ALI
Audiovisual History
No. 1

Herbert Wechsler

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Introduction

Professor Herbert Wechsler served as Director of The American Law Institute from 1963 to 1984. He had been the Chief Reporter for the Model Penal Code from 1952 until 1962. Since his retirement as Director he has been a member of the Council and Director Emeritus.

His important contributions to the Institute over almost four decades make it eminently fitting that he be the subject for the videorecorded interview inaugurating the development of an audiovisual history of the Institute.

The interview of Professor Wechsler was recorded on videotape in his New York apartment on April 13, 1989 and was subsequently transcribed. The transcript as edited is published herein.

The videotape is available for viewing in the Library of The American Law Institute, 4025 Chestnut Street, Philadelphia, Pennsylvania 19104 (Telephone 215-243-1658).

Paul A. Wolkin
Interviewer

August 30, 1990
Mr. Wolkin: The American Law Institute is producing an audiovisual history of persons who were active in its affairs over the years. Today we shall be interviewing Professor Herbert Wechsler.

Professor Wechsler was elected to The American Law Institute in March of 1954 and became a life member in June of 1980. Before his election to membership, he served as Reporter, starting in 1952, for the Model Penal Code, a project that was completed in 1962.

Following his Reportership, Professor Wechsler was designated Director of The American Law Institute in 1963, a position that he held until 1984. Upon his retirement in that year, Professor Wechsler became Director Emeritus and was elected as a member of the Council.

Our interview today is taking place in Professor Wechsler's residence in New York City, the date being April 13th, 1989. I first asked Professor Wechsler what his earliest recollection of The American Law Institute was, perhaps as a law student or later on as a law clerk.

Professor Wechsler: I think I recall that it was in a symposium published a lifetime ago by West Publishing Company in a magazine of that period put out by the Association of American Law Schools. At that point the whole idea captured my interest.

Mr. Wolkin: And that continued—

Professor Wechsler: Well, I'm talking about my first years as a teacher really, which started in 1931.
Mr. Wolkin: Did they use the Restatement in law school in those days, when you were a student?

Professor Wechsler: My recollection is that in both contracts and torts the instructors did so quite naturally. The instructor in torts was Professor Bohlen, who was the first Reporter for the Restatement of Torts, and in contracts my teacher was Professor Herman Oliphant, who was, I think, one of the most effective critics of the whole idea of a Restatement; that was instructive too.

Mr. Wolkin: Was that a subject of debate between the students and the professors, as to whether the Restatement was worth the candle?

Professor Wechsler: Well, not really, I'd say. Oliphant, you know, was what we called in those days a "rule skeptic," so anything that attempted to put anything in black letter invited his ridicule and hostility.

Mr. Wolkin: There are still such people out there. I was just talking the other day about Friedman's History of American Law, in which he has some very unkind things to say about the Institute.

Professor Wechsler: Yes, I think I remember, I didn't think that was particularly compelling, but I guess I have a pretty good collection of criticisms of the Institute. Some of them have been very good.

Mr. Wolkin: You remember the Goodrich and Arnold articles in the Yale Law Journal?

Professor Wechsler: Yes. The debate, you mean.

Mr. Wolkin: The debate, yes, about the Institute. Well, the thing that I wondered about was how come you didn't become a member before you became a Reporter?

Professor Wechsler: Modesty.

Mr. Wolkin: That still obtains today. The people you want are too modest to ask to become members.

Professor Wechsler: We lose a lot of people in the Institute, I think, because we proceed on the assumption that since they are bright or otherwise able or distinguished, they must necessarily be members. Well, very frequently they're not, and the reason is that it never has occurred to anybody to ask them, or everybody assumed that they were members. 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?" And how about you?

Mr. Wolkin: Well, I waited until, I think, John Buchanan raised a point as to why I wasn't a member, and he asked me —

Professor Wechsler: You didn't come forward either and propose yourself or put yourself up?

Mr. Wolkin: No. I think John Buchanan was the instrument of my becoming a member. Well, I think your career as Director is unique. If I'm correct, you're the only one who was a Reporter, Director, and now a Council member. Goodrich, of course, died in office, and I don't think Lewis was ever a Reporter, but I may be wrong.

Professor Wechsler: Yes, if you check back you'll find that there was one project that he took on, and it's interesting in relation to our present problems. There was a period when, early in the game, the Institute wanted to do something in the field of business associations. During the preliminary period Dr. Lewis served as a Reporter, and you'll find in the files that there are a few tentative drafts that he prepared. He was assisted by Professor Alexander Frey, whom I knew very well. Whether the drafting was actually done by Frey and blessed by Lewis or actually done by Lewis, of course, I don't know, but our printed proceedings indicate the proceedings on those drafts, which are not without interest. When I went through them I thought they were a little bit fanatic. Anyhow, as you know, the project was aborted and it is not entirely clear to me why in the end it collapsed.

Mr. Wolkin: Maybe there was a Business Round Table in those days also.

Professor Wechsler: No, as far as I know there was no denunciation of it comparable to the stupidity that emerges from the Business Round Table today.

Mr. Wolkin: Well, and I suppose, though, Lewis — I'll have to check this — was made an emeritus member of the Council for the brief period of time he had after he stepped down as Director in '47.
Professor Wechsler: Whom will you find who was on deck then?

Mr. Wolkin: Well, I can look in the records and check — just to see whether you are as unique as I thought you were.

Professor Wechsler: Since we lost John Buchanan, our living memories don't really go back behind the time when I became a Reporter.

Mr. Wolkin: Well, there are two people who have volunteered: Jim Casner, who was a Reporter way back, and I ran into Milton Handler, who remembers being an Adviser.

Professor Wechsler: Now incidentally, Handler is an illustration of what we're talking about. I don't believe that he's a member of the Institute, and I think that if you ask him why he isn't, he'd say that nobody ever invited him.

Mr. Wolkin: I'll have to check that. Well, let's go to the decade of your Reportership. Why the special interest in criminal and penal law?

Professor Wechsler: Well, that's an interesting question to put. I started teaching, you know, in 1931, right after I graduated from Columbia, at which time my assignment was to work up a course in federal jurisdiction. We didn't have one in the school then. There had been one years before, taught by Harold Medina. When Medina stopped teaching it, for some reason — he continued teaching New York practice at Columbia for quite some years, but he didn't continue teaching federal jurisdiction; I never found out why — there was a hole in the curriculum, and so my first year was devoted to working up a course in federal jurisdiction. I didn't like Medina's book, but happily, Felix Frankfurter came out with a book that year and I was able to use that, which was somewhat better.

But then I went to Washington and I was out for a year as law clerk to Justice Stone, and in 1933 I came back as an assistant professor and a member of the faculty. When I came back it was with the idea of devoting my life to teaching, and the plan that they had for me was to participate with Jerome Michael in filling another gap in the Columbia curriculum at that time. There was no course in criminal law.
That hiatus tells you something about the law school, and probably about the law schools of the early 1930s. There wasn’t any money in criminal law, and, therefore, it wasn’t included in the curriculum. Well, my father had been a lawyer, was then a lawyer, and during a long career at the bar he had practiced quite a lot of criminal law. Indeed, the most interesting cases that he’d had were criminal cases. His partner was a very good trial lawyer, so he did the trial work while my father did the appellate work. So long before I went to law school I found myself reading his briefs in the New York Court of Appeals. Actually, when I went to law school, I had no pleasanter occupation than looking up the reports of the decisions in the cases that he had had, and as I said, many of them were criminal cases, and some of them quite interesting criminal cases. And so, given the inherent dramatic quality of the subject, and that special family interest, I found that during my period as a student I developed a quite substantial interest in criminal law, and I was delighted, for that reason, when I got the assignment to work with Jerome Michael in developing a course in criminal law.

Michael was then engaged in some great project of the time and the consequence was that it fell to me for the first years or so to get the criminal law work off the ground. I started putting together a set of materials which, in the end, we worked on for some seven or eight years before they were first published in 1940, I think, under the title of *Criminal Law and Its Administration*, a book that made a real contribution, I think, by going outside the cases and the statutes and attempting to bring to bear on criminal law teaching the criminological social science aspects of the subject. It always has been, was then and ever since has been one of my major interests.

Mr. Wolkin: Well, under what circumstances did the Penal Code or codification of the criminal law by the Institute originate?

Professor Wechsler: Well, I’ll tell you, that has an interesting background. I’ll go all the way back. In the formative days when the Institute was originally being organized, in the early ’20s, one of the enthusiastic leaders of the movement was Governor Hadley of Missouri, whose idea was that the major work of the Institute should be in the field of criminal law, because of the enormous
social and political importance of the subject, and the fact that it was not getting any sustained, thoughtful attention anywhere. In the beginning there was serious consideration of what the Institute should do in criminal law. They soon discovered that a restatement approach was not going to be easy to work out, because the subject was so predominantly statutory, and in the '30s there was a Council meeting at which Judge Learned Hand maintained heroically that, if you were thoughtful about it, the fact that it was statutory should help rather than hinder the effort, but his colleagues were unpersuaded, and in the end the project was dropped in favor of doing the Model Code of Criminal Procedure. Somehow or other it was felt, and properly so, I guess, that there was more uniformity and calculable pattern in the prevailing criminal procedure than there was in the prevailing substantive law. Still, they came up with the idea of doing a model code, and, as you know, that's one of your publications, and it had a great influence in the 1930s on the then existing procedural statutes throughout the country.

Well, then, in the '30s, there developed within the Institute a strong program to do the same thing with substantive criminal law. There was a committee of the Institute that filed a report recommending that a model code of criminal law be drafted. Trouble was, though, that the committee that came forward with this recommendation had the most elaborate ideas as to the procedure to be followed. Their plan called for enormous empirical studies of the actual administration of the criminal law, which they thought somehow would be the proper basis for statutory formulations in the model code. Justin Miller, a pedagogue of that time, who I think later became a judge, was, I believe, the chairman of that committee.

Anyway, the estimate of the financial needs of such an undertaking were quite gargantuan for the time, and, of course, what happened was that this was being talked about and being pushed just as the market crashed in 1929 and the depression followed, and of all the Institute's ambitions, this was the first one to be discarded, because it was the most expensive one to realize. Actually, however, it was that bit of experience that Judge Goodrich picked up later on in the early 1950s, I guess, when he was think-
ing about the program of the Institute, and that made him wonder whether there wasn’t some way to go about working in the criminal law, and he came to me, I guess among others, for advice on that subject. I knew him casually from the law school meetings at the time when he was dean, before he became a judge. I got to know him a little better after he became a judge, especially during the period when I was Assistant Attorney General, and concerned at times with cases in the Third Circuit. Out of that grew the memoranda that I wrote and he liked, the material that’s published in the *Harvard Law Review* under the title of “The Challenge of a Model Penal Code.” This article in the *Harvard Law Review* is actually in substance two memoranda that I wrote for the Institute, the first of which was read at an Annual Meeting of the Institute in, oh, it would have been 1950 maybe, around there — ’51 is the period for which we have no published records at the moment — those memoranda had the approval of a quite interesting and eclectic advisory committee that Judge Goodrich established. The memoranda really were the basis on which the Rockefeller Foundation ultimately made the grant totaling, before we were done, a half million dollars, with which the Model Penal Code was drafted.

**Mr. Wolkin:** Who thought of Rockefeller? Was that Tim Pfeifer or —

**Professor Wechsler:** No, no, it was through Judge Goodrich. Dr. Joseph Willits, I think was his name.

**Mr. Wolkin:** He taught at Penn, I think, at one time.

**Professor Wechsler:** He’d been the dean of the Wharton School at Penn, and, somewhere around that time, he became the director of what was so-called the Social Science Division of the Rockefeller Foundation. Judge Goodrich had been discussing with him whether the Institute could not do something useful in the field of criminal law and whether the Foundation might be interested in providing funds if some plan could be worked out. The way that developed was that the Rockefeller Foundation, at Judge Goodrich’s request, made a small grant, like $10,000 or $15,000, for the Institute to pursue the idea somewhat further. Then Goodrich went first, I think, to Louis Schwartz, who developed a memorandum arguing that this would be a useful thing to do. Then
Judge Goodrich, along with Harry Tweed and Tim Pfeifer, who was a partner of Tweed's in the law firm and had served on and off as outside counsel to the Rockefeller Foundation (he was indeed one of the lawyers for the Rockefeller family), these three people, Goodrich, Tweed, and Pfeifer, talked it over with me at some length. In the end, I was retained to advise on the development of a study group and also to provide the materials that the study group would examine.

Well, we did develop quite an interesting study group of academics and practitioners, including prosecutors. We had, for example, Frank Hogan's chief assistant from the New York area, the New York District Attorney's office; we had a couple of state attorneys general on this group; we had the principal academics working in the field of criminal law; we had representation from the branch of psychiatry that concerns itself with criminal behavior in one of the ablest of those people, Dr. Manford Gutmacher, of Baltimore; people engaged in penological work, such as Jim Bennett, who was then the director of the Federal Bureau of Prisons, and Sanford Bates, who'd been his predecessor in that field; we had the California people who had been somewhat adventuresome in dealing with correctional matters. Well, we must have had three or four meetings of this group, in the course of which Sheldon Gluck of Harvard filed a memorandum taking a different view of the purposes of criminal law, which was a much more clinical view. The group voted down Gluck's approach, sustained mine, and approved the memoranda.

Then we went back to the Rockefeller Foundation with the memoranda and the support of the committee and a proposed budget for the project and, much to our delight and surprise, they came along with a grant of $250,000. This sum was to sustain a $50,000 a year budget for five years, and was given with the understanding that the matter would be reexamined at the end of five years if the work seemed to be successful. Well, it was reexamined and our estimate was that we needed another five years to get finished, so we got another grant in the same amount, and after 10 years we did get done on the button.

Mr. Wolkin: How long did that study take that led to the grant? You said the group met four or five times?
Professor Wechsler: Yes.

Mr. Wolkin: That take about a year?

Professor Wechsler: Yes, we worked, oh, I would think about 14, 15 months all told.

Mr. Wolkin: And I take it that many of the individuals in that study group ultimately became your Advisers?

Professor Wechsler: Yes, sure.

Mr. Wolkin: Was Paul Tappan in that study group or did he come on the scene later?

Professor Wechsler: No, he was in the study group.

Mr. Wolkin: Well, and who suggested that you should be the Chief Reporter?

Professor Wechsler: Well, I think, in all candor, that when I was asked to do the preparatory work leading to the grant and when we got the grant, it seemed natural that I should be, certainly, included in the group that would undertake to do what I said I thought was possible, and I think maybe even natural that I should be asked to take the Chief Reporter's responsibility, but if you ask who proposed it, it must have been Judge Goodrich or Mr. Tweed who proposed it to the Council and the Council that approved it.

Mr. Wolkin: How did you find the Institute process of Advisory Committee meetings, Council meetings, and Annual Meetings worked out in developing the Code? Was that a congenial process?

Professor Wechsler: Yes, I thought it was a perfect medium in which to work, provided that the Reporter used it properly and produced. It would fall flat on its face if the Reporter for a particular subject was either so idiosyncratic that he kept laying before the group material that the group turned down or wasn't led to support, and obviously if he didn't produce, then there would be nothing for the three organs, Advisory Committee, Council, and membership, to consider. It's an onerous process, because once you undertake it, you've got to meet these deadlines. While a little tolerance maybe can be worked into the scheduling, if you have enough projects going, there's not much scope, and it won't sur-
prise you that we've had Reporters who were unable somehow to develop anything to report.

Mr. Wolkin: But you raise an interesting question of the combination between the views of a Reporter and, let's say, the Advisers or particularly the Council. To what extent does a Reporter have to adjust his personal views in order to accommodate the Council? Or is this something that is of a scholarship or intellectual level that works itself out with a Reporter?

Professor Wechsler: Well, I would say, first of all, perhaps this is the most important part, that the Council, through all my years, has seemed to me to be a very sensible body that understood that the kind of work that we do, the creative element must, for the most part, come from the reportorial side of the picture and the Council functions best as a critical body. If the Council had to originate, I don’t believe that, as a group, it could do it, but given the text that’s put before it for critique, naturally the critical faculties of the legal profession are brought into play in the very best way. We've had reasonably good luck, I think, in our projects in having Reporters who understood how to deal with criticism, welcomed criticism rather than resenting it, and knew how to profit from it, and a Council that had no desire to supplant the Reporter and therefore didn’t undertake to originate the material that should go forward. On rare occasions when that type of relationship has broken down, it's ended up really with an impasse at which it was necessary to get rid of the Reporter.

Mr. Wolkin: Well, there have been some sort of release valves. I've always thought the notion of a study draft or a discussion draft was the kind of release valve that sort of saves the day for the Reporter and also saves the views of the Council. Is that your view of that device?

Professor Wechsler: Well, it might serve that purpose, but that’s not my view of the function of the study draft. I think study drafts should be used at a time when both the Reporter and the Council are sufficiently uncertain of the direction to follow, the options to be picked up, the alternatives to be adopted, in working in a particular subject, that they welcome a wider sounding board than even the Advisers and the Council can provide.
I suppose there's another function, too, that when the Council and/or the Reporter are really uncertain and want to buy time, then a study draft is a good device. It keeps the matter on the agenda without forcing a decision, and so it goes over for another year, during which, hopefully, a consensus can be developed as to whether to move the material on to a tentative draft for it to be considered for approval, or to drop it.

**Mr. Wolkin:** Well, suppose you have a Reporter who feels strongly enough about the subject that he'll go with the study draft or a discussion draft but he comes back to his original positions. Is that a question of his leaving the project at that point?

**Professor Wechsler:** Well, it might be, and at that point, you're right that the study draft often is an opportunity to make a deal. The Council says we're not ready to go along with you but your ideas are interesting and we don't object to your putting them out, so we'll publish them, and then they're published as a study draft. That happened, you know, with the tax material on two occasions, and at least on one of those occasions the ultimate result was the enactment of the ideas of the study draft. That was on the combination of the estate and gift taxes, federal estate and gift taxes, and I think I'm right that the same thing is happening in taxation with respect to the corporate income tax. It is a curious position now where if a corporation chooses to finance itself through equity, such as through selling stock, then the dividends distributed to shareholders constitute taxable income to the shareholders, having previously, of course, been derived from income to the corporation that was taxable to the corporation, so you have double taxation with respect to the money involved in the dividend distributions. However, if the corporation chooses to finance itself through borrowing rather than through equity financing, bonds, for example, then interest paid on the bonds is a deductible expense to the corporation. This is, of course, the reason for the junk bond epidemic of our time.

**Mr. Wolkin:** I guess Andrews has kind of proven that kind of prudent, agreeing to a discussion draft, even though there perhaps wasn't a great receptivity to his proposals in that area, Subchapter C.

**Professor Wechsler:** Well, I think the Council felt it was premature to make the choice. It wasn't really hostility on the part of
the Council, and I think if the Council had had to vote, I think they'd have voted to do away with the double taxation.

Mr. Wolkin: Well, getting back to the Penal Code, what do you consider your greatest satisfaction in that project, and in what areas? Are there particular areas that are your greatest disappointments?

Professor Wechsler: Well, it has had, in retrospect, both disappointments and gratifying results. From my point of view, I think that developing an acceptable general part for the Code, that is to say, an acceptable formulation of the general principles that cut across criminal law, such, for example, as the concept of criminal intent, was, I think, on one hand the most difficult and creative part of the Code work. It was also the most successful, because we've had more utilization of this analysis of mens rea, for example, than we have had of any other single feature of the Code. That was brought out at the Rutgers conference, you might remember, and even in jurisdictions where the legislatures have not taken this on, the courts have utilized it; they have utilized it in the way that the courts utilize a restatement, and really developed it as a gloss on whatever body of law the particular jurisdiction may have.

We were extremely gratified that our policy conceptions in highly controversial areas, like sex offenses, for example, proved, to our surprise I may say, to be acceptable legislatively. To take an easy case, one example is the decriminalization of adultery, the treatment of sexual relations between consenting adults of the same sex. Another example is capital punishment, where, although the Institute took no position on it, the Comments indicated that the Reporters and the Advisers were almost unanimously opposed to the employment of capital punishment. That's, perhaps, a victory that we're in the process of losing after 20 or 25 years of crime, of increasing crime, though I expect that the states that have held out against the reinstatement of capital punishment will, for the most part, continue to hold out.

The area in which the developments of the last 25 years have benefited least from the Code positions, I would say, is the very important area of sentencing. At the time when we were doing the Code, the dominant view, certainly in academic, liberal, and even many political circles, called for a thorough individualization of
punishment. Emphasizing the character of the offender as distinguished from the nature of the offense, there was discretion in both the courts in applying a wide range of sanctions and also in the correctional agencies, particularly a parole board, to determine the termination of imprisonment. As you know, much to everyone's surprise, the left wing and the right wing combined some decade or so ago to oppose individualization and to go back to determining sanctions by the nature and circumstances of the offense and what were deemed to be the just deserts for the offender. I consider that a lamentable retrogression, which has led to an almost mechanical approach to sentencing by the application of enormously detailed guidelines, and I'm frank to say that I anticipate that the current developments will, in due course, collapse of their own weight.

Mr. Wolkin: Do you want to take a rest now or shall we continue?

Professor Wechsler: What time is it?

Mr. Wolkin: It's only 12:25.

Professor Wechsler: Well, I'm ready. I thought we'd have lunch. We'll have lunch here. I thought we'd go on. But if you're hungry.

Mr. Wolkin: No, I'm not. I just don't want to wear you out. You're doing very well.

Professor Wechsler: I seem to be all right so far.

Mr. Wolkin: Well, let's go into one more question. Were there any particular individuals in the ten years of the Model Penal Code that stood out for their contributions or their lack of contribution or left an impression on you in the process?

Professor Wechsler: Well, yes, of course there were. Overall I think the most helpful single adviser that we had was Judge Charles Breitel of New York, who, when we started out, I think was still a justice of our appellate division here but in due course became an associate judge of the Court of Appeals and then Chief Judge of our highest court, the New York Court of Appeals. He had been Governor's Counsel when Tom Dewey was Governor of New York and prior to that time he had been a prosecutor with Tom Dewey way back in the '30s, when Dewey's success as a prose-
cutor brought him national prominence. He was a superb lawyer and a fine judge, and he saw the possibilities of an enterprise like the Model Penal Code, and he had marvelous judgment as to when formulations or articulations would be helpful and when they would not.

There were others, of course. You single out one person, you always are in danger of doing an injustice to others, but I'd say we had an exceedingly helpful advisory committee and I was very lucky in having Lou Schwartz and Paul Tappan as co-reporters. Tappan really was the creator of the Code's approach to sentencing, and Schwartz, as you know, did all the work on the definition of specific crimes, except homicide. I did homicide because I had written on homicide and perhaps knew the materials closer at hand than he did.

Mr. Wolkin: Well, let's move on to the years as Director.

Professor Wechsler: I think we ought to get in something about the effect of the Code.

Mr. Wolkin: Oh, sure.

Professor Wechsler: Why don't we take a break now, and that will be a good place to pick up.

(THEREUPON, a recess was taken)

Mr. Wolkin: Well, Herb, we're now going to take up the years of your being Director. It's quite a period. It's at least 22 years, 22 reports anyway. Was there much difficulty in getting you to agree to be Director?

Professor Wechsler: No.

Mr. Wolkin: Wasn't it a hard decision to reach?

Professor Wechsler: No. I must confess when the Judge died I thought that this, you know, that it might be a possibility that might come my way, but I still was sort of surprised. My own situation at that time was, let's see, we're talking about —

Mr. Wolkin: 1963.

Professor Wechsler: That's right. When I was approached I had just been retained by the New York Times to do the Sullivan case in the Supreme Court. Certiorari had been granted on the petition that I drafted. The case was an important assignment for me, and so I had
to tell the Institute I'd be delayed in taking on as Director; and the delay was getting the brief and argument done in that case.

Mr. Wolkin: You came in at an interesting time, I think, as I read your 1963 report. Division of Jurisdiction was starting up, I think, at the time, and Torts, Second, was winding up intentional torts and negligence, and just about that time the Permanent Editorial Board was being established, and you graciously went against the agreement with the Commissioners and let Bill Schnader serve as chairman, and the Foreign Relations Law we thought was being completed. I think in your report you said it was being edited.

Professor Wechsler: Right.

Mr. Wolkin: And pending was some possible new work that had been explored, land use or land development, prearraignment, and federal estate and gift taxation. As I recall, you were instrumental in getting the grants for land use and prearraignment.

Professor Wechsler: Yes, I think I was, but Judge Goodrich, I think, had gotten the process started. The important point from a historical point of view, though, is that the decision that the Institute should work in those fields had been taken by the Council, and I guess on the Judge's recommendation, before I came on. So, in other words, when the Judge died, the situation was that the Penal Code, from his point of view, had been completed. As you say, the Division of Jurisdiction project was still under way. I was an Adviser on that project so I was up to date on that, and of course the Torts Restatement, Second, was going on, and then there were these three new projects, and the Contracts Restatement had been begun, too, I think.

Mr. Wolkin: I think that started a year later, 1964, according to your reports, if I read them correctly. You came on in 63. I think you had enough to digest with three new projects, land use, prearraignment, and federal estate and gift tax, and I suppose that the success of the Model Penal Code was a significant influence in the Council agreeing to do more statutory projects.

Professor Wechsler: Well, I think that we certainly persuaded the Council that the Institute could do them, and that the format of the Institute was appropriate to statutory work. I myself was something of a crusader for law reform by statute rather than the
slower process of decisional change or, at least, along with the slower process of decisional change. By that time there was a reasonable degree of acceptance of that point of view, and I think that made it easier to cast the land use project and the prearraignment project in legislative form.

Mr. Wolkin: Well, you picked that up in your first Annual Report. You may recall your last paragraph on that, in that report, in which you say “Important as the common law remains in our system, the most pressing tasks of law increasingly have been assumed by legislation.” Then you go on and say, “Whether we approve of it or not, we are living in the greatest legislative age in the entire history of man.” That was a theme that was to recur during your — what was it? — 22 reports as Director.

Professor Wechsler: I’m sure it did. It was my basic slant on things, in my teaching, as well as in Institute work. I think that my happiness about being offered the Director’s post at the Institute was predicated, in some part, at least, on my thought that the Institute could be persuaded to subordinate the restatement emphasis sufficiently to accommodate a reasonable amount of statutory work. That was really approved before I became Director by Judge Goodrich’s approach to the land use and prearraignment projects, and even the tax project. I mean all three of those were legislative in basic perspective.

Mr. Wolkin: You mentioned Goodrich several times. I take it you have a sort of a high opinion of his contribution as Director, as you do, of course, of Dr. Lewis. You had two great predecessors in office, I take it, in your view?

Professor Wechsler: Well, I didn’t know Dr. Lewis, and from my point of view, the original proposal for the Institute suffered from his total reliance on case law as the subject matter of Institute work and as the means to improvement of the law of the United States. The difference between Dr. Lewis and Judge Goodrich was precisely there. Judge Goodrich was, from my point of view, a modern man in his view of law, and Lewis was very much still a Langdellion.

Mr. Wolkin: Well, that’s a theme you mentioned in your address at the Annual Dinner in 1984, where you spoke about the traditionalists and the reformationists. Remember that?
Professor Wechsler: Yes.

Mr. Wolkin: And then you put Dr. Lewis, I think, in the middle group, together with Elihu Root, and you put Justice Cardozo, Judge Learned Hand, Justice Harlan Stone, and Judge Goodrich as the leaders of the reformation. Now sometimes a speech read years later is much more meaningful to the reader than when he first hears it, but what —

Professor Wechsler: Well, Justice Stone, you know, well, of course, during the period before he went on the Supreme Court, was on the Council of the Institute and he was on the original Council. He was one of the original founders. He had had the idea from the very beginning that what the Institute should do was to develop the Restatements and then propose the enactment of the Restatements, and he was not only very sincere but almost dogmatic in his insistence that this was the way for the Institute to achieve its maximum utility. Well, as you know, the second part of his idea was rejected, and I guess quite soundly rejected, by the Council, and I suspect that at that point his enthusiasm greatly declined.

The Council may have been right that it would have been unwise to seek legislative approval. For one thing, it would have been very hard to get. For another thing, it might have operated to freeze things in the very way that was antipathetic to the enthusiasts for case law and case development, but in any event, my sense for it — I was Stone's law clerk from '32 to '33, the October '32 term — and I had the sense that he had turned a bit cold on the Institute, and I also had the sense that that was the reason why — that Stone tended to turn cold on people who rejected any ideas of his.

Mr. Wolkin: Not unlike some other people, a lot of us. But do you think that's where Judge Maris got his idea? You know, Judge Maris had the Restatement, I believe, enacted statutorily in the Virgin Islands and in Guam.

Professor Wechsler: No, I think that was a little different, because there there was no body of case law. I mean, you didn't have a mature body of case law, but I think that not even Maris would have proposed getting the legislature of New York to enact the Restatement of Torts or Contracts, and Cardozo wouldn't have been for it.
Mr. Wolkin: Well, coming in, as you did, in midstream in 1963, some of the new projects were already crystallized and I think you were instrumental in getting the grants from Ford for land use and prearraignment.

Professor Wechsler: Well, it’s true that I carried forward to consummation the applications that were in for those grants, but don’t underestimate the start-up that Judge Goodrich had already given that. All the preliminary discussions with the Ford people had been conducted by Judge Goodrich. I don’t know who else was with him, probably Tweed at least, and maybe Pfeifer, too, but those applications were in healthy condition when he died and when I took over. I had to pick up from there, when the grants were made, but even there, Judge Goodrich had picked Arthur Sutherland as director for the prearraignment project and the Council had already approved that, so that was fait accompli; and also the same thing for the land use project with Charlie Haar, who was then a professor at Harvard, and the, let’s see, what was the third one?

Mr. Wolkin: Well, I remember Goodrich interviewing Professor Sutherland for that project. The third one was Federal Estate and Gift Tax with Jim Casner.

Professor Wechsler: Yes. Well, there wasn’t any doubt about that, because the project had been proposed by Jim Casner, and so I didn’t have any initial problem with Reporters, and I inherited that, too, from Judge Goodrich, though only one of those three arrangements proved to be stable when the work got under way.

Mr. Wolkin: That’s true, as later reports indicate. In your ’64 report you again speak about the role of legislation, and increasing the need for legislative resolution to eliminate the encrustation in a field of law and start afresh, which is a refreshing theme that —

Professor Wechsler: Yes. Well, that was the theme that I deliberately pressed at every opportunity, and I think that I did carry the Institute on that. I mean, there was no internal resistance to the statutory projects, but I think that the clue to doing it was not diminishing in any way our interest in Restatement work, keeping the Restatements alive and going so that the people who were devoted to the Restatement method of law improvement found in the Institute as much scope for their ambitions afterwards as they
had before. The statutory thing emerged as an additional, rather than as a substitutive, mode of approaching law reform.

Mr. Wolkin: I think the best episode was the bridge you created between statute and case law when you did Landlord and Tenant, and I think in that report you spoke of legislation as serving as a basis for developing restatement propositions. I think that was innovative, too.

Professor Wechsler: That was innovative but it wasn’t my innovation. Actually the person who had written most about the use of statutes as a base for analogical reasoning through the judicial common law method was Harlan Stone, and if you take a look at his paper at the Harvard celebration in the early ’30s, the paper that was, I think, called The Common Law in the United States — it was about ’35, 1938 or 1936 — I guess it was the 250th anniversary of the, no, I guess it was the 300th anniversary of the founding of Harvard. This was a paper delivered at a very strategic time. It was just about the time of the President’s court plan in relation to the Supreme Court of the United States, and it was Felix Frankfurter who engineered getting Stone invited to give this paper rather than, as you would have expected, Chief Justice Hughes. All of that was quite articulate scheming, which is indicated in the letters and papers that have been published since, but Stone in that paper urged consideration in developing the common law of drawing on statutory determinants as the basis for analogies, as well as, of course, giving generous effect to statutes in the fields that they had come to occupy, and that was one of the main tenets of what was reasonably regarded as a progressive view of law, as distinguished from the type of view associated with Professor Beale, which was a sort of mechanical view of the case system. All of that was in the making when I was a law student and a beginning teacher, and I must say it made the jurisprudential atmosphere in those times a very exciting time.

Mr. Wolkin: And you brought that to bear in the Institute, I think both on Landlord and Tenant, as I recall, and on Contracts.

Professor Wechsler: Right.

Mr. Wolkin: Bob Braucher was dealing with some of the sections there, based on the UCC.
Professor Wechsler: That's absolutely right, and Farnsworth, of course, carried that forward.

Mr. Wolkin: I found it interesting in your '64 report, where Section 402A was reopened and you said, "The Reporter and Council think the section states the scope of liability of sellers of defective products more narrowly than it has been defined by the numerous decisions since the section was presented on the floor." And now you have the reverse of that, I suppose, taking place.

Professor Wechsler: That’s right.

Mr. Wolkin: And then that struck an interesting note. In '65, Herb, that's when I think you reported that Professor Vorenberg succeeded Sutherland on the prearraignment code and you pointed out how the scope of work had increased to 14 Reporters, 14 Consultants, 17 research assistants, and a hundred plus Advisers. How did you keep that circus going?

Professor Wechsler: Well, it was quite an arduous undertaking in terms of time and people, but I think I can reasonably say at this distance that the directorship of the Institute was not really for me a part-time job. I did my teaching, but I had been teaching for enough years at that time so that I could continue my teaching without having to take much more time than the number of hours in the classroom, and really all my other time went into Institute work. Even my schedule was set up so that I had from midday Wednesday through the balance of the week, without any academic obligations, so I could use Thursday, Friday, and Saturday of every week for advisory or other Institute meetings. I think that at least during the heavy months of our work, I mean four or five months of the year, Doris and I were on the road a good part of the time.

Mr. Wolkin: '65, I think, was the year when the study draft concept came into play in Jim Casner's estate and gift tax project. I suppose that was — we spoke about that earlier —

Professor Wechsler: Yes.

Mr. Wolkin: — in partial response to the resistance that he met in the tax bar with some of his proposals.

Professor Wechsler: Well, you know, I really think that the study draft concept was invented to avoid breaking the heart of a
very fine friend of the Institute, Mr. Miller. I forget Mr. Miller's first name.

Mr. Wolkin: Bob, Robert Miller.

Professor Wechsler: Robert Miller. Robert Miller was one of the best friends the Institute ever had. He was a bachelor, a tax lawyer, and was opposed to the notion of combining the estate and gift tax at similar rates and eliminating the distinctiveness that required that a credit be earned in each field separately and not combined. I think it would literally have broken his heart to think that the Institute had taken that position. He thought that the system of rates that we had was absolutely essential to a healthy tax system. Well, this gave us a chance to ventilate that idea without anybody being able to say that the Institute had embraced that idea. Of course, after Mr. Miller's death the Institute did embrace that, and of course Congress enacted it.

Mr. Wolkin: I think Jim Casner's very proud of the congressional response to some of his ideas.

Professor Wechsler: Well, and with good reason.

Mr. Wolkin: The bar then was very antagonistic — at least the tax bar.

Professor Wechsler: As for ideas that seemed way out in left field, Jim Casner had a way of bringing people to see them as reasonable solutions to admitted problems. Another illustration of it is the elimination of a tax on interspousal transfers. Just those two ideas, the merger of estate and gift on the one hand and the free interspousal transfer on the other, represent quite massive contributions to aspects of American tax law that touch us all.

Mr. Wolkin: It's interesting that an adventurous Reporter like Prosser with 402A and one like Casner with this tax and estate business, and you with the Penal Code, ultimately have become national influences. Is that the Reporter's persona that does it or is it the Reporter working through the Institute that achieves that?

Professor Wechsler: Well, I credit the Institute enormously. I remember, for example, in relation to the Penal Code, apparently when Judge Goodrich and Harry Tweed and Tim Pfeifer started talking to me about that, I inferred from what they said that there was a school of thought in the Council that preferred going at the
criminal law differently, that is, going at it by subsidizing a scholar or group of scholars to write a treatise on the criminal law. That was specifically offered to me in the preliminary stages as an alternative. "Would you rather, if the Institute were willing to finance it, undertake to write a treatise that would be published in your name by the Institute?" I said no, that my sense for the situation was that since one didn't do these things just to enjoy reading one's favorite author at night but to try to make an impact on the law, and since the Institute was an organ which, as a corporate entity, could be truly influential, the notion that an individual, however wise or able, could marshal that degree of influence seemed much more remote.

The best examples that you could think of were Williston and Wigmore in their respective fields, but even they, I thought, with the enormous influence that Williston on Contracts and Wigmore's Evidence had exerted on the courts and the profession, I thought that still to have the imprimatur of the Institute, not merely as a publisher but as an organization that had done the work and approved it, was the way to get a decent result. I added that I thought that this was particularly necessary in the criminal law field, where, if one came out with anything that the district attorneys didn't like, they'd simply start propagandizing against the author to destroy the product. They couldn't do that with an organization like the Institute, with the kind of representation that it had. I'm absolutely damn sure that I was right about that.

Mr. Wolkin: Well, yet there's a problem today, if we may go to present time, the Tom Rowe study of "A Better Way" had the benefit of a group of Advisers, but if it's to be published it's to be published as his work; it hasn't gone through the Institute, and I take it that that is not the optimum circumstance. Also to some extent the compensation project that Dick Stewart is on, the contemporary tort reform project, presents similar problems. On the other hand, when you get a heavy agenda, as we have today —

Professor Wechsler: Well, in my own judgment, it would be better not to do the work than to farm it out, and — but we'll wait and see. In any event, at least today I think the Institute is more secure in its status and influence than it was even 20, 25 years ago.
I think that the last 28 years have had something to do with producing that result.

Mr. Wolkin: That raises another question. What is the influence that — well, let me put it this way — I've always been amazed at what happens to a draft. It goes through a specialized Advisory Committee with knowledgeable Reporters and then it comes to the Council, who are not necessarily experts in the field, and new ideas come up that have credence, and then it goes back and it's revised and it comes to the Annual Meeting and the same phenomenon happens again. Here these knowledgeable Reporters and Advisers and the Council have not thought of all the ramifications. Is that a characteristic of the Institute process, because there are more numbers reviewing it? How do you explain that phenomenon?

Professor Wechsler: Well, I think it has to do, first of all, with the subject matter. I mean, that's the way law is; the more time you take, the more ideas you're going to have, and the more that you bring different minds to bear on a problem or on a field, the richer the result is going to be. It's in the nature of law, I think, particularly the nonempirical aspects of law. I mean morality and conscience and principle and all have an important role to play, but that's the thing about the Institute that has fascinated me. I never realized until I got involved in Institute work that this repetitive examination and reexamination of a problem and its proposed solutions seems to pay off the longer you carry it on, and you really stop, when you do, not because you don't think that further rumination would be rewarding but just as a practical matter, because the world has to go on.

Mr. Wolkin: That reminds me of Goodrich's famous quip about writing opinions. He said, "God made the world in six days and on the seventh day he rested, and it shouldn't take any longer to write an opinion."

Professor Wechsler: Well, it's the same point, and there's one difference maybe. Normally an opinion gets revised by a judge and a law clerk or two. In the Institute, as in legislative work generally, you bring many more eyes to bear and voices to speak before you come to rest. I think that this is what has made the Institute's product better than the product of other organizations that work simply with a subcommittee reaching agreement or ma-
 Jury agreement on a formulation of a draft or report and then bringing it to a huge body on a motion to approve it when all the forces that play really argue against amendments on the floor. In the Institute everything is always open until the end.

Mr. Wolkin: It's expensive and laborious, but in the end it's —

Professor Wechsler: It's expensive and laborious but you can bet your bottom dollar that if the Institute has a good reputation, and I believe it has, and commands substantial influence, as I believe it does, it is that method, that ponderous method on the one hand, coupled with the choice of personnel on the basis of talent on the other, that explains it all.

Mr. Wolkin: I think you've put your finger on some important things there. Your '66 report is the one, I believe, that spoke about the formula for restating, what restating law means.

Professor Wechsler: Yes.

Mr. Wolkin: You did it in an introduction on pages 5, 6, and 7, and it goes on through page 9, and it's an eloquent statement that somehow should be almost printed in the front of every report, so that when the draft comes up for consideration, the old question isn't raised of "Is that restating the law?"

Professor Wechsler: I like that. I think we get less of it now.

Mr. Wolkin: Well, you read the White papers referred to by the Business Round Table people.

Professor Wechsler: But they're not Institute people.

Mr. Wolkin: No, but —

Professor Wechsler: We used to get it within the Institute. Now I don't believe we get it within the Institute, but we get it from people outside the Institute. The people I was writing about in the 1966 report, if you remember what it was — we had two people, wasn't it Fred Helms and somebody —

Mr. Wolkin: Fred Helms, yes.

Professor Wechsler: And somebody else, who had joined together to denounce the Institute's treatment of product liability, that is, the support of strict liability in the product damage field, and the basis of the attack was that at the time when the Institute adopted Torts 409A —

Mr. Wolkin: 402A.
Professor Wechsler: 402A, right, of the Torts Restatement was attacked on the basis that it was a minority view, which it was. The number of courts that had decided cases that way was less than 24 — I guess we had 48 states then — or 25 states but what Prosser saw was that the law was moving that way, that is, as these cases were coming up, jurisdictions in which that had not been held were holding that; and the Institute agreed with him that that was the direction that the law was taking and then approved the formulation of 402A. Well, Helms and his colleagues were right that this undoubtedly involved some bootstrapping; once the Institute had approved 402A it became easier to get another jurisdiction that had not yet taken that position to take it, and so speedily after 402A the number of jurisdictions that were in accord with that formulation increased to the point where it did command a majority. The complaint, in short, was not that the result in 402A was wrong, in the sense that it was undesirable, but that the Institute had approved it at a time when it did not have the support of a majority of the states.

Mr. Wolkin: Three or four, Prosser said.

Professor Wechsler: Well, we had never taken the position that what the Institute would approve was to be determined by what a majority of the state courts, common law courts, had held. As Judge Goodrich put it in a report of his, a statement that I often quoted, so long as there was a disagreement among courts as to what the common law was, we felt free to adopt the position that we thought was right, or what he said was, "We felt free to adopt either position, and naturally we chose the one that we thought was right."

Mr. Wolkin: Exact quote.

Professor Wechsler: If there was any point at which a creative moment existed on this issue, it was right there, when Judge Goodrich said that. Now, I think you'll find intimations of that in Dr. Lewis's piece that we published with the restatements, the paper that he called "How We Did It." He, too, I think, saved the Institute from any idea that we were committed to articulating a majority view or making a count of heads.

Still, Dr. Lewis was very strong for the proposition that we were stating the law that is, not the law that ought to be but the
law that is. Judge Goodrich was a little too cagey to put it quite that way. He knew that the mode of existence of law is a very complicated idea, rather than a simple idea. You know, Holmes put it in terms of prediction of decisions, but after all, that doesn't help a court. A court doesn't decide cases by predicting how it will decide cases, so the normative element, the notion that this not only is the law but ought to be the law, or not only ought to be the law but is the law, is a somewhat mysterious but nonetheless very important aspect of our concepts of what law is, and that complexity was what I tried to articulate in the report. Even then it's somewhat enigmatic in the articulation; it has to be. It's an enigmatic problem, but I think that I did carry the Council on that. Helms and his organization filed a brief against me and the Council considered that brief and rejected it, and I never lost out in the Council on the proposition that we didn't have adequate support for an assertion that the law was such and such.

**Mr. Wolkin:** In your report the following year you refer to the previous statement and you say, in your last sentence, “The statement of the principle has not, at least as yet, provoked dissent.”

**Professor Wechsler:** Yes.

**Mr. Wolkin:** So it carried the day.

**Professor Wechsler:** I think that judges were happy with it. It really reflected their own view of how they wanted it to be — not that I would for a moment contend that judges aren’t influenced by prior decisions, any more than that they’re not influenced by statutory language — but they know that the system requires a certain degree of flexibility and elbow room.

**Mr. Wolkin:** You put it, again, eloquently: “My purpose is to ask if we are not obliged in our deliberations to weigh all of the considerations relevant to the development of the common law that our polity calls on the courts to weigh in theirs.”

**Professor Wechsler:** Right. That is the position I would die for.

**Mr. Wolkin:** Well, we’re making some progress, Herb. I’m now up to ’67 in your reports, and I notice that that’s when the Article 9 review committee got under way. Bob Braucher, of course, was quite a Reporter for Contracts before he died, and I think he also carried the laboring oar in the Article 9 review committee.
Professor Wechsler: That’s right. He was quite a remarkable man. Remember, he was also a very good judge.

Mr. Wolkin: Another one of your, I think, significant contributions, which you must have said was inspired by Paul Freund, was the reformulation of the concept of illustrations.

Professor Wechsler: Yes.

Mr. Wolkin: It came up in connection with the Restatement of Conflict of Laws.

Professor Wechsler: Right.

Mr. Wolkin: Where there didn’t have to be a “yes” or “no” answer.

Professor Wechsler: Right.

Mr. Wolkin: As you said, focus on the issues or factors to be weighed. I think that made a pretty significant change. It’s still not universally followed in our Restatements.

Professor Wechsler: No, and of course there are differences among fields of law in how concrete and specific one can be as to what the right answer is on the kind of situation that you tend to put as a hypothetical. But I was always content if Reporters had it in mind that this alternative mode of approach to Illustrations was acceptable and available, that they could use it, and some Reporters used it more than others. In Judgments, for example, it was used very effectively and very frequently. In Foreign Relations it was used.

Mr. Wolkin: Second or Third?

Professor Wechsler: Third, Revised Foreign Relations.

Mr. Wolkin: Right. Now, another highlight, I think, of your reign was in ’68, when it was decided to publish Casner’s Study of Estate and Gift Taxes. Remember it was in two parts: The series of ALI recommendations and the Reporter’s Study, which gave the Reporter more elbow room to expand on some of the ideas that the tax bar at that time wouldn’t buy, I take it.

Professor Wechsler: Well, again, we spoke of Mr. Miller earlier. It was a matter of not pushing the Institute too hard on issues that it found difficult to resolve, primarily because of Mr. Miller — and yet not losing the benefit of both the ideas and analysis that had been articulated by the Reporter. I think I wouldn’t like to see
it used too often, but when the situation is right for it, I think the study draft is a good solution.

Mr. Wolkin: Well, something else you allude to in your, I think now we're up to the '68 report, and that is the impact on our work of Supreme Court decisions that impose constitutional dimensions. This came up in connection with the Prearraignment project, you may recall, and then subsequently, of course, in Torts and elsewhere. That wasn't so true in the early days, was it, of Institute work, that Restatement work and even statutory work where the impact of new decisions of the Court —

Professor Wechsler: Well, if the Supreme Court decision goes to power, after all, it's the first principle of our polity that it's binding on all inferior courts. It wouldn't make much sense to be restating as law a proposition that was inconsistent with a flat holding of the United States Supreme Court, unless you were prepared to predict that the Supreme Court would not follow that decision if the matter were to come up again. If you were prepared to make that prediction, I don't see any reason why the general principle that the Institute follows wouldn't be acceptable. It would have to be accompanied by full disclosure, of course, that an overruling by the Supreme Court was necessary.

Mr. Wolkin: Well, in the prearraignment project it came up in terms of the Miranda case, and wasn't there some question of whether the project should continue in light of Miranda? Or didn't it go that far?

Professor Wechsler: No, the issue was whether the Institute should take a position on the question then before the Supreme Court in Miranda v. Arizona. John Frank, who had either argued or briefed the Miranda case in the Supreme Court, made a very strong plea that the Institute not undercut him by taking a position antipathetic to his submission in the Miranda case, but the case had not yet been decided. I think that what the Institute did was to yield to John's plea and not to take a position on the issue that first time around. The second time around, when the case had been decided, and decided contrary to what the Institute probably would have approved, it came up as to whether the Institute would approve a recommendation or a statement inconsistent with the
recent Supreme Court decision, and the judgment was that we shouldn't do that.

Mr. Wolkin: That seemed to be happening increasingly. I'm thinking of Torts and the defamation part over which, when Wade was Reporter, there was constant interplay between —

Professor Wechsler: We held off while the Supreme Court was feeling its way on libel, for example. We held off to the last minute, and even then took pains to show that the Supreme Court had not taken a contrary position on anything that was stated in Torts Restatement, Second.

Mr. Wolkin: That same thing seemed to happen in the Foreign Relations Law, both Second and Third, with pending cases that held up the —

Professor Wechsler: The act of state —

Mr. Wolkin: — act of state.

Professor Wechsler: — case held up the first Restatement and then I forget what it was in the revised Restatement, but that makes sense. If you're dealing with a federal question which can be authoritatively determined finally only by one court, the notion of picking and choosing among decisions that go different ways doesn't make any sense, and the Institute has never, to my knowledge, pushed it to beyond where it makes sense.

Mr. Wolkin: But wouldn't an Institute position have an influence on a court decision, absent Justice Douglas, to whom you refer in your closing address?

Professor Wechsler: Oh, the Institute has often had an influence.

Mr. Wolkin: In fact, it might help the Court.

Professor Wechsler: Well, if we thought that that would be so and if the Institute disagreed with a current Supreme Court decision, there's nothing in our procedure that would preclude doing what I think we would do. We would state the Supreme Court decision result as the law, but we would use the Comments or the Reporter's notes to marshal the arguments against it, I mean in favor of a different view. Now, the first, the original Restatement format wouldn't have allowed that. One of the great contributions that Judge Goodrich made in Restatement, Second, was to modify
that format so that the Institute could do that. I'm not saying that's something you do lightly, but it still could be done, and I dare say it has been done.

**Mr. Wolkin:** Now, '69 was a year when we started a trio of new projects, I think: Judgments, with Kaplan and Shapiro, the Property reexamination with Casner, and Louis Loss's Federal Securities Code. That's quite an order to take place in one year.

**Professor Wechsler:** Well, that was because of the things we had completed.

**Mr. Wolkin:** Yes. You completed Division of Jurisdiction, Estate and Gift Tax, and Land Use was coming to a close, and in addition that's the year Bosselman came in and he kind of —

**Professor Wechsler:** We pretty much had three projects either finished or finishing, and so we had three places on the agenda for new projects.

**Mr. Wolkin:** Article 9 was then continuing. That wasn't completed till '71, and there you had two new Reporters to contend with, or to work with; I shouldn't say contend. Wade succeeded Prosser, who'd been Reporter since '84, and Farnsworth succeeded Braucher, but then I'm looking at your '72 report, and that's the one in which you gave a review of your first 10 years as Reporter.

**Professor Wechsler:** As Director, you mean.

**Mr. Wolkin:** As Director, I'm sorry. It was rather impressive. You said we're then working on Prearraignment Procedure, Torts, Contracts, Land Use, Federal Securities Code, Judgments, Landlord and Tenant, and Article 9. Your responsibilities seemed to be getting broader. Still holding up?

**Professor Wechsler:** Well, the internals of some of those were simplifying, though. I mean, we were getting near the end.

**Mr. Wolkin:** Then we come to '73. That was the 50th anniversary, and I think it was your idea to have that 50th anniversary issue reprint the original report that went to the organization of the Institute.

**Professor Wechsler:** Yes. Yes, I think one of the very important things about the Institute is to take full advantage of its many, many years of continuous existence and production and service, and it seemed to me one way to pull in the current generation in a
setting that took advantage of this historic continuity was to go back to the original. I'm sure many people who'd never read that original report read it in connection with that anniversary.

Mr. Wolkin: I notice in your '74 Annual Report you took up this proposal for a National Institute of Justice and didn't treat it too kindly.

Professor Wechsler: Well, this was a crazy idea. This was a proposal to have one organization be responsible for the improvement of the law in every jurisdiction in the country, or at least that's the way I read it, and it was that aspect of it that I called attention to as gently but as critically as I could, because of course nothing's ever happened with it.

Mr. Wolkin: No, I think you helped give it its final bullet, as it were. I keep referring to this, and I hope you don't mind. Again, in '74 you were talking about the Restatement of Contracts and that's where you mentioned that the statutory norm was being treated as a premise for legal reasoning, referring to Braucher's — to the use by Farnsworth of reliance on the UCC. Now, in '75 two projects that were pending when you came in '62 finally came to conclusion, the proposed official drafts of the Model Prearraignment Code and of a Model Land Development Code. Then in the next year there was a change in administration, as you may recall, Norris stepped down — and we haven't said much about Norris Darrell. Do you want to say a word about Norris? I thought he was rather a kindly, gentle soul.

Professor Wechsler: Well, of course Norris was responsible, I'm sure, for my appointment, and during the years from 19 — 1963, did I start?

Mr. Wolkin: Yes.

Professor Wechsler: — 1963 to his resignation in '76, so that's 13 years. During those years we worked together very closely.

Mr. Wolkin: I think we're all set now, Herb. We were talking about Norris, who was President during your first 13 years as a Director, and in relation to that, Tweed, who was President in your years as Reporter.

Professor Wechsler: That's right.
Mr. Wolkin: As I recall, Tweed attended most of your Advisory Committee meetings.

Professor Wechsler: He usually did, yes. Certainly he attended Advisory Committee meetings more than Norris, and I think, well, it reflected a difference in the personalities of the two men. I think one would say that Norris was a much better delegator than Tweed, but the great thing that Norris offered as President to a Director was, first of all, his availability whenever the Director sought advice or discussion or help. Is that working?

Mr. Wolkin: Yes, I think so.

Professor Wechsler: Second, his very studious noninterference with the details of the operation. I think his large corporate experience gave him a sense for how a board chairman ought to operate in relation to a CEO who was somebody else, and he did that just right. He provided encouragement and sustenance and wise guidance when his guidance was sought, but he didn’t dabble around in the detail. He expected that the Director would bring to him any problem that had a significant public relations dimension or that called for the best judgment, an organizational judgment, or judgment about the nature and future of the organization.

Mr. Wolkin: In the years following '77, or in '77, Contracts were still going on, UCC Article 8 came up, we had the Tax project, as you remember, Subchapter K, Subchapter C, and International Aspects of U.S. Income Taxation, and then we started thinking about a new Restatement of Foreign Relations Law.

Professor Wechsler: Right.

Mr. Wolkin: And adventuring into electronic fund transfers or the new payments code with Hal Scott. That was also quite an agenda but was capped later on by the exploration of doing a project in corporate governance, —

Professor Wechsler: That’s right.

Mr. Wolkin: — following a series of invitational conferences, and Restitution, with Bill Young. I remember the introduction of the Chief Justice in, in the year you stepped down, what was that, 1984, in which he quotes somebody complimenting your great agility in being able to jump in and deal substantively with this very diverse group of subjects, and I always marveled at your
great capacity in that respect, whether it was Subchapter K or Foreign Relations Law or even Electronic Funds Transfers or UCC. How much time did you give to studying the drafts for those? Or did all this come to you naturally?

Professor Wechsler: No, I really worked very hard on the drafts. I mean, these tended to be periods when, you know, I had my teaching and really wasn't doing anything else except for completing the New York Times case, which was on my docket when I became Director, and that required the postponement of my incumbency for some six or eight months, I forget what it was — during which, by the way, I did not get paid anything by the Institute — but after the decision in the New York Times case and finishing up a few obligations that I had to the Times in relation to other cases, I simply didn't take on any assignments in practice, I mean even advisory or operative, for that 20-year period. I considered that I was obliged to give the Institute substantially all of my time, other than that required for teaching, and I was paid accordingly.

Mr. Wolkin: Well, I might add here, Directors of the Institute have always been underpaid, but be that as it may, this is maybe a personal question, but I hope you won't be modest. Was it hard work jumping around from subject to subject or did your facility for grasping the issues and seeing the problems sort of come naturally to you?

Professor Wechsler: Well, I think I have an aptitude for it, obviously, but it's not an aptitude I can put to use without pretty solid preparation. After all, if you're talking about, you know, I'm talking about drafts, the first thing you have to do is read them to be able to work with them, but on the other hand, one reason why I was so happy in the work was that it seemed to be up my alley and I didn't suffer with the work. Indeed, I found the Reporter's job a harder job, because writing has always been, for me, an enervating experience. I mean I seem to be an oral person rather than a writing person, but I don't dictate letters even, for example. My mode of work is with a yellow pad and a pencil. I wouldn't be happy with a word processor or even less so with a computer, but I did find the variety was an excellent safeguard against boredom, and I did try to assure that the program of the Institute had suffi-
cient variety so that a person interested in law would find it inter­
esting almost no matter what his specialty might be.

Mr. Wolkin: I think I have about two or three questions left. One is why are we having the difficulties that seem to be coming up in Corporate Governance? I don't recall that coming up in any other project, just maybe a hint of it in Torts when they did 402A, and then, of course, there was that problem with the UCC when it was first promulgated and had to be revised in New York, but Corporate Governance seems to be engendering particular difficulties, and as you said earlier, we dropped a business associations project some years ago. Is the subject one that doesn't lend itself to academics and law and judges and general practitioners addressing it?

Professor Wechsler: I don't think that the experience of the early period has any bearing on the experience of the later period. I mean, there was no public opinion problem, and we dropped the business associations project because we ran out of funds. It wasn't a project which at that time, in the, what are we talking about, the late '20s probably, or early '30s at the most, had any sex appeal really, and the depression had hit and funds had dried up. That was the story of the early days, as I see it.

Mr. Wolkin: Well, what happened? What's the problem today?

Professor Wechsler: Well, I think I can't avoid stating that I think that there was gross ineptitude in that first draft in Corporate Governance, ineptitude in the sense of the work itself. Second, the mode of expression did not take account in any sophisticated way of the organized sensitivities that had developed at the corporate bar and in the organization of opinion of corporate personnel, executives, and directors. I think if we'd had the benefit of wiser counsel, if what's his name hadn't died —

Mr. Wolkin: Ray Garrett.

Professor Wechsler: If Ray Garrett hadn't died, if he had remained the Chief Reporter for the project, I don't think we'd have gotten into any trouble at all, because he would have been sensitive to these unnecessary irritants that were in that draft. I hadn't been working in the corporate field. I had, as a matter of fact, a good deal to do with the elimination of some of those unnecessary irritants before any draft was made public, but you remember that we got the initial reaction on the basis of the prelimi-
nary draft, which ought not to have been distributed in many quarters where it was in fact distributed to people who did not preserve the confidentiality limitations that the draft carried. I must say, though, that for me, I, too, was inadequately attuned to the nature of the terrain in which we were working.

There are mitigations, I think. We'd had such a splendid relationship with the corporate bar in doing the Federal Securities Code. There, after all, we were dealing with issues of perhaps greater moment to Wall Street than anything in that first corporate governance draft, but they were handled with sophistication and knowledgeable, and while there were differences of opinion and issues were raised, and some of them were important, we were working together. I assumed that we had succeeded in conscripting for the Corporate Governance project all the good will that we had developed in our work on the Federal Securities Code, and I thought that this was guaranteed, really, by the regional conferences that you remember were held before we embarked on the project, the thrust of which was throughout the country to urge the Institute to dig into corporate law as a field that needed the kind of in-depth analytical work that the Institute would do. The first anxiety that I had in this came when I read that preliminary draft, and I got agreement from the Reporters, particularly the then Chief Reporter, to eliminate some material, but I didn't get it soon enough. I should have had it, and I should have seen that preliminary draft before it was duplicated and distributed. I blame myself a good deal for that. I was coasting along on the sense of good relations developed by Louis Loss and his colleagues working on the Securities Code.

Mr. Wolkin: Well, that's interesting. Just a year or two before this a policy decision was made to distribute preliminary drafts beyond the Council and Advisers. That's the current policy, and your explanation of what happened raises a question about the wisdom of such a policy; we hadn't had the same episode since then, but it could occur again. Once the die is cast people don't remember anything that happens after that.

And this conversation wouldn't be complete without having at least a brief statement from you of your views on the ALI-ABA partnership on postadmission legal education. Remember that fa-
mous conference at the association of the bar that Ross Malone called a summit meeting?

Professor Wechsler: Yes.

Mr. Wolkin: When the ABA wanted to withdraw?

Professor Wechsler: Well, as you know, my position has always been to buy them a ticket and say goodbye. I'm not even satisfied today that from the point of view of either the ALI's own mission or pleasure of working with the educational side of our work that we gain anything from the association with the ABA. I know that we are, to some extent, hampered and limited by that association, but in the early days when the matter seemed to be an issue, I didn't hesitate to express these views in meetings of the board, or whatever you call the governing body of ALI-ABA.

Mr. Wolkin: Committee.

Professor Wechsler: Committee? Meetings of the Committee. I didn't hesitate, as I say, to express these views, when they were relevant, to meetings of the Committee. I have not been associated with that work for the past five years, and if I now were it may well be that I would take a different view of it, but as Director, you have done a marvelous job of avoiding the difficulties that the collaboration has always involved, and I know and respect your view that there are advantages in it, as well as disadvantages. I no longer worry about it because I'm satisfied that, if the ABA should ever decide again that it was interested in going its own way, the Institute would continue its part of the work; ALI-ABA would simply become ALI, and I don't believe that the work would suffer.

Mr. Wolkin: Well, this has been a long session, and I'm going to impose on you by asking you a broad question about the future. What, if anything, would you do to revise the way the Institute operates, the way its membership is selected, the way the Council is elected, and the way leadership is provided? Are there any changes that you think are indicated, or would you let well enough alone and think that things are working pretty well and may continue in the same way?

Professor Wechsler: Well, let me say that I think that, if I were still involved with policymaking on those points, I probably would not have favored the principal change that was made in
Institute procedures, namely, opening the matter up to further preliminary discussion among volunteer groups of members; that is, the invitation to the entire membership to receive the drafts before the Council receives them and works on them. I understand the impulse on the part of the membership to get involved more deeply than just attending the Annual Meeting and participating in the review of the drafts there, and I understand the desire on the part of the leadership to satisfy that impulse. However, I keep worrying that devoting more and more time to more and more conferences with more and more people will, in the long run, detract from, rather than improve, the quality of the work, and it would seem to me that the pristine concept of a Reporter or a group of Advisers, the Council, and the Institute, which, after all, already calls for three levels of review, makes the procedure arduous enough from the point of view of a Reporter. On the other hand, I'm gratified to see that in the areas where these preliminary conferences have taken place, both the member participants and the Reporter participants seem to feel that the effort has been worthwhile. I am right about that, am I not?

Mr. Wolkin: Yes, and lest somebody else be blamed for this procedure, I was the instigator of it, so I'll have to plead guilty if it turns out to be imprudent.

Professor Wechsler: Well, I think your judgement's no doubt better than mine. I view it, I guess, still from the point of view of the working stiff who has to get the material out and who wants as much time as possible to have it in the best shape that it can be in.

Mr. Wolkin: Any other aspects for the future? Size of the Council too large, too small, or are they not sufficiently diverse? The Annual Meeting too large? We're getting to have a larger membership now, as you are aware.

Professor Wechsler: Yes. No, I don't sit here with any program for modification. I think probably if I had continued as Director I would have been less responsive to the proposals for change, like the ones that we have been talking about, than my successor has been, but that may simply demonstrate the wisdom of my feeling that when you're approaching the age of 75 the thing to do is to retire.
Mr. Wolkin: You think that's the crucial age, 75? I mean, I have three more years to go. Herb, thanks very much.

Professor Wechsler: What do you mean, three more?

Mr. Wolkin: I have three more years to go.

Professor Wechsler: Oh, you. Oh yes. Well you may be an exception to the rule.

Mr. Wolkin: That's encouraging, but thanks very much. I'm delighted we had this session, and think if future sessions are as fruitful, this project may have some merit after all.

Professor Wechsler: Well, I'll be at your call, as long as I'm on deck.