

2009

# American Oresteia: Herbert Wechsler, the Model Penal Code, and the Uses of Revenge

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## Recommended Citation

Walker, Anders, American Oresteia: Herbert Wechsler, the Model Penal Code, and the Uses of Revenge. *Wisconsin Law Review*, Vol. 2009, p. 1018, 2009.

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ANDERS WALKER

ABSTRACT

The American Law Institute recently revised the Model Penal Code's sentencing provisions, calling for a renewed commitment to proportionality based on the gravity of offenses, the "blameworthiness" of offenders, and the "harms done to crime victims." Already, detractors have criticized this move, arguing that it replaces the Code's original commitment to rehabilitation with a more punitive attention to retribution. Yet, missing from such calumny is an awareness of retribution's subtle yet significant role in both the drafting and enactment of the first Model Penal Code (MPC). This article recovers that role by focusing on the retributive views of its first Reporter, Columbia Law Professor Herbert Wechsler. Though a dedicated utilitarian, Wechsler became increasingly aware of retribution's value to sentencing over the course of his career, using that awareness to guide both the development and adoption of the MPC. Recovering his view helps us to contextualize and perhaps even better appreciate the current revision's emphasis on proportionality.

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REVENGE

ANDERS WALKER ♦

*But [the Furies] have their destiny too, hard to dismiss, and if they fail to win their day in court – how it will spread, the venom of their pride.<sup>1</sup>*

INTRODUCTION

With over two million people in prison and costs of incarceration eroding state budgets, sentencing policy is rapidly becoming a matter of urgent concern in the United States.<sup>2</sup> To address such concern, the American Law Institute recently revised the Model Penal Code’s sentencing provisions, calling for a renewed commitment to proportionality based on the gravity of offenses, the “blameworthiness” of offenders, and the “harms done to crime victims.”<sup>3</sup> Already, detractors have criticized this move, arguing that it replaces the Code’s original commitment to

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<sup>1</sup> AESCHYLUS, THE ORESTEIA 252 (Robert Fagles trans., Penguin Books, 1984).

<sup>2</sup> See e.g. THE PEW CENTER ON THE STATES, ONE IN 1000: BEHIND BARS IN AMERICA (2008).

<sup>3</sup> The American Law Institute, Model Penal Code: Sentencing, Tentative Draft No. 1, Part I. General Provisions (April 9, 2007), 1 [hereinafter MPC 2007 Draft].

rehabilitation with a more punitive attention to retribution.<sup>4</sup> Yet, missing from such calumny is an awareness of retribution's subtle yet significant role in both the drafting and enactment of the first Model Penal Code (MPC).<sup>5</sup> This article recovers that role by focusing on the retributive views of its first Reporter, Columbia Law Professor Herbert Wechsler. Though a dedicated utilitarian, Wechsler became increasingly aware of retribution's value to sentencing over the course of his career, using that awareness to guide both the development and adoption of the MPC.<sup>6</sup> Recovering his view helps us to contextualize and perhaps even better appreciate the current revision's emphasis on proportionality.

Retrieving Wechsler's retributive vision also helps us reassess a central problem in modern sentencing policy, namely how to constructively reconcile popular demands for retribution with rational reform.<sup>7</sup> Stung by the xenophobic prejudice of Prohibition, Wechsler remained alert to the constitutive role that criminal punishment plays in democratic societies, not just as a modality for preventing crime but also as a bulwark of social cohesion. While aspects of such thinking paralleled the work of

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<sup>4</sup> See e.g. James Q. Whitman, *A Plea Against Retributivism*, 7 BUFF. CRIM. L. REV. 85, 88 (2003); Edward Rubin, *Just Say No to Retribution*, 7 BUFF. CRIM. L. REV. 17 (2003). Perhaps the most vehement opponent of the ALI's commitment to retribution, or proportionality, is Judge Michael H. Marcus. See, e.g. Michael H. Marcus, Letter to Professor Reitz, October 4, 2003, available at <http://ourworld.compuserve.com/homepages/SMMarcus/LtrToProfReitz10-03.pdf>. Markus Dubber, perhaps the foremost explicator of the Model Penal Code, denies retribution any significant role in the MPC, arguing that any effort to read retribution into the MPC is an exercise in "futility." See e.g. MARKUS D. DUBBER, *CRIMINAL LAW: MODEL PENAL CODE* 24 (2002).

<sup>5</sup> See e.g. Kevin R. Reitz, Reporter's Introductory Memorandum, The American Law Institute, Model Penal Code: Sentencing, Tentative Draft No. 1, (April 9, 2007), xxviii. Scholars who have discussed the history of the MPC have tended to emphasize its treatmentist side. See e.g., Markus Dirk Dubber, *Penal Panopticon: The Idea of a Modern Model Penal Code*, 4 BUFF. CRIM. L. REV. 53 (2000); Sanford H. Kadish, *The Model Penal Code's Historical Antecedents*, 19 RUTGERS L.J. 521 (1988).

<sup>6</sup> Markus Dubber notes that Wechsler "subscribed" to the "orthodoxy" of "treatmentism." DUBBER, *CODE*, *supra* note 4 at 11. For one example of Wechsler's interest in retribution, or the public's "demand for heavy sanctions," see Herbert Wechsler, *Sentencing, Correction, and the Model Penal Code*, 109 U. PA. L. REV. 473 (1961).

<sup>7</sup> See e.g. William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505 (2001); Paul H. Robinson & Michael T. Cahill, *The Accelerating Degradation of American Criminal Codes*, 56 HASTINGS L.J. 633 (2005); Paul H. Robinson & Michael T. Cahill, *Can a Model Penal Code Second Save the State from Themselves?* 1 OHIO ST. J. CRIM. L. 169 (2003); Sara Sun Beale, *What's Law Got to Do With It? The Political Social Psychological and Other Non-Legal Factors Influencing the Development of (Federal) Criminal Law*, 1 BUFF. CRIM. L. REV. 23 (1997).

Nineteenth Century sociologist Emile Durkheim, Wechsler's insights hewed even more closely to an earlier model, the ancient Greek tragedy *The Oresteia*.<sup>8</sup> In that play, Orestes kills his mother Clytemnestra to avenge the murder of his father, Agamemnon, only to then be pursued by the Furies of Revenge, or Erinyes, who demand his blood. As the Erinyes close in on their prey, Athena intervenes, replacing blood vengeance with judicial process. Yet, even though Athena's reform is a step forward, effectively replacing the old system of vendetta with jury trial, she still requires that the citizens of Athens pay the Furies tribute, renaming them the Eumenides, or kindly ones.

Like Athena, Herbert Wechsler also recognized that the furies of revenge, though they may have no positive impact on offenders or crime control, had to be paid deference. "[T]he desire for revenge," wrote Wechsler in 1940, is "entrenched in the general population" and cannot be ignored.<sup>9</sup> When electoral majorities opposed reform, argued Wechsler, it was the duty of liberal-minded policy-makers to persuade the public, through education, that change was good. When this failed and "public demand for heavy sanctions" became "inexorable," Wechsler argued that voters should be accommodated – even indulged – lest they spark legislative backlash.<sup>10</sup>

While the problem of backlash has become prominent in recent literature on civil rights, it has not factored largely in criminal law.<sup>11</sup> Instead, criminal law scholars have tended to deride the political process, arguing that it is "pathological" and has resulted in the "degeneration" of criminal codes.<sup>12</sup> To ameliorate this, prominent scholars have argued against democracy, calling for the abolition of "legislative supremacy," the surrender of criminal law creation to courts, and the creation of standing commissions insulated from popular vote.<sup>13</sup>

Rather than decry democracy, Wechsler embraced it. To him sentencing authorities should always place "the general community" at the center of reform debates for it is the community whose "values and security" are often what is most "disturbed" by crime.<sup>14</sup> Of course, this did not mean that liberal reform should not

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<sup>8</sup> See e.g., EMILE DURKHEIM, ON THE NORMALITY OF CRIME (1895).

<sup>9</sup> JEROME MICHAEL & HERBERT WECHSLER, CRIMINAL LAW AND ITS ADMINISTRATION: CASES, STATUTES AND COMMENTARIES 16 (1940).

<sup>10</sup> Wechsler, *Sentencing*, *supra* note 6 at 473.

<sup>11</sup> *But see*, STUART HALL, POLICING THE CRISIS: MUGGING, THE STATE, AND LAW AND ORDER (1978).

<sup>12</sup> Stuntz, *Politics*, *supra* note 7 at 101; Robinson & Cahill, *Degradation*, *supra* note 7 at 633.

<sup>13</sup> Stuntz, *Politics*, *supra* note 7 at 582, 587; Robinson & Cahill, *Degradation*, *supra* note 7 at 653.

<sup>14</sup> Wechsler, *Sentencing*, *supra* note 6, at 476.

be attempted, only that it should be incorporated, even camouflaged, within larger initiatives that accommodated retribution. To show how Wechsler reconciled popular demands for retribution with liberal reform, this article will proceed in four parts. Part I will recover Wechsler's early criminal law thinking, showing how he began to develop a sense of the intimate relationship between democratic politics and criminal law while a young Columbia law professor in the 1930s and a participant in the Nuremburg trials in the 1940s. Part II will discuss Wechsler's application of democratic theory to the Model Penal Code in the 1950s. Part III will show how Wechsler applied many of his theories to the revision of New York's Criminal Code in the 1960s. Finally, Part IV will examine the manner in which Wechsler's theories inform recent developments in criminal law, particularly the strange career of the death penalty in New York. This article concludes by suggesting that both current criminal law scholars and judges should not only look more carefully at popular views of sentencing, but develop a theory of reform that brings democracy back in.

## I. FROM NEW YORK TO NUREMBURG: THE FORMATIVE YEARS

Born in New York City in 1909, Herbert Wechsler confronted criminal law's direct, sometimes perverse relationship to popular politics early on. Jewish by birth, Wechsler became alarmed at the manner in which Protestant nativism led to the criminalization of alcohol in 1918.<sup>15</sup> Though the Volstead Act provided an annual allowance of ten gallons of sacramental wine per Jewish family per year, prominent Jewish newspapers like the *Jewish Daily Forward* and the *American Hebrew* decried the law as an infringement on their religious liberty.<sup>16</sup> Such complaints gained strength when dry leaders accused Jewish rabbis of selling sacramental wine out of their homes in New York in 1921.<sup>17</sup> Spurred by anti-semitism, New York's Bureau of Prohibition ultimately refused to issue wine licenses to Jews in the city, prompting Wechsler's family to defy the law "with abandon."<sup>18</sup>

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<sup>15</sup> MICHAEL A LERNER, *DRY MANHATTAN: PROHIBITION IN NEW YORK CITY* 115 (2007).

<sup>16</sup> *Id.* at 120.

<sup>17</sup> *Id.*

<sup>18</sup> Interview by Norman Silber and Geoffrey Miller with Herbert Wechsler, Professor, Columbia University School of Law, in New York City, N.Y.

While his parents broke the law at home, Wechsler came to appreciate the obstacles that popular prejudice posed to criminal law in other parts of the United States as well. In 1932, Wechsler began a Supreme Court clerkship with Justice Harlan Fiske Stone that brought him face to face with the vagaries of criminal law in the American South. Only weeks after Wechsler arrived in Washington, the Court heard an appeal from the communist-affiliated International Labor Defense, or ILD, of nine African American defendants falsely accused of raping two white women in Scottsboro, Alabama.<sup>19</sup> The ILD won representation of the defendants over the National Association for the Advancement of Colored People, or NAACP, and waged a massive political campaign to raise awareness for the “Scottsboro boys.”<sup>20</sup> Convinced that litigation alone would fail, the ILD advocated “mass action outside of courts and legislative bodies,” staging protests, rallies and demonstrations to free the nine black defendants.<sup>21</sup> From 1931 to 1932, the ILD and its communist allies held mass demonstrations in Chicago and New York, staged a mass rally in front of the White House, and even sent the mothers of the Scottsboro boys on a national tour.<sup>22</sup>

While Alabama’s persecution of the Scottsboro boys reinforced Wechsler’s view that popular prejudice undergirded criminal law, the ILD’s propaganda campaign awakened him to the power of democratic persuasion. Not only did the ILD hold demonstrations, but it churned out reams of propaganda in publications like *The Daily Worker* and *New Masses*, propaganda that, by 1932, bled into more mainstream publications like *The Nation*, the *New Republic* and the *New York Times*.<sup>23</sup> By the time the case reached the Supreme Court in the fall of 1932, figures as disparate as Albert Einstein, H.G. Wells, and Maxim Gorky were speaking out against the persecution of the nine black defendants.<sup>24</sup>

While Alabama juries refused to reconsider the boys’ plight, otherwise conservative Justice George Sutherland reversed and remanded the convictions of the nine African American

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(August 11, 1978; February 23, 1979; March 12 & 13, 1982) [hereinafter Wechsler, *Interview*].

<sup>19</sup> HARVARD SITKOFF, *A NEW DEAL FOR BLACKS: THE EMERGENCE OF CIVIL RIGHTS AS A NATIONAL ISSUE, THE DEPRESSION DECADE* 146 (1978).

<sup>20</sup> DAN T. CARTER, *SCOTTSBORO: A TRAGEDY OF THE AMERICAN SOUTH* 54-100 (1969); PATRICIA SULLIVAN, *DAYS OF HOPE: RACE AND DEMOCRACY IN THE NEW DEAL ERA* (1996) 87-8; SITKOFF, *NEW DEAL*, *supra* note 18 at 146-7.

<sup>21</sup> SITKOFF, *NEW DEAL*, *supra* note 18, at 148; CARTER, *SCOTTSBORO*, *supra* note 18, at 59, 141-3, 244.

<sup>22</sup> SITKOFF, *NEW DEAL*, *supra* note 18, at 146; CARTER, *SCOTTSBORO*, *supra* note 18, at 146-7, 248-251.

<sup>23</sup> SULLIVAN, *DAYS OF HOPE*, *supra* note 19, at 87-8; SITKOFF, *NEW DEAL*, *supra* note 18, at 146-147.

<sup>24</sup> SITKOFF, *NEW DEAL*, *supra* note 18, at 147.

defendants in November 1932, ruling that Alabama had violated their right to due process under the Fourteenth Amendment.<sup>25</sup> Though Wechsler returned North in the fall of 1933, he did not forget the perverse relationship between popular prejudice and criminal law in the South, nor the hope that such law might be changed.<sup>26</sup> In 1934, Wechsler came out in favor of federal anti-lynching legislation in the prominent *Yale Law Journal*.<sup>27</sup> Lynching, a problem that had gradually been in decline in Dixie, spiked in 1930 and continued to rise through 1932 and 1933.<sup>28</sup> This violence led to a surge in anti-lynching activism as the NAACP pushed for the enactment of a federal anti-lynching bill and New Deal liberals like Will Alexander, then employed by the Roosevelt administration, formed a commission to study the problem.<sup>29</sup>

In a review of two books on lynching sponsored by Alexander's commission, Wechsler argued that "significant reconstruction" of the South was necessary and that federal legislation was "[f]ar more" likely to achieve reform than solutions sponsored by southern states.<sup>30</sup> In fact, Wechsler strongly advocated federal intervention in southern affairs, noting that federal prosecutors "answerable to Washington," federal judges "enjoying life tenure" and federal jurors "drawn from a higher economic and social stratum," promised to be more equitable than "the southern legislator."<sup>31</sup>

Of course, Wechsler realized that southern justice might look very different if African Americans were allowed to participate in the political process. In the same *Yale Law Journal* piece that he attacked lynching, Wechsler also lamented "the political impotence" that black voters suffered under poll taxes, literacy tests, and other modes of disfranchisement.<sup>32</sup> If such obstacles were removed from black access to politics, argued

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<sup>25</sup> *Id.*

<sup>26</sup> Wechsler recalled Stone's attitude towards minority rights to be one of relative "ambivalence" in the early 1930s, not truly congealing around the idea of protecting minority access to the political process until 1938. This stood in marked contrast to the communist intervention on behalf of southern blacks in 1931. Wechsler, *Interview*, *supra* note 17, at 154.

<sup>27</sup> Wechsler, *Review of Lynching and the Law & The Tragedy of Lynching*, 44 *YALE L. J.* 191, 193 (1934) [hereinafter Wechsler, *Review*].

<sup>28</sup> SITKOFF, *supra* note 18, at 244-5.

<sup>29</sup> SITKOFF, *supra* note 18, at 270-4; SULLIVAN, *supra* note 19, at 24-5. Interestingly, one of the authors of the Costigan-Wagner Anti-lynching bill turned out to be Columbia University Law Professor Karl Llewellyn, a colleague and former professor of Herbert Wechsler. SITKOFF, *supra* note 18, at 281.

<sup>30</sup> Wechsler, *Review*, *supra* note 26, at 193.

<sup>31</sup> *Id.*

<sup>32</sup> Wechsler, *Review*, *supra* note 26, at 191; *State of Missouri ex rel. Gaines v. Canada*, 305 U.S. 337 (1938).

Wechsler, then criminal law might be reformed from the ground up.<sup>33</sup>

Wechsler personally sought to facilitate such reform in 1934 when ILD lawyer Carol Weiss King asked him for help on a Georgia case involving a black communist named Angelo Herndon.<sup>34</sup> Atlanta police had arrested Herndon in 1932 for possessing documents advocating a black-led “revolution” in the South; an act that led him to be charged with inciting insurrection.<sup>35</sup> While Herndon’s charge rested on his possession of written material, a relatively innocuous act, authorities were aware that he had helped organize a demonstration of the unemployed in Atlanta only a month before, thereby evincing an arguably more militant commitment to social change. Also, Herndon had been involved in communist organizing in neighboring Alabama for several years, and had even worked on the ILD’s campaign to free the Scottsboro boys.<sup>36</sup>

Hoping that Herndon’s case might become another Scottsboro, the ILD rushed to help Herndon in Georgia.<sup>37</sup> Unfortunately, the group’s trial attorneys encountered an unsympathetic jury at the state level, resulting in a sentence of eighteen to twenty years on a chain gang for Herndon.<sup>38</sup> The penalty’s severity prompted Carol Weiss King to approach Wechsler through a colleague at Columbia, in the hopes of mounting a more robust federal appeal.<sup>39</sup> Wechsler agreed and ultimately dedicated three years to the case, working on it from 1934 to 1937.<sup>40</sup> The assignment proved formative, an education not only in the vagaries of constitutional law but also the

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<sup>33</sup> Wechsler, *Review supra* note 26, at 191.

<sup>34</sup> Charles Martin maintains that it was Walter Gellhorn, one of Wechsler’s colleagues, who approached him about representing Herndon. CHARLES H. MARTIN, *THE ANGELO HERNDON CASE AND SOUTHERN JUSTICE* 140 (1963). This contradicts Wechsler’s memory of events, which was that Carol Weiss King contacted him, Gellhorn and Jerome Michael at roughly the same time about aiding Herndon’s case. Wechsler, *Interview, supra* note 17, at 125.

<sup>35</sup> SITKOFF, *NEW DEAL, supra* note 18, at 150.

<sup>36</sup> MARTIN, *HERNDON, supra* note 33, at 10.

<sup>37</sup> *Id.* at 12-14. See also, Joseph North, *Angelo Herndon, Fighter*, *NEW MASSES* 11, 12 (Aug. 21, 1934).

<sup>38</sup> MARTIN, *HERNDON, supra* note 33, at 61; North, *Fighter, supra* note 36, at 11.

<sup>39</sup> Wechsler, *Interview, supra* note 17, at 125.

<sup>40</sup> According to some accounts, Carol Weiss King approached Gellhorn, who then approached Wechsler. According to others, King approached Wechsler, Gellhorn and Jerome Michael, who later bowed out due to his southern ties. Wechsler’s account is that King contacted him and Gellhorn simultaneously, and that he and Gellhorn contacted Whitney North Seymour. Wechsler *Interview, supra* note 17, at 126. Charles Martin suggests a slightly different version of events, based on Seymour’s memory, which is that he enlisted Wechsler and Gellhorn to aid in him in preparing the briefs. MARTIN, *HERNDON, supra* note 33, at 140-2.

intersection between criminal law and popular politics. Though only one of what would eventually become six lawyers on Herndon's team, Wechsler later confessed to having written "the briefs in both cases," documents that sought to undermine Georgia's criminal insurrection law as an unconstitutional exercise of state power over free speech.<sup>41</sup>

Despite his best efforts, Wechsler's first brief failed.<sup>42</sup> Though the young law professor went to great lengths to show that Herndon had not posed a clear and present danger to the state of Georgia, the Supreme Court dismissed his complaint on the grounds that Herndon's lawyer had not raised the issue successfully at trial.<sup>43</sup> Undaunted, Wechsler began searching for an alternate theory upon which to continue Herndon's case while the ILD engaged in an impressive display of popular politics, or what it called "mass pressure" to stoke popular support for Herndon's defense.<sup>44</sup> In the summer of 1935, the ILD arranged for Herndon to tour the west coast, even building a cage like the ones used to house prisoners on Georgia chain gangs to accompany him.<sup>45</sup> In October of that year, the ILD held a mass demonstration in New York during which Herndon himself argued that the Supreme Court had denied his appeal not on legal deficiencies but in order to keep "white and Negro workers from organizing" in the

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<sup>41</sup> During his interviews with Silber and Miller, Wechsler recalled writing the "bulk" of Herndon's legal briefs himself. Wechsler, *Interview*, supra note 17, at 125-7. During his testimony before the subcommittee of the Senate Judiciary Committee in 1944, however, he confessed to having researched and written "the briefs in both cases." Statement of Herbert Wechsler, "Nomination of Herbert Wechsler, of New York, to be Assistant Attorney General," U.S. Senate Subcommittee of the Committee on the Judiciary, May 29, 1944, 75, 78. Atlanta attorneys Elbert Tuttle and William A. Sutherland also participated in the case, though Wechsler remembered them to be involved primarily in Herndon's second appeal. Brief for the Appellant, *Herndon v. Georgia*, 295 U.S. 441 (1935) (No. 665).

<sup>42</sup> *Herndon v. Georgia*, 295 U.S. 441 (1935).

<sup>43</sup> Brief for the Appellant, *Herndon v. Georgia*, 295 U.S. 441 (1935) (No. 665).

<sup>44</sup> Interestingly, the rise of fascism abroad seemed to help activists like Herndon at home as well. In April 1936, for example, not long after Hitler mobilized German troops in the Rhineland, anti-war protests broke out on college and high school campuses across the United States. *Nation's Students Join Peace Rallies*, N.Y. TIMES, April 23, 1936, at 14. Though unrelated to race, the protests did have implications for free speech as students promised not to strike at those institutions allowing them to "express their views without censorship" many taking "Oxford" oaths not to fight in future wars. *Id.* Angelo Herndon, in a testament to his growing notoriety, spoke at one such rally held by Yale University. *Id.* Herndon also addressed a crowd of over 20,000 people at Madison Square Garden in New York City in November 1936, denouncing racism in the South and fascism abroad. *Fascism is Issue, Browder Contends*, N.Y. TIMES, Nov. 3, 1936, at 18. See GLENDA ELIZABETH GILMORE, *DEFYING DIXIE: THE RADICAL ROOTS OF CIVIL RIGHTS*, 67-105, 112-154 (2008).

<sup>45</sup> MARTIN, HERNDON, supra note 33, at 154.

Deep South.<sup>46</sup> Herndon's fusion of the black struggle in the South with the struggle of labor generally cast his own case in a more broad-based light, one that implicated the Supreme Court's initial decision against him as part of a larger move to suppress labor and the New Deal.<sup>47</sup>

Though it is impossible to know whether the ILD's tactics had an effect on the nation's highest tribunal, the Supreme Court did agree to rehear Herndon's case in April 1937.<sup>48</sup> The reason for the rehearing was a Georgia law unearthed by Wechsler that provided an appeal in cases where a statute's constitutionality had not been raised appropriately at the state level.<sup>49</sup> This resolved the technical deficiency in Herndon's initial petition, namely that he had failed to raise a constitutional objection to Georgia's insurrection statute at the trial level.<sup>50</sup> However, the question of whether such an objection should, or for that matter even could have been raised was debatable. The trial judge had actually agreed with Herndon's attorneys on the constitutional interpretation of the statute in question, namely that it only imposed liability when the accused represented an imminent danger to the state.<sup>51</sup> It was a surprise to Herndon then when the Georgia Supreme Court reinterpreted the statute against him, holding that it not only punished offenders for risking imminent overthrow of the government, but overthrow of the state at "any time," thereby raising a constitutional question that Herndon had not anticipated.<sup>52</sup> In a manner that reflected bias against Herndon, the United States Supreme Court held that Herndon should have predicted the Georgia Supreme Court was going to reinterpret the statute against him based on two of its past opinions, neither of which dealt with similar facts.<sup>53</sup> To Wechsler's mind, this holding was suspect, indicating possible bias on the Court. Convinced that Herndon should be free, he decided to go back through Georgia's statutes to find grounds for a second appeal, ultimately discovering a habeas petition keeping federal challenges to state statutes open,

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<sup>46</sup> *Herndon Cheered as Martyr by 2,000*, N.Y. TIMES, Oct. 22, 1935, at 15.

<sup>47</sup> Kenneth W. Mack, *Law and Mass Politics in the Making of the Civil Rights Lawyer, 1931-1941*, 93 J. OF AMERICAN HIST. 44-6 (2006); SITKOFF, *NEW DEAL*, *supra* note 18, at 148-9.

<sup>48</sup> *Herndon v. Lowry*, 301 U.S. 242 (1937). For a discussion of Lowry's significance, see DAVID M. RABAN, *FREE SPEECH IN ITS FORGOTTEN YEARS* 375 (1997); and HARRY KALVEN, JR., *A WORTHY TRADITION: FREEDOM OF SPEECH IN AMERICA* 169-175 (1988).

<sup>49</sup> Wechsler, *Interview*, *supra* note 17, at 75.

<sup>50</sup> *Georgia*, 295 U.S. at 448-9.

<sup>51</sup> Justice Cardozo found the Court's refusal to hear Herndon's case to be a procedural dodge. See, Cardozo, *dissenting*, *Herndon v. Georgia*, 295 U.S. 441 at 447-449.

<sup>52</sup> *Georgia*, 295 U.S. at 445-6. .

<sup>53</sup> *Georgia*, 295 U.S. at 444.

even when the statute's constitutionality had not been raised at trial.

After three years of pressure from the ILD, the Court agreed to rehear Herndon's case. And, in 1937, he won.<sup>54</sup> Communists rejoiced.<sup>55</sup> "Herndon is Free!" proclaimed the communist paper *The New Masses*, praising the "mass pressure" that the ILD had applied on his behalf.<sup>56</sup> "[H]ow come this change in attitude of the court?" asked *New Masses* writer Joseph North.<sup>57</sup> "The answer," North continued, was not in Wechsler's skill as an attorney, but in the "tidal wave of labor organization," the "surge of sit-down strikes," and the "growing unity of labor" nationwide all of which "inevitably caused the Court to reconsider its previous decision."<sup>58</sup>

While it is unlikely that communist "mass pressure" alone influenced the Supreme Court, changing winds caused by the Great Depression probably did help Herndon's case. In 1937, President Roosevelt threatened to increase the number of justices on the Supreme Court by appointing judges sympathetic to the New Deal, a plan that the President announced on the same day that Herndon's second appeal went up for oral argument.<sup>59</sup> FDR's court-packing plan coincided with a dramatic spike in the power of labor unions and "labor's rights" following the presidential election of 1936.<sup>60</sup> Wechsler capitalized on this surge by de-emphasizing Herndon's racial identity in his second brief, meanwhile stressing his labor credentials.<sup>61</sup> He lifted a discussion

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<sup>54</sup> *Herndon v. Lowry*, 301 U.S. at 242.

<sup>55</sup> *Lowry*, 301 U.S. at 242.

<sup>56</sup> Joseph North, *Herndon is Free!* 23 NEW MASSES, May 11, 1937, at 13.

<sup>57</sup> *Id.*

<sup>58</sup> *Id.*

<sup>59</sup> Historians of the *Herndon* case place considerable weight on the court-packing plan as the deciding factor in Herndon's victory. See for example MARTIN, HERNDON, *supra* note 33, at 182; Sitkoff, *New Deal*, 151. On the same day that *Lowry* came up for oral argument, President Roosevelt publicly announced a plan to pack the Court with a new justice for every judge on the bench who was over seventy. This "court-packing plan" as it came to be known, sought to pressure the Justices into endorsing ambitious New Deal programs that pushed traditional boundaries of federal power. To many, the plan also pushed the Court to take a different view of cases brought by minority plaintiffs seeking civil rights like Angelo Herndon. WILLIAM E. LEUCHTENBURG, *THE SUPREME COURT REBORN: THE CONSTITUTIONAL REVOLUTION IN THE AGE OF ROOSEVELT* 186, 231-8 (1995); MARTIN, HERNDON, *supra* note 33, at 182.

<sup>60</sup> Again, I borrow the term "labor's rights" from Risa Goluboff, who charts a move towards upholding the rights of labor on the Court in the late 1930s. RISA GOLUBOFF, *THE LOST PROMISE OF CIVIL RIGHTS* 30-1 (2007).

<sup>61</sup> Another possibility, of course, is that Roberts ruled differently because Wechsler found a more solid basis for the appeal. Thanks to his own research, for example, Wechsler found a clear statutory basis for challenging the constitutionality of Georgia's insurrection law, a move that Herndon's initial attorneys had arguably failed to do. For justices like Hughes and Roberts, who

of the demonstration that Herndon had organized in Atlanta out of the footnotes and into the main text, making sure to note that Herndon had been demonstrating not just for blacks but for “unemployment relief” and “unemployment insurance” for all workers.<sup>62</sup> Further, Wechsler made sure to argue that while some of Herndon’s literature advocated the creation of a black state, a terrifying proposition to southern whites, the sum of Herndon’s material merely endorsed the “peaceful organization of the unemployed.”<sup>63</sup>

Despite the lawyering skills that he brought to the case, Wechsler left Herndon agreeing with the ILD that the “winds” of politics had decided the ultimate outcome.<sup>64</sup> This reaffirmed his belief that politics, not principal undergirded criminal law, and that popular opinion could dramatically alter the kinds of sentences that defendants received. As popular opinion shifted in favor of labor and labor’s rights, the Court found new reason to review Herndon’s case, ultimately releasing him from a Georgia chain gang.

Similar types of nullification, believed Wechsler, emerged in other contexts as well, particularly cases involving the death penalty. In a 1937 article co-written with Columbia Law professor and colleague Jerome Michael, Wechsler argued that “there is a point” at which “severe penalties” like death might actually stir “a sympathy for those accused of crime,” leading to “nullification” of the law by jurors, witnesses, and prosecutors.<sup>65</sup> This view, which Wechsler invoked as part of a larger argument about the need to lower the severity of punishment to fit individual crimes, reflected a sensitivity to the democratic politics of criminal law, particularly the manner in which both jurors and prosecutors could manipulate sentencing outcomes to coincide with popular sentiment. Indeed, it suggests that Wechsler understood criminal law to be a relatively fragile legal edifice subject to “nullification” by actors who were neither judges nor legislators, but still had the power to influence sentencing.

How might non-judicial/non-legislative actors control, or “nullify” sentencing? Prosecutors could simply decide not to

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had expressed sympathy for minority clients and civil liberties in the past, this alone might have pushed them to decide in Herndon’s favor. Barry Cushman discusses the influence that legal drafting had on Hughes and Roberts in Cushman, *Rethinking*, 38. See also James A. Henretta, *Charles Evans Hughes and the Strange Death of Liberal America*, L. & HIST. REV. 24 (2006), 115.

<sup>62</sup> Brief for the Appellant, *Herndon v. Lowry*, 301 U.S. 242 (1937) (Nos. 474 and 475), 16-17.

<sup>63</sup> *Id.* at 28.

<sup>64</sup> Wechsler, *Interview*, *supra* note 17, at 95.

<sup>65</sup> Herbert Wechsler & Jerome Michael, *A Rationale of the Law of Homicide II*, 37 COL. L. REV. 1261, 1265 (1937).

prosecute cases, even if there was sufficient evidence to proceed. Witnesses, meanwhile, could refuse to testify while jurors, long celebrated for their nullification power, could simply refuse to convict. Though Wechsler did not provide specific examples of the above happening in the United States in the 1930s, he probably did not have to. The nation had only recently given up its attempt to criminalize alcohol consumption, a fiasco that had led to rampant lawbreaking nationwide.<sup>66</sup> Popular rejection of Prohibition was so bad in fact that it had led to a dramatic rise in organized crime and state sponsored corruption, a phenomenon that spurred governmental investigations into both criminal organization and police in the 1930s.<sup>67</sup> As the government focused its attention on stopping crime, the public developed a bizarre affinity for “celebrity bandits,” men like Alphonse Capone and John Dillinger who flaunted criminal law.<sup>68</sup> To a law professor writing in 1937, four years after Prohibition had been repealed, the idea that popular sympathy for criminals might nullify criminal law was not strange. In fact, popular sympathy for criminals had led President Roosevelt to campaign successfully for re-amending the Constitution and restoring legality to alcohol.

Another factor that might have contributed to Wechsler’s fear that the public might reduce punishments and nullify the law was the persistence of the Great Depression. By 1937, the United States had entered its seventh year of an economic crisis marked by unprecedented unemployment, poverty, and popular distress.<sup>69</sup> That such dire straits might have increased popular sympathy for criminal defendants, or at least tempered popular demand for harsh punishment, is probably reasonable to assume. Indeed, in 1936 divisions between law-breaking and morality became blurred as autoworkers in Flint, Michigan seized control of a massive General Motors plant, winning enthusiastic endorsement from proponents of labor across the United States, even though GM branded the strikers as criminals.<sup>70</sup>

Interestingly, even as Wechsler feared that harsh punishment might lead to nullification by a downtrodden public, he also became concerned that an overly liberal application of the death penalty might harm public morals. “It is at least arguable,” noted Wechsler in 1937, that the “use of the death penalty” may actually “brutalize” the “non-criminal population” meanwhile

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<sup>66</sup> SAMUEL WALKER, *POPULAR JUSTICE: A HISTORY OF AMERICAN CRIMINAL JUSTICE*, 2D ED. 158-9 (1998).

<sup>67</sup> *Id.*

<sup>68</sup> CLAIRE BOND POTTER, *WAR ON CRIME: BANDITS, G-MEN, AND THE POLITICS OF MASS CULTURE* (1998).

<sup>69</sup> DAVID M. KENNEDY, *FREEDOM FROM FEAR: THE AMERICAN PEOPLE IN DEPRESSION AND WAR, 1929-1946* (1999).

<sup>70</sup> *Id.* at 310-11.

providing examples of “the very kinds of behavior” that the punishment is designed to deter.<sup>71</sup> To provide support for this theory, Wechsler cited the execution of Ruth Snyder, a New York woman convicted of murdering her husband just prior to the stock market crash in 1929, with the help of a paramour named Henry Judd Gray. Partly due to the dramatic nature of the crime, committed with blunt sash weights, newspapers focused on the case for months, eventually describing Mrs. Snyder’s death in meticulous detail. For example, the *New York Times* noted that Snyder entered the “death chamber” with her “face tearful and eyes aghast,” only to start begging for mercy once a “black leather mask” was placed over her face.<sup>72</sup>

Wechsler’s fear that such macabre attention to detail might “brutalize” the population reflected a rationale for opposing the death penalty that initially seemed different from the fear that the public might nullify the law by allowing killers to go free. Among other things, it reflected a paternalist concern for the public’s mental well-being, a position that assumed voters were relatively impressionable when it came to the gory details of death. At first glance, this seemed to contradict Wechsler’s fear that the public were themselves a threat to the legal system precisely because they were able to nullify the law in cases where they believed that the defendant, even if guilty, should not be killed. Pulling the camera back for a moment, if the public sympathized with offenders enough to nullify the law, how could the law then be in a position to “brutalize” them?

Wechsler’s seemingly contradictory positions on the death penalty maintained at least one common thread. In both cases of nullification and brutalization, the intersections between popular opinion and law were critical to assessing the success or failure of formal legal process; in this case the administration of the death penalty. Before states should legalize execution, for example, Wechsler argued that they should try to gauge “popular sentiment” even in cases where it was “rarely uniform.”<sup>73</sup> What the state should not do, he warned, was ignore popular sentiment and consign the “question of punishment” to “the discretion” of “administrators.”<sup>74</sup> Administrators worried Wechsler because they could easily thwart the “development and articulation of uniform policies” that coincided with popular rule, and therefore possessed a better chance of not being overturned by future legislation.<sup>75</sup>

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<sup>71</sup> Wechsler, *Rationale*, *supra* note 64, at 1266.

<sup>72</sup> *She Goes to Death First*, N.Y. TIMES, Jan. 13, 1928, at 1.

<sup>73</sup> Wechsler, *Rationale*, *supra* note 64, at 1267.

<sup>74</sup> *Id.*

<sup>75</sup> *Id.*

In short, Wechsler supported a democratically responsive criminal law, one that sought to keep abreast of popular opinion without letting popular consensus neutralize basic criminal law goals like making sure that the severity of punishment fit the severity of crime. In 1937, this democratic concern seemed to lead Wechsler to come out relatively strongly against the death penalty, both as a brutalizing force and an invitation to popular nullification of the law.

Yet, Wechsler also saw a utilitarian reason for keeping death alive. In 1940, Wechsler and his colleague Jerome Michael authored a criminal law casebook that mentioned, in passing, a rationale for execution. “[T]he desire for revenge,” wrote Wechsler and Michael, “the belief that retributive punishment is just, and the feeling that examples must be made of those guilty of shocking crimes are to a very considerable degree entrenched in the general population.”<sup>76</sup> Recognizing that the public may want severe punishments in certain cases, Wechsler and Michael advanced a utilitarian rationale for harsh punishment, even death. “Too lenient treatment of offenders,” they argued, “however well adapted to reforming them, may therefore lead to lynching, self-help or indifference about prosecution which may be far worse in their social consequences than the utilization of more severe methods of treatment which satisfy the popular desire for severity though they have no reformatory capacity.”<sup>77</sup> That light punishment might lead to “lynching, self-help, or indifference about prosecution,” was a remarkable claim. Not only did it suggest that harsh punishment should be used to satisfy popular outrage, but it seemed to contradict Wechsler’s own position on lynching in the South. How, for example, could southern lynching possibly be a result of too lenient punishment of black offenders? Wasn’t the problem that southern whites rejected any semblance of legal process when it came to blacks? And why invoke federal power to stop lynching, if all that was needed was harsher punishment?

Neither Wechsler nor Michael were strangers to the kind of popular justice that stalked southern states. Michael, who was also Jewish, had grown up in the South. Born in Athens, Georgia in 1890, Michael was twenty-five years old when Georgia authorities prosecuted and sentenced a Jewish pencil-factory manager who worked outside Atlanta named Leo Frank. Accused of murdering a thirteen-year old girl, Frank was found guilty by a Georgia trial jury but questions about the evidence in the case prompted Georgia Governor John M. Slaton to commute his sentence from death to

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<sup>76</sup> JEROME MICHAEL AND HERBERT WECHSLER, *CRIMINAL LAW AND ITS ADMINISTRATION: CASES, STATUTES AND COMMENTARIES* 16 (1940).

<sup>77</sup> *Id.*

life in prison. Outraged, a mob of private citizens, some prominent Georgians, stormed the state prison farm where Frank was held, kidnapped him, and brutally lynched him near Marietta, garnering headlines.<sup>78</sup>

Is it possible that Michael and Wechsler, both Jews, believed Frank's sentence should never have been commuted? Probably not, but their encounters with the South left an indelible imprint nevertheless. Unlike reformers who focused exclusively on offenders, neither Michael nor Wechsler would ever forget the active, even catastrophic role that the public could play in altering criminal outcomes, amending criminal sentences, or even "nullifying" criminal law. Further, these lessons applied across the United States, not just the Deep South. In San Jose, California in 1933, for example, angry citizens seized and lynched John Holmes and Thomas H. Thurmond, both white, after they confessed to kidnapping and murdering a young boy named Brooke Hart.<sup>79</sup> The lynching became so popular that California Governor James Rolph, Jr. commended the mob's leaders for being "patriotic citizens."<sup>80</sup>

Popular support for the death penalty molded Wechsler's thinking on the utility of retribution, inspiring him to assert not only that soft punishment might lead to lynching, but that it could also result in "self-help" and "indifference about prosecution." While lynching and self-help referred to the removal of the criminal process by private individuals from the state, Wechsler's reference to "indifference about prosecution" was less clear. Did this mean that if punishment was not severe enough then the public might simply lose interest in the criminal process? If so, why was this not a good thing? Had not Wechsler been disturbed by popular fascination with the trial and execution of Ruth Snyder? Or, had Wechsler come to realize that popular indifference to the criminal process was a bad thing, a phenomenon that might facilitate handing the reins over to agents free from public control, perhaps even some kind of "administrator"?

Wechsler's mention of popular indifference to the criminal process as a bad thing suggested that popular interest in the criminal process was actually a good thing. In fact, his warning that popular indifference could lead to "social consequences" far worse than the harsh punishment of a small number of offenders hinted at a positive correlation between the criminal process and popular interest. Here, Wechsler's utilitarian view of punishment as a means of keeping the people vested in the legal system

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<sup>78</sup> *Warden is Overpowered, Twenty-Five Men in Party Kidnap Frank from Jail*, N.Y. TIMES, Aug. 17, 1915, 1.

<sup>79</sup> *Lesson Learned*, TIME, Dec. 11, 1933.

<sup>80</sup> *Id.*

coincided with his earlier interest in the intersection between criminal law and popular opinion, opinion that could either be brutalized by the law or, conversely, nullify it.

Perhaps the single-biggest event that convinced Wechsler of the uses of retribution occurred five years after he and Jerome Michael completed their casebook. Following the Allied victory over Hitler in World War II, former Attorney General Francis Biddle asked Wechsler whether he wanted to serve as an aide in the prosecution of Nazi high officials in Nuremburg, Germany.<sup>81</sup> Wechsler agreed and for almost a year beginning October 1945 watched as American, Russian, British, and French prosecutors excoriated Nazis in court.<sup>82</sup> Two lessons stayed with him. One was that retribution, not deterrence, incapacitation or rehabilitation justified trying the Nazis.<sup>83</sup> Two, the retribution directed at Hitler's lieutenants had a distinctly utilitarian purpose. As Wechsler later remembered it, popular "demand for retribution" against the Nazis was so great that it "rose like a plaintive chant" from Europe's "desolated lands" following the war.<sup>84</sup> In fact, retribution, or the prevention of private citizens from exacting retribution, became, for Wechsler, the most compelling reason for holding the trials. "[W]ho can doubt," he wrote, "that indiscriminate violence," indeed "a blood bath beyond power of control" would have exploded in Europe had the Allies announced that "no trial would take place?"<sup>85</sup> The reason for trying Nazi officials was not simply to punish them, but rather to provide some "institutional mechanism" that would "reserve the application of violence" to public entities and not private actors.<sup>86</sup> The prevention of private recriminations, concluded Wechsler, was the most "constructive purpose" behind the war crimes tribunal.<sup>87</sup>

If Prohibition convinced Wechsler that politically unpopular criminal laws would be broken "with abandon," Nuremburg persuaded him that retribution had utilitarian value. Though there was nothing that could be done to German high officials that would be commensurate with the harms that they had caused, at least a formal trial promised to convince private citizens

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<sup>81</sup> Wechsler, *Interview*, *supra* note 17, at 105.

<sup>82</sup> AIREY NEAVE, *ON TRIAL AT NUREMBERG* (1978).

<sup>83</sup> Perhaps surprisingly, Wechsler did believe that Nuremburg might have had some deterrent value. "[T]here are men," explained Wechsler, who in "valuing personal survival, will take account of the contingency of failure." Presumably this meant that potential political discontents might think twice before engaging in the kinds of atrocities that the Nazis did. Herbert Wechsler, *The Issues of the Nuremburg Trial*, 62 *POL. SCI. Q.* 16 (1947).

<sup>84</sup> *Id.*

<sup>85</sup> *Id.*

<sup>86</sup> *Id.*

<sup>87</sup> *Id.*

that they need not take matters into their own hands. This meant that satisfying the retributive desires of average people was by itself an important goal of the criminal process, regardless of the utilitarian effect that punishment had on the offender.

Nuremberg formed the third leg in Wechsler's triadic vision of retributive utilitarianism. It reminded him that public desires for retribution needed to be satisfied lest private violence ensue and therefore complemented the lesson of Prohibition, which was that public prejudice ultimately determined the contours of criminal law. However, Wechsler never became a fatalist. Angelo Herndon's journey through the American court system convinced him that even though popular prejudice determined the contours of the law, that prejudice could be mitigated, even reversed through political propaganda, agitation, and education. Prior to Roosevelt's 1936 election, the rise of "labor's rights," and the Court-packing plan, Herndon had little chance of gaining an acquittal. Following these events, however, Herndon's fortunes changed dramatically. Whether the ILD's political organizing had anything to do with this or not, Wechsler became so impressed with the organization's approach to practicing law "outside of courts and legislative bodies," that he ultimately became a member of the group's legal advisory board.<sup>88</sup>

In the next section, we shall see how Wechsler's personal experiences informed his reform efforts, particularly his commentaries on the American Law Institute's Model Penal Code. Partly due to his work with Michael in the 1930s, ALI chose him to serve as Chief Reporter on the Model Penal Code project. It would prove to be a hands-on opportunity for him to apply his political sensibilities to the reform of criminal law.

## II. POPULAR CONSENSUS AND THE MODEL PENAL CODE

First envisioned as a corrective to the common law in the 1930s, the Model Penal Code project finally gained sufficient funding to proceed in the 1950s. Animating the Code was a sense that criminal law had failed to stay abreast of modern developments in psychology and the social sciences, becoming over-burdened with idiosyncratic offenses lacking logical definition. To correct this, the Code's drafters devised a series of

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<sup>88</sup> Statement of Herbert Wechsler, "Nomination of Herbert Wechsler, of New York, to be Assistant Attorney General," U.S. Senate Subcommittee of the Committee on the Judiciary, May 29, 1944, 75.

innovations that states could adopt as they pleased, depending on how far they wanted to go down the road to reform.<sup>89</sup>

Assembled over a ten year period, the MPC abolished common law notions of malice and reduced mental state to four simple categories: purpose, knowledge, recklessness, and negligence. The MPC also simplified a variety of common law crimes. Instead of battery, aggravated assault, and mayhem, for example, the MPC simply prohibited “bodily injury.”<sup>90</sup> Rather than particularized offenses aimed at punishing recklessness like “failure to protect [the] public from attack by wild animals and reptiles,” “throwing knives or shooting at human being in course of exhibition,” and “negligently furnishing insecure scaffolding,” the Code simply included a statute prohibiting “reckless conduct.”<sup>91</sup>

Perhaps the Code’s most controversial innovation was a focus on the treatment of offenders, rather than simply their punishment. According to Wechsler, who outlined the basic “challenge” of a Model Penal Code in 1952, the primary goal of criminal law was to reduce crime by successfully treating present and future offenders. “Treatment,” according to Wechsler, included both rehabilitation and reform of present offenders, through for example probation and parole, as well as deterrence. “[T]he deterrence of potential offenders is a practicable objective of their treatment” posited Wechsler.<sup>92</sup>

The MPC’s focus on treatment rankled some criminal law scholars, most notably Henry M. Hart, who maintained that the Code should balance its emphasis on offenders with a counter-emphasis on “the aims of the good society generally.”<sup>93</sup> Noting that crime was different from other wrongs, or torts, because it incurred “the moral condemnation of the community,” Hart argued that substituting notions of treatment for notions of punishment confused criminal law with the practice of medicine, doing a “disservice” to the “purposes of law as a whole.”<sup>94</sup> “The core of the difference” between criminal law and medicine, observed Hart, “is that the patient has not incurred the moral condemnation of his community, whereas the convict has.”<sup>95</sup>

Hart’s complaints that the MPC substituted treatmentism for the “conscience of the community” obscured the fact that the Code’s Reporters actually did keep the relationship between

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<sup>89</sup> For more on the Model Penal Code, *see* DUBBER, MODERN PENAL CODE, *supra* note 4.

<sup>90</sup> “Comments,” Tentative Draft No. 9, Model Penal Code, May 8, 1959, 81.

<sup>91</sup> *Id.* at 86.

<sup>92</sup> Wechsler, *Rationale II*, *supra* note 64, at 1262.

<sup>93</sup> Henry M. Hart, Jr., *The Aims of Criminal Law*, 23 L. & CON. PROB. 401, 402 (1958).

<sup>94</sup> *Id.* at 404, 409.

<sup>95</sup> *Id.* at 406.

criminal law and public opinion at the forefront of their minds. This was particularly true for offenses that stirred popular outrage but were otherwise victimless, like incest. Positing that prohibitions against incest “may have their justification” in the “science of genetics,” Wechsler noted that upon close scrutiny there was actually scant scientific evidence supporting continuation of the crime.<sup>96</sup> Conceding that many opposed incest on the grounds that it encouraged “defective offspring,” Wechsler observed that the offense could not be explained by “breeding objectives” alone because it was not “limited to child-bearing” but applied to couples who decided not to have children.<sup>97</sup> Breeding-objectives also failed to explain why marriages were forbidden “between persons not related by blood,” like “step children,” “adoptive” relatives, and “daughter[s]-in-law.”<sup>98</sup>

Even data on whether parents who were related risked a higher degree of genetic defects, argued Wechsler, was inconclusive. Although “consanguineous marriages” may “increase the incidence of defective offspring” in the first generation, he noted, this was only true if both parents carried a “rare, recessive, unfavorable gene,” not common among the general population.<sup>99</sup> The probability of such a misfortune, continued Wechsler, was “not significantly increased by consanguineous mating” so long as the “unfavorable gene [was] common in the population.”<sup>100</sup> In fact, unfavorable genes would negatively impact individuals whether incest was criminalized or not. “[A]ny decrease in the number of first generation defectives,” argued Wechsler, would be “balanced by an increase in later generations,” as the negative genes of individual parents entered the general population, raising the “frequency with which the marriage of unrelated persons produces the unfavorable characteristic.”<sup>101</sup> In fact, “animal inbreeding” indicated that “permanent favorable effects” could be achieved by “continuous control of matings through successive generations” with an eye to “elimination of unfavorable lines.”<sup>102</sup>

Recognizing that most voters would be reluctant to apply theories of animal breeding to people, Wechsler concluded that the crime of incest should be retained lest popular opposition erupt. “Even if it were demonstrable,” wrote Wechsler, that incest laws “promote no secular goal,” doing away with the offense would be a

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<sup>96</sup> “Comments,” Tentative Draft No. 4, Model Penal Code, April 25, 1955, 231.

<sup>97</sup> “Comments,” Tentative Draft No. 4, Model Penal Code, April 25, 1955, 231.

<sup>98</sup> “Comments,” Tentative Draft No. 4, Model Penal Code, April 25, 1955, 231.

<sup>99</sup> “Comments,” Tentative Draft No. 4, Model Penal Code, April 25, 1955, 231-2.

<sup>100</sup> “Comments,” Tentative Draft No. 4, Model Penal Code, April 25, 1955, 232.

<sup>101</sup> “Comments,” Tentative Draft No. 4, Model Penal Code, April 25, 1955, 232.

<sup>102</sup> “Comments,” Tentative Draft No. 4, Model Penal Code, April 25, 1955, 232.

mistake given the public's "intense hostility" to the crime.<sup>103</sup> At least some of this hostility derived from religious sources. "The bible defines and prohibits incest," noted Wechsler, so much so that "modern legislation" forbidding incest "is largely derived from canon law."<sup>104</sup> "The religious character of the prohibition," he continued, was most obvious in states like Rhode Island, where Jews were exempted from prohibitions against "uncle-niece" and "aunt-nephew" marriages "since such marriages are permissible for that religious group."<sup>105</sup> Here Wechsler, himself of Jewish descent, evinced an awareness of community norms as a guiding factor in criminal law. To further establish the importance of keeping local norms in mind, Wechsler articulated a general principle of criminal lawmaking: "a penal law will neither be accepted nor respected," declared Wechsler, "if it does not seek to repress that which is universally regarded by the community as misbehavior."<sup>106</sup> No matter how irrational a particular offense may be, in other words, community support for that offense justified its survival.

Of course, if community attitudes appeared to be shifting then reform was probably in order, as in the case of adultery and fornication. Noting that prosecution for adultery and fornication served several utilitarian objectives, including "preservation of the institution of marriage," "prevention of illegitimacy," and "prevention of disease," Wechsler still lobbied for dissolution of the offenses on the grounds that they lacked popular support.<sup>107</sup> Citing two reports by University of Indiana professor Alfred Kinsey, Wechsler noted that "a large proportion of the population is guilty at one time or another" of adultery, while pre-marital intercourse was "very common and widely tolerated."<sup>108</sup> To further establish popular opposition to the offenses of fornication and adultery, Wechsler noted that "complaints are almost always withdrawn," and sentences imposed "only in exceptional circumstances."<sup>109</sup>

Why be concerned with offenses that were widely broken but rarely prosecuted? To Wechsler's mind, the criminalization of conduct that most people thought was acceptable threatened the very legitimacy of the law. "Impossibility of enforcement" he warned in the MPC Commentaries, tends "to bring the law into disrepute."<sup>110</sup> Here, Wechsler flagged another reason for paying

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<sup>103</sup> "Comments," Tentative Draft No. 4, Model Penal Code, April 25, 1955, 233.

<sup>104</sup> "Comments," Tentative Draft No. 4, Model Penal Code, April 25, 1955, 231.

<sup>105</sup> "Comments," Tentative Draft No. 4, Model Penal Code, April 25, 1955, 231.

<sup>106</sup> "Comments," Tentative Draft No. 4, Model Penal Code, April 25, 1955, 233.

<sup>107</sup> "Comments," Tentative Draft No. 4, Model Penal Code, April 25, 1955, 207.

<sup>108</sup> *Id.* at 206.

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

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

attention to popular opinion, one that went far beyond the utilitarian goals of preserving or abolishing any single offense. The legitimacy of the entire legal system, he implied, could suffer if lawmakers did not reconcile criminal law with popular consensus. “Criminal law,” argued Wechsler, could not “undertake or pretend to draw the line where religion or morals would draw it.”<sup>111</sup> Repeating his emphasis on the danger of unenforceable crimes, “criminal liabilities,” that proved “unenforceable because of nullification” argued Wechsler, should be “eliminated.”<sup>112</sup>

While the desirability of elimination was easy to determine for certain offenses, it was not for others. Abortion posed a particularly complex problem. At the time, an “absolute prohibition” existed on abortion in the United States, with only half a dozen states recognizing an exception “for the purpose of saving the mother’s life.”<sup>113</sup> Yet, illegal abortions persisted, leading to over 300,000 abortions per year and the death of roughly 8,000 women annually.<sup>114</sup> Though “ethical or religious” objections constituted a significant obstacle to liberalization, Wechsler suspected that “the weight of critical and public opinion” favored a “more restricted application of criminal sanctions” than what was then in place.<sup>115</sup> This led the Reporter to recommend “a policy of cautious expansion of the categories of lawful justification” of abortion.<sup>116</sup>

Wechsler endorsed three instances where abortion should be legal. The first included cases where the mother’s life was at risk, an exception already recognized in some states.<sup>117</sup> The second included cases where abortion was necessary to “prevent gravely defective offspring” including cases where infants were likely to have “serious abnormalities” including “gravely defective central nervous systems.”<sup>118</sup> The third case for available abortions, argued Wechsler, should be cases of pregnancy resulting from rape.<sup>119</sup> Popular support for rape-victims, argued Wechsler, was relatively high. Evidence of this emerged in 1956, when a woman from Philadelphia was denied permission to abort a rape-induced pregnancy. The woman’s plight was “sympathetically reported in the press” as an example of “an unrealistic legal requirement.”<sup>120</sup>

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<sup>111</sup> *Id.* at 150.

<sup>112</sup> *Id.*

<sup>113</sup> “Comment,” Tentative Draft No. 9, Model Penal Code, May 8, 1959, 155.

<sup>114</sup> *Id.* at 147.

<sup>115</sup> *Id.* at 149.

<sup>116</sup> *Id.* at 150.

<sup>117</sup> *Id.* at 152.

<sup>118</sup> *Id.* at 153, 154.

<sup>119</sup> *Id.* at 155.

<sup>120</sup> *Id.*

Pregnancies resulting from statutory rape garnered a different response. Noting that “some foreign laws” allow abortions in cases of statutory rape, Wechsler worried that exempting young consenters might “be misinterpreted as affirmative approval” of a “practice strongly discountenanced by substantial groups in society.”<sup>121</sup> For this reason, the “issue was left among those,” upon which the MPC took “no position.”<sup>122</sup>

Concerns that popular opinion should guide, if not determine criminal lawmaking applied not only to abortion but to the death penalty as well. Noting that “[o]n balance, the Reporter favors abolition” of the penalty, Wechsler counseled that it would be useless for the Institute to recommend ending capital punishment given that “many jurisdictions will retain [the] sentence of death” regardless of what the ALI recommended.<sup>123</sup> Even states that decided to abolish the penalty, continued Wechsler, could expect adverse results. Indeed “some communities” might even find that doing away with the death penalty invited the “greater evil” of “private violence.”<sup>124</sup> Here Wechsler picked up on a point that he had made over twenty years earlier, namely that private citizens might be tempted to take the law into their own hands if certain penalties were not retained.

University of Pennsylvania professor and special consultant to the MPC project Thorsten Sellin disagreed. In a special report conducted exclusively for the MPC staff, Sellin argued that “no good basis” existed for claiming that retaining the death penalty would “prevent an outraged community from taking the law into its own hands.”<sup>125</sup> Though lynchings had declined dramatically over the course of the twentieth century, Sellin argued, southern states that led “in the total number of persons lynched” also tended to be “among the leaders in the use of capital executions.”<sup>126</sup> Conversely, states like Arizona, Colorado, and Missouri, all of which had “experimented” with abolition of the death penalty, suffered no surge in lynchings once the penalty was removed.<sup>127</sup>

Rather than reduce private violence, Sellin argued that retaining the death penalty might actually increase it. Citing several historical examples, Sellin noted that “the desire to be executed” had actually caused people to kill in the Eighteenth Century. In 1760, a lieutenant in the Pennsylvania militia became

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<sup>121</sup> *Id.* at 146.

<sup>122</sup> *Id.* at 155.

<sup>123</sup> “Comments,” Tentative Draft No. 9, Model Penal Code, May 8, 1959, 65.

<sup>124</sup> Tentative Draft No. 9, Model Penal Code, May 8, 1959, 65.

<sup>125</sup> Thorsten Sellin, “The Death Penalty: A Report for the Model Penal Code Project of the American Law Institute,” included in Tentative Draft No. 9, Model Penal Code, May 8, 1959, 79.

<sup>126</sup> *Id.*

<sup>127</sup> *Id.*, at 79-80.

“weary of life,” and shot an innocent man in the street “in order to deprive himself of existence” through state sponsored execution.<sup>128</sup> Five years later, two Philadelphians committed murder in the hopes that their own lives might be taken by the state. The first, Henrich Albers “cut the throat of a twelve-year old German boy,” so that he “might lose his own life,” while the second, “cut the throat of his own three-months old son” so that he might “die by the process of law.”<sup>129</sup> Why murder others rather than simply commit suicide? One reason was religion. “[B]y murdering another person and thereby being sentenced to death,” explained Sellin, one could repent for one’s crime prior to being executed and thereby “still attain salvation.”<sup>130</sup> Individuals who committed suicide, on the other hand, remained guilty of a “sin more serious than fornication” and would automatically be denied entry to Heaven.<sup>131</sup>

Despite a lack of evidence that the death penalty reduced private violence and in certain bizarre cases even contributed to it, Thellin cautioned the ALI to think seriously before it abandoned execution. Proponents of the penalty were less interested in statistics, he conceded, than “tradition and what we have earlier called dogmas” rooted in the “feelings of the people.”<sup>132</sup> These feelings, recognized Sellin, could be “deeply rooted in a people’s culture,” and hard to dispel.<sup>133</sup> Only when popular opinion becomes “so oriented” that the majority of voters “favor the abolition of the death penalty” would political support for it truly disappear.<sup>134</sup>

Precisely because popular support for the death penalty remained high, the MPC’s drafters retained the penalty. However, they did become interested in the question of who precisely should determine death. Aware that both judges and juries could decide, Wechsler argued that there were “strong arguments” in favor of allowing judges to determine death.<sup>135</sup> To his mind, they were likely to be “less emotional or prejudiced” than juries, judicial tenures were more likely to promote “equality” in results, and judicial decisions were more likely to be based on “responsibility and rationality” because courts “might be persuaded to give reasons for determinations.”<sup>136</sup>

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<sup>128</sup> *Id.* at 66.

<sup>129</sup> *Id.*

<sup>130</sup> *Id.* at 67.

<sup>131</sup> *Id.* at 68.

<sup>132</sup> *Id.* at 81.

<sup>133</sup> *Id.*

<sup>134</sup> *Id.*

<sup>135</sup> “Comments,” Tentative Draft No. 9, Model Penal Code, May 8, 1959, 73.

<sup>136</sup> *Id.*

Yet, Wechsler concluded that it would be “unwise” to make any “changes” in the “prevailing practice” of leaving the determination of death to the jury.<sup>137</sup> This was because “many legislators would resist” abandoning the position that “the decision of life and death ought to reflect community, not specialized judgment.”<sup>138</sup> Legislative “objection,” continued Wechsler, “should not be invited” unless reformers possessed a “strong conviction” that whatever change in the law was being proposed amounted to a “great improvement” likely to curry popular support.<sup>139</sup> When it came to the question of removing the power to decide death from juries, concluded Wechsler, “[t]he Reporter does not hold such a conviction.”<sup>140</sup>

Precisely because of Wechsler’s concern for community sentiment, the Model Penal Code retained the death penalty and the jury’s power to determine it. The Code also retained the crimes of incest and abortion, though exceptions to abortion were proposed in cases of rape, health of the mother, and genetic defects. Fornication and adultery, by contrast, were completely eliminated. Recognizing that the ALI made political concessions in drafting the MPC helps to capture the manner in which liberal reformers at mid-century understood Henry Hart’s basic argument that criminal law should reflect the conscience, and condemnation, of the community. Though celebrated for emphasizing treatment, the Code also respected community norms, even those that had no value to offenders. Perhaps not surprisingly, the completion of the MPC gained headlines, most of them favorable.<sup>141</sup>

While the MPC Commentaries remain one of the best windows into Wechsler’s thinking on the relationship between criminal law and popular demands for retribution in the 1950s, he continued to sharpen his ideas in the 1960s. Just as the Code was completed, New York Governor Nelson Rockefeller appointed Wechsler to a commission to revise New York’s criminal law. Records of Wechsler’s work on that Commission are perhaps the best example of his sense that retribution had utilitarian value.

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<sup>137</sup> *Id.*

<sup>138</sup> *Id.*

<sup>139</sup> *Id.*

<sup>140</sup> *Id.*

<sup>141</sup> See e.g. *Modernizing the Law*, N.Y. TIMES, May 25, 1962, at 32.

### III. REFORMING NEW YORK'S PENAL LAW

Inspired by the ALI's work, Republican Governor Nelson Rockefeller appointed Wechsler to a Temporary Commission to Revise New York's Penal Law on June 21, 1961, hoping that he could bring his legal expertise to benefit the Empire State.<sup>142</sup> The 1961 commission was, in many ways, a product of Rockefeller's moderate Republican politics, if not his presidential aspirations. "The Penal Law and Criminal code contain archaic provisions which should be modernized," asserted Rockefeller in 1961, "The volume of provisions can be greatly reduced and the procedures can be simplified without affecting substantial rights."<sup>143</sup>

One of Rockefeller's goals was to make good on a campaign promise to reduce crime. Though moderate, Rockefeller had won the governorship partly due to public frustration with Democrat Averill Harriman's failure to control crime in New York.<sup>144</sup> In 1958, Republican Representative Kenneth B. Keating accused Harriman of "lax and laggardly anti-crime efforts" even implying that Democrats were reluctant to crack-down on crime for fear that it might expose a "tie-up between criminal elements and political leaders."<sup>145</sup> Such accusations were bolstered by the shocking discovery of a mafia convention in Appalachin, New York in November 1957, a meeting of criminal kingpins that Democratic leaders purportedly knew about but failed to disrupt.<sup>146</sup> Dismay at this discovery led to Republican-led investigations of organized crime in the state, investigations that echoed national Senate inquiries into organized crime by Tennessee Democrat Estes Kefauver.<sup>147</sup> Fearing Kefauver might beat him to the White House, Nelson Rockefeller made fighting crime a central part of his political platform in New York.<sup>148</sup>

In April 1959, Rockefeller promised to reduce a backlog of criminal cases in New York City, even urging passage of a

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<sup>142</sup> *State Picks Panel on Criminal Law*, N.Y. TIMES June 21, 1961, at 39.

<sup>143</sup> Nelson Rockefeller, Annual Message, January 4, 1961, Records of the Temporary Commission on Revision of Penal Law and Criminal Code, Criminal Law Library, 1<sup>st</sup> Judicial District – Supreme Court, New York, New York, Box 1 Folder 1. [hereinafter RTC] "I recommend that the Penal Law and the Code of Criminal Procedure be revised and simplified," maintained the Governor, "to provide a streamlined substantive law and procedure and that this be undertaken by a Commission including in its membership the Chairman of the Judicial Conference, law enforcement officials, and members of the bar." *Id.*

<sup>144</sup> *G.O.P. Eyes Three for Regent Posts*, N.Y. TIMES, Feb. 10, 1958, at 12.

<sup>145</sup> *City G.O.P. Divides on Coudert Seat: Goodwin is Designated but Faces Fight – Keating Assails Harriman*, N.Y. TIMES, May 24, 1958, 1.

<sup>146</sup> *Id.*

<sup>147</sup> *The Legislative Session*, N.Y. TIMES, March 27, 1958, at 32.

<sup>148</sup> *Governor Signs Anti-Crime, Bill*, N.Y. TIMES, 18 April 18, 1959, at 14.

constitutional amendment permitting defendants to waive indictment, moving them more quickly to either plea-bargaining or trial.<sup>149</sup> At the same time, Rockefeller endorsed more liberal reforms like simplifying New York's Criminal Code and regulating police. Not long after becoming governor, he signed an anti-crime bill into law that created an eight-member Municipal Police Training Council assigned to "draw up minimum training requirements to be met by every applicant for permanent appointment to any police force in the state."<sup>150</sup> This rule focused more on disciplining police than criminals, and coincided with a concomitant move to improve the quality of the criminal process. In February 1962, for example, Rockefeller signed a Public Defender Bill into law thereby granting counties the authority to abandon the practice of assigning counsel for indigent defendants, providing instead a Public Defender Service.<sup>151</sup>

Rockefeller's interest in criminal defendants, not just crime control, coincided with the growing power of black voters in the state. Throughout the 1950s, black emigrants streamed into New York from the South, rapidly transforming the racial demographics of urban boroughs like Brooklyn and Queens, and smaller cities like Rochester and Newburgh. Though most African Americans had abandoned the Republican Party during the New Deal, black anger at Democratic politics in the Deep South following *Brown v. Board of Education* created a window of opportunity for New York Republicans to regain their support.<sup>152</sup> "A wholesale defection by Negro voters could play havoc with Democratic prospects in a close election," asserted the *New York Times* in 1956. "By defeating the ticket in such cities as New York, Chicago, and Los Angeles," argued the *Times*, African Americans

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<sup>149</sup> "Hopefully," maintained the Governor, "such a revision can also serve to reduce delay in the trial of criminal cases." *Governor Signs Anti-Crime Bill*, N.Y. TIMES, April 18, 1959, at 14.

<sup>150</sup> *Governor Signs Anti-Crime, Bill*, N.Y. TIMES April 18, 1959, at 14.

<sup>151</sup> *The New Public Defender Law*, NEW YORK STATE BAR JOURNAL, Feb. 1962, at 59.

<sup>152</sup> Southern intransigence on school integration led many African Americans to question their allegiance to the party, an allegiance nurtured by Franklin Roosevelt and Harry Truman. This ambivalence translated into a political opportunity for Republicans, particularly in urban centers like Chicago and New York, where black migration was on the rise. "The Autherine Lucy affair, the bus strike in Montgomery, Ala., the progressively more arbitrary stand of Southern leaders against school integration," noted the *N.Y. Times* in 1956, "have caused many Negro leaders to re-examine their political loyalties. Some of them already have stated openly that their race would be better served by the Republicans than by the Democrats." *Civil Rights Pose Hard Choice for Democrats: Issues Now Coming Up in Congress Could Split the Party Irrevocably*, N.Y. TIMES, April 8, 1956 at E3.

voters “might throw each of their respective states into the Republican column.”<sup>153</sup>

At first, northern Republicans sought black votes primarily by promising to improve conditions in the South.<sup>154</sup> In June 1958, New York Senator and Republican Jacob Javits introduced legislation authorizing Federal prosecution and investigation of “racially inspired bombings” in the South, partly in response to a string of bombings in Florida, Tennessee, and Alabama.<sup>155</sup> Rochester Republican and U.S. Congressman Kenneth B. Keating, the same Congressman who accused Averill Harriman of cooperating with the Mafia, introduced similar legislation in the House.<sup>156</sup> Javits continued to support civil rights in the South, entering bills calling for federal voting registrars, retention of voting records, and making lynching a federal crime in January 1960.<sup>157</sup>

In 1957, northern frustration with southern resistance to *Brown v. Board of Education* led to a Federal Civil Rights Act and an ensuing Federal Civil Rights Commission dedicated to studying problems of education, voting, and housing in Dixie.<sup>158</sup> While the Commission found myriad abuses in southern states, it also uncovered problems north of the Mason-Dixon line. In 1959, to the delight of many white southerners, the Commission began holding hearings on housing and criminal justice in New York City.<sup>159</sup> There, it uncovered an uncomfortable number of abuses

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<sup>153</sup> *Civil Rights Pose Hard Choice for Democrats: Issues Now Coming Up in Congress Could Split the Party Irrevocably*, N.Y. TIMES, April 8, 1956, at E3.

<sup>154</sup> Republican Senator Jacob Javits became a particularly outspoken advocate of federal solutions to southern intransigence. *Javits Urges U.S. to form Bias Unit: Calls for Immediate Naming of Civil Rights Body to Aid South's Minorities*, N.Y. TIMES, Oct. 24, 1957, at 27.

<sup>155</sup> *Bill Fights Bombings: Javits Would Permit U.S. to Act in Racial Incidents*, N.Y. TIMES, June 6, 1958, at 24.

<sup>156</sup> *Id.*

<sup>157</sup> *Civil Rights Bills Offered by Javits*, N.Y. TIMES, Jan. 12, 1960, at 18.

Southern Senators, conversely, attacked him for targeting racial troubles in the South, while ignoring racial problems at home. “Senator [Javits] lives in a glass house,” charged Herman Talmadge of Georgia in February, 1960, “He ought to be the last man in the Senate to throw stones and cast aspersions on any other states in the union.” N.Y. TIMES, Feb. 28, 1960, at 1.

<sup>158</sup> *Civil Rights Unit to Open Studies*, N.Y. TIMES, June 11, 1958, at 18.

<sup>159</sup> The Commission was formally established by the 1957 Civil Rights Act, itself inspired by southern resistance to *Brown*, particularly the 1956 “Southern Manifesto.” It began by investigating voting, education, and housing in the South. *Civil Rights Unit to Open Studies*, N.Y. TIMES, June 11, 1958, at 18. Within a relatively short amount of time, however, it turned North, holding its first public hearings on housing in New York City in February 1959. *U.S. Inquiry Begun on Bias in Housing*, N.Y. TIMES, Feb. 3, 1959, at 23. By October 1959, the Commission was entering into a study of the administration of justice in the North as well. *Civil Rights Unit Eyes New Fields*, N.Y. TIMES, Oct. 15, 1959, at 46. Six members made up the Commission (3 Democrats, 2

against minorities by landlords and, in a manner that would be germane to Governor Rockefeller's interest in criminal defendants, police.<sup>160</sup>

At a Commission hearing on February 3, 1959, for example, New York Housing Authority Chairman William Reid testified that "heavy migration" of African Americans from the South into New York "had hindered efforts to obtain and keep a racial balance in most of the public housing developments."<sup>161</sup> Reid's testimony was augmented by the testimony of former Brooklyn Dodger Jackie Robinson who claimed he had moved to Stamford, Connecticut because he was unable to find suitable housing in New York.<sup>162</sup> Several months later, in July 1959, Police Commissioner Stephen Kennedy inspired outrage by sending police reinforcements into the Brooklyn neighborhood of Bedford-Stuyvesant, and the Jamaica section of Queens following an incident in which two policemen were shot during an arrest.<sup>163</sup> According to Kennedy, such reinforcements were necessary to prevent rioting, a phenomenon that had not hit New York since the summer of 1943, when a police officer shot an African American soldier.<sup>164</sup> Black leaders disagreed, claiming that police brutality had become rampant, and that this was just another example of an emerging, racially segregated "police state" in New York City.<sup>165</sup>

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Republicans and 1 Independent), all appointed by President Eisenhower. They included Stanley F. Reed, former Supreme Court Justice, John A. Hannah, president of Michigan State University and former Assistant Secretary of Defense, Reverend Dr. Theodore M. Hesburgh, President of Notre Dame University, J. Ernest Wilkins, Assistant Secretary of Labor, and two southerners: John S. Battle, former Governor of Virginia, and Robert G. Storey, Dean of Southern Methodist University. *Eisenhower Picks Civil Rights Unit: Reed is Chairman*, N.Y. TIMES, Nov. 11, 1957, 1. Stanley F. Reed, J. Ernest Wilkins, and John S. Battle were later replaced by former Florida Governor Doyle E. Carlton and George M. Johnson of Washington. *Civil Rights Unit Eyes New Fields*, N.Y. TIMES, Oct. 15, 1959, at 46.

<sup>160</sup> *U.S. Inquiry Begun on Bias in Housing*, N.Y. TIMES, Feb. 3, 1959, at 23. The Civil Rights Commission's Advisory Committee in New York bolstered these reports. In April, 1960, it asserted that there had been "daily complaints from parents of Negro children guided to nonacademic careers, discouraged in their ambitions, scorned and stereotyped, categorized as difficult, of low cultural background and as coming from broken homes." *Rights Unit Seeks Study of Courts*, N.Y. TIMES, April, 9, 1960, at 1.

<sup>161</sup> *Id.*

<sup>162</sup> *Id.*

<sup>163</sup> *4 Negro Areas Get Extra Police Units*, N.Y. TIMES, July 16, 1959, at 1.

<sup>164</sup> *Id.*

<sup>165</sup> *Id.* The late 1950s witnessed an unprecedented attention to the workings of the criminal justice system, to the police, the prisons, and the courts – from the perspective of criminal defendants. See DAVID J. BODENHAMER, *FAIR TRIAL: RIGHTS OF THE ACCUSED IN AMERICAN HISTORY* (1992); LAWRENCE W. FRIEDMAN, *CRIME AND PUNISHMENT IN AMERICAN HISTORY* (1993); SAMUEL WALKER, *POPULAR JUSTICE: A HISTORY OF AMERICAN CRIMINAL JUSTICE*

The Temporary Commission to Revise New York's Penal Law emerged, in part, as a response to such accusations. The Commission was deeply political and heavily Republican, at a moment when the Republican Party was struggling to wrest black constituents from Democratic hands.<sup>166</sup> Members included eight prominent New York attorneys, and Herbert Wechsler.<sup>167</sup> Though less politically active than many of his colleagues, Wechsler brought a remarkably pragmatic approach to the task at hand. In fact, during his time on the Commission Wechsler repeatedly expressed a concern for negotiating public opinion – and popular desires for retribution – lest the overall project fail. Wechsler

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(1980). Earlier concerns had been half-hearted, at best. *See e.g.* Michael J. Klarman, *The Racial Origins of Modern Criminal Procedure*, 99 MICH. L. REV. (2000). For centuries, popular interest in the criminal justice system had revolved more around maintaining the social order, and punishing lawbreakers, than upholding individual rights. For representative works on this theme, *see*: MICHAEL S. HINDUS, *PRISON AND PLANTATION: CRIME, JUSTICE, AND AUTHORITY IN MASSACHUSETTS AND SOUTH CAROLINA, 1767-1878* (1980); EDWARD L. AYERS, *VENGEANCE AND JUSTICE: CRIME AND PUNISHMENT IN THE NINETEENTH-CENTURY AMERICAN SOUTH* (1984); DAVID J. BODENHAMER, *THE PURSUIT OF JUSTICE: CRIME AND LAW IN ANTEBELLUM INDIANA* (1986); LAWRENCE M. FRIEDMAN & ROBERT V. PERCIVAL, *THE ROOTS OF JUSTICE: CRIME AND PUNISHMENT IN ALAMEDA COUNTY, CALIFORNIA, 1870-1910* (1981); DWIGHT F. HENDERSON, *CONGRESS, COURTS, AND CRIMINALS: THE DEVELOPMENT OF FEDERAL CRIMINAL LAW* (1985); and William E. Nelson, *Emerging Notions of Modern Criminal Law in the Revolutionary Era: An Historical Perspective*, in *AMERICAN LAW AND THE CONSTITUTIONAL ORDER: HISTORICAL PERSPECTIVES*, EDS. LAWRENCE M. FRIEDMAN & HARRY N. SCHEIBER 171 (1988).

<sup>166</sup> The members were selected, perhaps ironically, one day after the Supreme Court extended the exclusionary rule to the states. *Mapp v. Ohio*, 367 U.S. 643 (1961).

<sup>167</sup> Governor Rockefeller, together with Senate Majority Leader Walter J. Mahoney and Assembly Speaker Joseph Carlino appointed three members each to the commission. Rockefeller's appointees included Howard A. Jones, one of his assistant counsels, William B. Mahoney, a Buffalo lawyer, and Timothy Pfeiffer. Pfeiffer was well known among lawyers in New York City. He was a former Deputy Attorney General who had prosecuted anti-trust cases against unions in the 1920s. *Fifty More Indicted in Lockwood Inquiry: Grand Jury Finds Bills Against Corporations and Individuals in Heating Business*, N.Y. TIMES, Jan. 31, 1922, at 6; Assembly Speaker Joseph F. Carlino appointed three additional members to the Commission. They were Assemblyman Richard J. Bartlett, a lawyer from Glens Falls, Assemblyman William Kapelman, a Democrat from the Bronx, and Nicholas Atlas, a New York City attorney. Bartlett was later appointed chairman of the Commission by Governor Rockefeller. A graduate of Harvard Law School, he served as a judge advocate for the Eighth Fighter Bomber Wing of the Air Force in Korea and was discharged in 1953 with the rank of captain. *Penal Code Expert: Richard James Bartlett*, N.Y. TIMES, June 2, 1965, 37. Senate Majority leader Walter J. Mahoney (William B. Mahoney's brother) appointed the final three members. They were Judge Philip Halpern of Buffalo, John J. Conway, Jr. District Attorney of Monroe County, and Herbert Wechsler.

articulated those views most forcefully in the context of revising New York's laws governing the death penalty.

In 1961, New York was the last state in the Union to impose a mandatory death penalty for all cases of first degree murder. To Wechsler, any move to alter this required holding "public hearings" in order to build popular support for legal change.<sup>168</sup> Wechsler's interest in holding hearings reflected a democratic strain that ran through much of the commission's proceedings. For example, at a Commission meeting on December 8, 1961, Wechsler warned that the "controversial" issue of the death penalty presented the Commission with a unique "problem" in that public attention to it far outweighed public interest in other aspects of the criminal law, notions of culpability, justification, and excuse for example.<sup>169</sup> To avoid jeopardizing important reforms of the entire code, in other words, Wechsler advocated catering to popular opinion on the question of the death penalty "so as not to impede the progress of a lot of other work that will not be controversial."<sup>170</sup> "My own view," continued Wechsler, "is that a careful effort should be made to separate these issues to which the public and the legislature are to be really divided."<sup>171</sup>

In addition to addressing controversial issues discretely, Wechsler also suggested the Commission spend time educating the public, preparing them for radical changes in the law before those changes were actually introduced as legislation. "This is a[n] opportunity," asserted the Columbia law professor, drawing from his early days with the ILD, to "educate the legislature and the public and the opportunity should not be lost to educate these two groups."<sup>172</sup> In fact, Wechsler took the issue of the death penalty so seriously that he suggested spending the entire year on sentencing. "This report ought to build up that this year thinking is about sentencing," Wechsler declared, "sentencing which is important to the people of the state of New York."<sup>173</sup>

Interestingly, Wechsler counseled against holding actual public hearings, suggesting instead that experts or organized groups be called, thereby creating forums not for the public to

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<sup>168</sup> Minutes of the Temporary Commission, Sept. 22, 1961, RTC, Box 2, Folder 1, 6.

<sup>169</sup> Minutes of the Temporary Commission, Dec. 8, 1961, RTC, Box 2, Folder 1, 3.

<sup>170</sup> Minutes of the Temporary Commission, Dec. 8, 1961, RTC, Box 2, Folder 1, 3.

<sup>171</sup> Minutes of the Temporary Commission, Dec. 8, 1961, RTC, Box 2, Folder 1, 3.

<sup>172</sup> Minutes of the Temporary Commission, Dec. 8, 1961, RTC, Box 2, Folder 1, 3.

<sup>173</sup> Minutes of the Temporary Commission, Dec. 8, 1961, RTC, Box 2, Folder 1, 4.

voice its views, but to be educated on the subjects at hand by those with either training, institutional knowledge, or experience. “I am against hearings,” he continued, “use available material. Hearings can be used for public relationship reasons.”<sup>174</sup> For changes in sentencing, he suggested the Commissioner of Correction.<sup>175</sup> Other possible speakers, Wechsler continued, included District Attorneys and even clergy.<sup>176</sup>

Wechsler’s suggestion that only experts or authorities be called to public hearings coincided with his larger belief that public hearings be used not to allow the public to air its concerns, so much as to pursue larger, as he put it, “public relationship reasons.” Wechsler’s interest in “public relationship” resonated with his interest in public education as a component of the reform process. At every turn he anticipated and sought to preempt a potential backlash, knowing that such a backlash could, even if focused on only one issue, jeopardize the entire project. This reflected a strategic approach to reform, an awareness that embedded within the Model Penal Code were myriad reforms, many of which did not, and probably would not, attract popular scrutiny. Among these were the elimination of concepts like “malignant heart” in favor of more precise, structured constructions of *mens rea*, as well as the simplification of battery crimes and reckless conduct.

Wechsler voiced some of his concerns about a preoccupation with the death penalty ruining other reform provisions on November 29, 1962, during the commission’s first structured hearing. The topic of the hearing, held in Albany’s Chancellor’s Hall, was a question that Herbert Wechsler had suggested, over a month earlier: “Should capital punishment be retained, limited, extended or abolished in New York State?”<sup>177</sup> Among those in attendance were Reverend Carl Herman Voss from the American League to Abolish Capital Punishment; Joseph Ryan, District Attorney for Onandaga County, and Al Sgaglione, President of the Police Conference of New York State.

Out of all the guests who spoke, only Sgaglione supported retention of the death penalty in the state. “The Police Conference is opposed to any alteration of capital punishment,” began Sgaglione, “because of its great effect as a deterrent.”<sup>178</sup> “Penalties must be strong,” continued Sgaglione, “As we are all aware today,

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<sup>174</sup> Minutes of the Temporary Commission, Dec. 8, 1961, RTC, Box 2, Folder 1, 5.

<sup>175</sup> Minutes of the Temporary Commission, Dec. 8, 1961, RTC, Box 2, Folder 1, 5.

<sup>176</sup> Minutes of the Temporary Commission, Dec. 8, 1961, RTC, Box 2, Folder 1, 5.

<sup>177</sup> Public Hearing, Minutes November 29, 1962, RTC, Box 2, Folder 1, 41

<sup>178</sup> Public Hearing, Minutes, November 29, 1962, RTC, Box 2, Folder 1, 41.

there is not enough respect for law and order in our great State or in our nation. Therefore, in conclusion, the Police Conference of New York respectfully urges this Honorable Commission continue the implementation of the mosaic [sic] law: ‘an eye for an eye and a tooth for a tooth.’”<sup>179</sup>

The commissioners jumped to grill Sgaglione on his claim that capital punishment deterred crime. “[A]s you know perfectly well,” began one commissioner, “deliberation can take place in an instant. What I would like to know is when does the man have the time to sit down and consider the deterrent of capital punishment, in your view?”<sup>180</sup> “Possibly after he commits the murder,” responded Sgaglione.<sup>181</sup> “After he commits the murder, then he hasn’t been deterred. Wouldn’t you admit that?” queried the commissioner.<sup>182</sup> “He may be deterred from going further, from killing a second person or a third murder. There is always that possibility,” responded Sgaglione.<sup>183</sup> “Why don’t you favor boiling them in oil?” interjected Wechsler.<sup>184</sup> “I think our society doesn’t believe in that,” responded Sgaglione.<sup>185</sup> “I wonder what the line of distinction is, as you see it?” continued Wechsler.<sup>186</sup> “I think – I don’t have the facts with me,” countered Sgaglione, “but every so often you read in the papers about someone who is released; they have served a number of years for a crime committed and they go out and commit a more serious crime.”<sup>187</sup> “You also read about people who served and have been released and go out and don’t commit crime,” countered Wechsler.<sup>188</sup> “True,” answered Sgaglione, clearly flailing.<sup>189</sup> “You know,” continued Wechsler, moving to the importance of discretion in the law, “the only state left in the Union – the only jurisdiction in the English speaking world that has a mandatory capital punishment is New York. Every other state has changed and you say you are in favor of it.”<sup>190</sup> “Why do you suppose,” continued Wechsler, “in the last 10 years, 15 jurisdictions have given up a mandatory capital penalty without any one of them returning to it? Do you think that is an experience you ought to study before you take a

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<sup>179</sup> Public Hearing, Minutes, November 29, 1962, RTC, Box 2, Folder 1, 42.

<sup>180</sup> Public Hearing, Minutes, November 29, 1962, RTC, Box 2, Folder 1, 43.

<sup>181</sup> Public Hearing, Minutes, November 29, 1962, RTC, Box 2, Folder 1, 43.

<sup>182</sup> Public Hearing, Minutes, November 29, 1962, RTC, Box 2, Folder 1, 43.

<sup>183</sup> Public Hearing, Minutes, November 29, 1962, RTC, Box 2, Folder 1, 43.

<sup>184</sup> Public Hearing, Minutes, November 29, 1962, RTC, Box 2, Folder 1, 43. This line got Wechsler into the *N.Y. Times* the following day. See *Change is Urged in Murder Laws*, N.Y. TIMES, Nov. 30, 1962, 18.

<sup>185</sup> Public Hearing, Minutes, November 29, 1962, RTC, Box 2, Folder 1, 43.

<sup>186</sup> Public Hearing, Minutes, November 29, 1962, RTC, Box 2, Folder 1, 44.

<sup>187</sup> Public Hearing, Minutes, November 29, 1962, RTC, Box 2, Folder 1, 44.

<sup>188</sup> Public Hearing, Minutes, November 29, 1962, RTC, Box 2, Folder 1, 44.

<sup>189</sup> Public Hearing, Minutes, November 29, 1962, RTC, Box 2, Folder 1, 44.

<sup>190</sup> Public Hearing, Minutes, November 29, 1962, RTC, Box 2, Folder 1, 44.

position on this question?” concluded Wechsler, relinquishing the floor to other Commissioners.<sup>191</sup>

Wechsler’s dialogue with Sgaglione indicated that he did not place much faith in deterrence as a legitimate reason for continuing the death penalty. Nor, for that matter, did he agree that the death penalty should be mandatory. Yet, he still believed that retribution had utilitarian value. Evidence of this emerged during the testimony of Joseph Ryan, District Attorney for Onandaga County, who opposed the penalty. Ryan began by arguing that juries often let killers go free because they themselves did not want to be responsible for killing someone. “The most and worst that the death penalty accomplishes today,” maintained Ryan, “is to whip up morbid curiosity in trials, creating a sensationalism that is based on the primal urge to secure an eye for an eye – a tooth for a tooth.”<sup>192</sup> Ryan’s claim that the “most” the death penalty did was “whip up morbid curiosity” echoed Wechsler’s own warnings that execution might brutalize the public, as it had done during the Ruth Snyder case. Ryan’s argument that juries sometimes refused to convict because they did not want to be implicated in the taking of human life, on the other hand, echoed Wechsler’s fear of nullification.

However, Wechsler did not agree with Ryan that the death penalty should be abolished. To his mind, keeping the penalty had utilitarian value for criminal law, if for no other reason than as a prophylactic against legislative backlash. To press this point, Wechsler asked Ryan whether he “had any real cruel murders in the last few years?” hoping to show that if the penalty were abolished and a gruesome murder occurred, then voters might call for an even more expansive restoration of execution.<sup>193</sup> “I don’t follow your question,” responded Ryan, “What do you mean?”<sup>194</sup> To illustrate, Wechsler posited a hypothetical. “Let’s assume a confession,” supposed Wechsler, “a documented confession and there is no question of who it is in anybody’s mind. This is a cruel, a bitter and unspeakable thing that happened. Now under present circumstances – if you, as the prosecutor, could perhaps make a judgment as to whether that was a bad enough case to press for a capital verdict, presumably you would take some account of public opinion as you appraised it in that situation.”<sup>195</sup> Wechsler’s

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<sup>191</sup> Public Hearing, Minutes, November 29, 1962, RTC, Box 2, Folder 1, 45.

<sup>192</sup> Public Hearing, Minutes, November 29, 1962, RTC, Box 2, Folder 1, 59.

<sup>193</sup> Public Hearing, Minutes, November 29, 1962, RTC, Box 2, Folder 1, 63.

<sup>194</sup> Public Hearing, Minutes, November 29, 1962, RTC, Box 2, Folder 1, 63.

<sup>195</sup> Wechsler referred here to a proposal by the New York State District Attorneys Association, presented by Raymond Baratta, advocating that a two-tiered, MPC style procedure be imposed for determining the death penalty. This procedure would involve a guilt phase and a separate penalty phase of trial. Public Hearing, Minutes, November 29, 1962, RTC, Box 2, Folder 1, 64.

mention of public opinion stemmed from his longstanding interest in the relationship between prosecutorial discretion and community sentiment, as well as the larger connection between popular opinion and legal authority. It was on this last point that he pressed Ryan, asking him “what effect” not being able to go for death might have “on public feeling” in cases of particularly cruel murders.<sup>196</sup> “Would it be a kind of sense of frustration?” wondered Wechsler, “enough to incite new legislation?”<sup>197</sup> To illustrate, he raised the matter of Delaware’s abolition and subsequent reinstatement of the death penalty in 1961.<sup>198</sup> While forces opposing the death penalty succeeded in convincing the legislature to do away with execution in 1958, the state continued to sanction public flogging as punishment for violent felonies.<sup>199</sup> Then, after a sensational triple murder one block from the governor’s house in 1960, the state legislature voted to restore the death penalty, eventually overriding a gubernatorial veto to do so.<sup>200</sup> “Why?” queried Wechsler, “[b]ecause there had been a triple murder and a very, very unforgivable condition so that any mitigation was negated and just a sense of frustration of the community resulted in this sentiment in the legislature. In other words, I put this question to you because it seems to me the issue is trying to judge whether abolition is really the most practical proposal to make in this situation.”<sup>201</sup> Afraid Ryan might not see things quite as strategically as he did, Wechsler tried to drive home the counter-intuitive notion that abolition of the death penalty could hurt criminal law generally. This, ultimately, was its “practical” side, its ability to assuage popular anger and legislative backlash.

Unable, or perhaps unwilling to see Wechsler’s point, Ryan countered by asserting that the death penalty actually had an impractical effect, namely that it pressured jurors to reduce first degree murder convictions to second, simply to avoid being implicated in executions.<sup>202</sup> Such a risk would not exist, responded Wechsler, if states followed the MPC’s example, bifurcating their capital trials and allowing juries to determine guilt in one phase and death in another.<sup>203</sup> Even if jurors were not “unanimous in favor of [the] death penalty,” continued Wechsler,

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<sup>196</sup> Public Hearing, Minutes, November 29, 1962, RTC, Box 2, Folder 1, 64.

<sup>197</sup> Public Hearing, Minutes, November 29, 1962, RTC, Box 2, Folder 1, 64.

<sup>198</sup> Public Hearing, Minutes, November 29, 1962, RTC, Box 2, Folder 1, 64. See e.g. *Death Penalty Backed: Bill for Restoration is Voted by Delaware Senate*, N.Y. TIMES, Dec. 8, 1961, p. 40.

<sup>199</sup> *Public Flogging seems near an End in Delaware*, N.Y. TIMES, Feb. 2, 1964, p. 46.

<sup>200</sup> *Id.*

<sup>201</sup> Public Hearing, Minutes, November 29, 1962, RTC, Box 2, Folder 1, 64.

<sup>202</sup> Public Hearing, Minutes, November 29, 1962, RTC, Box 2, Folder 1, 65.

<sup>203</sup> Public Hearing, Minutes, November 29, 1962, RTC, Box 2, Folder 1, 65.

“public opinion” could simply “focus on them,” not the criminal code, for perpetrating injustice.<sup>204</sup> Under such a scheme, “the most you would have is an unpopular verdict,” argued Wechsler, “but in an abolition situation, what you have is an outraged populace turning to the Legislature and denouncing the law and a very real danger that you may end up worse off than you started.”<sup>205</sup> Wechsler’s allusion to being “worse off” alluded to the corruption of criminal codes that occurred when elected representatives got votes by promising to boost sentences and invent new crimes. To him, this degradation of criminal codes had little to do with the inherent nature of the legislative process, but a great deal to do with popular desires for revenge stoked by liberal attempts to cabin popular will.

Following the public hearing, the Temporary Commission met informally and Wechsler alluded again to Delaware, warning that abolition of the penalty could lead to an even more severe backlash in favor of it, particularly in the aftermath of a particularly brutal killing. “If the Commission induces the Legislature to abolish capital punishment,” noted Wechsler, and if thereafter several shocking homicides occur, state lawmakers might feel that they were led down the garden path.”<sup>206</sup> He concluded that the passage of three bills would constitute a significant step forward in New York’s reform effort.<sup>207</sup> The first was a “redefinition of homicide,” abandoning malice aforethought for the MPC mens rea of purpose.<sup>208</sup> The second was a bifurcation of the criminal trial into a “two-stage proceeding” in which the jury first decided guilt and then determined the sentence.<sup>209</sup> Finally, Wechsler suggested abandoning the mandatory death penalty and allowing prosecutors the discretion to request death.<sup>210</sup>

Wechsler reiterated his fear that abolishing the death penalty might lead to a backlash at a second public hearing, also on the death penalty held in New York City on December 7, 1962. This hearing featured a parade of witnesses, most opposed to the penalty. Among them were Judge Samuel Liebowitz of Kings County, Senator Manfred Ohrenstein, Jerome Nathanson, representing the New York Committee to Abolish the Death Penalty, Norman Redlich, NYU law professor, and Monrad

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<sup>204</sup> Public Hearing, Minutes, November 29, 1962, RTC, Box 2, Folder 1, 66.

<sup>205</sup> Public Hearing, Minutes, November 29, 1962, RTC, Box 2, Folder 1, 66.

<sup>206</sup> Minutes of Informal Meeting of the Temporary Commission, Nov. 29, 1962, Box 2, Folder 1, 2.

<sup>207</sup> Minutes of Informal Meeting of the Temporary Commission, Nov. 29, 1962, Box 2, Folder 1, 2.

<sup>208</sup> *Id.*

<sup>209</sup> *Id.*

<sup>210</sup> Minutes of Informal Meeting of the Temporary Commission, Nov. 29, 1962, Box 2, Folder 1, 2.

Paulsen, one of Wechsler's colleagues at Columbia. "I think that it is a very serious mistake for a state to abolish capital punishment too soon," began Paulsen, "even from the point of time of the abolitionists. Because if you succeed by one or two or three votes in abolishing capital punishment, what will occur is that an outrageous case will come along and the citizens will be affronted and the repeal will be repealed. We have a good many instances of that sort in our national history."<sup>211</sup> "A very recent one in Delaware?" interjected Wechsler.<sup>212</sup> "Yes," replied Paulsen.<sup>213</sup> Paulsen recommended, as a solution, the MPC's two-tier system, which separated the trial phase from the sentencing phase in capital cases.<sup>214</sup>

While Paulsen agreed with Wechsler that abolishing the death penalty might lead to a popular backlash, not all the speakers concurred. Myron S. Isaacs of the Urban League of Westchester County argued that the penalty should be abolished because it discriminated against minorities. "It is our view that capital punishment today is incapable of equitable and impartial administration," maintained Isaacs, "It represents, in our judgment, a cruel concession to vengeance inherited from a time when revenge on the offender was a primary aspect of the penal code."<sup>215</sup> "Today, it seems to me that among the poor Negroes and Puerto Ricans, that they are the principal victims of the death penalty in New York."<sup>216</sup>

Wechsler said nothing. His silence proved all the more remarkable given that the rate of minority executions proved to be one of the few aspects of the hearing reported on by the *New York Times*. "Evidence that Negroes and Puerto Ricans have been the principal victims of the death penalty in New York State," observed the *Times*, "was presented at a legislative hearing here yesterday."<sup>217</sup> Wechsler's silence on black and Hispanic executions might have had something to do with his experience confronting racial bias in the South. Minorities, he knew well, fared poorly in democratic systems unless they could find a way to appeal to majority voters. Wechsler himself had struggled to open up such avenues of appeal in the case of Angelo Herndon almost three decades earlier.

However, the task that the Temporary Commission faced was not protecting minority rights against majority misrule, so much as trying to prepare the majority for rational reform. For this

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<sup>211</sup> Public Hearing, Minutes, December 7, 1962, RTC, Box 2, Folder 1, 82.

<sup>212</sup> Public Hearing, Minutes, December 7, 1962, RTC, Box 2, Folder 1, 82.

<sup>213</sup> Public Hearing, Minutes, December 7, 1962, RTC, Box 2, Folder 1, 83.

<sup>214</sup> Public Hearing, Minutes, December 7, 1962, RTC, Box 2, Folder 1, 84.

<sup>215</sup> Public Hearing, Minutes, December 7, 1962, RTC, Box 2, Folder 1, 91.

<sup>216</sup> Public Hearing, Minutes, December 7, 1962, RTC, Box 2, Folder 1, 100.

<sup>217</sup> *Death Law Seen Aimed at Negroes*, N.Y. TIMES, Dec. 8, 1962, at 25.

reason, Wechsler showed less interest in disparate treatment data than in the testimony of experts like Dr. Hans Kron, Chief of Psychiatric Services at Sing Sing Prison. “If I have to express an opinion, the murderer is the least dangerous of criminals,” began Kron during the December 7 meeting.<sup>218</sup> “The least dangerous?” wondered Chairman Bartlett.<sup>219</sup> “Yes, a murder is an isolated gesture,” continued the French psychiatrist.<sup>220</sup> The reasons for execution, Kron posited, surprisingly, had less to do with deterrence than with popular demand. “[W]e actually frustrate the needs of many people when we will have no more public executions,” asserted Kron, referring to the “Roman approach” of public punishment for public consumption.<sup>221</sup>

“Do you think that this would cause general neuroses, the abolishing of public executions?” wondered Wechsler, reaffirming his suspicion that abolishing the death penalty could incite a popular backlash.<sup>222</sup> “I cannot say,” responded Kron.<sup>223</sup> “Certainly that was a way for people to express their pent-up feelings of hostility, their aggressiveness . . . That is why we cannot afford public executions. We try to make executions humane. There is no humane way to kill. I agree. I am French by birth . . . [and] up to 1929, in France, executions were taking place in public . . . the last execution which had taken place in public . . . was a homosexual . . . He was executed in Versailles, which is a suburb of Paris. You had these buses around the night clubs of Paris picking up people to take them to the execution . . . that will give you the idea of the deep meaning of execution.”<sup>224</sup>

Before the death penalty could be abolished, Kron continued, echoing Wechsler’s own interest in preparing the public for reform, people needed to be educated. “We have to educate the public,” Kron explained to the Commission, “To abolish [the death

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<sup>218</sup> Public Hearing, New York, Minutes, December 7, 1962, RTC, Box 2, Folder 1, 242.

<sup>219</sup> Public Hearing, New York, Minutes, December 7, 1962, RTC, Box 2, Folder 1, 242.

<sup>220</sup> Public Hearing, New York, Minutes, December 7, 1962, RTC, Box 2, Folder 1, 242.

<sup>221</sup> Public Hearing, New York, Minutes, December 7, 1962, RTC, Box 2, Folder 1, 245.

<sup>222</sup> Public Hearing, New York, Minutes, December 7, 1962, RTC, Box 2, Folder 1, 245.

<sup>223</sup> Public Hearing, New York, Minutes, December 7, 1962, RTC, Box 2, Folder 1, 245.

<sup>224</sup> Public Hearing, Minutes, December 7, 1962, RTC, Box 2, Folder 1, 246-7. Kron continued, discussing the public outcry in France when executions were moved out of the public sphere and behind prison walls. “There was such a strong demonstration, that the head of the Government at the time – it was a sign of instability – to introduce a law on executions, that it should take place in the yard of a prison.” *Id.*

penalty] immediately, that will be a real revolution. This is a matter of education.”<sup>225</sup> Perhaps ironically, Kron saw the manner in which execution was conducted in the United States, behind prison walls, in a relatively mechanized, impersonal manner, as a factor which actually facilitated the administration, and continuation of the death penalty. “[U]nfortunately, when executions are exceptions, as they are here, when they are accomplished in a very discreet way, with nearly acceptable means for many people, when Socrates had to drink the hemlock, that was very acceptable, because that is nice, that was a nice death.”<sup>226</sup>

On the day after the December 7 hearing, the Commission met again and decided to postpone a decision on whether to abolish capital punishment, in large part due to Herbert Wechsler’s concerns that it would only jeopardize the larger process of reform.<sup>227</sup> The Commission did vote, however, in favor of the MPC rule advocating separate guilt and penalty phases in capital murder trials, with four commissioners, including Wechsler, voting in favor.<sup>228</sup> Further, the Commission approved much of the MPC’s law of homicide, a victory for Wechsler’s strategic approach.<sup>229</sup>

In the Spring of 1965, the legislature voted to adopt a new Penal Law for the State of New York.<sup>230</sup> It was, in many ways, a victory for both Herbert Wechsler and the Model Penal Code. The new law followed the Model Code’s rejection of the *M’naughten* Rule, substituting for it the substantial capacity test.<sup>231</sup> It also adopted the MPC’s defense of extreme emotional disturbance, a broader substitute for the ancient “crime of passion” reducing murder to manslaughter.<sup>232</sup> Although the new law did not follow the Model Penal Code’s lead in abolishing felony murder, it did limit it, to the specifically enumerated felonies of robbery, burglary, kidnapping, arson, rape, sodomy, sexual abuse, and escape.<sup>233</sup> Sodomy, despite the MPC’s suggestion that it be decriminalized, remained a crime; as did adultery. However, there was some liberalization. Married couples were exempted from deviate sexual intercourse, and sex offenses could only be proven by a corroborating witness.<sup>234</sup>

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<sup>225</sup> Public Hearing, New York, Minutes, December 7, 1962, RTC, Box 2, Folder 1, 249.

<sup>226</sup> Public Hearing, New York, Minutes, December 7, 1962, RTC, Box 2, Folder 1, 249.

<sup>227</sup> Minutes, Meeting, December 8, 1962, RTC, Box 2, Folder 1, 15.

<sup>228</sup> Minutes, Meeting, December 8, 1962, RTC, Box 2, Folder 1, 15.

<sup>229</sup> Minutes, Meeting, December 8, 1962, RTC, Box 2, Folder 1, 15.

<sup>230</sup> *Assembly Passes a Total Revision of the Penal Law*, N.Y. TIMES, June 4, 1965, at 1.

<sup>231</sup> IRVING SCHWARTZ, HIGHLIGHTS OF THE NEW PENAL LAW, 23 (1967).

<sup>232</sup> *Id.*

<sup>233</sup> *Id.* at 23-4.

<sup>234</sup> *Id.* at 36.

Perhaps the biggest liberalization was a move to abolish the death penalty.<sup>235</sup> In an eight-to-four vote, the Commission recommended that the penalty be eliminated in all cases.<sup>236</sup> According to Wechsler, who drafted the report, “the specter of the death house” introduced a “morbid and sensational factor” at criminal trials, creating the adverse problem of “sympathy for the accused.”<sup>237</sup> The state legislature agreed, with two exceptions.<sup>238</sup> It abolished the penalty for all defendants except those who killed a police officer “acting in the line of duty,” and for convicts serving life sentences who murdered a prison guard.<sup>239</sup>

#### IV: REVENGE RETURNS TO NEW YORK

For the most part, the Temporary Commission’s close attention to popular reception worked, engendering little political resistance. “From both sides of the aisle today,” reported the *New York Times* on June 4, 1965, “were applause and lavish praise for the commission chairman, Republican Assemblyman Richard J. Bartlett.”<sup>240</sup> Precisely because the Committee had been careful not to offend the public, even granting concessions to avoid backlash, it had been able to achieve substantive reform.

Yet, the furies of revenge remained. Despite Wechsler’s careful consideration of popular caprice, the Commission’s attempt to restrict the death penalty generated a backlash, particularly as crime rates began rising in the late 1960s. In October 1968, a legislative committee met in New York to decide whether to expand the scope of capital punishment.<sup>241</sup> Senator Edward J. Speno, the committee chair, announced that “many legislators” in New York had received “heavy mail” urging an expansion of cases where the penalty applied.<sup>242</sup> Much of this mail had been triggered by rising crime.<sup>243</sup> When New York City Controller Mario

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<sup>235</sup> *State Commission Recommends End of Death Penalty*, N.Y. TIMES, March 20, 1965, at 1.

<sup>236</sup> *Id.*

<sup>237</sup> *Id.*

<sup>238</sup> *Rockefeller Gets Bill on Abolition of Death Penalty*, N.Y. TIMES, May 20, 1965, at 1.

<sup>239</sup> *Id.*

<sup>240</sup> *Assembly Passes a Total Revision of the Penal Law*, N.Y. TIMES, June 4, 1965, at 1.

<sup>241</sup> *Witnesses Clash on the Death Penalty*, N.Y. TIMES, Oct. 4, 1968, at 21.

<sup>242</sup> *Id.*

<sup>243</sup> *Id.*

Procaccino called for a “get tough” policy on crime during a public hearing in Manhattan, including reinstatement of the electric chair for murderers, audience members cheered.<sup>244</sup> Conversely, “groans and cat-calls” inundated psychiatrist Henry Peckstein when he warned that “too much repressive legislation” could lead to a “fascist state.”<sup>245</sup>

In 1971, state legislators extended capital punishment to anyone who killed a corrections officer “while he is performing his official duties.”<sup>246</sup> In 1973, New York City mayoral candidate Mario Biaggi called for the execution of “hired assassins,” “those responsible for the killing of a witness to a serious crime,” and those who committed murder during a “rape, robbery, or kidnapping.”<sup>247</sup> In 1977, such a law passed both the House and Senate, only to be vetoed by New York Governor Hugh Carey.<sup>248</sup> Four years, and four vetoes later, the issue remained electric, this time with New York Mayor and gubernatorial candidate Ed Koch declaring that whether the death penalty deterred or not, it “is vital that society be allowed to express its moral outrage at wanton killing.”<sup>249</sup> In 1984, the New York Court of Appeals entered the fray and overturned the state’s statute requiring capital punishment for offenders who killed while incarcerated, arguing that the mandatory death penalty was unconstitutional.<sup>250</sup>

Despite the court’s ruling, popular initiatives to expand the death penalty continued into the 1980s. In 1989, a democratic led assembly voted to restore the penalty in cases of murder-for-hire, murder of police officers, murder of witnesses, or murder in the course of a violent crime.<sup>251</sup> Governor Cuomo vetoed the law, declaring that even though life had become “ugly and violent” in New York, capital punishment constituted little more than an “act of vengeance.”<sup>252</sup> Frustration with Cuomo’s anti-death penalty stance contributed to the 1994 election of George Elmer Pataki, the first Republican Governor in twenty years.<sup>253</sup> Pataki campaigned on a promise to expand the death penalty, something that no New

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<sup>244</sup> *Id.*

<sup>245</sup> *Id.*

<sup>246</sup> *Summary of Bills Passed and Killed in Albany During the 1971 Legislative Session*, N.Y. TIMES, June 10, 1971, at 34.

<sup>247</sup> *Biaggi Asks Death for Some Crimes*, N.Y. TIMES, Sept. 16, 1973, at 53.

<sup>248</sup> *Death-Penalty Bill is Vetoed by Carey*, N.Y. TIMES, July 13, 1977, at 18.

<sup>249</sup> *The Politics of Death Still Thrive*, N.Y. TIMES, June 6, 1982, at E6.

<sup>250</sup> *Court Overturns Death Sentence in New York Law*, N.Y. TIMES, July 3, 1984 at A1.

<sup>251</sup> *Assembly Backs Death Penalty by Wide Margin*, N.Y. TIMES, March 7, 1989, at B2.

<sup>252</sup> *Cuomo Vetoes Death Penalty Seventh Time*, N.Y. TIMES, March 21, 1989, at B1.

<sup>253</sup> *New York Voters End a Democratic Era*, N.Y. TIMES, Nov. 9, 1994, at A1.

York governor had done since 1977.<sup>254</sup> On March 7, 1995, he finally succeeded in reinstating the electric chair – three decades after the Temporary Commission had tried to eliminate it – with a new law creating ten separate instances where death was appropriate.<sup>255</sup>

Just as the political battle seemed over, the courts intervened. In 2004, New York’s highest court invalidated Pataki’s law on the grounds that it unconstitutionally pressured jurors into choosing the death penalty by warning them that offenders who did not get executed might be paroled.<sup>256</sup> Though Pataki moved quickly to amend the statute, he met stiff resistance in the State Assembly, now controlled by Democrats who were softening on the issue.<sup>257</sup> According to Democratic Assemblywoman Helene E. Weinstein, initially a supporter of capital punishment, “[m]y vote 10 years ago was 10 years ago.”<sup>258</sup> Since then, argued Weinstein, “new information, important information, about DNA testing” and “about innocent people being convicted” had emerged, changing her mind.<sup>259</sup> Though she did not mention the program by name, Weinstein’s allusion to DNA testing referred to the Innocence Project, a program founded by law professors Barry Scheck and Peter Neufeld to show that a surprising number of death row inmates were innocent of their crimes.<sup>260</sup>

Though Wechsler, who passed away in 2000, would undoubtedly have supported the Innocence Project’s work, he might also have issued a cautionary note to anyone calling for outright abolition of the death penalty. Based on his own experience, death served an important utilitarian, if symbolic, function. By satisfying popular demands for retribution in rare, unusually “cruel” cases, it actually limited popular pressures that might otherwise result in the degeneration of criminal codes. Such pressures made themselves apparent in the four decades following the Temporary Commission’s completion of the Empire State’s new Penal Law.

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<sup>254</sup> *Id.*

<sup>255</sup> *A Vow Fulfilled*, N.Y. TIMES, March 8, 1995, at A1.

<sup>256</sup> *Across New York a Death Penalty Stuck in Limbo*, N.Y. TIMES, Aug. 21, 2004, at 1.

<sup>257</sup> *Death Penalty Seems Unlikely to be Revived*, N.Y. TIMES, Feb. 11, 2005, at 1.

<sup>258</sup> *Id.*

<sup>259</sup> *Id.*

<sup>260</sup> BARRY SCHECK & JIM DWYER, *ACTUAL INNOCENCE: FIVE DAYS TO EXECUTION, AND OTHER DISPATCHES FROM THE WRONGLY CONVICTED* (2000).

## CONCLUSION

In a recent critique of the Model Penal Code's sentencing revisions, Yale Law Professor James Q. Whitman chastised the ALI's endorsement of retribution as a "distressing failure" in criminal law policy.<sup>261</sup> "Before we endorse retributivism," argued Whitman, "we need some thoughtfully worked-out understandings of its dangers."<sup>262</sup> Among those dangers, continued Whitman, was retribution's synergistic relationship with "harshness" in punishment, "propagandistically-minded leaders," and "mass democracy."<sup>263</sup> To Whitman's mind, "mass democracy" produced bad results, led to "the politicization of the crime issue," and should be curtailed. Declaring "legislative sovereignty" to be at the root of America's penal problems, Whitman called for nothing less than the end of popular control of criminal lawmaking, handing the system over to "criminal justice professionals."<sup>264</sup>

Though Wechsler was just the kind of criminal justice professional that Whitman suggested, he probably would have balked at Whitman's undemocratic approach. To him, the dangers of retribution paled in comparison to the dangers of rejecting democracy, provided that democracy could even be rejected. At least part of Wechsler's utilitarian endorsement of retribution rested on his conviction that democratic majorities would always find a way to override, if not eliminate, any kind of politically insulated body of "experts" that took control of criminal law and sentencing. Even courts could not fully withstand popular pressure, argued Wechsler, noting that judicial bodies jeopardized their autonomy when they decided cases that transgressed popular will. "Only the maintenance and the improvement" of neutral standards of judicial review, argued Wechsler infamously in 1959, will protect courts "against the danger of the imputation of a bias favoring claims of one kind or another."<sup>265</sup> Once the public suspected that courts were biased, then it could demand the appointment of new judges, the curtailment of jurisdiction, and even the outright rejection of judicial will, all of which Wechsler had witnessed in his lifetime.

Not only was democratic control over criminal law impossible to eliminate, believed Wechsler, but democracy itself was worth keeping. At the heart of all criminal law reform, he maintained, should rest the well-being of the community, whose

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<sup>261</sup> Whitman, *Plea*, *supra* note 4 at 88.

<sup>262</sup> *Id.*

<sup>263</sup> *Id.* at 92.

<sup>264</sup> *Id.*

<sup>265</sup> Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1, 10 (1959).

“values and security” are often what is most “disturbed” by lawbreaking.<sup>266</sup> This means that even if a punishment appears to have no deterrent or rehabilitative value, it might still be important for easing community outrage, lessening the chances that the community will elect politicians even more eager to reverse reform.

That communities across America have shown themselves eager to vote in proponents of new offenses and higher penalties does not necessarily mean that retribution should be rejected as a matter of sentencing policy. On the contrary, if the public felt that offenses were too numerous or punishments too harsh, then their sense of retributive justice would arguably work the opposite way, encouraging them to elect representatives intent on reducing offenses and lowering punishments, not raising them. Indeed, this is what happened during Prohibition, when states decided to repeal the Eighteenth Amendment to the Constitution, restoring legality to alcohol. That Wechsler came of age during this period helps explain his early fear that retribution might lead to nullification, not increased punishment.

During his life as a criminal law reformer, Herbert Wechsler articulated a nuanced rationale for the uses of retribution in sentencing, one that reflected a commitment to popular democracy and rational reform.<sup>267</sup> Recovering this rationale is important, particularly given that the tendency over the past two decades has been to assume that popular democracy is inherently incapable of sustaining reform. As Paul Robinson and Michael Cahill argue, for example, the “degradation” of criminal codes is near inevitable, a product of the “inherent nature of the legislative process.”<sup>268</sup> This is because legislators “share a common reluctance to appear ‘soft on crime’” and will therefore support harsher penalties and new offenses no matter how “useless or even ridiculous” they may be.<sup>269</sup>

Even a cursory look at Herbert Wechsler’s involvement in criminal law reform suggests that this is not true. In New York in the first half of the 1960s, for example, there was bipartisan support for reforming the state’s criminal code. There was even support for the elimination of certain offenses like adultery and fornication. Salvaging this history is important, if for no other reason than to underline the fact that popular attitudes towards crime change over time, rendering nothing “inherent” or inevitable. Just as the end of adultery was history-specific, reflecting changing attitudes towards extra-marital sex, for example, so too is current

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<sup>266</sup> Wechsler, *Correction*, *supra* note 6, at 476.

<sup>267</sup> Robinson & Cahill, *supra* note 7, at 644.

<sup>268</sup> Robinson & Cahill, *supra* note 7, at 644.

<sup>269</sup> *Id.*

support for higher penalties against violent felons and sex-offenders history-specific as well. While legislators have certainly tended to endorse harsher punishments against such offenders over the past few decades, this does not necessarily mean that they are always afraid of appearing “soft” on crime. Certainly, they have no problem appearing soft on adultery.

Assuming that legislative bodies operate mechanistically against reform ignores history and leads to undemocratic results. According to some criminal law scholars for example, the answer to the degradation of criminal codes is to shift discretion away from legislators and to “experts.”<sup>270</sup> For others, the solution to the “pathological politics” of criminal law is to abolish “legislative supremacy” by shifting crime definition from legislatures to courts.<sup>271</sup>

Instead of crippling democracy, why not look to the root causes of crime, or to improving law enforcement? Criminologists agree that offenders are much more likely to be deterred from committing crime based on the likelihood of arrest, not sentence length.<sup>272</sup> This means that whether sentences are long or short may actually be irrelevant to crime control – and academic calls for undermining democracy misplaced. Perhaps scholars should focus more on the development of more effective policing technologies, not robbing legislatures of their authority.

Along similar lines, perhaps the high number of incarcerations in the United States is more related to poverty, racial segregation, and the failure of urban public schools than to retributive sentencing schemes. Given that one in nine black males between the ages of 20 and 34 is incarcerated, claims by scholars like David Singleton and Augustina Reyes that there is in fact a school to prison “pipeline” in less-affluent black communities suggests that school-centered reform, not sentencing, might be the appropriate locus for legal change.<sup>273</sup> Here, policies like those being employed by District of Columbia Public School Chancellor Michelle Rhee, together with the enhancement of truancy laws, removal of summer break, and extension of school hours might do more to reduce crime than tinkering with sentencing terms.<sup>274</sup>

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<sup>270</sup> Whitman, *Plea*, *supra* note 4 at 88.

<sup>271</sup> Stuntz, *Politics*, *supra* note 7, at 582.

<sup>272</sup> Raymond Paternoster, *The Deterrent Effect of the Perceived Certainty and Severity of Punishment* 42 JUST. Q. 173 (1987).

<sup>273</sup> David A. Singleton, *Interest Convergence and the Education of African-American Boys in Cincinnati*, 34 N. KY. L. REV. 663, 664 (2007); Augustina Reyes, *Criminalization of Student Discipline Programs and Adolescent Behavior*, 21 ST. JOHNS J. LEGAL COMMENT 73 (2006).

<sup>274</sup> *D.C. School a Test of Teacher’s Grit – And Rhee’s Tactics*, WASH. POST, Jan. 11, 2009, at C1.

Finally, why not re-imagine punishment? Incarceration, though dominant in America today, is only one manifestation of many possible forms of sentencing. Both shaming and restitution, for example, hold the potential to satisfy community outrage just as effectively as incarceration, particularly if backed by popular support.<sup>275</sup> Even if criminal law reformers do not have a taste for such moves, they would do well to remember Wechsler's rationale behind the uses of revenge, and support the ALI's recent revision of the Model Penal Code's sentencing provisions.

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<sup>275</sup> See, e.g., Stephen P. Garvey, *Can Shaming Punishments Educate?* 65 U. CHI. L. REV. 733 (1998); Richard A. Posner, *Economic Theory of the Criminal Law* 85 COLUM. L. REV. 1193 (1985).