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TRIBUTE IN MEMORY OF HERBERT WECHSLER

*Geoffrey C. Hazard, Jr.**

Herbert Wechsler was my teacher at Columbia. He was a model as a scholar and lawyer throughout my career. He taught my classmates and me Criminal Law and, in a very demanding seminar, an introduction to Federal Jurisdiction based on the then paper version of what later became the great Hart and Wechsler casebook. I also served, not very effectively I fear, as a research assistant in his work on the Model Penal Code, particularly addressing the difficult subject, perhaps indeed an opaque one, of mistake as a defense or amelioration of criminal liability. He was an illuminating teacher and a demanding thinker. I later came to appreciate still other abilities of Professor Wechsler in working under his supervision on an American Law Institute project and, thereafter, as his successor as Director of the Institute. He was a leader and professional collaborator of great skill.

Professor Wechsler was Chief Reporter for The American Law Institute Model Penal Code (MPC). The MPC was a pioneering work in criminal law in its scope, policy premises, and penetration of the subject. The approach in the MPC was derived from Professor Wechsler's previous work with Professor Jerome Michael in endeavoring to expound a rationale for the law of homicide, obviously the most important component of a penal code.¹ The MPC extended that approach by pursuing the rationale for other elements of the criminal law—for example, the law of theft—and for the criminal law as a whole. The MPC has since become the standard for discourse concerning criminal law, both in academic analysis and in reform legislation. Even criticism of the MPC, and there has been considerable such criticism,² must begin with the text of its formulations.

The approach manifested in the MPC was to establish analytic coherence for the terms in which the received law should speak, and to express those terms in intelligible formulations. Each of the words in the previous sentence is an echo of Professor Wechsler's method of thought.

—He was interested in “manifestations,” i.e., language that displayed its meaning as distinct from a meaning that an author might have sought or intended. In my mind's eye I can see him recoiling at someone saying that a proposed text “intended” such and such, when that intention had not been fulfilled in proposed language.

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

2. See Symposium: *The 25th Anniversary of the Model Penal Code*, 19 *Rutgers L.J.* 519 (1988).

—He was supremely analytic, relentlessly pursuing the relationship between the language in which law might be expressed and the behavior to which that language was designed to refer. Professor Wechsler was both a formalist and a realist, and I suspect he thought the supposed distinction between these modes of thought was seriously misleading and a refuge for the intellectually indolent. In analysis of law, formalism is an element of realism.

—He sought coherence, and demanded it from others, concerning the relationship among the constituent elements in a legal rule and between a specific legal rule and the general corpus of the law. The ultimate test for a rule is that it provides guidance for conduct. The ultimate test for a decent legal system is a set of decent rules that are consistent with each other.

—Professor Wechsler was deeply respectful of the received law, evidently believing that judges' intuitions were generally sound even if their choice of language often might leave something to be desired. In this sense he was conservative. At the same time Professor Wechsler was committed to achieving what the law *should* say; it was never enough, in his view, that a received formulation had a long provenance. He was therefore a radical in the classic sense of that term—one who seeks to get to the root of the matter.

—Professor Wechsler wanted the law to speak in terms that were intelligible not only to the *cognoscenti* in the law schools but also to the judges and lawyers who had to apply the law throughout the land. He was thus both intellectually aristocratic and profoundly democratic.

—He repeatedly used the term “formulations” to refer to the product of his own endeavors and to other works of the American Law Institute. The term signifies formality in tenor and precision of expression, and Professor Wechsler sought both.

A salient feature of the MPC was its attention to terminology. Basic terms, such as “intent” and “reckless,” were introduced in the general part and then employed throughout the work. These terms were not only vocabulary but also conceptual building blocks for the Code's substantive prescriptions. Professor Wechsler believed and demonstrated in the MPC that clarity of substantive analysis depended on achieving verbal clarity in as high a degree as possible.

The project for the MPC was not only a major contribution to the law in itself but was also a model for other work undertaken by the ALI during Herb's long term as Director of the Institute. In 1963, having just completed the MPC project, Professor Wechsler became Director of the Institute, following the untimely death of Judge Herbert Goodrich, his predecessor in that office. I was not around at the time, but the record shows that Professor Wechsler was the obvious choice. It is not insignificant in the development of the character of the Institute, and of the legal profession at large, that Herb was Jewish. He himself never made anything of that aspect of his identity. But the ALI was a very “white shoe”

organization and employment of Jewish law graduates in some major law firms and some law faculties was still problematic through the 1950s. The selection of Professor Wechsler as Director of the Institute made a quiet but demonstrative contribution to eliminating that form of discrimination in the legal profession and, eventually and by example, other forms of discrimination as well.

As Director of the Institute, Professor Wechsler brought to bear his formidable intellectual and technical competence in other ALI projects. These included the Restatement (Second) of Torts, for which Dean William Prosser was Reporter; the project on Division of Jurisdiction Between the State and Federal Courts, for which the late Professor Charles Alan Wright was Reporter;³ the Restatement (Second) of Contracts, for which Professor Allan Farnsworth was Reporter; the Restatement of the Foreign Relations Law of the United States, in the second iteration of which Professor Louis Henkin was Chief Reporter; the Restatement (Second) of Conflict of Laws, for which Professor Willis Reese was Chief Reporter; and various revisions of the Uniform Commercial Code. Another project in Herb's tenure was the Restatement (Second) of Judgments, for which Judge Benjamin Kaplan, Professor David Shapiro, and I were Reporters. As Reporters we were aware of, indeed could directly sense, the standards that Herb expected us to meet. The aim was to develop analytically coherent formulations of what the law should be.

A review of the projects undertaken during Professor Wechsler's direction of the Institute suggests the influence of his intelligence. An illuminating example is the attention to basic concepts in the Restatement (Second) of Torts. The law of torts has an historic and functional affinity with the criminal law. Through its deterrent effect, tort law, especially in American law, is a regulatory mechanism parallel with the criminal law, as well as a mechanism for compensatory or commutative justice. It follows that basic concepts in well-considered criminal law, i.e., the MPC, should be transferable into tort law. In the Restatement (Second) of Torts such a transfer was largely accomplished, notably in clarification of the concepts of intention, recklessness, negligence, and accessorial liability.⁴ There was a similar if less pervasive influence on the Restatement (Second) of Contracts.⁵

The Second Restatements of Torts and Contracts were to become staples in American judicial reasoning and hence in arguments fashioned by counsel for presentations to the courts. The quality of analysis in these and other ALI projects passed into the streams of thought in American law. Professor Wechsler thereby became, sometimes at second or third

3. Professor Wright died unexpectedly in July of this year. Thus, the Institute lost two of its leading figures within a period of six months.

4. Restatement (Second) of Torts (1965).

5. Restatement (Second) of Contracts (1981).

remove, a teacher for the bench and bar, and not only in this country but abroad as well.⁶

One of the chronic complaints about the Restatement work of the Institute was that these texts expressed what the Reporters thought the law should be, rather than what the law "is." (Typically, comments supportive of a position taken in a Restatement commended the wisdom of the Institute, while negative comments directed criticism to the Reporter.) Professor Wechsler was quite impatient with these complaints. He always defended the Reporters from public attack, even when he might privately disagree with the position at issue. More fundamentally, he considered a complaint that a formulation was not a true *restatement* to be little different from an *ad hominem* attack on the draftsman. In the first place, the law never "is" but always is immanent as well as extant. In the second place, the common law in the United States—the subject addressed in Restatements—always evolves by fits and starts—decision by first one court, then another. Accordingly, there never are formulations fully agreeable to all the courts. Third, and more pragmatically, if the Institute's ambition were merely to be a mirror of the justices, so to speak, the ALI would not go to the trouble involved in the multiple drafts and multiple reviews and consultations that go into a Restatement. The very purpose of an ALI project is to "promote the clarification and simplification of the law and its better adaptation to social needs, to secure the better administration of justice, and to encourage and carry on scholarly and scientific legal work." A Restatement is not merely a journal of review.

Professor Wechsler captured these propositions in formulations that have guided the Institute at least since his time as Director. The formulations are posted in the conference room at the Institute headquarters:

[W]e should feel obliged in our deliberations to give weight to all of the considerations that the courts, under a proper view of the judicial function, deem it right to weigh in theirs.⁷

In judging what was right, a preponderating balance of authority would normally be given weight, as it no doubt would generally weigh with courts, but it had not been thought to be conclusive.⁸

There is a corresponding proposition that can be stated about the Institute's legislative projects—such as the Model Penal Code, the Uniform Commercial Code, the ALI tax law projects,⁹ the Federal Securities Code,¹⁰ and Corporate Governance projects¹¹—as distinct from Restatements. I do not recall Herb stating this proposition but it certainly ex-

6. See, e.g., *Gregory v. Portsmouth City Council*, 1 App. Cas. 419 (H.L. 2000).

7. Herbert Wechsler, *Annual Report of the Director*, 44 A.L.I. Proc. 16 (1967).

8. Herbert Wechsler, *The Course of the Restatements*, 55 A.B.A. J. 147, 149 (1969).

9. *Federal Income Tax Project (Tentative Draft, 1977)*.

10. *Federal Securities Code (1980)*.

11. *Principles of Corporate Governance: Analysis and Recommendations (1994)*.

presses a view he shared. The proposition is this: The formulation of legislation should take account of, and generally employ so far as consistent with its reform objectives, the concepts and terminology of existing law, thereby to assimilate the new with the old and to accentuate what is being changed. Correlatively, novel terminology can introduce confusion and needless uncertainty and reduce political acceptability of a proposal.

The reasons for this approach to legislative drafting correspond symmetrically to the reasons why a Restatement cannot simply state the law as it "is." First, legislation on any subject must be interpolated as smoothly as possible into the larger corpus of standing law. Although the law is a "seamless web," in the classic phrase, law reform should be sensitive to discrepancies between parts of the law and give careful regard to adjacent rules. Second, a proposal for legislation virtually by definition seeks to change the law in some respects. The focus and measure of change is sharpened by using familiar terminology in addressing the parts of the law that are not to be changed. And, third, proposed legislation, if adopted, should be intelligible to those who will administer it. That practical purpose is facilitated by using familiar terminology.

The law in its essential characteristics therefore is much the same whether expressed as Restatements of the common law or as legislation. The corpus of the law on any subject—criminal law, tort law, contract or commercial law, etc.—consists primarily of normative assumptions and technical terminology inherited from earlier generations. Life in a community never begins wholly anew, but proceeds from what has gone before. However, when any part of the law is addressed by a lawgiver, whether legislature or court, the law's text ought to be critically reexamined with reference to contemporary and emergent governance problems in the community.

In taking into account both the past and the future, lawgivers should function in a similar way, whether members of the legislature or of the judiciary. Of course, account must be taken of the differences in the constitutional foundations of a legislature as contrasted with the judiciary. The legislature in a democratic regime has authority to adopt broader and deeper changes in the law, if sufficient consensus can be established in support of a specific proposal. But a legislative body is not obliged to adopt any proposal, or even to address attention to it. Courts generally address not the "molar" but the "molecular," in Holmes's phrase. But the courts are obliged to give some kind of answer to every serious claim of legal injustice, rather than simply adjourning.

These aspects of law, whether legislation or decisional law, and of the responsibilities of lawgivers, must be appreciated by those who would give advice as to what the law is or should be. Giving such advice was and continues to be the ALI's purpose as an organization. Fulfilling that advisory purpose requires sensitive appreciation of the lawgivers' responsibilities, including a sympathetic understanding of the life of various ele-

ments of the community, and detachment necessary to make fair adjustment of the competing and conflicting interests that are at stake. In my observation, Herb was exasperated both by radical "crits," in their hostility to the fundamentally conservative structure of a reasonably peaceful society, and also by conservative critics' disregard of the pervasive discontinuities and injustices in the law as it stands at any given time. Professor Wechsler's life in the Institute was devoted to making such remedies in the law's deficiencies as appeared to be practicable.

In this respect I vividly recall an interchange between Professor Wechsler and someone hectoring him at a public meeting. Professor Wechsler was asked, in sarcastic tones, what he had been doing during the war (World War II) while the Holocaust was occurring. His response was, "Teaching law at Columbia and practicing it in the Justice Department." Of course, in and from the Department of Justice Professor Wechsler became one of the primary strategists in the Nuremberg prosecution. But his response to the hectoring was, in essence, that one's work is done where the pathway in life happens to lead. He would give the same answer to critics of the work of the Institute. Herb had no apology, quite the contrary, for devoting himself to improvement of the law in what might be called its architectural stage.¹²

Professor Wechsler's other great intellectual venture was the work on Federal Jurisdiction. I do not overlook his work in Constitutional law generally, nor his achievement as advocate in *New York Times Co. v. Sullivan*.¹³ These endeavors are well addressed by others in this Tribute. However, from my vantage point those are part and parcel of Professor Wechsler's engagement with the role of federal law and the federal courts in the American legal system—the subject addressed in the work on The Federal Courts and the Federal System. Professor David Shapiro in this Tribute more fully addresses that achievement. I speak to only one aspect of it: Appreciation of the normative pluralism that is a necessary basis for truly understanding American federalism.

The term "normative pluralism" refers to the multiplicity of assertions, affirmations, beliefs, doctrines, and dogmas, including but not limited to legal rules, that address issues of "the right thing to do" in a community at a given time. One person or group, for example, affirms the "right to life," while another affirms a woman's "right to choose" whether a pregnancy should be carried through. One person or group affirms the legitimacy of the death penalty, another calls it legalized murder. Some consider affirmative action to be necessary remediation for past social injustice, others regard it as a new form of inequality. Our law recognizes the legitimacy of these contending views in the protected afforded to freedom of conscience and freedom of speech. But the law also claims

12. See generally Alan Schwartz & Robert E. Scott, *The Political Economy of Private Legislatures*, 143 U. Pa. L. Rev. 595 (1995) (discussing rulemaking procedures of ALL as a private lawmaker).

13. 376 U.S. 254 (1964).

supremacy as final authority. And in making its authoritative pronouncements, the law endeavors to harmonize the dissonant and conflicting normative conceptions that are given voice in various community sectors.

The law's claim to have reduced dissonance into harmony could have superficial plausibility in a constitutionally unitary regime such as France. In such a regime it can be imagined that the law speaks with one voice. However, such a view of the law is untenable in a federal system. A federal system by definition is a constitutional scheme in which more than one level of government has supreme authority. Of course, the national level in such a regime is supreme within its allocated sphere, as expressed in the Supremacy Clause of our Constitution. But if a regime's federal character is not merely nominal, allocations of authority to other spheres are honored and given life. Such has been the character of American federalism since the beginning of the union.

In fact, the relationships between state and federal law in our system are extremely complex. It is not simply that federal law governs interstate commerce, bankruptcy and admiralty, for example, while state law governs marriage, intestate succession, and estates in land. Some aspects of interstate commerce are, and always have been, regulated by state law, for example the main elements of products liability in contemporary practice.¹⁴ Many aspects of the law of insolvency, which is now administered in bankruptcy court, are specified by state law.¹⁵ In the field of maritime commerce, governed initially by admiralty law, since the Judiciary Act of 1789 there has been recognition of common law remedy "where the common law is competent to give it."¹⁶

Correlatively, federal law typically incorporates or presupposes important elements of state law. The most obvious kind of example is the Federal Tort Claims Act, which adopts applicable state law as the measure of liability in cases where the Federal Government has waived its sovereign immunity.¹⁷ Similarly, federal law regulating responsibilities of managers of pension funds incorporates the common law—state law—of fiduciary responsibility in financial management.¹⁸ The federal income tax law is based on and is responsive to transactions (such as "sales") and structures (such as corporations) that are primarily defined by state law.¹⁹ In another sector of law there is the problem of "substance and proce-

14. See Restatement (Third) of Torts: Products Liability (Proposed Final Draft 1997); *Gurrieri v. William Zinsser & Co.*, 728 A.2d 832, 835 (N.J. Super. 1999) (contention about federal preemption).

15. See 11 U.S.C. § 522(b)(1) (1994).

16. 28 U.S.C. § 1333 (quoting from 28 U.S.C. sections 41(3) and 371(3) 1940 edition).

17. See Federal Torts Claims Act, 28 U.S.C. § 1346(b) (1994).

18. See 29 U.S.C. § 1101 (1999); Restatement (Third) of Trusts § 227 (Proposed Final Draft 1990) (Prudent Investor Rule).

19. See George K. Yin and David J. Shakow, *Federal Income Tax Project: Taxation of Business Enterprises: Reporters' Study* (1999).

ture," including but by no means limited to *Erie*.²⁰ The relationship between federal and state law in matters of procedure has been exponentially complicated with the extension of the requirements of Due Process and Equal Protection to administration of justice in state courts.²¹

Compounding these complex aspects of federalism as such are issues concerning the role and function of legislatures versus courts.²² A typical problem of the relationship between federal and state law is posed in terms of a state legislative measure challenged before federal judicial authority. Legislatures, whether state legislatures or Congress, generally approach matters of social policy—normative problems—in a different frame of mind than do courts. Among other things, members of a legislature generally hold more diverse viewpoints on normative issues than are found among members of an appellate court, which is where decisional law is made. The background governmental structure for the typical state judge is the state legislature and local government in that judge's own bailiwick. For the typical federal judge the salient structures are Congress and the federal administrative agencies. Perhaps most important, all legislators have to stand for election, while no federal judge is required to do so.

Further compounding these complexities is the problem of the nature of "constitutional law." As Professor Monaghan and others in this Tribute observe, we all recognize that there is something very real and deeply important about constitutional law in general and the law of the United States Constitution in particular. But constitutional law in general, and the law of the United States Constitution in particular, is not ordinary law, as has been evident since the decision in *Marbury v. Madison*.²³ The concept and the legitimacy of judicial review in terms of constitutional law remain debatable, perhaps never more intensively than today. The various viewpoints expressed in those debates thus are themselves prime examples of normative pluralism.

Hart and Wechsler's casebook, *The Federal Courts and the Federal System*, manifests subtle familiarity with these complexities. Professor Wechsler's developed awareness of these complexities was a foundation of his service as Director of the American Law Institute, and of his manifold contributions to American law.

20. See *Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938).

21. See Richard H. Fallon, Jr., Daniel J. Meltzer, & David L. Shapiro, Hart & Wechsler's *The Federal Courts and the Federal System* 492–655 (4th ed. 1996), Henry Friendly, *Some Kind of Hearing*, 123 U. Pa. L. Rev. 1267 (1975).

22. Henry M. Hart, Jr., *The Relations Between State and Federal Law*, 54 Colum. L. Rev. 489 (1954) (written contemporaneously with preparation of the Hart and Wechsler casebook).

23. 5 U.S. 137 (1803). See generally Fallon et al., *supra* note 21, at 67–293 (discussing *Marbury* and the nature of the federal judicial function).