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ARTICLE: AMERICAN ORESTEIA: HERBERT WECHSLER, THE MODEL PENAL CODE, AND THE USES OF REVENGE

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LEXISNEXIS SUMMARY:

... 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. ... 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. ... Though Wechsler believed that Georgia's insurrection statute violated Herndon's "First Amendment guarantees," the Supreme Court rejected Herndon's case on what Wechsler believed to be "silly" procedural grounds. ... 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. ... 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. ... 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popular opposition to the offenses of fornication and adultery, Wechsler noted that "complaints are almost always withdrawn," and sentences "imposed only in exceptional circumstances." ... Noting that "on 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. ... 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." ... Just as the Code was completed, New York Governor Nelson Rockefeller appointed Wechsler to a commission to revise New York's criminal law. ... Wechsler's dialogue with Sgaglione indicated that he did not place much faith in deterrence as a legitimate reason for continuing the death penalty. ... To press this point, Wechsler asked Ryan whether eliminating the penalty might adversely effect the community, 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. ... 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. ... 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.

HIGHLIGHT:

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. 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.

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. [n1]

TEXT:
[*1018]

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. [n2] To address such concern, the American Law Institute (ALI) 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." [n3] Already, detractors have criticized this move, arguing that it replaces the Code's original commitment to rehabilitation with a more punitive attention to retribution. [n4] 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). [n5] 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. [n6] Recovering his view helps us to contextualize and perhaps even better appreciate the current revision's emphasis on proportionality.

[*1019] 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. [n7] 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 nineteenth century sociologist Emile Durkheim, Wechsler's insights hewed even more closely to an earlier model, the ancient Greek tragedy The Oresteia. [n8] 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. [n9] As the Erinyes close in on their prey, Athena intervenes, replacing blood vengeance with judicial process. [n10] 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. [n11]

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. [n12] "The desire for revenge," wrote Wechsler in 1940, is "entrenched in the general population" and cannot be ignored. [n13] 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. [n14] When this failed and "public demand for heavy sanctions" became "inexorable," **[*1020]** Wechsler argued that voters should be accommodated - even indulged - lest they spark legislative backlash. [n15]

While the problem of backlash has become prominent in recent literature on civil rights, it has not factored largely in criminal law. [n16] Instead, criminal law scholars have tended to deride the political process, arguing that it is "pathological" and has resulted in the "degradation" of criminal codes. [n17] 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. [n18]

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. [n19] Of course, this did not mean that liberal reform should not be attempted, but 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.

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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. [n20] 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. [n21] Such complaints gained strength when dry leaders accused Jewish rabbis of selling sacramental wine out of their homes in New York in 1921. [n22] 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." [n23]

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 at the same time that the Court heard an appeal from the Scottsboro boys, nine black defendants accused of raping two white women outside of Scottsboro, Alabama. [n24] Alabama sentenced eight of the nine defendants to death; despite "contradictory testimony given by the women" reinforcing Wechsler's view that popular prejudice undergirded criminal law. [n25]

[*1022] Though Wechsler returned to the 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. [n26] In 1934, Wechsler authored a book review for the Yale Law Journal endorsing a federal anti-lynching law and maintaining that southern justice might look very different if African Americans were allowed to participate in the political process. [n27] In the same piece, Wechsler also lamented "the political impotence" that black voters suffered under poll taxes, literacy tests, and other modes of disfranchisement. [n28] If such obstacles were removed from black access to politics, he argued, then criminal law might be reformed from the ground up. [n29]

Wechsler's final encounter with southern criminal justice occurred between 1934 and 1937 when he volunteered to aid in the defense of Angelo Herndon, a black communist arrested for plotting insurrection in Georgia. [n30] Though Wechsler believed that Georgia's insurrection statute violated Herndon's "First Amendment guarantees," the Supreme Court rejected Herndon's case on what Wechsler believed to be "silly" procedural grounds. [n31] Then, as the Depression wore on the Court began to take a softer line against communists, ultimately accepting a second petition for habeas corpus filed by Wechsler, Carol King, and others on behalf of Herndon on January 21, 1937. [n32] Based on a state statute that provided an appeal in cases where a statute's constitutionality had not been raised appropriately at the state level, the appeal resolved the technical deficiency in Herndon's initial petition. [n33] Yet, Wechsler left **[*1023]** with the profound feeling that the "wind" of politics had convinced the Court to reconsider Herndon's case, ultimately ruling in his favor. [n34]

Similar types of context-driven outcomes, believed Wechsler, could be found in death penalty jurisprudence. 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. [n35] 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 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 relative-

ly 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 or non-legislative actors control, or "nullify," sentencing? Prosecutors could simply decide not to 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. [n36] 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. [n37] 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. [n38] To a law professor writing in 1937, four years after Prohibition had been repealed, the idea that **[*1024]** popular sympathy for criminals might nullify criminal law was not strange. In fact, popular sympathy for criminals had created a "national audience fascinated with bandits," even leading "poor people" to hide them from police. [n39]

The persistence of the Great Depression was another factor that might have contributed to Wechsler's fear that the public might reduce punishments and nullify the law. By 1937, the United States had entered its seventh year of an economic crisis marked by unprecedented unemployment, poverty, and popular distress. [n40] 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 lawbreaking 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 General Motors branded the strikers as criminals. [n41]

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 providing "examples of the very kinds of behavior that the penalties are designed to deter." [n42] 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. [n43] 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. [n44] 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. [n45]

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 **[*1025]** 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." [n46] What the state should not do, he warned, was ignore popular sentiment and consign the "question of punishment" to "the discretion" of "administrators." [n47] 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. [n48]

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, such as 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. [n49] "The 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." [n50] **[*1026]** 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 reformative efficacy. [n51]

That light punishment might lead to "lynching, self-help, or indifference about prosecution," was a remarkable claim. [n52] 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? Was 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. [n53] Born in Athens, Georgia in 1890, Michael was twenty-five years old when Georgia authorities prosecuted and sentenced a Leo Frank, Jewish pencil-factory manager who worked outside Atlanta. [n54] Accused of murdering a thirteen-year-old girl, Frank was found guilty by a Georgia jury, but questions about the evidence in the case prompted Georgia Governor John M. Slaton to commute his sentence from death to life in prison. [n55] 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. [n56]

[*1027] 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. [n57] The lynching became so popular that California Governor James Rolph, Jr. commended the mob's leaders for being "patriotic citizens." [n58]

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 "refusal to assist in prosecution." [n59] 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 reigns 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 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 largest event that convinced Wechsler of the uses of retribution occurred five years after he and Jerome Michael completed **[*1028]** their casebook. Following the Allied victory over Hitler in World War II, former Attorney General Francis Biddle asked Wechsler to serve as an aide in the prosecution of Nazi high officials in Nuremburg, Germany. [n60] Wechsler agreed and for almost a year beginning October 1945 watched as American, Russian, British, and French prosecutors excoriated Nazis in court. [n61] One lesson stayed with him: the retribution directed at Hitler's lieu-

tenants had a distinctly utilitarian purpose. [n62] 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. [n63] In fact, retribution, or the prevention of private citizens from exacting retribution, became, for Wechsler, the most compelling reason for holding the trials. "Who 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? [n64] 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. [n65] The prevention of private recriminations, concluded Wechsler, was the most "constructive purpose" behind the war crimes tribunal. [n66]

If Prohibition convinced Wechsler that politically unpopular criminal laws would be broken "with abandon," [n67] 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 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.

[*1029] 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; it 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. [n68]

In the next Part, 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. [n69] 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 overburdened with idiosyncratic offenses lacking logical definition. To correct this, the Code's drafters devised a series of innovations that states could adopt as they pleased, depending on how far they wanted to go down the road to reform. [n70]

Assembled over a ten-year period, the MPC abolished common-law notions of malice and reduced mental state to four simple **[*1030]** categories: purpose, knowledge, recklessness, and negligence. [n71] 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." [n72] 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 beings in course of exhibition," and "negligently furnishing insecure scaffolding," the Code simply included a statute prohibiting "reckless conduct." [n73]

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 criminal law's primary goal was "diminishing the incidence of major injuries to individuals and institutions." [n74] The best way to accomplish this, continued Wechsler, was "treatment," including both rehabilitation and reform of present offenders - for example, through probation and parole - as well as deterrence. "The deterrence of potential offenders is a practicable objective of ... treatment" posited Wechsler. [n75]

The MPC's focus on treatment rankled some criminal law scholars, most notably Henry M. Hart, who maintained that the criminal law should balance its emphasis on offenders with a counter-emphasis on "the aims of the good society generally." [n76] 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 criminal law. [n77] "The core of the difference" be-

tween criminal law and medicine, observed Hart, is "that the patient has not incurred the moral condemnation of his community, whereas the convict has." [n78]

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 criminal law and public opinion at the forefront of their minds. This was particularly true **[*1031]** 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. [n79] 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. [n80] Breeding objectives also failed to explain why marriages were forbidden "between persons not related by blood," like "step-children," adoptive relatives, and "daughters-in-law." [n81]

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. [n82] The probability of such a misfortune was therefore just as likely to afflict non-related couples as related ones. [n83] In fact, unfavorable genes would negatively impact individuals whether incest was criminalized or not. "Any 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." [n84] 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." [n85]

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 the incest laws promote no secular goal," doing away with the offense would be a mistake given **[*1032]** the public's "intense hostility" to the crime. [n86] 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." [n87] "The religious character of the prohibition," he continued, was most obvious in states like Rhode Island, where Jews were exempted from "the prohibition against uncle-niece and aunt-nephew marriages since such marriages are permissible for that religious group." [n88] 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." [n89] 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. [n90] 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." [n91] 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." [n92]

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 **[*1033]** Commentaries, tends "to bring the law into disrepute." [n93] Here, Wechsler flagged another reason for paying 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." [n94] Repeating his emphasis on the danger of unenforceable crimes, "criminal liabilities" that proved "unenforceable because of nullification," argued Wechsler, should be "eliminated." [n95]

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 "to preserve the mother's health." [n96] Yet, illegal abortions persisted, leading to over 300,000 abortions per year and the death of roughly 8,000 women annually. [n97] 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. [n98] This led the Reporter to recommend "a policy of cautious expansion of the categories of lawful justification of abortion." [n99]

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. [n100] The second included cases where abortion was necessary to "prevent gravely defective offspring," including cases where infants were likely to have "serious abnormalities" such as "gravely defective central nervous systems." [n101] The third case for available abortions, argued Wechsler, should be cases of pregnancy resulting from rape. [n102] 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 **[*1034]** "sympathetically reported in the press" as an example of "an unrealistic legal requirement." [n103]

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 our society." [n104] For this reason, the issue was "left among those" upon which the MPC took "no position." [n105]

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 "on 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. [n106] 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." [n107] 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." [n108] 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." [n109] Conversely, states like Arizona, Colorado, and Missouri, all of which had "experimented with the abolition of the death penalty," suffered no surge in lynchings once the penalty was removed. [n110]

[*1035] 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. [n111] In 1760, a lieutenant in the Pennsylvania militia became "weary of life," and shot an innocent man in the street "in order to deprive himself of existence" through state-sponsored execution. [n112] Five years later, two Philadelphians committed murder in the hopes that their own lives might be taken by the state. The first "cut the throat of his own three-months old son" so that he might "die by the process of law," while the second "cut the throat of a twelve-year-old German boy" so that he "might lose his own life." [n113] Why murder others rather than simply commit suicide? One reason was religion. "By 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." [n114]

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 people." [n115] These feelings, recognized Sellin, could be "deeply rooted in a people's culture," and hard to dispel. [n116] 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. [n117]

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. [n118] To his mind, they were likely to be "less emotional **[*1036]** 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." [n119]

Yet, Wechsler concluded that it would be "unwise to propose such a change in the prevailing practice" of leaving the determination of death to the jury. [n120] This was because "many legislators would resist" abandoning the position that "the decision of life and death ought to reflect community, not specialized judgment." [n121] Legislative "objection," continued Wechsler, "ought 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. [n122] When it came to the question of removing the power to decide death from juries, concluded Wechsler, "the Reporter does not hold such a conviction." [n123]

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. [n124] The Code also retained the crimes of incest and abortion, though exceptions to abortion were proposed in cases of rape, endangered maternal health, and genetic defects. [n125] 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. [n126] 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. [n127]

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 **[*1037]** Commission are perhaps the best example of his sense that retribution had utilitarian value.

III. Reforming New York's Penal Law

Inspired by the ALI's work, Republican Governor Nelson Rockefeller's administration 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. [n128] 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." [n129]

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. [n130] 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 certain political leaders." [n131] Such accusations were bolstered by the shocking discovery of a Mafia convention in Apalachin, New York, in November 1957 - a meeting of criminal kingpins that Democratic leaders purportedly knew about but failed to disrupt. [n132] Dismay at this discovery spurred Republican-led investigations of organized crime in the state that echoed national Senate inquiries into organized crime by Tennessee Democrat Estes Kefauver. [n133] Fearing Kefauver might beat him to the White House, **[*1038]** Nelson Rockefeller made fighting crime a central part of his political platform in New York. [n134]

Convinced that Governor Harriman had "weakened the state's crime-fighting resources," Rockefeller called for expanding the Attorney General's power to "initiate criminal investigation," coordinating local, state, and Federal law enforcement agencies, and "strengthening the state police bureau of criminal investigation." [n135] 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." [n136] 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. [n137]

Rockefeller's interest in criminal defendants, not just crime control, coincided with the growing power of black voters in the state. 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. [n138] "A wholesale defection by Negro voters could play havoc with Democratic prospects in a close election," asserted The New York Times in 1956. [n139] "By defeating the ticket in such cities as New York, Chicago, and Los Angeles," argued The New York Times, African American **[*1039]** voters "might throw each of their respective states into the Republican column." [n140]

At first, northern Republicans sought black votes primarily by promising to improve conditions in the South. [n141] 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. [n142] 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. [n143] 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. [n144]

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. [n145] 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. [n146] There, it uncovered an **[*1040]** uncomfortable number of abuses against minorities by landlords and, in a manner that would be germane to Governor Rockefeller's interest in criminal defendants, police. [n147]

At a Commission hearing on February 2, 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." [n148] 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. [n149] 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. [n150] 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. [n151] 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. [n152]

[*1041] 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. [n153] Members included eight prominent New York attorneys, and Herbert Wechsler. [n154] 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 **[*1042]** Commission, Wechsler repeatedly expressed a concern for negotiating public opinion - and popular desires for retribution - lest the overall project fail. 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 that law required holding "public hearings" in order to build popular support for legal change. [n155] 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, for example, notions of culpability, justification, and excuse. [n156] 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." [n157] "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." [n158]

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 legis-

lation. "This is an 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." [n159] 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." [n160]

Interestingly, Wechsler counseled against holding public hearings, suggesting instead that experts or organized groups be called to create forums not for the public to voice its views, but to educate the public **[*1043]** on the subjects at hand by those with either training, institutional knowledge, or experience. "I am against hearings," but Wechsler noted that, "hearings [can be] used for public relationship reasons." [n161] For changes in sentencing, he suggested the Commissioner of Correction. [n162] Other possible speakers, Wechsler continued, included District Attorneys and even clergy. [n163]

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." [n164] 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 and 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 first-degree murder, the elimination of "breaking" as a requirement for burglary, and the creation of false imprisonment and custodial interference as lower forms of kidnapping. [n165]

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?" [n166] Among those in attendance were Reverend Carl Herman Voss from the American League to Abolish Capital Punishment; Joseph Ryan, District Attorney for Onondaga County; and Al Sgaglione, President of the Police Conference of New York State. [n167]

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, **[*1044]** "because of its great effect as a deterrent." [n168] "Penalties must be strong," continued Sgaglione, since,

as we are all aware today, 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 law: "An eye for an eye and a tooth for a tooth.'" [n169]

The commissioners jumped to grill Sgaglione on his claim that capital punishment deterred crime. "As 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?" [n170] "Possibly after he commits the murder," responded Sgaglione. [n171] "After he commits the murder, then he hasn't been deterred. Wouldn't you admit that?" queried the commissioner. [n172] "He may be deterred from going further, from killing a second person or a third murder. There is always that possibility," responded Sgaglione. [n173] "Why don't you favor boiling them in oil?" interjected Wechsler. [n174] "I think our society doesn't believe in that today," responded Sgaglione. [n175] "I wonder what the line of distinction is, as you see it?" continued Wechsler. [n176] "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." [n177] "You also read about people who served and have been released and go out and don't commit any other crime," countered Wechsler. [n178] "True," answered Sgaglione, clearly flailing. [n179] "You know," continued Wechsler, moving to the importance of discretion in the law, "the only **[*1045]** 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." [n180] "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 position on this question?" concluded Wechsler, relinquishing the floor to other Commissioners. [n181]

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 Onondaga 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. [n182] "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." [n183] 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. [n184] 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. [n185]

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 then to reduce public "frustration" at the criminal justice system generally. [n186] To press this point, Wechsler asked Ryan whether eliminating the penalty might adversely effect the community, 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. [n187] "I don't follow **[*1046]** your question," responded Ryan, "What do you mean?" [n188] 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. [n189]

Wechsler's 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. [n190] "Would it be a kind of sense of frustration?" wondered Wechsler, enough to incite new legislation? [n191] To illustrate, he raised the matter of Delaware's abolition and subsequent reinstatement of the death penalty in 1961. [n192] 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. [n193] Then, in 1961, the state legislature voted to restore the death penalty, eventually overriding a gubernatorial veto to do so. [n194] "Why?" queried Wechsler,

because 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 **[*1047]** judge whether abolition is really the most practical proposal to make in this situation. [n195]

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 capability to assuage popular anger and legislative backlash. [n196]

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. [n197] 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. [n198] Even if jurors were not "unanimous in favor of [the] death penalty," continued Wechsler, "public opinion" could simply "focus on them," not the criminal code, for perpetrating injustice. [n199] 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." [n200] 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. Wechsler stated that "if the Commission induces the Legislature to abolish capital punishment, and if thereafter several shocking homicides occur, the Legislature might feel that they were led down the garden path." [n201] He concluded that the passage of three bills would constitute a **[*1048]** significant step forward in New York's reform effort. [n202] The first bill was a "redefinition of homicide," abandoning malice aforethought for the MPC mens rea of purpose. [n203] The second bill was a bifurcation of the criminal trial into a "two-stage proceeding" in which the jury first decided guilt and then determined the sentence. [n204] Finally, Wechsler suggested abandoning the mandatory death penalty and allowing prosecutors the discretion to request death. [n205]

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, Senator Manfred Ohrenstein, Jerome Nathanson, Norman Redlich, and Monrad Paulsen, one of Wechsler's colleagues at Columbia. [n206] "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. [n207]

"A very recent one in Delaware?" interjected Wechsler. [n208] "Yes," replied Paulsen. [n209] Paulsen recommended, as a solution, the MPC's two-tier system, which separated the trial phase from the sentencing phase in capital cases. [n210]

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 **[*1049]** 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." [n211] "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." [n212]

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 New York Times, "was presented at a legislative hearing here yesterday." [n213] Wechsler's silence on black and Hispanic executions might have had something to do with his experience confronting racial bias in the South. Minorities like Angelo Herndon, he knew well, fared poorly in democratic systems unless they could find a way to appeal to majority voters. [n214] Wechsler himself had struggled to open up such avenues of appeal in the case of Angelo Herndon almost three decades earlier. [n215]

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 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 all the criminals," began Kron during the December 7 meeting. [n216] "The least dangerous?" wondered Chairman Bartlett. [n217] "Yes, a murder is an isolated gesture," continued the French psychiatrist. [n218] The reasons for execution, Kron posited, surprisingly had less to do with deterrence than with popular demand. "We 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. [n219]

[*1050] "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. [n220] "I cannot say," responded Kron. [n221] Kron continued,

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. [n222]

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 penalty] immediately, that will be a real revolution. This is a matter of education." [n223] 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. "Unfortunately, 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." [n224]

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 **[*1051]** would only jeopardize the larger process of reform. [n225] 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. [n226] Further, the Commission approved much of the MPC's law of homicide, a victory for Wechsler's strategic approach. [n227]

In the spring of 1965, the legislature voted to adopt a new Penal Law for the State of New York. [n228] 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'naghten Rule, substituting for it the substantial-capacity test. [n229] It also adopted the MPC's defense of extreme emotional disturbance, a broader substitute for the ancient "crime of passion" reducing murder to manslaughter. [n230] 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. [n231] Sodomy - despite the MPC's suggestion that it be decriminalized - remained a crime, as did adultery. [n232] However, there was some liberalization. Married couples were exempted from deviate sexual intercourse, and sex offenses could only be proven by a corroborating witness. [n233]

Perhaps the biggest liberalization was a move to abolish the death penalty. [n234] In an eight-to-four vote, the Commission recommended that the penalty be eliminated in all cases. [n235] 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." [n236] The state legislature agreed, with two exceptions. [n237] It abolished the penalty for all defendants except **[*1052]** those who killed a police officer "acting in the line of duty," and for convicts serving life sentences who murdered a prison guard. [n238]

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." [n239] 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. [n240] In October 1968, a legislative committee met in New York to decide whether to expand the scope of capital punishment. [n241] 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. [n242] Much of this mail had been triggered by rising crime. [n243] When New York City Controller Mario 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. [n244] Conversely, "groans and cat-calls" inundated psychiatrist Henry Peckstein when he warned that "too much repressive legislation" could lead to a "fascist state." [n245]

In 1971, state legislators extended capital punishment to anyone who killed a corrections officer "while he is performing his official **[*1053]** duties." [n246] 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." [n247] In 1977, such a law passed both the House and Senate, only to be vetoed by New York Governor Hugh Carey. [n248] Five 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." [n249] 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. [n250]

Despite the court's ruling, popular initiatives to expand the death penalty continued into the 1980s. In 1989, a Democrat-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. [n251] 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." [n252] Frustration with Cuomo's anti-death-penalty stance contributed to the 1994 election of George Elmer Pataki, the first Republican Governor in twenty years. [n253] Pataki campaigned on a promise to restore the death penalty, something that no New York governor had done since 1977. [n254] On March 7, 1995, he finally succeeded in reinstating the death penalty - three decades after the Temporary Commission had tried to **[*1054]** eliminate it - with a new law creating ten separate instances where death was appropriate. [n255]

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. [n256] 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. [n257] According to Democratic Assemblywoman Helene E. Weinstein, initially a supporter of capital punishment, "my vote 10 years ago was 10 years ago." [n258] Since then, argued Weinstein, "new information, important information, about DNA testing" and "about innocent people being convicted" had emerged, changing her mind. [n259] 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. [n260]

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. [n261] 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.

[*1055]

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. [n262] "Before we endorse retributivism," argued Whitman, "we need some thoughtfully worked-out understanding of its dangers." [n263] Among those dangers, continued Whitman, was retribution's synergistic relationship with "harshness" in punishment, "propagandistically-minded leaders," and "mass democracy." [n264] To Whitman's mind, "mass democracy" produced bad results, led to the "politicization of the crime issue," and should be curtailed. [n265] 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." [n266]

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. [n267] 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. [n268] 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 in 1959, will protect the Supreme Court "against the danger of the imputation of a bias favoring claims of one kind or another." [n269] 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.

[*1056] 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 "values and security" are often what is most "disturbed" by lawbreaking. [n270] 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. [n271]

That communities across America have shown themselves eager to elect 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. [n272] 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. [n273] 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 nearly inevitable, a product of the "inherent nature of the legislative process." [n274] 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. [n275]

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 **[*1057]** reforming the state's criminal code. [n276] There was even support for the elimination of certain offenses like adultery. [n277] 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 extramarital sex, for example - so too is current 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. [n278]

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." [n279] For others, the solution to the "pathological politics" of criminal law is to abolish "legislative supremacy" by shifting crime definition from legislatures to courts. [n280]

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. [n281] This means that whether sentences are long or short may actually be irrelevant to crime control, and that academic calls for undermining democracy are 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 twenty and thirty-four 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, **[*1058]** not sentencing, might be the appropriate locus for legal change. [n282] 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. [n283]

Finally, why not reimagine 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. [n284] 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.

Legal Topics:

For related research and practice materials, see the following legal topics:
Criminal Law & ProcedureCriminal OffensesCrimes Against PersonsStalkingPenaltiesCriminal Law & ProcedureCriminal OffensesMiscellaneous OffensesRiot, Rout & Unlawful AssemblyGeneral OverviewCriminal Law & ProcedureSentencingProportionality

FOOTNOTES:

n1. Aeschylus, The Oresteia 252 (Robert Fagles trans., Penguin Books 1977)).

n2. See, e.g., Jenifer Warren, The PEW Center on the States, One in 100: Behind Bars in America 2008, at 5, 11 (2008), available at http://www.pewcenteronthestates.org/uploadedFiles/one%20in%20100.pdf.

n3. Model Penal Code: Sentencing ß 1.02(2)(2)(a)(i) (Tentative Draft No. 1, 2007).

n4. See, e.g., Edward Rubin, Just Say No to Retribution, 7 Buff. Crim. L. Rev. 17, 17 (2003); James Q. Whitman, A Plea Against Retributivism, 7 Buff. Crim. L. Rev. 85, 88 (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, Comments on the Model Penal Code: Sentencing Preliminary Draft No. 1, 30 Am. J. Crim. L. 135, 140-42 (2003). But see Markus D. Dubber, Criminal Law: Model Penal Code 24-27 (2002) (denying retribution any significant role in the MPC, and arguing that any effort to read retribution into the MPC is an exercise in "futility").

n5. See, e.g., Kevin R. Reitz, Reporter's Introductory Memorandum to Model Penal Code: Sentencing, at xxvii (Tentative Draft No. 1 2007) (illustrating the lack of awareness of retribution's role in the original MPC); Markus Dirk Dubber, Penal Panopticon: The Idea of a Modern Model Penal Code, 4 Buff. Crim. L. Rev. 53, 70-71 (2000). Scholars who have discussed the history of the MPC have tended to emphasize its treatmentist side. See, e.g., id.; Dubber, supra note 4, at 12 (noting that "the Model Code wholeheartedly endorsed the then-orthodoxy of treatmentism"); see also Sanford H. Kadish, The Model Penal Code's Historical Antecedents, 19 Rutgers L.J. 521, 537-38 (1988).

n6. Markus Dubber notes that Wechsler "subscribed" to the "orthodoxy" of "treatmentism." Dubber, 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. 465, 473 (1961).

n7. See, e.g., 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, 23-25 (1997); Paul H. Robinson & Michael T. Cahill, The Accelerating Degradation of American Criminal Codes, 56 Hastings L.J. 633, 644-45 (2005); Paul H. Robinson & Michael T. Cahill, Can a Model Penal Code Second Save the States from Themselves?, 1 Ohio St. J. Crim. L. 169, 170-72 (2003); William J. Stuntz, The Pathological Politics of Criminal Law, 100 Mich. L. Rev. 505, 509-11, 523-24 (2001).

n8. Emile Durkheim, On the Normality of Crime, in Theories of Society: Foundations of Modern Sociological Theory 872, 873-75 (Talcott Parsons et al. eds., 1961).

n9. Aeschylus, supra note 1, at 243.

n10. Id. at 253.

n11. Id. at 267.

n12. Jerome Michael & Herbert Wechsler, Criminal Law and its Administration: Cases, Statutes and Commentaries 16 (1940).

n13. Id.

n14. Id.

n15. Wechsler, supra note 6, at 473.

n16. But see Stuart Hall et al., Policing the Crisis: Mugging, the State, and Law and Order (1978).

n17. Robinson & Cahill, Degradation, supra note 7, at 634; Stuntz, supra note 7, at 505.

n18. Robinson & Cahill, Degradation, supra note 7, at 653; Stuntz, supra note 7, at 582, 587.

n19. Wechsler, supra note 6, at 476.

n20. Michael A. Lerner, Dry Manhattan: Prohibition in New York City 115, 120 (2007).

n21. Id. at 120.

n22. Id.

n23. Interview by Norman Silber & Geoffrey Miller with Herbert Wechsler, Professor, Columbia Univ. Sch. of Law, in New York City, N.Y. (Aug. 11, 1978, Feb. 23, 1979, Mar. 12-13, 1982) in Reminiscences of Herbert Wechsler 26 (Norman Silber & Geoffrey Miller eds., Columbia University Oral History Research Office 1982) [hereinafter Reminiscences of Wechsler].

n24. Harvard Sitkoff, A New Deal for Blacks: The Emergence of Civil Rights as a National Issue: The Depression Decade 145-49 (1978) [hereinafter Sitkoff, New Deal]. Wechsler first made contact with Stone in the late winter of 1931, traveled to Europe in the summer of 1932, then began at the Supreme Court that fall. Reminiscences of Wechsler, supra note 23, at 57, 63, 65-66. The first Supreme Court appeal in the Scottsboro case was argued on October 10, 1932. See Powell v. Alabama, 287 U.S. 45 (1932). Wechsler later alluded to a "volume" that Stone put together for him that included cases on which he had worked, including Rogers v. Guarantee Trust Co., 288 U.S. 123 (1933), argued in December 1932 and decided in January 1933, placing him in the fall 1932 term. Reminiscences of Wechsler, supra note 23, at 72.

n25. Sitkoff, New Deal, supra note 24, at 145-46.

n26. Anders Walker, "Neutral" Principles: Rethinking the Legal History of Civil Rights, 1934-1964, 40 Loy. U. Chi. L.J. 385, 390-93 (2009).

n27. Herbert Wechsler, Lynching and the Law by James Harmon Chadbourn & The Tragedy of Lynching by Arthur Franklin Raper, 44 Yale L.J. 191, 193 (1934) (book review) [hereinafter Wechsler, Lynching]. For more on this piece, see Walker supra note 26, at 391-93.

n28. Wechsler, Lynching, supra note 27, at 191.

n29. Id. at 191-92.

n30. Reminiscences of Wechsler, supra note 23, at 124-25. For more on King and Wechsler's defense of Herndon, see Walker, supra note 26, at 394-404.

n31. Reminiscences of Wechsler, supra note 23, at 128.

n32. Brief for the Appellant, Herndon v. Lowry, 301 U.S. 353 (1937) (Nos. 474 & 475); Reminiscences of Wechsler, supra note 23, at 130-34 (noting the Court's rulings in DeJonge v. Oregon, 299 U.S. 353 (1937)); Sromberg v. California, 283 U.S. 359 (1931) (holding that a California statute banning Communist flags was unconstitutional because it violated the Fourteenth Amendment).

n33. Reminiscences of Wechsler, supra note 23, at 130.

n34. Reminiscences of Wechsler, supra note 23, at 134. For the Court's opinion vindicating Herndon, see Herndon v. Lowry, 301 U.S. 242 (1937).

n35. Herbert Wechsler & Jerome Michael, A Rationale of the Law of Homicide II, 37 Colum. L. Rev. 1261, 1265 (1937).

n36. Samuel Walker, Popular Justice: A History of American Criminal Justice 158-59 (2d ed. 1998).

n37. Id.

n38. See generally Claire Bond Potter, War on Crime: Bandits, G-Men, and the Politics of Mass Culture (1998) (exploring John Dillinger as a political actor and the rise of celebrity bandits).

n39. Id. at 88, 105.

n40. David M. Kennedy, Freedom From Fear: The American People in Depression and War, 1929-1945, at 69, 86-87 (1999).

n41. Id. at 310-11.

n42. Wechsler & Michael, supra note 35, at 1266.

n43. Id. at 1266 n.18.

n44. She Goes to Death First, N.Y. Times, Jan. 13, 1928, at 1.

n45. Id.

n46. Wechsler & Michael, supra note 35, at 1267.

n47. Id. at 1267-68.

n48. Id. at 1268.

n49. Michael & Wechsler, supra note 12.

n50. Id. at 16.

n51. Id.

n52. Id.

n53. For Michael's southern origins, see Herbert Wechsler, The Courts and the Constitution, 65 Colum. L. Rev. 1001, 1001 (1965). For Michael's Judaism, see Jewish Congress Urged, N.Y. Times, Jan. 14, 1935, at 8.

n54. See Herbert Wechsler, Jerome Michael, 1890-1953, 53 Colum. L. Rev. 301, 301 (1953). For details of the Leo Frank case, see Nancy McLean, The Leo Frank Case Reconsidered: Gender and Sexual Politics in the Making of Reactionary Populism, 78 J. Am. Hist. 917, 917-18 (1991).

n55. McLean, supra note 54, at 918.

n56. Id.; Warden is Overpowered, N.Y. Times, Aug. 17, 1915, at 1.

n57. Lesson Learned, Time, Dec. 11, 1933, at 14.

n58. Id.

n59. Wechsler & Michael, supra note 35.

n60. Reminiscences of Wechsler, supra note 23, at 4-223.

n61. Airey Neave, On Trial at Nuremberg 217, 306 (1978).

n62. Herbert Wechsler, The Issues of the Nuremburg Trial, 62 Pol. Sci. Q. 11, 15 (1947). Perhaps surprisingly, Wechsler did believe that Nuremburg might have had some deterrent value. "There are men," explained Wechsler, who in "valuing personal survival, will take account of the contingency of failure." Id. at 16. Presumably this meant that potential political discontents might think twice before engaging in the kinds of atrocities that the Nazis did.

n63. Id. at 15.

n64. Id.

n65. Id.

n66. Id.

n67. Reminiscences of Wechsler, supra note 23, at 105.

n68. Nomination of Herbert Wechsler, of New York, to be Assistant Attorney General Before the S. Subcomm. of the Comm. on the Judiciary, 78th Cong. 75 (1944) (statement of Herbert Wechsler, Nominee).

n69. Dubber, supra note 4, at 8.

n70. Id.

n71. Model Penal Code ß 201.1 cmt. 1 (Tentative Draft No. 9, 1959).

n72. Id. ß 201.10 cmt. 1.

n73. Id. ß 201.11 cmt. 1.

n74. Herbert Wechsler, The Challenge of a Model Penal Code, 65 Harv. L. Rev. 1097, 1105 (1952).

n75. Wechsler & Michael, supra note 35, at 1262.

n76. Henry M. Hart, Jr., The Aims of Criminal Law, 23 Law. & Contemp. Probs., Summer 1958, at 401, 402 (1958).

n77. Id. at 405, 409.

n78. Id. at 406.

n79. Model Penal Code ß 207.3 cmt. 1(ii) (Tentative Draft No. 4, 1955). Wechsler served as reporter and drafted the commentaries. See Paul H. Robinson & Markus Dubber, The American Model Penal Code: A Brief Overview, 10 New Crim. L. Rev. 319, 323 (2007).

n80. ß 207.3 cmt. 1(ii).

n81. Id.

n82. Id.

n83. Id.

n84. Id.

n85. Id.

n86. Id. ß 207.3 cmt. 1(iv).

n87. Id. ß 207.3 cmt. 1(i).

n88. Id.

n89. Id. ß 207.3 cmt. 1(iv).

n90. Id. ß 207.1.

n91. Id.

n92. Id.

n93. Id.

n94. Id. ß 207.11 cmt. 1 (Tentative Draft No. 9, 1959).

n95. Id.

n96. Id. ß 207.11 cmt. 3.

n97. Id. ß 207.11 cmt. 1.

n98. Id.

n99. Id.

n100. Id. ß 207.11 cmt. 3.

n101. Id. ß 207.11 cmt. 4.

n102. Id. ß 207.11 cmt. 5.

n103. Id.

n104. Id.

n105. Id.

n106. Id. ß 201.6 cmt. 1.

n107. Id.

n108. Thorsten Sellin, The Death Penalty: A Report for the Model Penal Code Project of the American Law Institute, in Model Penal Code 79 (Tentative Draft No. 9, 1959).

n109. Id.

n110. Id. at 79-80.

n111. Id. at 65.

n112. Id. at 66 (quoting Henry Simpson, The Lives of Eminent Philadelphians, Now Deceased 158-59 (1859)).

n113. Id. (quoting 2 Henry Melchior Muhlenberg, The Journals of Henry Melchior Muhlenberg 235, 264 (Theodore G. Tappert & John W. Doberstein trans., Muhlberg Press 1945) (1859)).

n114. Id. at 67 (quoting Johs Andenaes, General Prevention - Illusion or Reality?, 43 J. Crim. L. Criminology & Police Sci. 176, 193 (1952)).

n115. Id. at 81.

n116. Id.

n117. Id.

n118. Model Penal Code ß 201.6 cmt. 4 (Tentative Draft No. 9, 1959).

n119. Id.

n120. Id.

n121. Id.

n122. Id.

n123. Id.

n124. Id. ß 210.6(2).

n125. Id. ß 230.2.

n126. See supra text accompanying notes 77-80.

n127. See, e.g., Modernizing the Law, N.Y. Times, May 25, 1962, at 32.

n128. State Picks Panel on Criminal Law, N.Y. Times, June 21, 1961, at 39.

n129. Governor Nelson Rockefeller, Annual Message: Revision of the Penal Law & Code of Criminal Procedure (Jan. 4, 1961) (transcript available in the New York Supreme Court Criminal Law Library). "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.

n130. Leo Egan, G.O.P. Eyes Three for Regent Posts, N.Y. Times, Feb. 10, 1958, at 12.

n131. Richard Amper, City G.O.P. Divides on Coudert Seat: Goodwin is Designated but Faces Fight - Keating Assails Harriman, N.Y. Times, May 24, 1958, at 1.

n132. Id.

n133. The Legislative Session, N.Y. Times, Mar. 27, 1958, at 32.

n134. Governor Signs Anti-Crime Bill, N.Y. Times, Apr. 18, 1959, at 14.

n135. Rockefeller Charges Rival Harms State Crime Fight, N.Y. Times, Oct. 8, 1958, at 1.

n136. Governor Signs Anti-Crime Bill, supra note 134, at 14.

n137. Vilas M. Swan, The New Public Defender Law, 34 N.Y. St. B.J. 59, 59 (1962).

n138. Cabell Phillips, Civil Rights Pose Hard Choice for Democrats: Issues Now Coming Up in Congress Could Split Party Irrevocably, N.Y. Times, Apr. 8, 1956, at E3. "The Autherine Lucy affair, the bus strike in Montgomery, Ala., the progressively more arbitrary stand of Southern leaders against school integration," noted The New York 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." Id.

n139. Id.

n140. Id.

n141. 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.

n142. Bill Fights Bombings: Javits Would Permit U.S. to Act in Racial Incidents, N.Y. Times, June 6, 1958, at 24.

n143. Id.

n144. 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, and "he ought to be the last man in the Senate to throw stones and cast aspersions on any other states in the union." John D. Morris, Russell Assails Race "Agitators" in Rights Debate, N.Y. Times, Feb. 28, 1960, at 1.

n145. Civil Rights Unit to Open Studies, N.Y. Times, June 11, 1958, at 18.

n146. The Commission was formally established by the 1957 Civil Rights Act, itself inspired by southern resistance to Brown. Id. It began by investigating voting, education, and housing in the South. Id. 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. Charles Grutzner, 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. Anthony Lewis, Civil Rights Unit Eyes New Fields, N.Y. Times, Oct. 15, 1959, at 46. Six members made up the Commission (three Democrats, two Republicans and one 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 Law School. Anthony Lewis, Eisenhower Picks Civil Rights Unit: Reed is Chairman, N.Y. Times, Nov. 8, 1957, at 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. Lewis. Civil Rights Unit Eyes New Fields, supra, at 146.

n147. Grutzner, supra note 146, 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, Apr., 9, 1960, at 1.

n148. Grutzner, supra note 146, at 23.

n149. U.S. Unit Here Gets Housing Bias Data, N.Y. Times, Feb. 4, 1959, at 1.

n150. Peter Kihss, 4 Negro Areas Get Extra Police Units, N.Y. Times, July 16, 1959, at 1.

n151. Id.

n152. 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 Lawrence M. Friedman, Crime and Punishment in American History 295-97 (1993); Samuel Walker, Popular Justice: A History of American Criminal Justice 214-16 (1980); David J. Bodenhamer, Fair Trial: Rights of the Accused in American History, in Bicentennial Essays on the Bill of Rights 105 (Kermit L. Hall ed., 1992). 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. 48, 69 (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 Edward L. Ayers, Vengeance and Justice: Crime and Punishment in the 19th-Century American South (1984); David J. Bodenhamer, The Pursuit of Justice: Crime and Law in Antebellum Indiana, in American Legal and Constitutional History (1986); Lawrence M. Friedman & Robert V. Percival, The Roots of Justice: Crime and Punishment in Alameda County, California, 1870-1910, in Studies in Legal History (1981); Dwight F. Henderson, Congress, Courts, and Criminals: The Development of Federal Criminal Law, 1801-1829, in Contributions in American History (1985); Michael Stephen Hindus, Prison and Plantation: Crime, Justice, and Authority in Massachusetts and South Carolina, 1767-1878, in Studies in Legal History (Morris S. Arnold ed., 1980); 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 170 (Lawrence M. Friedman & Harry N. Scheiber eds., 1988).

n153. 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, 660 (1961).

n154. State Picks Panel on Criminal Law, N.Y. Times, June 21, 1961, at 39. Governor Rockefeller, together with Senate Majority Leader Walter J. Mahoney and Assembly Speaker Joseph Carlino, appointed three members each to the commission. Id. Rockefeller's appointees included Howard A. Jones, one of his assistant counsels; William B. Mahoney, a Buffalo lawyer; and Timothy Pfeiffer. Id. Pfeiffer was well-known among lawyers in New York City. He was a former Deputy Attorney General who had prosecuted antitrust 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. State Picks Panel, supra. 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. Id. Bartlett was later appointed chairman of the Commission by Governor Rockefeller. Penal Code Expert: Richard James Bartlett, N.Y. Times, June 2, 1965, 37. A graduate of Harvard Law School, Bartlett 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. Id. Senate Majority leader Walter J. Mahoney (William B. Mahoney's brother) appointed the final three members. State Picks Panel, supra. They were Judge Philip Halpern of Buffalo; John J. Conway, Jr., District Attorney of Monroe County; and Herbert Wechsler. Id.

n155. New York Temporary Commission on Revision of the Penal Law & Criminal Code, Minutes of the Meeting 6 (Sept. 22, 1961).

n156. New York Temporary Commission on Revision of the Penal Law & Criminal Code, Minutes of the Meeting 3 (Dec. 8, 1961).

n157. Id.

n158. Id.

n159. Id.

n160. Id. at 4.

n161. Id. at 5.

n162. Id.

n163. Id.

n164. Id.

n165. Assembly Passes Total Revision of the Penal Law, N.Y. Times, June 4, 1965, at 1.

n166. New York Temporary Commission of Revision of the Penal Law and Criminal Code, Minutes of Meeting 3 (Nov. 29, 1962).

n167. Id. at 1.

n168. Id. at 41-42.

n169. Id. at 41-42.

n170. Id. at 43.

n171. Id.

n172. Id.

n173. Id.

n174. Id. This line got Wechsler into The New York Times the following day. See Douglas Dales, Change is Urged in Murder Laws: Mandatory Death Penalty is Scored at State Hearing, N.Y. Times, Nov. 30, 1962, at 18.

n175. Minutes of Meeting, supra note 166, at 43.

n176. Id. at 43-44.

n177. Id. at 44.

n178. Id.

n179. Id.

n180. Id.

n181. Id. at 44-45.

n182. Id. at 56.

n183. Id. at 59.

n184. See supra text accompanying notes 42-45.

n185. See supra text accompanying notes 35-39.

n186. Minutes of Meeting, supra note 166, at 64.

n187. Id. at 63-65.

n188. Id. at 63.

n189. Id. at 64.

n190. Id.

n191. Id.

n192. Id. See, e.g., Death Penalty Backed: Bill for Restoration is Voted by Delaware Senate, N.Y. Times, Dec. 8, 1961, at 40.

n193. Ben A. Franklin, Public Flogging Seems Near an End in Delaware, N.Y. Times, Feb. 2, 1964, at 46.

n194. Id.

n195. Minutes of Meeting, supra note 166, at 64-65.

n196. Id.

n197. Id. at 65.

n198. Id.

n199. Id. at 66.

n200. Id.

n201. New York Temporary Commission on the Revision of the Penal Law & Criminal Code, Minutes of Informal Meeting 2 (Nov. 29, 1962).

n202. Id.

n203. Id.

n204. Id.

n205. Id.

n206. For a list of witnesses, see New York Temporary Commission on Revision of the Penal Law & Criminal Code, Minutes of the Public Hearing on Capital Punishment 2-3, 82 (Dec. 7, 1962). For evidence that Paulsen was at Columbia, see Monrad G. Paulsen, The New York Family Court Act, 12 Buff. L. Rev. 420, 420 (1962-63).

n207. Minutes of the Public Hearing on Capital Punishment, supra note 206, at 82.

n208. Id. at 82-83.

n209. Id.

n210. Id. at 85.

n211. Id. at 91.

n212. Id. at 99-100.

n213. Leonard E. Ryan, Death Law Seen Aimed at Negroes, N.Y. Times, Dec. 8, 1962, at 25.

n214. See supra notes 30-34.

n215. See supra notes 30-34.

n216. Minutes of the Public Hearing on Capital Punishment, supra note 206, at 242.

n217. Id.

n218. Id.

n219. Id. at 245.

n220. Id.

n221. Id.

n222. Id. at 245-47. 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. at 247.

n223. Id. at 249.

n224. Id.

n225. New York Temporary Commission on Revision of Penal Law & Criminal Code, Minutes of Meeting 20 (Dec. 8, 1962).

n226. Id. at 15-20.

n227. Id.

n228. Assembly Passes a Total Revision, supra note 165.

n229. Irving Schwartz, Highlights of the New Penal Law 23 (1967).

n230. Id.

n231. Id. at 24.

n232. New State Penal Law Takes Effect on Friday, N.Y. Times, Aug. 30, 1967, at 54.

n233. Schwartz, supra note 229, at 35-36.

n234. Ronald Sullivan, State Commission Recommends End of Death Penalty, N.Y. Times, Mar. 20, 1965, at 1.

n235. Id.

n236. Id. (internal quotation marks omitted).

n237. Douglas Robinson, Rockefeller Gets Bill on Abolition of Death Penalty, N.Y. Times, May 20, 1965, at 1.

n238. Id. ("Death in the electric chair, however, would be retained for those found guilty of killing a peace officer acting in the line of duty, and for convicts under life sentence who murdered a prison guard or fellow inmate while in jail or attempting to escape.").

n239. Sibley, supra note 228, at 1.

n240. Bitter Controversy Persists in the State Two Years After Partial Abolishment of Capital Punishment, N.Y. Times, May 10, 1967, at 34.

n241. Charles Grutzner, Witnesses Clash on Death Penalty, N.Y. Times, Oct. 4, 1968, at 21.

n242. See id.

n243. Id.

n244. Id. (internal quotation marks omitted).

n245. Id. (internal quotation marks omitted).

n246. Summary of Bills Passed and Killed in Albany During the 1971 Legislative Session, N.Y. Times, June 10, 1971, at 34.

n247. Thomas P. Ronan, Biaggi Asks Death for Some Crimes, N.Y. Times, Sept. 16, 1973, at 53.

n248. David Bird, Death-Penalty Bill is Vetoed by Carey, N.Y. Times, July 13, 1977, at A1.

n249. E.J. Dionne Jr., The Politics of Death Still Thrive, N.Y. Times, June 6, 1982, at E6.

n250. David Margolick, Court Overturns Death Sentence in New York Law, N.Y. Times, July 3, 1984, at A1.

n251. Elizabeth Kolbert, Assembly Backs Death Penalty by Wide Margin, N.Y. Times, Mar. 7, 1989, at B2 ("Under the measure approved here today, those convicted of a murder of a policeman, a murder of a witness, a murder for hire, a murder in the course of a robbery, or a murder in the course of a crime that threatens many people's lives could be sentenced to death.").

n252. Elizabeth Kolbert, Cuomo Vetoes Death Penalty Seventh Time, N.Y. Times, Mar. 21, 1989, at B1 (internal quotation marks omitted).

n253. Kevin Sack, The 1994 Elections, The Overview: New York Voters End a Democratic Era, N.Y. Times, Nov. 9, 1994, at A1.

n254. Id.

n255. James Dao, Death Penalty in New York Reinstated After 18 Years; Pataki Sees Justice Served, N.Y. Times, Mar. 8, 1995, at A1; Wolfgang Saxon, Howard Jones, Rockefeller Aide for Drug Control, is Dead at 69, N.Y. Times, Oct. 14, 1992, at B10.

n256. William Glaberson, Across New York, a Death Penalty Stuck in Limbo, N.Y. Times, Aug. 21, 2004, at A1.

n257. Patrick D. Healy, Death Penalty Seems Unlikely to Be Revived, N.Y. Times, Feb. 11, 2005, at B1.

n258. Id.

n259. Id.

n260. See Barry Scheck et al., Actual Innocence: Five Days to Execution and Other Dispatches from the Wrongly Convicted (2000).

n261. Tamar Lewin, Herbert Wechsler, Legal Giant, is Dead at 90, N.Y. Times, Apr. 28, 2000, at C21.

n262. Whitman, supra note 4, at 88.

n263. Id.

n264. Id. at 92.

n265. Id.

n266. Id.

n267. See supra Part I.

n268. See supra Part I.

n269. Herbert Wechsler, Toward Neutral Principles of Constitutional Law, 73 Harv. L. Rev. 1, 9-10 (1959).

n270. Wechsler, supra note 6, at 476.

n271. See supra Part I.

n272. Lerner, supra note 20, at 302-03.

n273. Robinson & Cahill, Degradation, supra note 7, at 644.

n274. Id.

n275. Id.

n276. Assembly Passes a Total Revision, supra note 165.

n277. Overhaul Urged for the Penal Code, N.Y. Times, Mar. 17, 1964, at 1.

n278. Id.

n279. Whitman, supra note 4, at 88.

n280. Stuntz, supra note 7, at 505, 582.

n281. Raymond Paternoster, The Deterrent Effect of the Perceived Certainty and Severity of Punishment: A Review of the Evidence and Issues, 4 Just. Q. 173, 174 (1987).

n282. Augustina Reyes, The Criminalization of Student Discipline Programs and Adolescent Behavior, 21 St. John's J. Legal Comment. 73, 78-79 (2006); David A. Singleton, Interest Convergence and the Education of African-American Boys in Cincinnati: Motivating Suburban Whites to Embrace Interdistrict Education Reform, 34 N. Ky. L. Rev. 663, 664 (2007).

n283. Marc Fisher, D.C. School a Test of Teachers' Grit - And Rhee's Tactics, Wash. Post, Jan. 11, 2009, at C1.

n284. See, e.g., Stephen P. Garvey, Can Shaming Punishments Educate?, 65 U. Chi. L. Rev. 733, 737 (1998); Richard A. Posner, An Economic Theory of the Criminal Law, 85 Colum. L. Rev. 1193, 1207 (1985).