to administer, and given the many flaws in the inherited substantive law of crime, he insisted that a comprehensive rethink of basic substantive criminal legislation was in order. See *Thoughtful Code*, *supra* note 24, at 524 (“Poor administration will, of course, impoverish the soundest system. Good administration may improve a poor one There are limits to how far administrators can surmount the limitations of the thing that they administer.”).

162. See, e.g., *Legal Scholarship and Criminal Law*, *supra* note 29, at 19-21.

163. See Francis Barry McCarthy, *Crimes of Omission in Pennsylvania*, 68 TEMP. L. REV. 633, 659-62 (1995).

Wechsler never tired of pointing out, common law crimes codified into pre-Model Penal Code statutes usually left out the definition of key terms or failed to articulate elements at all. In practice, then, much of the basic substantive criminal law in many American jurisdictions remained within the discretion of the judiciary.¹⁶⁴ It was that misallocation of discretion—allowing judges, rather than the legislature, to determine basic criminal law doctrine—that exercised Wechsler greatly.¹⁶⁵ The discretion to determine in the first instance what behavior is to be penalized, categorized, and punished was, for Wechsler, a distinctly legislative function.¹⁶⁶ One of the Code’s chief aims, then, was to bring to decisive completion the long process by which criminal law moved from being a (predominantly) common law field to a (predominantly) statutory one.¹⁶⁷

The Legal Process authors, Wechsler among them, were by and large legislative supremacists.¹⁶⁸ For them, the legislature was the forum of policy, the place where wholesale decisions about state or national policy ought to be made.¹⁶⁹ Like Wechsler, most of the Legal Process authors had been enthusiastic New Dealers in the 1930s and had sided with Congress (and President Roosevelt) against the federal judiciary in the run-up to the great Constitutional clash of 1937.¹⁷⁰ Indeed, an “unqualified disdain for the [pre-1937] interpretation of the Constitution by the Supreme Court” was a life-long guiding thesis for Wechsler.¹⁷¹ To be sure, the Legal Process authors were defenders of constitutional rights,

164. See *Challenge*, *supra* note 22, at 1100.

165. See *id.* at 1102.

166. See MPC § 1.05 (“No conduct constitutes an offense unless it is a crime or violation under this Code or another statute of this State.”). Of course, Wechsler understood that gaps and ambiguities in any code require judicial elaboration or interstitial legislation, and he also understood that prosecutorial interpretation of criminal legislation would have significant consequences. Each official actor had a part to play in the working of the system, and each retained some significant and appropriate discretion. Nevertheless, Wechsler saw the legislature as the primary—though not exclusive—body suited to make substantive criminal law and policy because it was the general policy-making body for the system due to its democratic legitimacy. See *Challenge*, *supra* note 22, at 1127.

167. John KAPLAN, ROBERT WEISBERG, GUYORA BINDER, CRIMINAL LAW: CASES AND MATERIALS 10 (7th ed. 2012) (describing the Code as the “culmination of a more than century-long movement toward codification of the criminal law”). I add the word “predominantly” in parentheses to indicate that Wechsler understood that judges would still have an interstitial role to play in interpreting codified law and that, even before the Model Penal Code, some important criminal doctrines were already codified.

168. See Walker, *supra* note 78, at 1020 (noting that while, unlike many criminal law scholars, “[r]ather than decry democracy, Wechsler embraced it”).

169. On this account, the legislature is the forum of policy, and the judiciary is the forum of principle. See RONALD DWORKIN, A MATTER OF PRINCIPLE 33 (1985); RONALD DWORKIN, TAKING RIGHTS SERIOUSLY 107 (1977).

170. Indeed, the Legal Process preference for legislative, as opposed to judicial, action was precisely what brought them into conflict with Warren Court-era legal liberals. See LAURA KALMAN, THE STRANGE CAREER OF LEGAL LIBERALISM 48-50 (1996) (describing what began as a “family quarrel between Warren Court activists and process theorists, two wings of the realist tradition”). Their expressed discomfort with *Brown v. Board*, *Reynolds v. Sims*, *Griswold v. Connecticut* and other Warren Court opinions is what ultimately left them out of step with their erstwhile political home on the center-left of the American political spectrum. Good New Dealers, the Legal Process authors found themselves increasingly at odds with post-*Brown* liberals—and, later, faced with outright hostility from the New Left of the mid-1960s and beyond. Having witnessed or directly participated in major statutory and regulatory schemes themselves in the 1930s and 1940s, the Legal Process authors were cautiously optimistic about the capacity of democratically accountable legislatures to craft effective remedial legislation in the public interest. As Wechsler was still saying in 1959, five years after *Brown*, “any major change [in law] must usually come through legislation.” Herbert Wechsler, *Law, Morals, and Psychiatry*, COLUM. L. SCH. NEWS, March 4, 1959, at 2.

171. *Oral History*, *supra* note 5, at 864.

and they endorsed judicial review of legislation, albeit of a relatively deferential kind.¹⁷² But it was the legislature's prerogative, on their account, to set the policy trajectory of the nation (or the state),¹⁷³ and the judiciary should not interfere with that prerogative unless the legislature's work patently violates the Constitutional scheme.¹⁷⁴ The reason the basic determination of policy ought to rest with the legislature, according to the Legal Process approach, was that the legislature was the most democratically accountable and representative of the major organs of government.¹⁷⁵ For Legal Process authors, questions of ends—policy questions at the broadest levels—ought to be decided ultimately by the people's preferences as expressed via the ballot box.¹⁷⁶

Ever sensitive to allocations of discretion, the Legal Process authors did not claim that the legislature had *exclusive* policy-making authority. They well understood that the volume and diversity of litigation would inevitably require courts to make significant interpretations of statutorily enacted policies, interpretations that could rise to the level of “interstitial legislation.”¹⁷⁷ Inheritors of the Holmesian tradition, they were comfortable with the court's inevitable policymaking incursions in the course of dispute resolution.¹⁷⁸ Legal Process jurisprudence was also notable for its comfort with agency policymaking—or at least, policy elucidation—within its congressionally derived allocation of discretion.¹⁷⁹ Legal Process authors, more than any other group of American jurists, laid the intellectual foundations of the regulatory state and provided rationalizations for the mixture of legislative, executive, and judicial functions that agencies routinely perform in

172. The first part of *Neutral Principles* is a defense of the legitimacy of judicial review against the arguments of Learned Hand in the Holmes Lecture of the previous year. See *Neutral Principles*, *supra* note 8, at 2-10.

173. *Thoughtful Code*, *supra* note 24, at 525 (“our penal law requires thinking through—especially upon the legislative level, where it is clear the basic norms must necessarily be set”); Edgar, *supra* note 140, at 1354 (noting Wechsler's “strong preference for legislative solutions” and “commitment to democratic governance”).

174. It was Alexander Bickel, another Legal Process author, who coined the very phrase “the counter-majoritarian difficulty.” ALEXANDER BICKEL, *THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS* 16 (1962).

175. See Peller, *supra* note 19, at 593 (1988) (“The idea of democracy was central Because there was no neutral, determinate way to evaluate substantive policy differences, they were ultimately ‘left to be made by count of noses at the ballot box.’”). *But see* Eskridge & Frickey, *supra* note 117, at 2049-51 (criticizing Legal Process theory's “thin theory of democracy”). Gary Peller's indictment of Wechsler's *Neutral Principles* article rested largely on the claim that Wechsler failed to appreciate the distance between the theoretical democratic legitimacy of the legislature and the frightful democratic defects of actual American legislatures operating in racially segregated societies and shot through with structural inequalities of all kinds. See Peller, *supra* note 19, at 607-15. One could, of course, make a similar criticism of Wechsler's democracy-promoting belief in legislative primacy in criminal law. If state legislatures of the 1950s were incapable of providing equal protection or fundamental fairness to all of their citizens, regardless of race, then why should they be entrusted with the ultimate coercive state power, the power to criminalize and punish?

176. HART & SACKS, *supra* note 14, at 112 (“[D]ecisions which depend essentially on preference or sheer guesswork are left to made by count of noses at the ballot box.”).

177. See, e.g., Herbert Wechsler, *Federal Jurisdiction and the Revision of the Judicial Code*, 13 *LAW & CONTEMP. PROBS.* 216, 238 (1948) (discussing “that subordinate and interstitial legislation which must come in any system from the courts”); see also *Thoughtful Code*, *supra* note 24, at 524 (“I think a penal code must confer large discretion on the courts and other organs of administration, at the same time that it seeks to guide the exercise the discretion so conferred.”).

178. Indeed, the Legal Process approach to statutory interpretation might best be characterized as an attempt to orchestrate an effective collaboration between the judiciary, the legislature, and the executive branch toward the achievement of society's chosen policy goals.

179. Keith Werhen, *The Neoclassical Revival in Administrative Law*, 44 *ADMIN. L. REV.* 567, 576-80 (1992).

apparent tension with Constitutional separation of powers principles.¹⁸⁰ The Legal Process authors were thus not crude or formalistic in allocating policymaking authority; rather, they cast the legislature as the *pre-eminent* policymaking forum in a complex legal order (process) in which other actors and institutions had their own legitimate policymaking discretion. This was precisely the attitude Wechsler brought to the Model Penal Code project: lodge pre-eminent policymaking authority in the most democratically accountable branch, the legislature, via a clear and comprehensive Code, but also pay close attention to arranging residual discretion appropriately throughout the criminal justice system.¹⁸¹

There is, of course, some apparent tension between a commitment to democratic decisionmaking and the American Law Institute's elite, professional drafting process. The Advisory Committee that Wechsler assembled—professionally more diverse than it might have been—was hardly a cross-section of the American people. Nor did Wechsler ever believe that criminal law doctrine ought to be determined by a simple “count of noses at the ballot box.”¹⁸² The Model Penal Code project was, in conception and in execution, an undertaking by legal elites (elite practitioners *and* elite academics) to influence legislative criminal reform along the lines that they, the elites, thought best.¹⁸³ But to influence is not to dictate, and Wechsler was clear that “it is not our purpose to propose or to promote the uniformity of law throughout the country.”¹⁸⁴ Hence, a *model* penal code, not a uniform one. Wechsler insisted that the purpose of such a model was to “formulate in statutory form a draft that may be useful as a model.”¹⁸⁵ Of course, the idea was that a “systematic re-examination” of criminal law by legal and other professional experts relatively immune from immediate political pressure would yield a model representing “the mature sentiment of our respective jurisdictions” and “a reasoned, integrated body of material that will be useful in such legislative effort, as a solid treatise on a legal subject often aids adjudication by the courts.”¹⁸⁶ Wechsler wanted to provide a highly polished model code reflecting the most up-to-date professional knowledge and the consensus preferences of elite professionals, where consensus existed. “Having assumed the discipline of drafting,” wrote

180. See William N. Eskridge, Jr. & Gary Peller, *The New Public Law Movement: Moderation as a Postmodern Cultural Form*, 89 MICH. L. REV. 707, 710 (1991) (“Legal process transformed public law discourse, legitimating the modern regulatory state without sacrificing its flexibility in a dynamic world.”). The Legal Process obsession with the allocation of discretion was, in short, an attempt to update classic separation of powers principles for the post-War regulatory state.

181. See, e.g., *Some Observations*, *supra* note 28, at 394 (“The framework that I have described is offered as a means to the sound distribution of responsibility and function among legislature, courts[,] and organs of correction, taking account of the judgments each is best equipped to make, given the time when it must act, the nature of its action, the type of information that it has available for judgment[,] and the dangers of unfairness or abuse.”).

182. HART & SACKS, *supra* note 14, at 112.

183. Geoffrey Hazard, *Tribute in Memory of Herbert Wechsler*, 100 COLUM. L. REV. 1362, 1363 (2000). In a posthumous tribute, Hazard wrote that Wechsler was “both intellectually aristocratic and profoundly democratic” in his attitude toward law.

184. *Thoughtful Code*, *supra* note 24, at 525. The Model Penal Code ambition was thus importantly different than that of the American Law Institute's Uniform Commercial Code, the first edition of which was published in 1952, just as the Model Penal Code project began. As its title indicates, the Uniform Commercial Code project had as its conscious goal the promotion of uniformity in commercial law throughout the country. See *Some Observations*, *supra* note 28, at 321 (distinguishing the value of uniformity for commercial as opposed to criminal law).

185. *Some Observations*, *supra* note 28, at 321.

186. *Id.*

Wechsler, “we are not without ambition that our models will seem worthy of adoption or at least of adaptation.”¹⁸⁷ The code would not shirk from taking positions on many of the major issues of criminal code drafting, and those positions would no doubt generally reflect the “mature sentiment” of the elite criminal bar, the judiciary, and the professoriate.¹⁸⁸

At the same time, Wechsler recognized that some questions touched upon different prioritizations of values that no professional competence could determine in the abstract. Wechsler, who appreciated the benefits of a federal system, also fully expected that different states with different constituencies facing different social conditions might choose to resolve value clashes in different ways. In short, Wechsler recognized both value pluralism and regional variation and therefore expected different jurisdictions to make different value choices through the democratic, legislative process.¹⁸⁹ Wechsler also hoped that the Model Penal Code project would be beneficial even for those who disagreed with the ultimate value choices and doctrinal choices made by the drafters. “[E]ven though the formulations we have drawn prove unpersuasive,” he wrote, “others may be aided to their own conclusions by our attempt to state the issues and to canvas the considerations that a legislative judgment ought to weigh.”¹⁹⁰ The commentaries of the Code were, by design, detailed discussions of the dilemmas raised by each provision, the benefits and demerits of various possible resolutions, and explanations for why the American Law Institute chose the resolution it did.¹⁹¹ The key mission was to gather relevant information and to articulate the most persuasive viewpoints all in one accessible and systematically arranged form, so as to create a spur and resource for legislators to reform their state’s criminal laws.¹⁹² It was thus the concept of a model code—neither a restatement of judge-made

187. Wechsler, *Sentencing, Correction, and the Model Penal Code*, *supra* note 156, at 467.

188. *Some Observations*, *supra* note 28, at 321; *Thoughtful Code*, *supra* note 24, at 525 (“[W]e mean to act as if we were a legislative commission, charged with construction of an ideal penal code—properly regardful of realities but free, as legislative commissions rarely are, to take account of long range values as distinguished from immediate political demands.”).

189. *Thoughtful Code*, *supra* note 24, at 525. (“We are not animated by the thought—presumptuous as it would be—that our resolution of competing values of the kind reflected in the penal law should command general adherence, given the variety of circumstance and point of view in different states throughout the Union.”). Describing the work of the drafters, Wechsler declared clearly: “we do not seek to standardize the law of crimes.” *Id.* In Wechsler’s view, it fell ultimately to legislatures representing the people of their states—and not to judges or to expert panels—to make the value choices required by criminal codification. Markus Dubber has written that the “Model Penal Code was meant to emerge unmoored from any historical foundation, American or state-specific; as a document of scientific progress it is universally applicable, and adaptable—if necessary—to its specific audience.” *Alegitimacy*, *supra* note 4, at 241. Insofar as he is suggesting that the ambition of the Model Penal Code was to universalize its particular resolution of dilemmas raised by criminal law, I think Wechsler would reject that characterization of the project. Wechsler’s hope, of course, was to spur comprehensive penal reform in all American jurisdictions and to influence the outcome of that reform. But the Code project had no ambitions beyond the American context and, even there, Wechsler recognized that different jurisdictions might reasonably choose different formulations.

190. *Some Observations*, *supra* note 28, at 323; *accord Thoughtful Code*, *supra* note 24, at 525 (“We hope that those who disagree with our conclusions will be aided in their own appraisal of the answers by the data and analysis that we advance.”). It is notable how this attitude echoes the methodology of the *Rationale* article, in which he and Michael emphasized laying out the important “considerations” related to homicide law, rather than resolving them. *Rationale I*, *supra* note 71, at 702. The Model Penal Code took the methodology of *Rationale*, expanded it to the whole universe of criminal law and punishment, and then added a model code resolving important questions in the way Wechsler and his fellow drafters preferred.

191. *Challenge*, *supra* note 22, at 1130 (“The hope is to produce a commentary that will help to place the systematic literature of our penal law upon a parity with that of well-developed legal fields.”).

192. *See Thoughtful Code*, *supra* note 24, at 525 (“We urge no more than that the issues should be seen and

law, nor a uniform code, but a useful model with accompanying commentaries—that, for Wechsler, resolved the tension between his commitment to democratic decisionmaking and his leadership of a thoroughly elite legislative drafting project ordained by the self-selected legal experts of the American Law Institute.¹⁹³

C. *The Code's Purposes and Value Pluralism*

Legal Process was not the first school of jurisprudence to emphasize the purposive nature of law; its embrace of “law as a means to an end” was consistent with a venerable tradition of American jurisprudence going back at least to Holmes, Pound, and of course, the Legal Realists.¹⁹⁴ In the first line of their preface to the 1958 Tentative Edition of the Legal Process materials, Henry Hart and Albert Sacks explained that “[t]hese materials are concerned with the study of law as an ongoing, *functioning, purposive* process.”¹⁹⁵ The important point is that Legal Process theory, in its most philosophical elaboration, rested profoundly on a purposive philosophy of law. Hart and Sacks pitched the ultimate purposes of law at a very high level of abstraction, but the Legal Process authors did not venerate legal process for its own sake.¹⁹⁶ Nor did they believe that the realm of process, as opposed to substance, was somehow value-free or neutral or apolitical.¹⁹⁷ Rather, they believed that legal processes—the legal system as well as particular fields—

should be faced.”); *see also Challenge*, *supra* note 22, at 1130 (“The object is to canvass the existing law and practice, articulating legislative issues, analyzing possible solutions[,] and appraising the competing values and considerations which a legislative choice should weigh.”) The criticism that Wechsler was convinced that he had worked out in the Model Penal Code the scientifically correct answers to the venerable dilemmas of criminal law strikes me as entirely off target. Of course, like all good lawyers and academics, Wechsler made cogent arguments in favor of his preferred resolution of contested issues, and he hoped his arguments would be persuasive and influential. But the charge of hubris—the idea that Wechsler had excessive self-confidence or undue certainty in his own rightness—misses both his value pluralism and his distrust of social science as a basis for resolving legal-policy questions. As Wechsler himself wrote, the point of the Model Penal Code project was not to freeze, but to unfreeze, thinking about criminal law. *Challenge*, *supra* note 22, at 1133.

193. *See Some Observations*, *supra* note 28, at 321 (“By ‘model,’ . . . we mean nothing more than formulations that may be suggestive and commend themselves to legislative imitation . . .”). Wechsler later credited the “conception of the ‘model’” as part of the explanation for the Code’s success. *Oral History*, *supra* note 5, at 919. “We never over-pressed the position. . . . We proposed it modestly as a source, and I think that its success is some indication of the rhetorical effectiveness of understatement in this world, as against overstatement.” *Id.*

Markus Dubber has argued that the Code, as a model, could just as well have been prepared for enactment by an enlightened tyrant as for a democratic legislature. *Alegitimacy*, *supra* note 4, at 246 (“As an agnostic manual for the suppression of crime, the Model Penal Code would have been as useful to a sophisticated—and perhaps even benevolent—prince . . . as to Wechsler’s intended audience [of American legislatures].”) Here again, I think Wechsler would have rejected Dubber’s contention insofar as he is suggesting that Wechsler cared little for the democratic legitimacy of enacted criminal law. Wechsler would have reiterated his view that the model code was meant to assist democratic legislators in fulfilling *their* responsibility as representatives of the people in making the value choices necessary to enact a code.

194. BRIAN TAMANAHA, *LAW AS A MEANS TO AN END: THREAT TO THE RULE OF LAW* (2006). Some might locate the instrumentalism of American law to even earlier antecedents, e.g., nineteenth century judges. *See, e.g.*, MORTON J. HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW, 1780-1860* 7-30 (1977); William E. Nelson, *The Impact of the Antislavery Movement Upon Styles of Judicial Reasoning in Nineteenth Century America*, 87 HARV. L. REV. 513 (1977).

195. HART & SACKS, *supra* note 14, at cxxxvii (emphases added).

196. According to Hart & Sacks, the legal system aimed at “three main objectives”: (1) the maintenance of basic social order (as opposed to disintegration into violence and chaos); (2) the maximization of the total satisfactions of valid human wants; and (3) a fair division of the good things of life. *Id.* at 104.

197. Barzun, *supra* note 10, at 32 (“One of the most pervasive and pernicious misconceptions about the Legal

should be evaluated according to how well they achieve the purposes for which they were created. Charles Barzun has suggested that we interpret the word “process” in the title of the Legal Process materials to be “the process of ‘interaction of means and end,’ of fact and value, of ethics and science, by which a society fulfills its purposes.”¹⁹⁸ In other words, the focus on process was not meant to displace discussion of substantive ends or to promote dry proceduralism; the focus on process was there to evaluate the fit of means and ends in any area of law. Wechsler had already identified “the ordering of means and ends” as the core task of legal reform before the War.¹⁹⁹ In the Model Penal Code as elsewhere in his writings on criminal law, Wechsler endeavored to articulate as precisely as possible the ends—the values—that the criminal law was meant to promote.

Much has been written about the theory of punishment embedded in the Model Penal Code, and much has been made of the document’s utilitarian commitments.²⁰⁰ There is no doubt that Wechsler saw deterrence as the most convincing rationale for a regime of criminal punishment. He also had some sympathy for the rehabilitative ideal, though much less than may be supposed from the Code’s use of the term “treatment” in lieu of punishment.²⁰¹ It is also true that the language of the Model Penal Code largely, though not entirely, eschewed the rhetoric of retributivism, a theory then at the nadir of its scholarly prestige. It would be a mistake, however, to see the Model Penal Code as the product of a strictly utilitarian or deterrence-based mindset.²⁰² Retributive values were both explicit in the text, in the Commentaries, and in Wechsler’s writings about the Code. Wechsler was clear that, in his view, criminal conviction is at its essence a moral condemnation of the defendant. “[I]t is the penal law,” he wrote, “that safeguards our deepest human interests at the same that it governs condemnation and disgrace and punishment, with all the suffering that they entail and their irreparable scars.”²⁰³ Precisely for that reason, it was important to draft a code of criminal law that condemned only those deserving of such moral censure.²⁰⁴ The Code’s own Purposes section contained a mix of retributive, deterrent

Process materials is that the theory there offered was understood by the editors to ‘neutral’ with respect to controversial underlying values.”).

198. *Id.* at 43.

199. MICHAEL & WECHSLER, *supra* note 100, at 6.

200. See, e.g., Michele Cotton, *Back With a Vengeance: The Resilience of Retribution as an Articulated Purpose of Criminal Punishment*, 37 AM. CRIM. L. REV. 1313 (2000) (discussing the utilitarian aspects of the Model Penal Code).

201. *Rationale II*, *supra* note 71, at 1318-25 (discussing Michael & Wechsler’s views of reformation as a primary rationale of punishment).

202. The statement that “[i]n substance, the Model Code implemented a simple consequential model: prevent crime through deterrence and, if deterrence fails, through ‘treatment and correction’” is precisely the view of the Model Penal Code against which I am arguing. Dubber, *Penal Panopticon*, *supra* note 4, at 53. Wechsler, for instance, wholeheartedly rejected the idea that a mere showing of future dangerousness could form the basis of criminal conviction. Herbert Wechsler, *Insanity As A Defense: A Panel Discussion*, 37 F.R.D. 365, 398 (1965) (“[I]f you’re going to rebuild the law of the United States so that a fellow can be convicted of a crime because he’s accident prone, I’m going to move to Australia, and I think you’ll join me there after a little while.”).

203. *Thoughtful Code*, *supra* note 24, at 528 (“Crime means condemnation and it is not right to pass that judgement [sic] if the bench can not declare that the defendant’s act was wrong. This is a point that lawyers can not compromise.”). These passages are incompatible with a view that Wechsler’s retributivism was merely an accommodation to popular feelings. But it is certainly true that Wechsler’s commitment to democracy—and his belief that criminal laws must be in general accord with social norms to be effective—also factored into his cautious embrace of retribution. See generally Walker, *supra* note 78 (discussing Wechsler’s retributive views).

204. This was a view Wechsler shared with Henry Hart, as evidenced by Hart’s own significant contribution to criminal law scholarship. See Henry Hart, *The Aims of Criminal Law*, 23 LAW & CONTEMP. PROBS. 401, 412

(general and specific), rehabilitative, and incapacitative purposes.²⁰⁵ The sentencing provisions, for instance, allowed judges to impose longer sentences of imprisonment on a determination that “a lesser sentence will depreciate the seriousness of the defendant’s crime.”²⁰⁶ As its widespread acceptance and endurance also suggest, this was not a Code committed to any single theory of punishment to the exclusion of others.²⁰⁷

Crucially, Wechsler and Hart both understood the aims of the criminal law as irreducibly plural. Henry Hart began his article *The Aims of the Criminal Law* with a stirring paean to value pluralism in criminal law.

A penal code that reflected only a single basic principle would be a very bad one. Social purposes can never be single or simple, or held unqualifiedly to the exclusion of all other social purposes; and an effort to make them so can result only in the sacrifice of other values which also are important. Thus, to take only one example, the purpose of preventing any particular kind of crime, or crimes generally, is qualified always by the purposes of avoiding conviction of the innocent and of enhancing that sense of security throughout the society which is one of the prime functions of the manifold safeguards of American criminal procedure. And the same thing would be true even if the dominant purpose of the criminal law were thought to be the rehabilitation of offenders rather than the prevention of offenses. . . . The problem, accordingly, is one of the priority and relationship of purposes as well of their legitimacy—of multi-valued rather than of single-valued thinking.²⁰⁸

(1958). A crime, according to Hart, is “conduct which, if duly shown to have taken place, will incur a formal and solemn pronouncement of the moral condemnation of the community.” *Id.* at 405. And the only thing that “distinguishes a criminal from a civil sanction . . . is the judgment of community condemnation which accompanies and justifies its imposition.” *Id.* at 404; cf. *Thoughtful Code*, *supra* note 24, at 525 (“[I]t is the penal law that safeguards our deepest human interests at the same that it governs condemnation and disgrace and punishment, with all the suffering that they entail and their irreparable scars.”).

205. Note, for instance, the self-admitted futility of Markus Dubber’s attempt to identify the punishment theories implicit in the Code’s Purposes section. See DUBBER, *supra* note 4, at 24-26.

206. MPC § 7.01. See also Wechsler, *supra* note 202, at 406 (“You see, my approach to the thing is not in terms of maximum public safety, it really is in terms of developing a system that seeks to do justice and maintain the sense of public freedom that I think so vital to a good society.”).

207. Gerard Lynch, *Revising the Model Penal Code: Keeping It Real*, 1 OHIO ST. J. CRIM. L. 219, 222 (2003). Lynch made much the same point in noting that “the core provisions of the Code stand up remarkably well despite the resurgence of retributivism or just deserts thinking. If anything, indeed, they have solidified. . . . [T]he general part of the Code Wechsler produced is quite consistent with Kantian notions of fairness and desert.”

208. Hart, *supra* note 204, at 401. That article, which Hart claimed was a “revision of a mimeographed note originally prepared for first-year law students,” was published during the drafting of the Model Penal Code. *Id.* Though the full tentative draft of the Code was still incomplete and years away from adoption, numerous partial drafts had already been released, making the overall tenor and many particular formulations of the Code public. *The Aims of the Criminal Law* thus constituted Hart’s major comment on the Model Penal Code project, with perhaps some hope that he might influence its final form and its reception upon completion. Hart’s article was overwhelmingly supportive of the Project, the drafts he had studied, and the project’s underlying philosophy. *Id.* at *passim*. There is no overt criticism of his friend and one-time co-author Wechsler, and one might speculate that he and Wechsler had spoken privately about the Code project and probably also about this article.

Not coincidentally, the only citation Hart offers for this line of thought is Wechsler and Michael's *Rationale II*.²⁰⁹ Wechsler was already sounding pluralist themes in the 1930s, and the Model Penal Code project only amplified them. As Wechsler put it in 1961 near the completion of the project, "The Code is drafted with the view that here, as elsewhere in the realm of law and government, wisdom is unlikely to inhere in action guided by a single value when a multiplicity of values is involved."²¹⁰ Instead, he went on, "[t]he course of prudence normally is to shape policy in terms that take account of the diversity of interest, ordering[,] and harmonizing in so far as possible the conflicts that emerge."²¹¹ Wechsler's value pluralism, shared with Hart and other Legal Process authors, meant that drafting a criminal code could not be a mere technocratic exercise.²¹² Wechsler was explicit that the drafters would face "competing values" openly, consider them, and explain their choices as best they could.²¹³ Wechsler had no illusions that the Code would be a value-free or neutral document and well understood that reasonable people and reasonable legislators might disagree about the value choices he and the ALI made;²¹⁴ hence, his insistence that uniformity was not a goal of the project and that the commentaries serve as a resource for further debate on contestable subjects.²¹⁵ The success of the Code—its unprecedented influence on state reform efforts, its prominence in criminal law pedagogy and scholarship, and its endurance for over 50 years—would not have been possible without the explicit inclusion of multiple ends in the Code's provisions and Wechsler's humility regarding the value choices made by the drafters.²¹⁶

D. Pragmatism, Prudence, and Principle

Rather than trying to pigeon-hole the Code's philosophy into one or two of the conventional theories of punishment, we would do better to see its broadly consequentialist bent as part of the general Legal Process's purposive and pragmatic approach to law. For the Legal Process School certainly looked at all law—both "public" and "private" law—

209. *Id.* at 401 n.2. In his memorial tribute to Wechsler, Geoffrey Hazard noted Wechsler's "[a]ppreciation of the normative pluralism" as one of the key virtues he brought to the study of American federalism. Hazard, *supra* note 183, at 1367.

210. Wechsler, *supra* note 156, at 468; see also *Legal Scholarship and Criminal Law*, *supra* note 29, at 18 ("I doubt . . . that there is another legal field which presents sharper conflicts with respect to basic values [than criminal law].").

211. Wechsler, *supra* note 156, at 468. For more on Wechsler's prudence, see discussion *infra* Part IV.C.

212. Wechsler wrote, "It is vital . . . that we should bring to bear on the full body of the law of crime whatever knowledge, statesmanship, morality[,] and effort we are able to command." *Thoughtful Code*, *supra* note 24, at 525 (emphasis added).

213. *Challenge*, *supra* note 22, at 1130 ("The object is to canvass the existing law and practice, articulating legislative issues, analyzing possible solutions[,] and appraising the competing values and considerations which a legislative choice should weigh."); accord Hart, *supra* note 204, at 402 ("A complex of institutional ends must be served . . . as well as complex of substantive social ends.").

214. See *Thoughtful Code*, *supra* note 24, at 525 ("We are not animated by the thought—presumptuous as it would be—that our resolution of competing values of the kind reflected in the penal law should command general adherence, given the variety of circumstance and point of view in different states throughout the Union.").

215. See *Some Observations*, *supra* note 28, at 323 ("[E]ven though the formulations we have drawn prove unpersuasive, others may be aided to their own conclusions by our attempt to state the issues and to canvas the considerations that a legislative judgment ought to weigh.").

216. *Oral History*, *supra* note 5, at 919 (noting "the rhetorical effectiveness of understatement in this world, as against overstatement").

as a technique of good governance, a constructed set of processes aimed at achieving social ends.²¹⁷ For both Henry Hart and Herbert Wechsler, the legal apparatus of the criminal justice system was the backstop set of official procedures aimed at identifying and minimizing the most harmful, anti-social behaviors.²¹⁸ Criminal law, on this account, is not the function of any freestanding theory of punishment or of private ethics; it is a mode of governance and must be justified and assessed as any other public policy would be: Are its social ends legitimate, and are its means the best available to achieve its ends?²¹⁹ These questions are much more open-ended than a simple utilitarian (or other monist) assessment of criminal law would be.²²⁰ They also eschew a more private, moralistic perspective on criminal law, one that might see the drafting of a penal code as an exercise in applied moral philosophy. Ethics are involved in the legal process, of course—but more the Weberian ethic of responsibility than the ethic of moral conviction.²²¹ “[T]he penal law should not be used merely to express the pious sentiment of the community,” wrote Wechsler.²²²

217. See Edgar, *supra* note 140, at 1349 (2000) (describing Wechsler’s view of law as “a means of governance in which essentially political choices constantly are made and must be made, and therefore should be made in conscious pursuit of sensible social policy”); see also Jonathan Simon, *Wechsler’s Century and Ours: Reforming Criminal Law in a Time of Shifting Rationales of Government*, 7 BUFF. CRIM. L. REV. 247, 247 n.4 (2003). One of the key Realist insights was that the so-called private law was itself a public mode of governance, that its judge-made rules reflected policy choices as much as any piece of legislation or regulatory provision, and that these policy choices should be faced transparently. It was that much easier for Realists and post-Realists in the Legal Process School to see criminal law, always categorized as public law even when its provisions were primarily judge-made, as a domain of public policy, not simply a realm of private or inter-personal justice. See, e.g., Leonard, *supra* note 38, at 809 (2003) (“Realism called for frankness in the setting of policy goals and a recognition that law is not some autonomous science but simply a tool for reaching those goals. It thus supported reformers’ unanimous view that criminal law was merely a means of crime control.”); cf. Louis M. Seidman, *Points of Intersection: Discontinuities at the Junction of Criminal Law and the Regulatory State*, 7 J. CONTEMP. LEGAL ISSUES 97, 99-115 (1996) (arguing that Wechsler and the Model Penal Code project, among others, failed to fully incorporate Realist insights into the criminal law).

218. See *Challenge*, *supra* note 22, at 1098 (“This [criminal law] is the law on which men place their ultimate reliance for protection against all the deepest injuries that human conflict can inflict on individuals and institutions.”); Hart, *supra* note 204, at 410 (“For it is the criminal law which defines the minimum conditions of man’s responsibility to his fellows and holds him to that responsibility.”).

219. In distinguishing between a private justice orientation and a public policy orientation in thinking about criminal law, I am drawing on Gerald Leonard’s powerful article *Towards a Legal History of American Criminal Theory*. See Leonard, *supra* note 38. In that article, Leonard developed a dichotomy between two visions of criminal law: a “private” version of criminal law focused on justice to the accused and, on the other hand, a “public” version, derived in part from the historical designation of criminal law as a branch of public law, focusing on public policy and social consequences.” *Id.* at 827. Leonard’s dichotomy matches up in some ways with Herbert Packer’s two models—crime control (public) and due process (private)—but is even broader. Leonard himself seemed to view the Model Penal Code as a “sort of synthesis (by brute force, perhaps)” of the public and private versions of criminal law. *Id.* at 822. My view is that the public version dominates the Model Penal Code.

220. Importantly, these questions begin with an interest in the social practices of criminal law as they actually exist and then subject those practices to critique, rather than starting with a grand social philosophy and then demanding that the social practices of the criminal law conform to the theory. Cf. HART & SACKS, *supra* note 14, at 111 (“The beginning of wisdom for the social scientist . . . is to seek an understanding of the relevant aspects of the institutional system within which the subject of his inquiry is located.”).

221. Max Weber, *Politics as a Vocation*, in FROM MAX WEBER: ESSAYS IN SOCIOLOGY 118-19 (H.H. Gerth & C. Wright Mills eds. & trans., 1946). I do not wish to get into deep interpretive debates about Weber’s distinction between the ethic of responsibility and the ethic of moral conviction (or the ethic of ultimate ends). What I intend to note here is a distinction between (1) a public and prudential ethics concerned with achieving the best possible social outcomes and (2) a private and principled ethics concerned with consistency and personal rectitude. For Hart and Wechsler, as for Weber, the crafting of public policy calls upon the former more than the latter.

222. *Codification of Criminal Law*, *supra* note 28, at 1432.

Henry Hart made this pragmatic view even more explicit when he urged readers to “picture[] the criminal law as a process, a way of doing something, which is what it is.”²²³ “[T]he criminal law,” Hart wrote, “*like all law*, is concerned with the pursuit of human purposes through the forms and modes of social organization, and it needs always to be thought about in that context as a method or process of doing something.”²²⁴ The point of thinking about criminal law, according to this view, is not to create a beautiful intellectual construct of ideal postulates; the point is to do something, to change a complex social practice, to make it “work” better, to better align means and ends. The Model Penal Code project, as conceived by Wechsler, was nothing if not pragmatic in that basic sense.²²⁵ It is this pragmatic social fixation—more than any commitment to deterrence or rehabilitation—that accounts for the general hostility of the Code to thoroughgoing Kantian retributivism. Wechsler, the Legal Process author, was simply not an idealist about criminal law; he did not believe that criminal doctrine needed to be in perfect accord with any abstract ethical imperative. He understood criminal law as a complex set of public practices with multiple values at stake, and the task was to try to balance among multiple values keeping in mind the actual embeddedness of the substantive rules in institutions of limited capacities. For Wechsler, it was not that the law should ignore ideals; it was that there are multiple ideals, not all of which can be practically realized; legal reform requires hard choices among ideals while keeping in mind the actual (limited) competencies of the official actors and institutions through which the law operates.

Understanding law as a field of action, of purposive processes, Wechsler’s approach to drafting the Code emphasized practical wisdom, or prudence, above all. The task was, after all, to improve the social practices of the criminal law, not to flaunt one’s moral righteousness or to gain knowledge for knowledge’s sake.²²⁶ This is not to say that Wechsler deprecated scholastic projects; indeed, he saw the Model Penal Code itself as a scholastic project. Rather, the Jamesian pragmatism of the Legal Process approach held that “the ultimate purpose of thought is to help in deciding upon a course of action.”²²⁷ In that sense, Wechsler’s explicit legislative reform work was not, in his mind, categorically

223. Hart, *supra* note 204, at 402.

224. *Id.* at 403 (emphasis added). One may not, of course, simply ascribe Hart’s views to Wechsler. Dubber, for one, sees some daylight between the two when it came to their conception of criminal law as law. See *Alegitimacy*, *supra* note 4, at 258. But I can find very little suggesting a significant rift between Hart and Wechsler regarding the Model Penal Code project or their views on substantive criminal law more generally. The evidence of their jurisprudential collaboration during the period when Hart wrote and published *The Aims of the Criminal Law* is significant, most importantly Wechsler’s year-long visitation at Harvard during which he and Hart (already co-authors of the *Federal Courts* casebook) attended the Legal Philosophy Reading group together. Hart’s suggested revision of the Code’s Purposes provisions are interesting, see *id.* at 440-41, but actually show how friendly Hart’s attitude toward the Code approach was. I see those suggestions as Hart’s attempt to better articulate the connection between the Code and Legal Process theory’s philosophical foundations.

225. See Barzun, *supra* note 10, at 36-41 (emphasizing the influence of philosophical American Pragmatism on Henry Hart and the Legal Process more generally).

226. Prudence in the sense I am using it here—practical wisdom about ends and means with respect to specific actions or deliberations—is usually contrasted with *sophia* or theoretical wisdom about universals and necessary truths. I use the terms prudence, practical wisdom, and phronesis interchangeably in this article.

227. Hart, *supra* note 204, at 402. See also Barzun, *supra* note 10, at 7 (arguing that Hart and Sacks, in a chain of influence going back through Lon Fuller to William James, believed that “all knowledge, including that derived from the social and even natural sciences, was, in a sense, craft knowledge—that is, knowledge of how to do something.” (emphasis omitted)).

distinct from his scholarly agenda; they were one and the same.²²⁸ Practical wisdom, for Wechsler, was thus not a virtue of the legal practitioner alone, but also of the legal academic and legal reformer, of anyone interested in the “basic and intrinsic problems of the field, the questions as to ends and means that ought to be confronted in the building or appraisal or improvement of a system geared to serve its proper functions in the government of men.”²²⁹

There are important debates in the philosophical literature about what exactly prudence means, but what I mean to pick out here is a set of intellectual dispositions related to thinking practically about specific choices and actions rather than thinking in purely abstract or theoretical terms. Among the traits typically associated with prudence are: a disposition toward the practically achievable rather than the ideal;²³⁰ thinking in particulars rather than universals; recognizing the limits of one’s knowledge and power; sensitivity to complexity in human nature and human institutions;²³¹ and reliance on experience and commonsense intuition in addition to formalized knowledge or decisional criteria.²³² Though Wechsler himself never wrote explicitly philosophical studies of the classical tradition of prudence (*phronesis*)—or of American Pragmatism for that matter—his outlook and that of his Legal Process cohort was thoroughly prudential.²³³

The prudentialism of Legal Process thinking, though not unremarked, is often passed over in commentators’ emphasis on the Legal Process devotion to reasoned elaboration or “neutral principles.”²³⁴ For instance, in his book on American legal theory, Neil

228. In a short lecture he delivered at a 1955 Conference on [the] Aims and Methods of Legal Research, Wechsler wrote that “penal law offers a many-sided challenge to ‘research’—by which I mean and hope you mean no more than systematic inquiry designed to gain ideas, insights or information relevant to the solution of important problems of the field.” *Legal Scholarship and Criminal Law*, *supra* note 29, at 18 (printing Wechsler’s speech delivered at the University of Michigan on Nov. 5, 1955). The Code also advanced Wechsler’s pedagogical agenda. Markus Dubber remarked that “the Code reads—and looks—as much like a criminal law textbook as it does like a Code. It was meant to teach criminal law to criminal justice professionals.” DUBBER, *supra* note 4, at 10. Wechsler’s pragmatic understanding of legal scholarship also made him somewhat scornful, perhaps unduly so, of purely critical projects: “[A]n activity can not be ‘wrong,’ no less ‘completely wrong,’ unless and until some more promising alternative has been devised.” *Legal Scholarship and Criminal Law*, *supra* note 29, at 21-22.

229. *Legal Scholarship and Criminal Law*, *supra* note 29, at 20; accord Albert Sacks, *Henry Hart*, 82 HARV. L. REV. 1593 (1969) (“Since [Hart] conceived of law as a process of doing, he drew no distinction between understanding law and developing law. To understand law was to develop it. To develop law intelligently was to understand it. The law scholar and the law doer were one.”).

230. Cf. Barzun, *supra* note 10, at 40 (“[Lon] Fuller’s point was not just that it was difficult or even impossible to separate questions of ends from means, but that it was affirmatively better to conceptualize ends in light of the means available.”).

231. See HART & SACKS, *supra* note 14, at 111 (“The beginning of wisdom for the social scientist . . . is to seek an understanding of the relevant aspects of the institutional system within which the subject of his inquiry is located. He needs to know . . . both the presently fixed limitations of the system and its existing leeways.”).

232. See *id.* (arguing that, in understanding society, “science must depend ultimately upon judgment—upon judgment informed by experience and by all the objective data that can feasibly be assembled, but upon judgment nevertheless”).

233. This discussion relies significantly on Anthony Kronman’s description of prudence in describing another Legal Process author, Alexander Bickel. See Anthony Kronman, *Alexander Bickel’s Philosophy of Prudence*, 94 YALE L.J. 1567 (1985) (discussing Bickel’s ideas on law and politics); see also Anthony Kronman, *Practical Wisdom & Professional Character*, 4 SOC. PHIL. & POL. 203, 206-07 (1986) (discussing the idea of “*phronesis*,”—or “prudence”—as a practical way of thinking about the law).

234. DUXBURY, *supra* note 111, at 276 (discussing Wechsler’s view of why courts should strive to abide by neutral principles, even though neutral principles do not always lead to correct results).

Duxbury titled the chapter dedicated to the Legal Process School “Finding Faith in Reason” and argued that the Legal Process development of the concept of “principle” was a key theme in the veneration of “reason.”²³⁵ There is good reason why many discussions of Legal Process theory take “reasoned elaboration” and “neutral principles” as the central contributions of Legal Process theory. It is because those two phrases have come to represent the Legal Process approach to adjudication, and American legal academics tend to focus on theories of adjudication in jurisprudential discussions. The Legal Process authors themselves, however, were notable for their interest in the entire system of legal processes—including legislation, administration, regulation, private ordering, even constitution-making—and the full spectrum of officials and institutions comprising that system. If the large-scale organization of the Hart & Sacks’ Legal Process materials encapsulated one message, it was that adjudication—the work of judges—was only one prism through which to view the law. So while reasoned elaboration and principled decisionmaking may have been the touchstones of Legal Process thought regarding adjudication (at least in appellate courts), those concepts did not cover the field of Legal Process jurisprudence. Rather, the Legal Process—and Wechsler’s own—focus on comparative institutional competence was premised on the idea that different institutions in the legal system have different capacities and appropriate methodologies for decisionmaking.²³⁶ The court may be a forum of principle, but the legislature is a forum of policy. Consequently, there was no direct contradiction in demanding strict fidelity to principle and reasoned elaboration from judges but also promoting prudent and even expedient public policymaking by legislatures.²³⁷

There was still, however, some significant tension between Wechsler’s prudentialism and the ambition of the Model Penal Code to “provide a reasoned, integrated body of material.”²³⁸ One of the chief aims of the Code—and by many accounts, one of its greatest achievements—was its coherence, its systematic ordering of the hitherto scattered and haphazard doctrines of criminal law.²³⁹ Markus Dubber’s comment that “[i]n a sense, the Model Penal Code’s structure *is* the Model Penal Code” is accurate.²⁴⁰ As he put it, “[t]he Code wears its conceptual coherence on its sleeve” and “[t]he Model Code drafters imposed structure on chaos wherever they turned.”²⁴¹ Its coherence is manifested in the Code’s large-scale organization, in the careful definition and consistent use of terms, and in the strict consistency of the “special part” defining specific offenses with the “general part” provisions setting out general principles of liability. The intellectual roots of the Code’s systematicity cannot all be traced back to Legal Process jurisprudence, for surely

235. *Id.* at 297 (“The [Legal Process] tradition must be understood primarily as the embodiment of an attitude concerning the importance of rationality within a democracy.”). Duxbury’s chapter on Legal Process also contains a sub-section primarily on Alexander Bickel titled “The Jurisprudence of Prudence.” *Id.* at 278-86.

236. *But see* Anthony J. Sebok, *Reading the Legal Process*, 94 MICH. L. REV. 1571, 1594 (1996) (arguing that Hart & Sacks end up demanding the same rigorous criteria of decisionmaking from all legal decisionmakers, not only judges, and thereby accidentally brought administrative decisions into disrepute).

237. *See, e.g.*, BICKEL, *supra* note 174, at 58 (1986) (“[I]t is for legislatures, not courts, to impose what are merely solutions of expediency. Courts must act on true principles, capable of unremitting application.”).

238. *Some Observations*, *supra* note 28, at 321.

239. Hazard, *supra* note 183, at 1362-63 (“The approach manifested in the MPC was to establish analytic coherence for the terms in which the received law should speak He sought coherence”).

240. DUBBER, *supra* note 4, at 17.

241. *Id.*

the impulse toward coherence in legal reform (in law generally) is more venerable and pervasive than any post-War school of thought. But Legal Process theory's interest in reason—in the “reason immanent in law”²⁴²—was real, and Wechsler's own interest in principled decisionmaking famously extended beyond his work on criminal law to Constitutional adjudication.²⁴³ Moreover, Wechsler repeatedly invoked terms such as “rational,”²⁴⁴ “systematic,”²⁴⁵ and “reasoned”²⁴⁶ when describing the Code's “rethinking” of criminal doctrine.²⁴⁷ These terms suggest that the rationalization project Wechsler had in mind for criminal law went beyond the attempt to match doctrinal means and policy ends; it was also an attempt to make the law more integral, more consistent with itself, such that principles adopted in one area of the law would be applied *mutatis mutandis* in other areas as well.²⁴⁸

Where adherence to principle or a strict consistency would lead to imprudent choices, tension is inevitable. To be sure, prudential thinking is not the same as unprincipled thinking; the prudentialist may be as deeply committed to principles and ideals as a typical idealist. As Anthony Kronman articulated it, “a prudent person . . . is one who sees complexities, who has an eye for what Bickel called the ‘unruliness of the human condition,’ but is nevertheless able to devise successful strategies for the advancement (however gradual or slow) of his own favored principles and ideals.”²⁴⁹ It is not accurate then to say that prudence and principle are contradictory, and the prudential reformer will in fact succeed in advancing his principles better than an imprudent one. But in the accommodations that a prudential reformer must accept, purity of principle inevitably suffers.²⁵⁰ Thus, in

242. DUXBURY, *supra* note 111, at 205-06. In his invocation of neutral principles, Wechsler never suggested that legal decisionmakers could eschew substantive value choices. To the contrary, he explicitly noted that such value choices are occasionally necessary. See *Neutral Principles*, *supra* note 8, at 15. Wechsler's demand was that a judge ought not choose among principles solely to reach the judge's preferred result in the case at hand, but ought to choose the principle which he or she would be willing to apply across the full domain of relevant cases. *Id.* at 17, 19. It might have been better had Wechsler titled the article “Toward the Articulation and Neutral Application of Principles in Constitutional Law” to better articulate the thrust of his thesis—that judges ought to both (a) clearly articulate the principle(s) justifying their decisions and (b) be prepared to apply those principles neutrally, i.e., even when doing so would go against the judges' own preferred outcome. See, e.g., Henry Paul Monaghan, *supra* note 2, at 1373 (“What Herb insisted upon was not so much that the governing principle should be neutral, but that the applicable principle should be neutrally and generally applied.”).

243. See White, *supra* note 111, at 289 (“With the advent of Wechsler's [neutral principles] thesis[,] Reasoned Elaboration reached its maturity.”).

244. *Challenge*, *supra* note 22, at 1098 (“The law that carries such responsibilities should surely be as rational and just as law can be.”).

245. *Some Observations*, *supra* note 28, at 321 (“[W]hat is generally needed, we believe, is systematic re-examination of the subject.”).

246. *Id.* (“We hope to provide a reasoned, integrated body of material.”).

247. See *Legal Scholarship and Criminal Law*, *supra* note 29, at 22 (asserting that one of legal scholarship's special competences include “relating what is done or is projected in one area of law with what is done or is projected in another, in the interest of the justice and coherence of the system as a whole False[and] general analysis of concepts and idea, with special reference to clarity and consistency”).

248. Robert Weisberg has written that “Wechsler's creation of the MPC was a high point in an effort to bring neutral rationality to the political contentiousness of criminal law.” Robert Weisberg, *How Sentencing Commissions Turned Out to Be a Good Idea*, 12 BERKELEY J. CRIM. L. 179, 229 (2007). Justice Ginsburg described the Model Penal Code as a “rational, well-organized Code.” Ruth Bader Ginsburg, *In Memory of Hebert Wechsler*, 100 COLUM. L. REV. 1359, 1359 (2000).

249. Kronman, *supra* note 233, at 1569.

250. *Id.* at 1567 (“A prudent person . . . has a high tolerance for accommodation and delay and is able to accept the final incommensurability between any system of ideas and the world as it is given to us with all its raggedness and inconsistency; who values consent but is not demoralized by the process of irrational compromise

the Model Penal Code project, wherever strict consistency would conflict with political plausibility, with commonsense intuitions, or with deeply embedded institutional features of the criminal justice system, there was a ready-made clash between prudence and principle. Wechsler intended to produce a model code that would have significant influence over real legislative reform efforts, and to that end, he felt that the Code's provisions should stray only so far from deeply held and widely accepted expectations of the criminal law.²⁵¹ Substantive criminal doctrines that could not fit into the larger legal firmament or into the institutional context of criminal justice were non-starters for Wechsler.²⁵² So although Wechsler, the principled reformer, was eager to sweep away many of the irrational vestiges of common law-derived criminal law, Wechsler, the prudentialist, was sensitive to the complex interaction of extant norms and institutions, as well as to popular expectations. He thus wanted to craft reforms that could fit in and gain legitimacy while ameliorating the status quo.

Both the commitment to principled reform and to prudential reform were authentic expressions of Legal Process jurisprudence and of Wechsler's own legal outlook, but they clearly pulled in differing directions with respect to many of the most controversial issues in criminal law. In the context of drafting the Model Penal Code, such issues were numerous.²⁵³ In some cases, Wechsler and the Code leaned toward principle and in others toward prudence; in every case, the tension was reflected in the debates and commentaries accompanying the Code. A brief review of the Code's treatment of strict liability, the death penalty, and incest provide representative examples of three different attempts to resolve the tension.

1. Strict Liability

The most celebrated and perhaps most influential feature of the Model Penal Code has been its articulation of the traditional *mens rea* requirement of criminal law and the hierarchy of culpable mental states it delineated: purpose, knowledge, recklessness, and negligence.²⁵⁴ Wechsler and the Code drafters insisted that criminal offenses must include one of these four modes of culpability for each material element of a crime.²⁵⁵ Thus, the Code categorically rejected strict liability crimes and required, at minimum, a

that is often needed to achieve it.”).

251. *Challenge*, *supra* note 22, at 1113. Wechsler's commitment to democratic legislation was both principled and prudential; he believed both that the people ought to set policy through a democratic legislature (principle) and that policies lacking popular legitimacy would eventually prove ineffective (prudence).

252. *Hazard*, *supra* note 182, at 1366 (stating that Wechsler believed that “legislation on any subject must be interpolated as smoothly as possible into the larger corpus of standing law”).

253. *Challenge*, *supra* note 22, at 1108. Provisions which cast Wechsler's commitments to prudence and to principle, respectively, in significant tension included those related to strict liability and negligence as bases of culpability, the death penalty, the felony murder doctrine, liability for intoxication, incest, fornication, and abortion.

254. Alan Michaels, “Rationales” of Criminal Law Then and Now: For a Judgmental Descriptivism, 100 COLUM. L. REV. 54, 64-65 (2000) (noting that the Code's “translation of the doctrine of mens rea into the four culpable mental states of purpose, knowledge, recklessness, and negligence . . . is generally viewed as the Code's crowning achievement”); Kadish, *supra* note 68, at 953 (“It [the Code] was a breakthrough to articulate so lucidly and powerfully a conception of culpability requirements comprehending all crime definitions, and it has been transforming in its impact on the law and on legal education and scholarship.”).

255. MPC §2.02.

negligence standard for each and every criminal offense.²⁵⁶ At the time the Code was being drafted, strict liability crimes were already widespread in state and federal law and were, in fact, increasing along with the growth in regulations more generally. Many defended strict liability crimes as necessary features of the complex regulatory state emerging in the post-War years, the very regulatory state that Wechsler and his Legal Process colleagues did so much to help construct and theorize.²⁵⁷ Moreover, the Supreme Court had apparently legitimated strict liability as a basis of criminal liability in *United States v. Balint*²⁵⁸ and in *United States v. Dotterweich*.²⁵⁹ Thus, the Code's determination that there is no place for imposing the moral condemnation of criminal conviction absent some finding of culpability was a powerful stand on principle.²⁶⁰ At the same time, the Code provided for incorporation of strict liability offenses into the framework of a criminal law code so long as such offenses were deemed "violations" rather than crimes and no sentence of imprisonment or probation was available for them. This construction of a new class of strict liability "violations" was a creative (and prudent) way to allow states to maintain their strict liability offenses on the books while downgrading their status from crimes to mere violations and allowing for only monetary penalties.²⁶¹ Taken as a whole, the Code's emphatic position against strict liability crimes was an instance of principle winning out over concern for existing doctrines and evolving institutional trends, both of which favored strict liability crime.²⁶²

2. Death Penalty

The Code's legacy with respect to the death penalty is complex and defies easy categorization,²⁶³ but for our purposes, it is the placement of brackets around the Code's death penalty provision that is most relevant. The brackets indicated that the Institute took

256. *Id.* §2.05. The commentary begins, "This section makes a frontal attack on absolute or strict liability in the penal law, whenever the offense carries the possibility of criminal conviction, for which a sentence of probation or imprisonment may be imposed." MPC §2.05, cmt. at 140 (AM. LAW. INST., Tent. Draft No. 4 1955) [hereinafter MPC Tentative Draft No. 4]. In both its bold assertion of principle ("a frontal attack") and its careful articulation of the limited scope of that principle, this sentence is emblematic of the Code's commitment to principle and prudence.

257. *Id.* §2.05, 141-45 (1955).

258. 258 U.S. 250 (1922).

259. 320 U.S. 277 (1943). For a more detailed look at the contours of Supreme Court doctrine on the requirements of mens rea around the time of the Code's drafting, see Herbert L. Packer, *Mens Rea and the Supreme Court*, 1962 SUP. CT. REV. 107 (1962). Packer pithily summed up the Court's position this way: "To paraphrase: Mens Rea is an important requirement, but it is not a constitutional requirement, except sometimes." *Id.* at 107.

260. *See id.* at 117. And note that this was a principled stand on retributivist grounds, not one based on deterrence theory or rehabilitation.

261. Jerome Hall, a prominent criminal law theorist who briefly served on the Model Penal Code project, argued that the Code's recognition of criminal liability for negligent action also violated the principle that one should not be criminally punished for inadvertent conduct. *See* Jerome Hall, *Negligent Behavior Should Be Excluded from Penal Liability*, 63 COLUM. L. REV. 632 (1963).

262. I am following Herbert Packer in pointing to the Code's rejection of strict liability as an example of Code's commitment to principle, while noting that the Code's accommodation of non-criminal strict liability violations was a pragmatic means to allow states to retain strict liability offenses. Herbert Packer, *The Model Penal Code and Beyond*, 63 COLUM. L. REV. 594, 594-96 (1963).

263. *See, e.g.*, Franklin E. Zimring, *The Unexamined Death Penalty: Capital Punishment and Reform of the Model Penal Code*, 105 COLUM. L. REV. 1396, 1400-06 (2005); Russel Dean Covey, *Exorcising Wechsler's Ghost: The Influence of the Model Penal Code on Death Penalty Sentencing Jurisprudence*, 31 HASTINGS COST. L.Q. 206 (2004); Walker, *supra* note 78.

no position on the desirability of the death penalty.²⁶⁴ This was one instance in which the Code formally refused to take a position on a legal-policy dispute, despite Wechsler's pronounced desire to provide lawmakers with resolutions—in addition to intelligent consideration—of the various dilemmas of criminal law. But the Code's lack of an official position on the merits of capital punishment was hardly the same as silence on the topic. Despite rendering the provision optional, Wechsler and his fellow drafters drew up a detailed legal framework for capital punishment that was so persuasive it would come to be adopted and constitutionalized in large measure by the Supreme Court in *Gregg v. Georgia*.²⁶⁵ Moreover, the Code's commentary made it explicit that Wechsler, the other drafters, and the Advisory Committee all favored abolition of capital punishment entirely.²⁶⁶ Nevertheless, in a move that Wechsler apparently supported, the American Law Institute decided not to take a position on capital punishment one way or the other because the issue was deemed “political” and thus beyond its capacity to influence.²⁶⁷ Wechsler's own thoughts on capital punishment were nuanced and perhaps evolved over time. He was generally opposed to capital punishment—“an abolitionist at heart”²⁶⁸—because he thought it failed as a deterrent and corrupted the judicial process, turning trials into “morbid and sensational” affairs, leading to unearned sympathy for the defendant, and generally legitimating homicidal violence.²⁶⁹ On the other hand, Wechsler was sensitive to the popular support for the death penalty and for the potential negative effects of an attempt at outright abolition—including rejection of, or backlash against, other worthy criminal reforms and potential popular resort to private violence in cases formerly subject to capital punishment. Because any proposal relating to the death penalty would receive wildly disproportionate coverage from the press and popular interest, Wechsler also feared that a controversial stand on the death penalty might well eclipse all of the other urgent reforms recommended by the Model Code.²⁷⁰ In short, Wechsler had prudential reservations against his own abolitionist position.²⁷¹ In the end, he was not willing to jeopardize the Model Penal Code project for, what he calculated was, a futile mission to abolish the death penalty.²⁷² Nor

264. See MPC § 210.6.

265. 428 U.S. 153 (1976). The details of the Model Penal Code scheme are not germane to this article, but have been the subject of much commentary. See, e.g., Covey, *supra* note 263, at 207.

266. See Robert Weisberg, *Apology, Legislation, and Mercy*, 82 N.C.L. REV. 1415, 1425-26 (2004) (noting that the Code drafters “were repelled by what they saw as the vulgarity of the death penalty and its potential to cause social disruption”).

267. Minutes of the One Hundredth and Sixth Meeting of the Advisory Council, American Law Institute, March 11–14, 1959, at 13. Of course, as Wechsler well understood, every dilemma in criminal law was political in the same sense—they touched on deep clashes of values. So there is no sense in which the refusal of the American Law Institute to take a position on capital punishment was itself a principled stand against “political” decisions. It must be seen as an anomaly in the Code and as a failure to follow through on Wechsler's goal to provide resolutions to all the difficult problems of drafting a penal code.

268. Corinna Barrett Lain, *The Highs and Lows of Wild Justice*, 50 TULSA L. REV. 503, 515 (2015).

269. Walker, *supra* note 78, at 1051.

270. *Id.* at 1043 (noting, in the context of New York state criminal law reform, that “[t]o avoid jeopardizing important reforms of the entire code, . . . Wechsler advocated catering to popular opinion on the question of the death penalty.”)

271. For a more sustained discussion of Wechsler's views on capital punishment and on the significance of popular opinion for criminal law reform more generally, see generally *id.*

272. Consider also Anders Walker's suggestion that Wechsler may have concluded that, “satisfying the retributive desires of average people was itself an important goal of the criminal process.” *Id.* at 1028.

was he willing to fortify the institution of capital punishment by endorsing it.²⁷³ Instead, he and the Institute took the passive step of refusing to take a position on the merits of capital punishment while providing a bracketed death penalty provision.²⁷⁴

3. Incest

If the rejection of strict liability represented the triumph of principle over prudence, and the bracketed death penalty provision represented a stalemate between principle and prudence, the Code's inclusion of incest as a crime represented a clear victory for prudence over principle.²⁷⁵ Wechsler's discussion of adult, consensual incest in the Model Penal Code Commentary indicated that he found no persuasive reason for its criminalization.²⁷⁶ He noted the crime's provenance in religious prohibitions against inter-family sexual relations, but also pointed out that these prohibitions took various forms in different religions.²⁷⁷ In any event, Wechsler certainly never argued that religious views on their own ought to determine questions of secular criminal law.²⁷⁸ Turning to more utilitarian arguments against incest, Wechsler rejected the view that criminal prohibitions were necessary or justifiable in reference to higher incidence of genetic defects in the offspring of incestuous relations.²⁷⁹ The latest genetic science, he argued, suggested that incest did not increase the chance of genetic defects, and in any event, non-incestuous (exogamous) relations also had the negative effect of spreading genetic defects more widely in the general population.²⁸⁰ In fact, Wechsler pointed out that "inbreeding" had often been used to good effect in animal husbandry.²⁸¹ Nevertheless, despite the absence of secular reasons for criminalizing adult, consensual incest, Wechsler argued that such criminal prohibitions should be included in the Code because of the depth and unanimity of popular feeling against incest.²⁸² Wechsler's prudential concern with popular support was made explicit when he wrote in defense of this position, "penal law will neither be accepted nor respected, if it does not seek to repress that which is universally regarded by the community as misbehavior."²⁸³ This rationale points not to any principle of criminalization—whether

273. There is thus considerable irony in the fact that this optional death penalty provision, lacking any conviction on the part of its drafters, ended up being hugely influential and set the framework for all capital punishment statutes upheld by the Supreme Court after Furman. See Robinson & Dubber, *supra* note 137, at 325.

274. The American Law Institute's decision here calls to mind Bickel's promotion of the "passive virtues" or judicial avoidance of value-laden disputes on jurisdictional grounds. Alexander Bickel, *The Supreme Court 1960 Term Forward: The Passive Virtues*, 75 HARV. L. REV. 40, 45 (1961). The difference, of course, is that the American Law Institute was not a court and chose to take on for itself the task of proposing a model penal code.

275. MPC § 230.2. The Code's treatment of incest is also revealing about Wechsler's view of social science's role in legal reform. See discussion *infra* Part IV.E.

276. MPC Tentative Draft No. 4, *supra* note 256, § 207.3 cmt. at 231.

277. *Id.*

278. See, e.g., MPC § 207.11 cmt. 1 (Tent. Draft No. 9 1959) ("Criminal law. . . cannot undertake or pretend to draw the line where religion or morals would draw it.").

279. *Id.*

280. *Id.* at 232.

281. *Id.*

282. MPC § 207.3, *supra* note 256, at cmt. 233. It should be noted that the Code classified incest as the lowest (third) degree of felony. *Id.*

283. *Id.*

of utility, harm, or retribution—nor to any genuinely live debate about the merits of criminalizing incest, but simply to the brute fact-of-the-matter regarding consensus norms and expectations regarding the criminal law.²⁸⁴ Wechsler was uninterested in advocating for unachievable provisions of law.²⁸⁵

There was also something about the unanimity of popular support for incest prohibitions that gave Wechsler pause about his own more secular and rational approach to the subject. It was not simply that such unanimity made abolition of incest crimes politically implausible; it was that the unanimity itself suggested (without proving) that there was some inarticulable merit in the popular position, perhaps some tacit wisdom present in the populace but unfathomable from a scientific or rational perspective.²⁸⁶ Wechsler liked to quote Holmes' dictum that the law "has the final title to respect that it exists, that it is not a Hegelian dream, but part of the lives of men."²⁸⁷ He may also have had in mind Holmes' observation that the "law can ask no better justification than the deepest instincts of man."²⁸⁸ In the end, Wechsler's inclusion of a criminal prohibition on adult, consensual incest reflected both his unwillingness to take on impossible causes and his respect for consensus views even when he could not find a rational basis for them.

Where communal norms were as deeply and as widely held as those against incest, Wechsler believed, not even systematic reformers drafting a model code ought to recommend changing them.²⁸⁹ But where communal norms were neither so deep nor so wide, the opportunity for principled reform should be seized: hence, the Model Penal Code's exclusion of the crimes of fornication and adultery. And, even more daringly for

284. Even looking back decades later, Wechsler spoke of the incest provision in terms suggesting his principled opposition:

The criminal law in our culture has always taken a dim view of sexual intimacy within particular degrees of consanguinity—essentially the incest problem. Well, why? I mean why should that type of conduct, if it isn't otherwise criminal, if it isn't forcible or doesn't involve corruption of youth, minors and so on, why should that type of bodily activity be criminalized?

Oral History, *supra* note 5, at 870. Still, he noted that despite the lack of secular, rational reasons for the incest prohibitions, "our culture" is more comfortable with its criminalization. *Id.*

285. Cf. Oliver Wendell Holmes, Jr., *The Path of the Law*, 10 HARV. L. REV. 457, 460 (1897) ("I once heard the late Professor Agassiz say that a German population would rise if you added two cents to the price of a glass of beer. A statute in such a case would be empty words, not because it was wrong, but because it could not be enforced.").

286. See MICHAEL POLANYI, *THE TACIT DIMENSION* 4-5 (1966). Charles Barzun has uncovered correspondence between Michael Polanyi and Lon Fuller during the late 1950s. See Barzun, *supra* note 10, at 51. Though such correspondence does not prove a direct link between Polanyi and Wechsler, there was a fairly robust line of communication between Fuller, Hart, and Wechsler during this period. There was apparently an invitation to Michael Polanyi to give a talk at the Legal Philosophy Discussion Group that Hart, Fuller, and Wechsler all attended, although no proof that Polanyi actually did so. *Id.*

287. Holmes, *supra* note 285, at 473, quoted in *Criminal Law and Legal Scholarship*, *supra* note 29, at 20. The tension I am describing here between Wechsler's simultaneous commitment to principle and prudence is akin to Holmes' own dichotomy of logic and experience: On the one hand, "The life of the law has not been logic: it has been experience," O.W. HOLMES, JR., *THE COMMON LAW* 1 (1881), but on the other hand, "it is revolting to have no better reason for a rule of law than that so it was laid down in the time of Henry IV." Holmes, *supra* note 285, at 469.

288. Holmes, *supra* note 285, at 477.

289. See, e.g., MPC, § 207.11 cmt. 1 (Tentative Draft No. 9, 1959) ("To use the criminal law against a substantial body of decent opinion. . . is contrary to our basic traditions. Accordingly, . . . criminal punishment must be reserved for behavior that falls below standards generally agreed to be substantially the entire community.").

its era, the Model Penal Code took a strong position against the criminalization of consensual adult homosexual relations.²⁹⁰ So the inclusion of the incest provision, without any firm principled rationale, should not mislead us into thinking that Wechsler's devotion to principle and reason were set aside at the first sign of popular opposition to reform. Even if some critics would have made more radical doctrinal choices, the Code was no mere restatement of the criminal law or a simple collation of majority expectations; it was thoroughly reformist in its general part, in its overall systematic structure, in its sentencing provisions, and in many of the particular provisions defining specific crimes.

Thus, we can see that Wechsler's commitment to both principled and prudential reform revealed itself across a number of different legal-policy questions in the drafting of the Code, and the ultimate resolution of that tension differed from issue to issue. In some cases, principle came to the fore, while in others prudence won out; in the death penalty case, one is tempted to say that they fought to a draw. In his review of the 1962 Official Draft of the Code, Herbert Packer famously remarked that "the dominant tone of the Code is one of principled pragmatism"²⁹¹—a slightly paradoxical phrase that captures well the tension I have been describing. Packer meant it as a term of great commendation, as he too was sympathetic to the delicate balance criminal justice reformers need to strike between "fidelity to principle" and a "spirit . . . of accommodation" to the existing institutional framework and popular expectations of criminal justice.²⁹² Indeed, one might well describe the central tension—and the central achievement—of the Model Penal Code as its careful advancement of ideals on the very messy slate of mid-twentieth-century American criminal law.²⁹³

A final aspect of Wechsler's prudence was his humility regarding the effects of criminal law reform on the actual incidence of crime or anti-social behavior. This was a theme Wechsler first sounded back in 1937 in his *Caveat on Crime Control*—the public should not expect, nor should officials promise, immediate or dramatic improvements in public order on account of changes in substantive or procedural criminal law, for the criminal law itself is a severely limited means of insuring public order.²⁹⁴ For Wechsler, making the criminal law and its administration more just and more workable—bringing the ends and means of the law in better accord—was a worthy project in its own right.²⁹⁵ But, Wechsler continued to insist during the drafting of the Code, legal reform was not a magic bullet that could solve the "crime problem" of the public imagination.²⁹⁶ He cautioned

290. *Id.* § 207.5 cmt. 1 (Tentative Draft No. 4, 1955) (explaining the decision to reject provisions criminalizing consensual adult sodomy and other sexual practices).

291. Packer, *supra* note 262, at 594.

292. *Id.* Packer even echoed the Hart & Sacks materials in noting that the Model Penal Code reflected the wisdom that "in law one does not write on a clean slate." *Id.*; cf. HART AND SACKS, *supra* note 14, at 111 ("The social scientist, therefore, never writes on a clean slate . . . he is dealing with a science of 'Where do we go from here?').

293. With typical understatement, Wechsler himself said, when asked to account for the success of the Code, "we came up with what seemed like fair and workable solutions, rather than a document that would have seemed to the average legislator to be way off beat." *Oral History*, *supra* note 5, at 919. Fairness and workability, principled decision-making and prudential consideration—these were the hallmarks of Wechsler's Code.

294. See *Caveat*, *supra* note 35, 637.

295. MICHAEL & WECHSLER, *supra* note 100, at 6 (identifying the "ordering of means and ends" as the key to solving the basic problem of the criminal law).

296. See *Codification of Criminal Law*, *supra* note 28, at 1432 (1968) (emphasizing that the Code promised "no major breakthrough" or "extraordinary remedies to meet the mounting incidence of many common crimes

that, when it comes to criminal reform, the “public views the situation generally with ambivalent emotions, sometimes demanding results that no system can attain, sometimes expressing apathy that is a threat to the supremacy of law.”²⁹⁷ By the 1950s, of course, the crime wave of the Prohibition Era was already a thing of the past, and criminal justice was not the high-profile object of popular and political interest it would become again in the late 1960s. Still, Wechsler was careful to insist at the very outset of the project that one of the benefits of an intensive reexamination of criminal law would be that it “may further education with respect to the intrinsic limitations of the penal law, as distinguished from other and less oppressive, more constructive methods of protection and control.”²⁹⁸ In other words, far from touting the great social benefits of a rationally reconstructed criminal code—as one might expect in an article meant to “fortify professional support” for the Model Penal Code project—Wechsler in fact suggested that the better we understand criminal law, the more we will appreciate the limits of what it can accomplish.²⁹⁹

In an interview conducted toward the end of his teaching career, Wechsler went so far as to suggest that the net benefit of the entire criminal justice system might simply be in checking and moderating unorganized, private vengeance. Asked by the interviewer to reflect on the Nuremberg Tribunals, Wechsler told a few stories of his experiences as chief technical adviser to the American judges and then commented as follows:

[T]he principal function of Nuremberg and supplementary trials was not to administer punishment, but to influence its withholding, its postponement, while passions cooled, and to give reason a chance to be operative in determining who deserved to be punished. If the Allied powers had simply washed their hands of this question, the liberation governments on the one hand, and the masses in Germany and Poland on the other, coupled with the liberated prisoners—what they would have done is almost as unthinkable as what the Nazis did.³⁰⁰

This is not such an abstruse explanation. If we ask, you know, “when does the criminal law do more good than harm, even domestically,” the best answer is not going to be terribly different.³⁰¹

The remark was off the cuff, coming as it did during his reminiscences on the Nuremberg Tribunal, and it may not represent Wechsler’s most considered judgment. But it is nevertheless revealing of the relatively low expectations that American criminal law’s

reported generally in the country”).

297. *Some Observations*, *supra* note 28, at 322.

298. *Challenge*, *supra* note 22, at 1133.

299. Leon Radzinowicz, *Herbert Wechsler’s Role in the Development of American Criminal Law and Penal Policy*, 69 VA. L. REV. 1, 7 (1983) (listing among Wechsler’s principles the proposition that “the criminal law cannot achieve [its] object in isolation” from other areas of law and policy). Both Wechsler and Hart took a decidedly sober view of what even the best system of criminal justice could accomplish with respect to reducing breaches of public order. Hart wrote that “the practical fact must be faced that many crimes . . . are undeterrable” and described “the frequent seeming futility of the criminal law when it is considered simply as a means of preventing undesired behavior.” Hart, *supra* note 204, at 409.

300. *Oral History*, *supra* note 5, at 913.

301. *Id.* at 914.

greatest codifier had for the law he did so much to ameliorate. Of course, Wechsler insisted on high standards in all aspects of the criminal justice system and devoted much of his professional energy to making the criminal law the best it could reasonably be. But he consistently downplayed the capability of criminal law to achieve larger social ends and cautioned against tasking the criminal law with work that it could not bear.³⁰²

E. Criminal Law and Social Science

The approach that Wechsler took to social science in the drafting of the Code was largely consistent with his attitude toward social science in the 1930s: openness to insights to be gained from relevant social science research coupled with a strong defense of the independent sphere of legal judgment against imperialist assaults from outside the profession.³⁰³ But Wechsler's skepticism of social science and his confidence in the practical wisdom of legal professionals were markedly greater in the 1950s than they had been before the War. In general, the Legal Process authors were less naïve about, and less infatuated with, the social sciences than the Realists had been in the 1920s and early 1930s.³⁰⁴

Still, in laying out the “challenge of a Model Penal Code” in 1952, Wechsler identified “psychological and scientific criticism” of the existing criminal law as a seminal challenge to be faced by the drafters.³⁰⁵ Indeed, he wrote, “in no other area of law have legal purposes and methods been subjected to a more sustained and fundamental criticism emanating from without the legal group—especially the psychological and social sciences—but buttressed also from within.”³⁰⁶ According to Wechsler, among the bill of particulars leveled against the criminal law from psychology was that “the law . . . employs unsound psychological premises such as ‘freedom of the will’ or the belief that punishment deters” and that, even where it turns to psychiatrists for help, “it poses questions that a scientist can neither regard as meaningful nor relevant nor answer on his own scientific terms.”³⁰⁷ Wechsler was clear that in stating such criticisms, he was not endorsing them.³⁰⁸ Rather, he explained that the Model Penal Code project would “explore the merits of such criticism” and that “[w]here the critique is valid, law will gain from recognition of its merit.”³⁰⁹ Wechsler, in fact, recruited top psychiatrists to be consultants and advisers on the project and consistently praised legal reform as an “ideal setting for collaborative work

302. Wechsler's humility was genuine, but he was also aware of the “rhetorical effectiveness of understatement in this world, as against overstatement.” *Id.* at 919.

303. Wechsler's skepticism toward social scientific proposals for criminal law is also evidence of Wechsler's prudence insofar as it was a refusal to let theoretical knowledge (science) dictate answers to issues better left to prudential judgment, which takes in a wider array of concerns. *See* discussion *infra* Part IV.E.

304. *See, e.g.*, DUXBURY, *supra* note 111, at 209 (noting the “casual attitude” of Legal Process authors toward social science in comparison to the more enthusiastic embrace of social science by Legal Realists); Barzun, *supra* note 10, at 48 (discussing the view of Henry Hart and Albert Sacks regarding the relationship of law and social science).

305. *Challenge*, *supra* note 22, at 1102.

306. *Id.*

307. *Id.* at 1103.

308. *See id.*

309. *Id.*

by lawyers and the representatives of other disciplines and occupations concerned with the problems of penal law, with crime and its prevention.”³¹⁰

This openness to criticism from non-legal social science was not disingenuous—Wechsler was genuinely interested in the social science of crime and thought it could be helpful in the drafting process—but he tipped his hat regarding his true disposition at the very end of the *Challenge of a Model Penal Code* essay. “[I]f, and insofar as, candid study leads to the conclusion that social judgment reflected in penal law rest on grounds unlikely to be touched by changes in the state of scientific knowledge,” he wrote “there is important gain in recognizing this to be the case.”³¹¹ In other words, Wechsler was already asserting at the very beginning of the Code project that criminal law was unlikely to be greatly affected by any findings in—or criticisms emanating from—social sciences outside the law.³¹² Indeed, Wechsler explicitly rejected the view, voiced by Jerome Hall among others, that the Model Penal Code project should be delayed until social science findings related to criminal law were more firmly established.³¹³ Granting that social science may yet produce “significant advance[s] . . . concerning both the causes and control of human conduct,” Wechsler argued that work on the Code should not wait for any such breakthroughs.³¹⁴ To the contrary, he argued, “only by systematic study of the penal law . . . can we appraise the relevancy of behavior science in this field.”³¹⁵ The value of social science for legal reform, he asserted, can be gauged only through grappling with “concrete legislative problems,”³¹⁶ it cannot be worked out beforehand.³¹⁷ Wechsler’s conclusion was that legal professionals have to first do the spadework of systematic legal reform to see whether or where insights from outside disciplines might be useful; social science could not itself set the agenda of such reform.³¹⁸

310. *Legal Scholarship and Criminal Law*, *supra* note 29, at 21.

311. *Challenge*, *supra* note 22, at 1133.

312. Indeed, one gets the sense that Wechsler hoped the Code project would tamp down a good deal of the social scientific criticism of criminal law. At the same time, Wechsler also noted that, “there is every reason to believe that proper canvas of the fruits of special medical and psychological knowledge will have important impact on the law.” *Id.* at 1133. How to reconcile these two statements? Wechsler thoroughly rejected the radical criticism of criminal law—e.g., the idea that criminals were merely sick or that their actions were entirely socially determined. *See, e.g.*, Herbert Wechsler, *The Criteria of Criminal Responsibility*, 22 U. CHI. L. REV. 367, 375 (1955) (condemning as “a kind of psychiatric crypto-ethics” those who “disavow the basic premises about the penal law” such as condemnation and punishment). But he did believe that social science expertise could be illuminating—not necessarily determinative—on particular doctrinal questions such as criminal insanity and on methods of post-conviction treatment.

313. *See* Jerome Hall, *The Proposal to Prepare a Model Penal Code*, 4 J. LEGAL STUD. 91 (1951) (arguing for a model penal code based on, and to be drafted after, extensive scientific and empirical research).

314. *Challenge*, *supra* note 22, at 1132.

315. *Id.* at 1132-33.

316. *Id.* at 1133.

317. If it turns out that important legal questions really ought to turn on knowledge from psychiatry or sociology, Wechsler wrote, then the law should be drafted with an eye toward assimilating such knowledge as soon as it becomes available. *Id.* at 1132.

318. Wechsler’s emphasis on the primacy of legal, as opposed to social scientific, articulation of the issues of criminal law recalls this discussion by Karl Llewellyn from 1949:

When I was younger I used to hear smugish assertions among my sociological friends, such as: ‘I take the sociological, not the legal, approach to crime’; and I suspect an inquiring reporter could still hear much of the same (perhaps with ‘psychiatric’ often substituted for ‘sociological’)—though it is surely somewhat obvious that when you take ‘the legal’ out, you also take out ‘crime’.

Karl Llewellyn, *Law and the Social Sciences—Especially Sociology*, 62 HARV. L. REV. 1286, 1287 (1949)

Wechsler's attitude toward social science during the Model Penal Code project had significant affinity with the developing views of Henry Hart and Albert Sacks.³¹⁹ Hart and Sacks argued that social science—including law as a discipline of study—could not “content itself simply with the observation and analysis of human behavior . . . because, however informative, the results of these are bound to be inconclusive.”³²⁰ Instead, because its subjects are human beings and human institutions with all their histories and complex aims and wants, social science “must depend heavily upon ethical and hence disputable considerations.”³²¹ At bottom, “the science of society is essentially a judgmental, or prudential, science. . . . [It] must depend ultimately upon *judgment*—upon judgment informed by experience and by all the objective data that can feasibly be assembled, but upon judgment nevertheless.”³²² The Hart and Sacks' position was, first and foremost, a rejection of the idea that legal knowledge—knowledge of legal processes—could be derived from merely empirical means, as some of the more scientific Realists had suggested. Recall that Wechsler too had always rejected the more radical social science agenda of Herman Oliphant at Columbia, on the grounds that empirical social science could not wholly displace other modes of studying the law.³²³ However, the Hart and Sacks position was novel insofar as it suggested that value-free empiricism was also a deficient methodology for (non-legal) social sciences. As Charles Barzun put it, Hart and Sacks “argued that the other social sciences, were, or ought to be, more like law—that is, more straightforwardly evaluative in orientation.”³²⁴

Wechsler, to be sure, did not explicitly follow Hart and Sacks in making broad and controversial pronouncements about the methodology of non-legal social sciences. However, Wechsler's resolute defense of *legal* judgment for *legal* decisions reflected a very similar view that lawyers had a craft sense for the matching of ends and means in legal institutions, which non-legal social scientists were lacking. The point was not that lawyers should ignore the fruits of social science research—as Wechsler consistently said “you try to get all the information you can get”³²⁵—it was that determining how information coalesced into useful descriptions of human behavior was not itself an empirical technique, but rather one that involved judgment (prudence). For legal questions, Wechsler held, those with legal expertise were uniquely competent in making such judgments. In any event, Wechsler had very little confidence that psychiatrists or sociologists could do a better job than lawyers in describing legal phenomena, much less in reforming law.³²⁶

(quoted in Hart, *supra* note 204, at 403 n.5).

319. Hart and Sacks were, in turn, significantly influenced by Lon Fuller's view of social science. The best account of the Legal Process view of social science can be found in Barzun, *supra* note 10, at 33-35.

320. HART & SACKS, *supra* note 14, at 110. This was, in part, a criticism of certain empiricist tendencies in Legal Realist thinking—e.g., the divorce of the “is” and “ought” of law. See, e.g., Llewellyn, *supra* note 58, at 1236 (listing the “temporary divorce of Is and Ought for purposes of study” among the elements of Legal Realism”).

321. HART & SACKS, *supra* note 14, at 110.

322. *Id.* at 107, 110.

323. See *Oral History*, *supra* note 5, at 871-72 (criticizing those empirical Realists who “seemed to think that what was needed was more accurate reportage” and praising as “vital and significant” those Realists who focused on “better normative determination”).

324. Barzun, *supra* note 10, at 48.

325. *Oral History*, *supra* note 5, at 870.

326. See Leonard, *supra* note 38, at 812 (“Wechsler always harbored a good deal more skepticism of the

This view not only evinced a certain skepticism of empirically oriented social science, it also signaled a return to confidence in the elite legal academy in the post-War years. If legal academics of the late 1920s were enthralled with the burgeoning fields of social science, differing only on how much law had to learn from other disciplines,³²⁷ the Legal Process authors and Wechsler himself took a much more self-assured posture toward the other human sciences. As the saying went, they were happy to have social science “on tap,” but not “on top.”³²⁸

The clearest example of Wechsler’s cautious attitude toward social science during the Model Penal Code project was his handling of the debate over the legal responsibility provisions of the Code, particularly the provision allowing for acquittal on the ground of mental disease. The venerable *M’Naghten* standard, dating back to 1843, had set the legal standard for the insanity defense for over a century and was still in use, sometimes in conjunction with the so-called “irresistible impulse” test, in virtually every American jurisdiction at the time the Model Penal Code was drafted. However, the *M’Naghten* rule faced increasingly fierce criticism from many psychiatrists and others on the grounds that it was “based on an entirely obsolete and misleading conception of the nature of insanity.”³²⁹ In 1954, in *Durham v. United States*, the D.C. Circuit rejected the *M’Naghten* and irresistible impulse standards and crafted a different test that it declared in better accord with “the science of psychiatry.”³³⁰ For our purposes, the content of the different rules is not of great import.³³¹ The significant factor is that, as the Code drafters were set to tackle the problem of criminal responsibility and the insanity defense, the battle lines has been drawn between the traditional and still dominant legal standard of *M’Naghten* and the newer *Durham* test largely promoted by the psychiatric profession. Choosing one or navigating between the two was one of the most sensitive tasks Wechsler faced in drafting the Model Penal Code.³³²

In addition to Wechsler, who maintained ultimate drafting control, those primarily involved in the drafting of the Model Penal Code’s responsibility provisions were three

scientists’ powers than did many other reformers.”).

327. See discussion *supra* notes 52-59 and accompanying discussion.

328. See W. Wesley Pue, *Locating Hurst*, 18 LAW & HIST. REV. 187, 189 (2000) (attributing James Willard Hurst the “wish to limit the role of social science to service ‘on tap’ for lawyers but never ‘on top’”). Markus Dubber has developed the thesis that Wechsler and his fellow Code drafters naively accepted the findings and authority of social scientists and endeavored to fix the legal system pursuant to the ends and means dictated by social scientists. See, e.g., Dubber, *supra* note 4, at 79-80. I am arguing *against* that view of Wechsler’s attitude toward social science.

329. Royal Commission on Capital Punishment, 1949-53 Report at 30 n.80 (1953) (recommending a change away from the *M’Naghten* standard in England).

330. *Durham v. U.S.*, 214 F.2d 862, 871 (D.C. Cir. 1954) (internal quotes omitted) (Bazelon, J. writing for the majority).

331. For a clear description of the different tests, see WAYNE LAFAVE, CRIMINAL LAW §§7.2-7.4 (4th ed. 2003).

332. MPC Tentative Draft No. 4, *supra* note 256, § 4.01, at 156 (“No problem in the drafting of a penal code presents larger intrinsic difficulty than that of determining when individuals whose conduct would otherwise be criminal ought to be exculpated on the ground that they were suffering from a mental disease or defect when they acted as they did.”); accord Herbert Wechsler, *Insanity As A Defense: Panel Discussion*, 37 F.R.D. 365, 383 (1965) (noting that the articulation of the insanity defense was “was one of the hardest problems that we [drafters] had to face”).

well-known judges and three eminent psychiatrists.³³³ It was clear from the beginning that the psychiatrists would not endorse the *M'Naghten* standard, at least not in its traditional articulation, and the lawyers on the panel agreed that, at minimum, the *M'Naghten* language was archaic and its test too narrowly conceived. Representing the predominant view of their profession, the three psychiatrists, led by Dr. Manfred Guttmacher, endorsed the D.C. Circuit's *Durham* test.³³⁴ However, Wechsler and the lawyers on the panel were unpersuaded. As they began the drafting proceedings, both Wechsler and Dr. Guttmacher, an acknowledged "leader in the field of forensic psychiatry,"³³⁵ contributed short articles to a symposium on the insanity defense published in the University of Chicago Law Review. Guttmacher's article celebrated the *Durham* opinion and explained why the psychiatric profession was so supportive of it.³³⁶ Wechsler, on the other hand, used his short piece to set out his primary criticisms of the *Durham* test and to preview an early version of his preferred articulation of the rule.³³⁷

At the same time they were drafting their dueling articles for the symposium, Wechsler and Guttmacher were also exchanging an extraordinary series of letters on the same topic.³³⁸ The letters, respectful in tone throughout, reveal both Wechsler's attempt to understand the issue of irresponsibility from the point of view of a psychiatrist and, eventually, his frustration with the psychiatric position as represented by Guttmacher. Guttmacher supported the *Durham* test largely because it allowed psychiatrists to use their medical expertise to make a psychiatric determination of the ultimate question of responsibility.³³⁹ Wechsler, for his part, resisted the conflation of a psychiatric diagnosis with the legal test for responsibility. Noting that they had finally arrived at "the heart of the problem,"³⁴⁰ Wechsler wrote that Guttmacher's proposal would "either convert the issue of punishability into a psychiatric matter . . . or else the psychiatric judge must undertake to weigh all the non-psychiatric values that bear on whether a particular defendant should be punished."³⁴¹ Wechsler, of course, rejected both possibilities and insisted that the "final judgment" regarding legal responsibility must be with the court "and the final criterion for the tribunal is the criterion of justice."³⁴²

333. The judges were Learned Hand, John J. Parker, and Floyd Thompson. See Wechsler, *Insanity As A Defense: Panel Discussion*, 37 F.R.D. 365, 383 (1965). The psychiatrists were Manfred Guttmacher, Winfred Overholser, and Lawrence Freedman. On the three psychiatrists, see generally Deborah W. Denno, *Criminal Law in a Post-Freudian World*, 2005 U. ILL. L. REV. 601, 623-626 (2005) (describing Guttmacher, Overholser, and Freedman as Freudians and providing more detail on their professional backgrounds).

334. LAFAVE, *supra* note 331, at 398.

335. Denno, *supra* note 333, at 625.

336. Alan Guttmacher, *The Psychiatrist as an Expert Witness*, 22 U. CHI. L. REV. 325, 329 (1955) ("For the psychiatrist, the chief merit of the new rule is that it permits him to present his testimony in regard to the mental condition of the accused in concepts that are familiar to him and that actually exist in mental life."). Guttmacher also noted as "encouraging" the fact that the Model Penal Code project had sought out "the advice of psychiatric consultants" and had made "a wide study of the technical medical literature" regarding mental health. *Id.* at 330.

337. Wechsler, *supra* note 303.

338. MPC Tentative Draft No. 4, *supra* note 256, § 4.01 app. C, at 182-92.

339. *Id.* at 188 (praising a test that "will have the tendency to make the psychiatrist, in large measure, the arbiter").

340. *Id.* at 189.

341. *Id.* at 191.

342. *Id.* Wechsler also admonished psychiatrists for seeking a legal standard of irresponsibility cast in psychiatric terms while, at the same time, begging off from any responsibility for the ultimate legal disposition of cases. The major point of the entire G.A.P. [Group for the Advancement of Psychiatry] report, as I read it, is that the

As Wechsler put it in an address to the New York Society for Clinical Psychiatry a few years later, the question of responsibility does *not* turn on “whether a person who has performed an otherwise criminal act suffers in some meaningful sense from a mental disorder or defect any more than the question of responsibility would turn on whether he suffers from a physical disease.”³⁴³ Instead of this purely medical determination, Wechsler urged in good Legal Process terminology, the standard must “differentiate between cases which, in the division of function our society and culture have established, belong exclusively to mental health and those which may be viewed as cases for correction.”³⁴⁴ In short, for Wechsler, the psychiatrist had an important role to play in the process of determining legal responsibility (e.g., offering an expert opinion as to the existence of a mental disease and its likely symptoms). However, the ultimate determination of whether legal responsibility should lie is one that also involves non-psychiatric values—“the criterion of justice”³⁴⁵—which are outside the expertise of the psychiatrist and more clearly within the institutional competence of a court of law. “The legal standard of responsibility,” Wechsler wrote,

is not a proposition in psychiatry. It is a moral and juristic concept drawn from deep ideas of justice derived from the ancient world. . . . Changes in psychiatric knowledge may have bearing on that issue, . . . but psychiatric knowledge can not answer such a problem in itself.³⁴⁶

Wechsler’s approach to the responsibility provisions of the Model Penal Code was a microcosm of his attitude toward non-legal social science: In their areas of expertise, the social sciences have an important role to play in helping legal professionals make better legal and policy decisions, but legal-policy questions are not reducible to scientific or empirical questions, and legal professionals must ultimately rely on their own prudential judgment in navigating the legal process.³⁴⁷ Wechsler’s interest in the insights of social sciences was genuinely high; indeed, he began the Model Penal Code project by promising that “[t]o 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.”³⁴⁸ However, like his fellow Legal Process authors, Hart and Sacks, Wechsler’s

psychiatrist wishes to be disengaged from responsibility for the judgment and feels that he is not so disengaged even under the present system. How then can we devise a system under which he will take more rather than less responsibility? How can he take responsibility for a final judgment and still proceed in merely psychiatric terms?

343. Herbert Wechsler, *Law, Morals, and Psychiatry*, 18 COLUM. L. SCH. NEWS, March 4, 1959, at 3.

344. *Id.* Wechsler’s speech generally praised the working relationship between lawyers and psychiatrists, especially their joint work on the Model Penal Code. But Wechsler’s frustration at the psychiatric profession revealed itself in one small portion of his speech where he launched a brief but scathing attack on the failures of the psychiatric profession—but only, he assured his listeners, to show how little value there is in criticizing something without offering proposals for improvement. *Id.* at 3. His explicit point was that psychiatrists who criticize the law have a responsibility to make ameliorative proposals. *Id.* His implicit point, on my interpretation, was to show how easy it would be to denigrate the psychiatric critic’s own profession.

345. MPC Tentative Draft No. 4, *supra* note 256, § 4.01 app. C, at 191.

346. *Thoughtful Code*, *supra* note 24, at 530.

347. The Model Penal Code provision on responsibility ultimately reflected Wechsler’s favored approach, not that of the psychiatrists. MPC Tentative Draft No. 4, *supra* note 256, § 4.01.

348. *Challenge*, *supra* note 22, at 1130.

interest in non-legal social science was driven by a larger goal of helping officials make good legal decisions within their discretion, and he thoroughly resisted any imperialist attempt to reduce legal questions to those of another field.³⁴⁹ The study of law, for the Legal Process authors, was a prudential discipline, not a derivative one.

V. CONCLUDING THOUGHTS

In my account of Herbert Wechsler's engagement with the criminal law up through the early 1960s, I have argued that Wechsler's Model Penal Code work reflected many of the signature themes of Legal Process jurisprudence. In this concluding section, I will lay out briefly a few implications suggested by this account for both our understanding of Legal Process theory and for our consideration of the Model Penal Code.³⁵⁰

There is already a considerable literature discussing the relationship between "classic" Legal Realism of the pre-War years and Legal Process theory of the post-War years. Clearly, there are both continuities and discontinuities between these two bodies of thought,³⁵¹ and given the diversity of viewpoints within each approach to law, there is no sense in which the study of one theorist's work can decisively answer all our questions regarding the relationship of the two approaches. However, Wechsler's work on criminal law certainly militates toward a view that emphasizes the similarities and links between the two movements, rather than any gaps between them. As Wechsler experienced it, the shift in emphasis that we call Legal Process theory was not a "response to Realism"; it was simply one post-War elaboration of the broad Realist outlook Wechsler identified with in the 1930s.³⁵² Wechsler always maintained that his own guiding principles never changed, even if the focus of his interest shifted over the course of his long and varied career. Those principles were consensus articulations of 1930s Realism both in its critical aspects—rejection of "the concept of the common law as a closed system" and disdain for the pre-New Deal Supreme Court—and in its constructive aspects: promotion of statutory and regulatory reforms and a dedication to understanding law beyond "ordering of rules and doctrines."³⁵³ Wechsler's principles were, of course, just as compatible with the 1950s era Legal Process theory he did so much to define as they were with 1930s era Legal Realism.³⁵⁴

349. My use of the term "imperialism" here in the context of disciplinary boundary-crossing is indebted to J.M. Balkin, *Interdisciplinarity as Colonization*, 53 WASH. & LEE L. REV. 949, 963 (1996).

350. One may, of course, accept my historical account without finding persuasive the claims made in this section.

351. Samuel Moyn, *Truth and Triviality: Christianity, Natural Law, and Human Rights*, The Immanent Frame, <http://blogs.ssrc.org/tif/2015/07/28/truth-and-triviality-christianity-natural-law-and-human-rights/> ("For every phenomenon there is an indefinite, if not infinite, number of both continuities and discontinuities with what came before. To assert continuity, therefore, could not possibly exclude discontinuity altogether—or vice versa. It is only to assert *what truth deserves our attention* in the mix of overwhelmingly trivial relationships. The only arguments that matter, therefore, are why continuities or discontinuities are important, or interesting, or both.")

352. A more narrowly circumscribed version of Realism—e.g., the social science empiricism of Herman Oliphant or the philosophically more ambitious Realism of Felix Cohen—would certainly appear more at odds with Legal Process theory.

353. *Oral History*, *supra* note 5, at 864.

354. It is notable that Karl Llewellyn, the quintessential Legal Realist, might just as well be defined as a Legal Process author. Ackerman included Llewellyn among his list of Legal Process authors in the article in which Ackerman coined the term Legal Process School. Ackerman, *supra* note 3, at 128 n.26. Note, too, that even in

Of course, Realism and Process theory both contained various streams within themselves, and one could easily choose definitions for both approaches that set them at greater odds with one another. Conventional accounts of American jurisprudential history tend to focus on the picture of adjudication painted by each theory, and when it comes to theories of adjudication, the discontinuities between Realism and Process theory are more pronounced.³⁵⁵ However, the Legal Process view of adjudication constituted only one star in the Legal Process constellation of ideas. Legal Process authors took a much more holistic view of the legal system and understood litigation as only one and not necessarily the most important aspect of the legal process writ large. Legal Process authors, who had experienced the explosion of legislation and regulation that was the New Deal, turned their attention to the inter-related decisionmaking processes and structures of legislative, regulatory, and administrative bodies, in addition to those of the courts. Their interest in the allocation of discretion across the legal system was a direct result of this turn from an exclusive attentiveness to the courts to a more system-wide vision. Working in a field of law that necessarily implicated a variety of public institutions, Wechsler perhaps intuited this change in purview earlier than legal academics working in civil fields. And thus, Legal Process themes that resonated beyond adjudication—e.g., an interest in the allocation of decision-making power, value pluralism, and the relationship between law and social science—came to the fore in Wechsler’s work on criminal law even in the pre-War years. Pre-War Wechsler was, we might say, Legal Process *avant la lettre*. Wechsler himself never focused on jurisprudential labels, and surely there is much artificiality in our attempt to compartmentalize thinkers into clear jurisprudential schools. But, insofar as Legal Realism and Legal Process theory denote identifiable approaches to law (and I think they do), Wechsler’s work on criminal law fits easily within both approaches and thus suggests significant continuities between the two.

If Wechsler was slightly ahead of his cohort in his exploration of certain Legal Process themes, the trajectory of his work on criminal law after the War was emblematic of the greatly enlarged confidence of the post-War legal-academic elite. The New Deal and the unprecedented national mobilization for World War II gave American legal academics significant experience in major legislative reform efforts as well as an up-close view of the administrative capacity of government agencies. The outcome of these efforts included overwhelming victory in war and major economic expansion—in short, success.³⁵⁶ Many legal academics who once wrote as critics of the pre-New Deal Court or of

The Bramble Bush, Llewellyn described procedure as “conditioning the existence of any substantive law at all. Everything that you know of procedure you must carry into every substantive course.” LLEWELLYN, *supra* note 69, at 17-18; accord HART & SACKS, *supra* note 14, at 6 (“Knowledge of the procedures by which types of decisions are made . . . is root knowledge, with a ramifying and pervasive bearing on legal problems of every kind.”).

355. Where Realists tended to expose the indeterminacy of legal rules and reveal the nakedly political nature of judicial decisions, Legal Process authors attempted to discern the factors constraining discretion and promoted “reasoned elaboration” of decisional rationales. Nevertheless, even in the context of adjudication, the differences can be overblown. Realists and Process authors both held that judges in fact have significant discretion in deciding a wide range of cases, and authors in both traditions urged judges to articulate as best they could the real reasons animating their decisions. The Legal Process authors’ reference to reason or “neutral principles” as criteria of legal decisionmaking has misled some critics into arguing that Legal Process authors believed in a strict separation between law and politics (they did not) or that Process theory represented some kind of return to Langdellian formalism (it did not). HART & SACKS, *supra* note 14, at 143-58.

356. Lynch, *supra* note 207, at 225 (noting that the “apparent success of Roosevelt’s reformers, so many of

archaic common law doctrines had gone to Washington to serve as legal officials with significant public responsibility. Most of these academics, including Wechsler, returned to the law schools with significant policy successes under their belt and, crucially, a new sympathy for the plight of the responsible legal official. Rather than approach the law as outside critics, these academics came to see the law from the perspective of the inside official doing his or her best to make decisions within a complex system of inter-related decisionmaking. The experience of New Deal or wartime service, I am suggesting, yielded a grown-up Legal Realism cautiously optimistic about the potential of systematic legal reform and highly attuned to both the actual discretion of legal officials and the web of institutional constraints within which they operate. This mature variant of Legal Realism became Legal Process; and the Model Penal Code was one of its great products.

What is striking, therefore, about post-War Legal Process theory was not its ambitions for legal reform, but rather how modest its reform ambitions were.³⁵⁷ One might expect that victory in war and overcoming the Great Depression might have given rise to a hubristic sense of the great possibilities of systematic legal-policy innovation.³⁵⁸ In the event, Wechsler and most of the Legal Process cohort focused just as much on the *constraints* of institutional actors in the legal process as on their powers. They emphasized the legal virtue of prudence—humble practical wisdom in the face of difficult decisions implicating a plurality of values and interests. Wechsler’s rationalist ambition to systematize the major doctrines of criminal law was always balanced against his sensitivity to the inherited expectations of the public and of legal officials regarding crime and punishment, as well as the inherent limits of criminal law doctrine and the criminal justice system to achieve the ends of criminal justice. Wechsler’s own off-the-cuff suggestion that a well-functioning criminal justice system’s most worthwhile function is simply to limit the incidence of vigilantism is indicative of the striking—even jarring—humility of ambition inherent in a man who dedicated his professional life to massive legal reform.³⁵⁹ The post-war confidence that marked the Legal Process School was thus not an arrogant or naively idealistic faith in the endless ameliorative possibilities of the law, but rather a restrained self-assurance regarding the legal profession’s competence to contribute to the amelioration of social conditions through careful legal reform.³⁶⁰

them lawyers and law professors, inspired a confidence that laws could be changes and improved by earnest effort”).

357. Of course, Legal Process theory has been criticized by legal liberals and, even more so, by Critical Legal Studies authors for its “complacency” and “institutional formalism.” See Neil Duxbury, *Faith in Reason: The Process Tradition in American Jurisprudence*, 15 *CARDOZO L. REV.* 601, 667-69 (1993). The account I am giving here stresses the virtues of prudence and humility in Legal Process thought, but mounting a full-blown defense of Legal Process thinking on specific policy issues is not my project.

358. Certainly, the Legal Process thinkers have been accused of assuming that legislators and regulators were more competent and public-spirited than they actually were. *Id.* at 666.

359. See *Oral History*, *supra* note 5, at 913-14. It is meaningful, I think, that that this remark came while Wechsler was recounting his experiences in Central Europe after the war. One factor militating against grander ambitions among post-War legal elites was their acute sensitivity to the fragility of public order and the desolation of war that they saw in Europe and Asia during World War II. See, e.g., IRA KATZNELSON, *DESOLATION AND ENLIGHTENMENT: POLITICAL KNOWLEDGE AFTER TOTAL WAR, TOTALITARIANISM, AND THE HOLOCAUST* (2003). For Wechsler, as for Hart and Sacks, avoiding a “disintegrating resort to violence” was the first priority of the legal system. See HART & SACKS, *supra* note 14, at 4.

360. For a mournful account of the clash between the Legal Process attitude of prudential reform and the more ambitious and romantic vision of late 1960s student activists, see GEORGE PACKER, *BLOOD OF THE LIBERALS* 22-62 (2000).

Relatedly, the account of Wechsler's work on criminal law I have sketched emphasizes the resonance between the Legal Process approach and what we might call the prudentialist tradition in public affairs. Prudence, or *phronesis*, was one of the cardinal virtues of Ancient Greek thought, and there is a line of thinking about prudence stretching back from Plato and Aristotle to contemporary political scientists and ethicists. William Eskridge and Charles Barzun have already unearthed the roots of Legal Process thought in the American Pragmatism of William James and John Dewey, which has certain affinities with the prudentialist tradition I mean to indicate.³⁶¹ Anthony Kronman has explicitly defended another Legal Process thinker, Alexander Bickel, as a twentieth century exemplar of the "philosophy of prudence."³⁶² But the Legal Process engagement with the prudentialist tradition was not Bickel's innovation, though Bickel may have been more self-conscious about it than others. Indeed, Hart and Sacks were explicit in describing all social knowledge, including knowledge of law, as "essentially a judgmental, or prudential, science."³⁶³ The Legal Process approach to law was recognizably prudentialist in a number of senses, but primarily in its consciousness of practical wisdom as a virtue of the legal profession and its concomitant defense of legal-prudential judgment against more idealistic normative theory and against the imperialistic assaults of more empirical social sciences. Wechsler exhibited these traits in his resistance to turning law into a branch of sociology or psychiatry, his preference for achievable reform over idle idealistic posturing, and his vindication of legal judgment in the crafting of public policy.³⁶⁴ Wechsler's work on criminal law reform thus suggests that Legal Process theory more generally might be seen as part of the ancient prudentialist tradition.

Seeing the Model Penal Code as a Legal Process document also has implications for students of criminal law hoping to better understand the Code. First, as many others have pointed out, the Model Penal Code was conceived as an exercise in public policy—that is to say, in governance more generally—and is thus usefully grouped with other major public policy reforms emanating from the New Deal regulatory state.³⁶⁵ At the same time, Wechsler's Code did not, as some contend, exhibit a doctrinaire utilitarian approach to public policy. To the contrary, Wechsler and the Legal Process approach took value pluralism for granted and, indeed, took as one of its goals the sharp articulation of disputes about ends. Among the ends of any just criminal law, for Wechsler, were the protection of the innocent against state power and the promotion of civil liberties more generally.

361. Barzun, *supra* note 10, at 36–41. Eskridge and his co-author Philip Frickey explicitly engaged with the prudentialist tradition in William N. Eskridge & Philip J. Frickey, *Statutory Interpretation as Practical Reasoning*, 42 STAN. L. REV. 321 (1990). The relationship between American Pragmatism and the prudential tradition is not well theorized, but there are significant areas of similarity.

362. Kronman, *supra* note 233. In Kronman's article, Wechsler figures only as a foil for Bickel, rather than as a fellow devotee of prudence.

363. HART & SACKS, *supra* note 14, at 107.

364. Notably, Wechsler's defense of law against encroachments from other social science disciplines came before the rise of the Law & Economics movement, and it is not surprising that one hears echoes of Wechsler's defense of the prerogatives of legal discourse in some criticism of Law & Economics in the 1980s and 1990s. See, e.g., Owen M. Fiss, *The Death of Law?*, 72 CORNELL L. REV. 1, 2–8 (1986).

365. See Simon, *supra* note 217, at 262 (arguing that the Model Penal Code "paralleled the central thrust of the New Deal to preserve the essentially liberal nature of the American political order while modernizing the capacity of government").

Wechsler, like Hart, insisted on the key retributive insight that criminal conviction constitutes a social and moral condemnation of the defendant, and therefore substantive criminal laws ought to be crafted to allow for the conviction of only those who are thus blameworthy. Of course, Wechsler also believed that deterrence of future crimes, incapacitation of the undeterrable, and, when feasible, rehabilitation for treatable defendants were also among the values that any decent criminal law must reflect. Far from thinking that the drafting of the Code required merely technical expertise, Wechsler saw the drafting of the Code as a prudential task of prioritizing among multiple and often conflicting values. It is true that the Code was drafted at a time when retributivism was at a relatively low ebb—and treatmentism at its high tide—among criminal theorists. However, Wechsler was no “whatever works” consequentialist, nor was he a stalking horse for a psychiatrically derived rehabilitative ideal. He explicitly rejected what he saw as the ideological extremes in criminal theory. Criminal law, for Wechsler then, was a branch of governance, but governance was not itself a technocratic exercise in maximizing any single goal. Hence, the Code is shot through with a variety of conflicting values, varying attempts to balance them against one another, and in the commentaries, clear articulations of the clash of ideals at stake in each provision. Neither the Code nor Wechsler can be pigeonholed as programmatically committed to any single ideal or methodology.

Wechsler was also emphatic that the Code’s completion should not halt the further development of criminal law doctrine. “It would. . . be unfortunate,” he wrote, “if the enterprise should operate to ‘freeze’ existing law or practice into rigid mold without exploration of the larger underlying questions.”³⁶⁶ Given the reluctance of the legal profession to amend the Model Penal Code and its dominant place in criminal law scholarship and pedagogy,³⁶⁷ Wechsler’s call for continuous development of criminal doctrine may strike us today as a little ironic. But, especially in these days when the talk has again turned to criminal justice reform, it is good to remember that Wechsler would be among the supporters of rethinking criminal law in light of contemporary problems and “all the knowledge that can be obtained” today.³⁶⁸ Wechsler did not set out to create a technocratic, universal Code that solved all the major problems of substantive criminal law once and for all. He well understood that his model was meant to help a concrete process of legal reform, in a particular time and in a particular place, and that that reasonable people may come to different doctrinal resolutions to the genuine dilemmas of criminal law. Precisely because it is part of governance more generally, Wechsler maintained that “criminal law cannot remain static.”³⁶⁹

In the end, I would slightly amend Herbert Packer’s initial review of the Code and call its dominant tone one of “principled prudence.”³⁷⁰ As Packer sympathetically understood, the Code started with a commitment to principled and systematic reform of

366. Wechsler, *supra* note 22, at 1133.

367. See, e.g., Lynch, *supra* note 207, at 219-21 (describing the tremendous influence of the Model Penal Code and the implausibility of any major revision of the Code).

368. *Challenge*, *supra* note 22, at 1133.

369. Radzinowicz, *supra* note 299, at 7 (listing “criminal law cannot remain static” as among the seven principles that guided Wechsler’s work on criminal law).

370. Packer called it “principled pragmatism,” Packer, *supra* note 262, at 594, but I would like to think Packer would have been comfortable with my revision given the way he described the pragmatism of the Code.

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the criminal law, but its drafters were also mindful that “the besetting sin of rationality is the temptation to press a principle to the outer limits of its logic.”³⁷¹ According to Packer, the Code avoided that sin because

its spirit is one of accommodation, by which I do not mean the spirit of the horse-trade or of that politics which is defined as the art of the possible. Rather, I mean the kind of accommodation to existing institutions that results from the perception that in law one does not write on a clean slate.³⁷²

Whether Wechsler’s great creation—the work of which he was most proud—hit the right balance between principle and prudence is a question that will continue to be debated.³⁷³ But any serious reckoning with the Code cannot help but see the tension between them as the central drama of the Code, as it was of the Legal Process approach to law—and as it is of legal reform in general.

371. *Id.*

372. *Id.*

373. As Wechsler wrote during the drafting of the Code, “If we have erred in the details, we do submit at least that the philosophy is right.” *Some Observations*, *supra* note 28, at 394.