

The Memorial Minute in memory of Herbert Wechsler was read by Chair of the Council Roswell B. Perkins.

Herbert Wechsler
December 4, 1909 – April 26, 2000

Out of the nine decades of the life of Herbert Wechsler, 46 years were ones of membership in The American Law Institute and 21 years were ones of extraordinary service as the third Director of the Institute. It is unlikely that the magnificence of his contributions to the Institute will ever be surpassed.

In his oral interview with Paul Wolkin in 1989, Herb said (and I cannot refrain from calling him Herb in spite of the formality of this biographical memorial):

I remember it took quite a lot of courage on my part, after I'd been a Reporter for a couple of years, to ask Judge Goodrich if he'd either propose me or get me proposed as a member. He looked at me with astonishment and said, "You mean you're not a member?"

Of course Judge Goodrich, Herb's predecessor as Director, promptly remedied this institutional oversight in the same year, 1954.

Herb's choice of a career in service of the law was attributable in part to the fact of his being the son of a lawyer, Samuel Wechsler. Herb was born in New York City, brought up in Manhattan, and entered City College of New York at the age of 15, graduating in 1928 with a degree in French. In a dialogue recorded in the Columbia Oral History Project, conducted between 1978 and 1982, Herb gave us this vignette of his college days:

I was not only apolitical, but rather anti-political in college. My interest was in the arts, not in politics. I took the usual view of politicians, holding them in low esteem. I thought the least government the best. I didn't want to be interfered with in my choices. This was symbolized for my generation by things like the Prohibition Amendment, which we defied with total abandon. It never entered my mind that there might be any obligation to obey the temperance law. I considered it entirely a matter of trying to avoid wood alcohol poisoning.

As graduation neared, Herb applied to teach French at City College, but was turned down because his father convinced the head of the

French Department, whom he knew, that the young man should be a lawyer.

City College's loss was Columbia's gain. Off to Columbia Law School, where rich fare awaited. He studied torts under Professor Francis H. Bohlen, who was the first ALI Reporter for the Restatement of Torts, and contracts under Professor Herman Oliphant. Other professors influential in his development were Julius Goebel, Karl Llewellyn, and Jerome Michael. The legislative drafting office had recently been set up under Professor Joseph P. Chamberlain and Thomas I. Parkinson, an aspect of the Law School that undoubtedly helped to shape Herb's thinking.

Herb became Editor in Chief of the *Columbia Law Review* and graduated from the Law School in 1931.

Dean Young B. Smith had already invited Herb to teach at the Law School, and he joined the faculty in the fall of 1931. His first assignment was to work up a course in federal jurisdiction. The following year was one of leave of absence since Herb went to Washington as law clerk to Justice Harlan Fiske Stone. He returned to the Law School in 1933 as an Assistant Professor. The plan the Law School had for him was to participate with Professor Jerome Michael in filling another gap in the Columbia curriculum at that time. There was no course in criminal law. The fact is that while still a student Herb had developed a substantial interest in criminal law — partly because his father did appellate work, including criminal cases, and Herb had enjoyed reading the reports of the decisions in the cases his father had argued. Thus Herb was delighted with his assignment, and he began putting together a set of materials for the course.

In 1937 the 28-year-old scholar co-authored with Professor Michael an article in the *Columbia Law Review* entitled "A Rationale of the Law of Homicide," in which they called attention to the insistent demand for revision of the criminal law. Herb continued to work on his materials, and they were published in book form in 1940 (with Professor Michael as co-author) under the title *Criminal Law and Its Administration*. The document went outside the cases and the statutes and brought to bear on criminal law teaching the social science aspects of the subject.

In 1940 Herb took a sabbatical from Columbia and went to Washington on an invitation from the Assistant Attorney General in charge of the Criminal Division. As matters worked out, Herb went into the Solicitor General's office rather than the Criminal Division. He argued five cases, including the important case of *United States v. Classic*, which broadened the availability of civil rights remedies by applying the federal Civil Rights Act to fraud in primary elections for the U.S. Congress.

When war came in December of 1941, Herb was asked to take on the task of screening the vast number of lawyers needed for staffing the

new and old government agencies, with the title of Executive Secretary of the Board of Legal Examiners. Attorney General Biddle then called Herb back to the Justice Department as Assistant to the then equivalent of Deputy Attorney General. In February of 1944 President Roosevelt nominated Herb as Assistant Attorney General in charge of the War Division and, after an extended confirmation process, Herb was sworn in by Attorney General Biddle in June of 1944. In that capacity Herb oversaw internments on the West Coast, martial law in Hawaii, and, as the Allied victory neared, the development of a legal framework around which Nazi war criminals could be tried.

Francis Biddle ceased to be Attorney General shortly after President Truman took office, but later in 1945 Truman offered Biddle the post of American Judge on the International Military Tribunal for the conduct of the Nuremberg trials. Biddle asked Herb to go with him as his assistant. One of Herb's first assignments after he arrived in Nuremberg was to help find counsel for the potential defendants named in the indictment. Throughout the Nuremberg trials Herb served as chief technical adviser to the American judges, stationed directly behind them during the entire trial.

Herb returned to the Columbia Law Faculty in time for the summer session of 1946. He commenced work in the field of reform of the federal courts, and in 1948 authored an important article entitled "Federal Jurisdiction and the Revision of the Judicial Code," published in *Law and Contemporary Problems*. In 1953 Herb and Professor Henry Hart of Harvard Law School published the casebook *The Federal Courts and the Federal System*, which Charles Alan Wright in 1993 described as "the most unusual and inspiring casebook ever." In reviewing the Third Edition of this work, Professor Akhil Amar of Yale Law School spoke of the First Edition as being "probably the most important and influential casebook ever written." Herb remained a leader throughout his career in the clarification and reform of the law relating to federal courts, and his contributions in this field placed him at the top of one of four pinnacles of his legal achievements.

A second pinnacle of Herb's career was his preeminent scholarship and advocacy in the field of constitutional law.

Herb had demonstrated his incisive analytical approach to constitutional law and his independence of judgment in his Oliver Wendell Holmes Lecture in 1959, published in the November 1959 issue of the *Harvard Law Review* under the title "Toward Neutral Principles of Constitutional Law." Tackling both Judge Learned Hand and the Supreme Court's 1954 decision in *Brown v. Board of Education* was not an exercise for the legally faint of heart. While the lecture was highly controver-

sial, Judge Henry J. Friendly later observed that the “Neutral Principles” lecture

lifted the entire tone of scholarly constitutional discourse in our times.

When he was approached in 1962 to take on the Directorship of the Institute, he had just been retained by *The New York Times* to argue the *Sullivan* case in the Supreme Court. He had to delay the start of his ALI Directorship in order to complete the brief and make the argument in that case. The argument Herb made was innovative and, by all accounts, brilliant. The Court’s decision unanimously upholding the position of *The New York Times* and reversing the courts below greatly bolstered the First Amendment. Twenty years after the decision, at a symposium celebrating the principles of the decision, a prominent First Amendment lawyer called the opinion, written by Justice William J. Brennan, Jr., “one of the most extraordinary, far-reaching and beautiful decisions in American history.”

It is appropriate that Herb held the chair of Harlan Fiske Stone Professor of Constitutional Law at Columbia Law School for 21 years and was the Stone Professor Emeritus for the remaining 22 years of his life.

A third pinnacle, as the world well knows, was in the field of criminal law.

Early efforts of The American Law Institute to undertake a project in the field of criminal law were thwarted by depression and war, and it was not until 1950 or 1951 that Judge Goodrich came to Herb for advice as to how to undertake such a project. Herb wrote two memoranda for the Institute that were later published in the *Harvard Law Review* in May of 1952, under the title of “The Challenge of a Model Penal Code.” The first of the memoranda was also read at the Annual Meeting of the Institute in 1951. A study group, appointed by Judge Goodrich and consisting of academics and practitioners, worked for some 14 months and ultimately approved Herb’s memoranda.

The Rockefeller Foundation provided the necessary financing, and Herb was officially made the Chief Reporter by the Executive Committee in December of 1951. He remained in that capacity until the Model Code was approved by the Institute in 1962.

The Model Penal Code became, of course, an unmatched contribution to the field of criminal law. So much has been written about that monumental achievement that this memorial can add no meaningful embellishment. The most recent encomiums appear in Professor Harold Edgar’s article in the current memorial issue of the *Columbia Law*

Review. Professor Edgar articulates the tremendous success of the project and observes that

... it successfully achieved its goals to a degree beyond what anyone might reasonably have thought possible.

Professor Edgar also summarizes Herb's personal contribution and the different roles he played, including his tireless efforts, following completion of the Code, to explain its provisions to the profession and the public and to encourage penal law codification projects throughout the United States.

A fourth pinnacle of Herb's career was, of course, his 21-year directorship of The American Law Institute.

When the Institute's second Director died in 1962, it took only two meetings of the Executive Committee to put the spotlight on Herb as Judge Goodrich's successor. Having completed the Model Penal Code, Herb did not resist. The deed was done on December 13, 1962, at a meeting of the Council of the Institute, the minutes of which tell us that Herb's nomination by the Executive Committee was "met with wholehearted and unanimous approval."

The following May, at the 1963 Annual Meeting of the Institute held at The Mayflower Hotel in Washington, in his inaugural address as Director, Herb expressed in eloquent and moving terms his dedication to The American Law Institute and his conviction as to its importance. He characterized the law as "the vital, powerful, creative and releasing force, giving direction to man's highest aspirations for his country and his time," and added:

[T]his Institute is one of the great organs of our culture for sustaining this ... conception of the law, on which I do believe that our welfare as a nation most depends. It is because that is the fact that I am grateful for the opportunity to give whatever energy and capacity I may have to the work of this Institute in its great effort to give service to the Law.

Herb gave that great energy; he gave that enormous capacity.

To compress the grandeur of Herb's 21-year tenure as Director is obviously an impossible task. Some 21 major projects were worked on or initiated under his Directorship.

Two broad successes of Herb's, in addition to those in producing particular projects, were his articulation of the true role of a Restatement and his leadership in promoting the role of legislation in the work of the Institute.

As to the first of these, our late President Wright observed in 1993 that Herb “freed us from the bondage of majority rule in our Restatement projects.” Herb’s classic characterizations will remain unassailable, namely, that

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

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

As to legislation, in his very first Annual Report, Herb included a final paragraph in which he said:

Important as the common law remains in our system, the most pressing tasks of law increasingly have been assumed by legislation ... Whether we approve of it or not, we are living in the greatest legislative age in the entire history of man.

Herb pursued this theme, and in his own words, became “a crusader for law reform by statute rather than the slower process of decisional change.” Herb effectively merged the exercises of formulating decisional common law and statutory drafting. Under his leadership our Restatements increasingly took account of existing statutory law. Conversely, in his farewell address as Director in 1984, Herb observed that even unenacted model statutes of the Institute, such as the Federal Securities Code,

function, in a sense, as a modern restatement, describing present law in the context of an exploration of its difficulties and proposals for its possible improvement.

Herb’s tenure as Director has been extolled on many occasions. At the Annual Dinner of the Institute in 1984, Chief Justice of the United States Warren Burger introduced Herb as the dinner speaker and paid high tribute, as did we all.

Although Herb’s tenure as Director ended in 1984, that year was not the last for his contributions to the Institute. He remained an active member of the Council until 1995, when he took Emeritus status.

These inadequate recitals of Herb’s professional career must stand in the context of an even more important element of Herb’s qualities,

namely, his humanity and warmth and the depth of the friendships he made in the course of his career.

At a dinner of the Council of the Institute, held in Philadelphia in October of 1993, Herb was presented with the Henry J. Friendly Medal, the highest honor of the Institute. Because of the significance of the relationship of Herb and Henry J. Friendly, I will quote the second sentence of Herb's brief acceptance remarks. Herb said he was deeply touched

Not only because one of my closest friends in a long and satisfying life was Judge Henry Friendly, but also because closest to my affection for Henry Friendly is my affection for The American Law Institute, and so on this occasion two of my deepest loves are brought together in an affectionate setting.

By the time of his 90th birthday last December, the passing years had taken the lives of Herb's brother and of many close friends, including his valued colleague at the ALI, Paul A. Wolkin. However, many others were gathered together for a glorious birthday party. The outpouring of affection for Herb must surely have given a warm glow to the final months of his life.

The writer of this memorial will never forget Herb's response to the tributes at his 90th birthday celebration. He closed with an expression of his conviction, reached during the course of a long lifetime, that the most important things in life were friends and their friendship.

No report on Herb's career can fail to depict its heavy dependence on a wonderful wife, Doris. A valued and adored companion in all aspects of Herb's life, including participation in many of his legal achievements and in his work as Director of the Institute, she remains for us a treasured tie to the memory of a great legal scholar and friend.

ROSWELL B. PERKINS