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I Remember Professor Wechsler

Yale Kamisar*

This year marks the one hundredth anniversary of the birth of Professor Herbert Wechsler, one of the greatest criminal law scholars in American history.

When I first met Professor Wechsler (in the spring of 1951, in my first year of law school), I was struck by how old he seemed at the time and how young he actually was (forty-two). One reason he appeared to be much older than his age was that he was such a stern, imposing figure. Another reason was that he had already accomplished so much.

At the age of twenty-eight, he had co-authored (with his much older colleague, Jerome Michael) an overpowering two-part article on the law of homicide, probably the longest article, and certainly the most significant one, ever written on the subject.[1] At the age of thirty-one, he had co-authored (again with Jerome Michael) a monumental casebook on criminal law.[2] (Evidently Professors Michael and Wechsler began their joint work on the book immediately after Wechsler completed his clerkship with Justice Harlan Fiske Stone and returned to Columbia Law School.[3])

In an essay review of the casebook, David Riesman, at the time a University of Buffalo Law School professor, but soon to become a renowned sociologist, lavished much praise on the authors. At last, he reported, two professors had "tackle[d] the job of social science integration" in methodical and tangible material to be used in teaching in a particular field.[4] Michael and Wechsler, continued Riesman, "make law a social science by being steadily comparative, legislative, and jurisprudential—drawing upon the resources of the other social sciences to explain comparisons, assist legislation, and give content to jurisprudence."[5]

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1 *See generally* Herbert Wechsler & Jerome Michael, *A Rationale of the Law of Homicide* (pts. 1 & 2), 37 COLUM. L. REV. 701 (1937), 37 COLUM. L. REV. 1261 (1937).

2 JEROME MICHAEL & HERBERT WECHSLER, CRIMINAL LAW AND ITS ADMINISTRATION: CASES, STATUTES AND COMMENTARIES (1940) [hereinafter CASEBOOK]. Of course, while I was still in law school Wechsler co-authored another monumental casebook, arguably the greatest casebook ever, HENRY M. HART, JR. & HERBERT WECHSLER, THE FEDERAL COURTS AND THE FEDERAL SYSTEM (1953), but I put this work aside for purposes of this remembrance.

3 *See generally* David Riesman, Jr., *Law and Social Science: A Report on Michael and Wechsler's Classbook on Criminal Law and Administration*, 50 Yale L.J. 636 (1941).

4 *Id.* at 636.

5 *Id.* at 645. Riesman was also greatly impressed by the authors' astonishing research and their focus on law reform efforts:

> A glance at the 24-page table of articles, books, and other publications shows the inclusion of such recondite sources as Catherine II's instructions to Commissioners

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I.

I leave it to others to discuss the substantive criminal law materials in the Michael-Wechsler casebook, but I cannot resist commenting on the criminal procedure materials in their casebook. First of all, I think it fair to say that the book contained the richest collection of criminal procedure materials to be found in any casebook at that time.[6]

The Michael-Wechsler book had an excellent collection of what might be called traditional materials (e.g., United States Supreme Court and lower court opinions, extracts from various books, law review articles and law reform reports), but it also contained many unusual items. Three examples should suffice.

In a section on vagrants and disorderly persons, the authors included an extract from a speech by F.H. La Guardia, Mayor of New York City at the time, at the graduation exercises of a police class. The mayor told the new police officers:

> Now, I give notice that certain individuals are not wanted in New York City, and I want your full cooperation in driving them out. . . . There are certain individuals who are indexed and marked and fingerprinted as vagrants, gamblers, confidence men, pickpockets, men engaged in commercial immorality—they all came under the definition of vagrants . . . .
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> . . . Some of these tinhorns and vagrants have political influence with some politicians. Don't be afraid of them. You've got them on the run now. You will not be censured or transferred for picking up these vagrants in tailor-made, up to the minute fashion clothes. . . . [7]

The section on *Nulla Poena Sine Lege* (No Punishment Without Legal Authority) contains a six-and-a-half page unpublished manuscript by Karl

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Appointed to Frame a New Russian Code; of such fugacious pieces as articles in *The Nation* or in various trade journals, and newspaper accounts of criminal trials and vigilante activities; of the seldom-cited but valuable reports of a century of efforts by reforming and investigatory bodies. By this unremitting attention to efforts at law reform, past and present, they give their book a sense of social movement, even hopefulness, lacking in casebooks whose sense of progress is confined to the decided cases.

Id.

[6] There were few, if any, separate courses on criminal procedure, and no casebooks devoted solely to that subject, until the mid-1960s. Until then, whatever exposure to criminal procedure law students had, and it was usually not much, took place in Constitutional Law, Evidence or the basic course in Criminal Law. *Miranda* may not have fared well in the post-Warren Court era, but it had a great and lasting impact on the law school curriculum. Immediately after *Miranda*, virtually every law school began offering one or two separate courses on criminal procedure. Casebooks devoted solely to constitutional criminal procedures were soon published. Today there are more than thirty.

[7] CASEBOOK, *supra* note 2, at 1016 n. 7.

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Llewellyn, an eminent authority on contracts and commercial law,[8] about the Sacco-Vanzetti case.[9] In a trenchant and moving commentary, Professor Llewellyn said in part:

> [Our rules] are not chiefly for the direct protection of unpopular minorities. More deeply, more far-sightedly, they are *for the indirect protection of majorities against themselves. . . . It is for ourselves* that we must guarantee to this recalcitrant [a] fair trial—[a] fair trial of whether he has committed a specific, clear offense . . . . *We* need to keep faith with *ourselves*, that the law we have made for ourselves and all who live among us shall be applied alike to all who live among us and to ourselves.
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> . . . .
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> . . . If you believe . . . that these two Italians were dangerous men, ungrateful beneficiaries of a long-suffering America, men of violence, undesirable in every sense: then (1) you will think that they got what they deserved, and guilt or innocence of the Braintree murder will seem to you of relatively little consequence . . .; and (2) you will find very slight evidence quite ample to convince you that the Braintree murder in particular must be laid at their door . . . .
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> . . . .
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> . . . You may take or reject our American institutions. But you cannot take them, you cannot honor them, without taking on yourself the burden of indignation, of wrath, of reform, if you should find that a man has been put away *for what he has not done.* A man. *Any* man. Foreigner, radical, or revolutionary; draft-dodger or desperado. *It is not that man, it is your institutions which are at stake.*[10]

This brings me to the last item in the Michael-Wechsler criminal procedure materials I want to discuss. When I wrote my first article on search-and-seizure in the late 1950s, I never would have known about this item if I had not thumbed through my own beat-up copy of their casebook. (It was the only casebook I kept from my law school days.) Nor would I have ever known that at the New York State Constitutional Convention of 1938, the convention had rejected by a narrow margin a proposal to write the search-and-seizure exclusionary rule right into New York's counterpart to the Fourth Amendment. Although the opposition, led by District Attorney Thomas Dewey, ultimately prevailed, U.S. Senator Robert F.

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[8] But Professor Llewellyn had a wide range of interests and in the preface to their casebook Professor Michael and Wechsler thanked Llewellyn for his "valuable criticism" and "friendly interest" in the work. *Id.* at vi.

[9] This much-debated case took place in the 1920s. At the time they wrote their casebook, Professors Michael and Wechsler were 70 years closer to the case than we are today.

[10] CASEBOOK, *supra* note 2, at 1087–91 (emphasis in the original).

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Wagner made the most powerful case for the exclusionary rule I had ever heard or read up to that time.[11] Similar arguments have been made since then, but I believe Wagner was the first to make them, or at least the first to make them so well.[12] This is why I am pleased that in the latest edition of his great six-volume treatise on search and seizure, Professor LaFave still sets forth Senator Wagner's speech at considerable length.[13] Senator Wagner observed in part:

> I profoundly believe that [a search and seizure guarantee] which does not provide for the exclusion of evidence is not only ineffective but it is dangerous; it is dangerous because it will promote the spectacle, unfortunately not unknown in our time, of constitutional rights which have their meaning on paper and paper alone. Let no one who cares for civil liberty discount this danger. To guarantee civil rights in theory and permit constituted authority to deny them in practice, no matter how justifiable the ends may be or may seem, is to imperil the very foundation on which our Democracy rests.
>
> . . . .
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> Finally, I have no fear that the exclusionary rule will handicap the detection or prosecution of crime. All the arguments that have been made on that score seem to me to be properly directed not against the exclusionary rule but against the substantive guarantee itself. The exclusion of the evidence is only the sanction which makes the rule effective. It is the rule, not the sanction, which imposes limits on the operation of the police. If the rule is obeyed as it should be, and as we declare it should be, there will be no illegally obtained evidence to be excluded by the operation of the sanction.
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> It seems to me inconsistent to challenge the exclusionary rule on the ground that it will hamper the police, while making no challenge to the fundamental rules to which the police are required to conform. . . .[14]

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[11] Senator Wagner's speech is quoted at length in the Michael-Wechsler casebook. CASEBOOK, *supra* note 2, at 1191–92.

[12] Or should I say Wechsler was the first to make them? *See infra*, note 14.

[13] 1 WAYNE R. LAFAVE, SEARCH AND SEIZURE 28 (4th ed. 2004).

[14] CASEBOOK, *supra* note 2, at 1191–92. We know that Professor Wechsler played some role at the New York State Constitutional Convention of 1938. He was counsel to the minority leader of the convention. Did he write Senator Wagner's speech? The late Professor Frank Allen, whose articles on search-and-seizure and confessions helped establish the foundation for modern criminal procedure, and who knew Wechsler fairly well because they worked together on the Model Penal Code, once told me that after hearing several reports that Wechsler had written the Wagner speech he finally asked Wechsler whether this was so. According to Professor Allen, Wechsler smiled and replied that indeed it was.

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II.

Wechsler was not one to confine his activities to the classroom or the law library. He was counsel to the Minority Leader of the New York state constitutional convention in 1938; Assistant Attorney General of New York, 1938-40; Special Assistant to the Attorney General of the United States, 1940-44; and Assistant Attorney General of the United States (in charge of the war division) from 1944-46.[15]

When I was still a law student, another event occurred that kept Wechsler quite busy away from the law school. He was named Reporter for a new American Law Institute project, a Model Penal Code. As a result, Wechsler soon started rethinking and reworking, "in the light of all the knowledge that can be obtained,"[16] "the law on which men place their ultimate reliance for protection against all the deepest injuries that human conduct can inflict on individuals and institutions."[17]

The project took ten years to complete. A quarter-century after its completion, Sandy Kadish (a great criminal law scholar in his own right and co-author of the most distinguished "Weschler-like" criminal law casebook since the Michael-Wechsler book) called the Model Penal Code "the principal text in

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[15] Professor Wechsler once told me that shortly after he became an Assistant Attorney General of the United States he dropped by to introduce himself to J. Edgar Hoover, but one of Hoover's aides told Wechsler that the Director of the FBI would not see him. When asked why not, the aide replied that it was because of an article Wechsler had written some years earlier, Herbert Wechsler, *A Caveat on Crime Control*, 27 J. CRIM. L. & CRIMINOLOGY 629 (1937). When Wechsler wrote that article, a number of "crime crisis" conferences had been held or were being held in New York and elsewhere, and a special prosecutor, Thomas E. Dewey, had been investigating "racketeering" in New York. As Wechsler saw the situation, "[t]here has been ample publicity for all these activities," but "none of the dilemmas which lie at the root of any effort to deal with crime by law has been exposed to public view." *Id.* at 629. He went on to say:

> [T]here has been an impressive series of newspaper and motion picture glorifications of the police work of Mr. J. Edgar Hoover and his Bureau and of the integrity and ability as prosecutors of men like Mr. Dewey in New York. As a result, the faith that crime programs [of New York Governor Herbert Lehman's type], police work of the Hoover type, and prosecution of the Dewey type will substantially eliminate crime is almost as widely held as the belief that the Bureau of Investigation fulfills the principal function of the Department of Justice of the United States.
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> *Id.*

It is worth recalling how Professor Wechsler concluded his short, crisply written 1937 article:

> [O]ne can say for social reform as a means to the end of improved crime control what can also be said for better personnel but cannot be said for drastic tightening of the processes of the criminal law—that even if the end should not be achieved, the means is desirable for its own sake. I argue, finally, that this should have been the primary message of the crime conferences and that this is the story which the newspapers should have carried.
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> *Id* at 637.

[16] Herbert Wechsler, *The Challenge of a Model Penal Code*, 65 HARV. L. REV. 1097, 1133 (1952).

[17] *Id.* at 1098.

criminal law teaching, the point of departure for criminal law scholarship, and the greatest single influence on the many new state codes that have followed in its wake."[18]

Wechsler's formidability may explain why, even after I had spent a number of years in teaching and even though I had no difficulty calling law professors older than Wechsler by their first names, I could not bring myself to call Wechsler anything but "Professor Wechsler." How could I possibly call him "Herb"? That would be like calling Learned Hand by his first name!

III.

Wechsler was not only my teacher, but my employer. In the summer of 1953, I was one of six Columbia law students who worked for Wechsler on the Model Penal Code project.[19] Law faculties were quite small in those days and very few law school graduates went into teaching, but all six of us did.[20]

Much of the work I did for Wechsler involved the circumstances under which police officers *could* use, and *ought to* use, deadly force to prevent the escape of a fleeing felon. I must have read every twentieth century reported case bearing on the subject. I learned a lot about the law of arrest and some useful things about the law of search-and-seizure as well. But in retrospect, I lacked what some would call "creativity." It never dawned on me that the Fourth Amendment had an important bearing on the subject.[21]

Some thirty years later, however, the U.S. Supreme Court told us that a police officer's use of deadly force to prevent the escape of a fleeing felon constituted a violation of the Fourth Amendment unless "the officer has probable cause to

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[18] Sanford H. Kadish, *The Model Penal Code's Historical Antecedents*, 19 RUTGERS L.J. 521, 521 (1988).

[19] I still remember that we were each paid the munificent sum of 75 cents an hour. But I hasten to add that that was not at all bad compensation for those days. After all, tuition at Columbia Law School has gone up about 40 times since 1953.

[20] My five fellow research associates for Wechsler in the summer of 1953 were Geoffrey Hazard, William Kenneth Jones, Harold Korn, Robert Pitofsky and Warren Schwartz.

Jones and Korn subsequently taught at Columbia Law School and then, in 1961, teamed up with Wechsler to write a brilliant two-part, 130-page article on inchoate crimes, Herbert Wechsler, William Kenneth Jones & Harold Korn, *The Treatment of Inchoate Crimes in the Model Penal Code of the ALI: Attempts, Solicitation and Conspiracy* (pts. 1 & 2), 61 COLUM. L. REV. 571 (1961), 61 COLUM. L. REV. 957 (1961). (As research associates, Jones had worked on the law of attempts and Korn on conspiracy.) Hazard went on to teach law at the University of California (Berkeley), Yale and the University of Pennsylvania. Thirty-one years after he had worked for Wechsler as a student, Hazard succeeded him as Executive Director of the American Law Institute. Pitofsky later taught at New York University Law School and Georgetown Law School (where he served as dean of the school). Schwartz went on to teach law at the University of Texas, the University of Virginia and Georgetown.

[21] So far as I am aware, neither did it dawn on anybody else who worked on this section of the Code.

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believe that the suspect poses a threat of serious physical harm, either to the officer or to others. . . ."[22]

I did have the satisfaction of noticing that the opinion of the Court contained language remarkably similar to the relevant Model Code provisions and accompanying commentary. The conclusions the Model Penal Code had reached as a matter of policy the Court had arrived at as a matter of constitutional interpretation.

IV.

In 1965, the American Law Institute embarked on a new project, a Model Code of Pre-Arraignment Procedure, and I was asked to be a member of the Advisory Committee to the project. It was now twelve years since I had worked for Professor Wechsler and, even though I still didn't call him by his first name, I was determined to show him at the first meeting of the Advisory Committee that I had "grown up." Unfortunately, things didn't work out as I had planned.

As Executive Director of the American Law Institute, Wechsler presided over the first meeting. I still remember what followed quite well:

SCHAEFER:[23] Herb, I'm having trouble going along with you on proposed paragraph 3(a). I do have some suggested language that could fix this [reading his language], but if you don't think such language is necessary I'm afraid I'll have to vote against you.

WECHSLER: That's a good suggestion, Wally. I'll insert your language.

FRIENDLY: [24] Herb, I'm not sure I can go along with you on this one. But if you are willing to delete the last sentence of paragraph 2(b) it will make it a lot easier for me to vote with you.

WECHSLER: O.K., Henry. I don't see why we can't delete that sentence.

KAMISAR: I'm afraid, Professor Wechsler that I can't vote for the proposal unless you add a sentence to paragraph 3(b), making it clear that the rule doesn't apply to [certain] situations.

WECHSLER: So vote against me.

I don't remember how I wound up voting on that occasion. But if anybody were to ask me to choose the greatest American criminal law scholar of the twentieth century, I would vote for Professor Wechsler.

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[22] Tennessee v. Garner, 471 U.S. 1, 11 (1985).

[23] At the time Walter Schaefer was a Justice of the Supreme Court of Illinois.

[24] At the time Henry Friendly was a judge on the U.S. Court of Appeals for the Second Circuit.

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