

COMMENTARY

THE MAKING OF THE LEGAL PROCESS

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In one of the most unusual decisions in the history of legal publishing, Foundation Press is printing the 1958 "tentative edition" of Henry M. Hart, Jr. and Albert M. Sacks's teaching materials on *The Legal Process: Basic Problems in the Making and Application of Law*.¹ Although *The Legal Process* remains unfinished to this day, it provided the agenda, much of the analytic structure, and even the name of the "legal process school" of the 1950s and the 1960s.² One need not embrace the proposition that *The Legal Process* is "the most influential book not produced in movable type since Gutenberg"³ to agree that these are unusually important teaching materials whose influence extends well beyond the students who studied them in a law school course.

Despite their fame, *The Legal Process* materials presented us (the current editors) with several mysteries: How original were they? Why were the materials never published in the authors' lifetimes? How did these unpublished materials gain the stature they enjoy today? This Commentary provides both background and our own informed speculation about the answers to these questions. We maintain that *The Legal Process* was a splendid synthesis of public law themes that had become prominent before World War II. Although the world view and assumptions of the materials were sharply questioned by the next generation, *The Legal Process* and its philosophy made a come-

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¹ HENRY M. HART, JR. & ALBERT M. SACKS, *THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW* (tent. ed. 1958).

² See ROBERT STEVENS, *LAW SCHOOL: LEGAL EDUCATION IN AMERICA FROM THE 1850S TO THE 1980S*, at 270-71 (1983); MORTON HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW 1870-1960*, at 253-55 (1992); Clark Byse, *Fifty Years of Legal Education*, 71 *IOWA L. REV.* 1063, 1076-77 (1986); Duncan Kennedy, *Legal Formality*, 2 *J. LEGAL STUD.* 351, 395-98 (1973); Elizabeth Mensch, *The History of Mainstream Legal Thought, in THE POLITICS OF LAW* 18, 29-30 (David Kairys ed., 1982); Jan Vetter, *Postwar Legal Scholarship on Judicial Decision Making*, 33 *J. LEGAL EDUC.* 412, 415-17 (1983).

³ J.D. Hyman, *Constitutional Jurisprudence and the Teaching of Constitutional Law*, 28 *STAN. L. REV.* 1271, 1286 n.70 (1976).

back in the 1980s and have become freshly relevant for a new generation of lawyers.

I. SETTING THE STAGE FOR *THE LEGAL PROCESS*: AMERICAN PUBLIC LAW, 1938–1941

Public law scholarship in the first third of this century was in intellectual turmoil. Thinkers who viewed law as mechanical deduction from authoritative premises were disputed by pragmatists and sociological jurists; they, in turn were challenged by the legal realists, some of whom argued against any objectivity or reason in law.⁴ Notwithstanding these sharp disagreements, legal scholars achieved a remarkable consensus about three central ideas: law as policy, institutional competence, and principle and democratic openness as the basis for state legitimacy.

The view of law as a policy science was the first concept to gain wide intellectual acceptance. After an unfolding elaboration of Justice Holmes's critique of formalism,⁵ by the 1930s most scholars actively writing in the field of American public law agreed that law is the creation and elaboration of social policy. This proposition implied that legal decisionmakers should consider a utilitarian cost-benefit analysis when choosing one rule or policy over another.⁶ For example, by 1942 legal academics all but unanimously urged courts to interpret statutes consistent with their animating policies or purposes and rejected more formal approaches to statutory interpretation.⁷

Justices Holmes and Brandeis argued from the law-is-policy concept that legislatures, not courts, are the most appropriate institutions to make social policy choices.⁸ From this suggestion, Justice Frankfurter developed the second great legal process concept, "institutional

⁴ For overviews of this messy turbulence, see HORWITZ, cited above in note 2, at 109–212; LAURA KALMAN, *LEGAL REALISM AT YALE 1927–1960 passim* (1986); and G. EDWARD WHITE, *THE AMERICAN JUDICIAL TRADITION 154–77* (1988).

⁵ See Oliver W. Holmes, Jr., *The Path of the Law*, 10 HARV. L. REV. 457, 464–77 (1897). For later elaborations, see BENJAMIN N. CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS passim* (1921); JOHN C. GRAY, *THE NATURE AND SOURCES OF THE LAW 1–8* (1909); and Roscoe Pound, *The Scope and Purpose of Sociological Jurisprudence* (pts. 1–3), 24 HARV. L. REV. 591 (1911), 25 HARV. L. REV. 140, 489 (1912).

⁶ See L.L. Fuller, *American Legal Realism*, 82 U. PA. L. REV. 429, 437 (1934).

⁷ For instance, see (in chronological order) Harry W. Jones, *The Plain Meaning Rule and Extrinsic Aids in the Interpretation of Federal Statutes*, 25 WASH. U. L.Q. 2 *passim* (1939); Frederick J. de Sloovere, *Extrinsic Aids in the Interpretation of Statutes*, 88 U. PA. L. REV. 527, 531–32 (1940); Henry M. Hart, Jr., *The Business of the Supreme Court at the October Terms, 1937 and 1938*, 53 HARV. L. REV. 579, 623 (1940); and Max Radin, *A Short Way with Statutes*, 56 HARV. L. REV. 388, 398–99, 408–09, 422–23 (1942).

⁸ See, e.g., *International News Serv. v. Associated Press*, 248 U.S. 215, 262–63 (1918) (Brandeis, J., dissenting); *Lochner v. New York*, 198 U.S. 45, 75–76 (1905) (Holmes, J., dissenting).

competence": in a government that seeks to advance the public interest, each organ has a special competence or expertise. The key to good government is not just figuring out the best policy, but also identifying which institutions should be making which decisions and how the different institutions can collaborate most productively.⁹ For example, administrative agencies were extolled as institutions best situated to implement and to elaborate upon regulatory regimes created by the New Deal.¹⁰

Just as the New Deal revealed the value of treating law as policy, Nazi Germany suggested the dangers of a purely instrumental view of law. But what made policy-driven American law any more legitimate than policy-driven Nazi law? Some thinkers distinguished American law by asserting that it rested upon principle and reason; others distinguished it by reference to its open and democratic character.¹¹ Lon Fuller, in 1940, offered a synthesis of the two ideas by positing that the democratic character of the United States ensured the reasonableness of its laws.¹² Law's legitimacy had both a substantive foundation in fidelity to principle and a procedural foundation in openness of participation. These twin sources of legitimacy were mutually reinforcing.

II. CREATING *THE LEGAL PROCESS*: PUBLIC LAW TEACHING MATERIALS, 1938-1959

The key ideas on which scholars reached a pre-World War II consensus formed the intellectual basis for law school courses that introduced students to public law in the regulatory state. Although early legislation courses were descriptive and doctrinal rather than jurisprudential in scope,¹³ the Harvard Law School course in "Legislation," introduced into the graduate program by James Landis in the years 1929 through 1934 and taught by Erwin Griswold from 1934

⁹ See Felix Frankfurter & Henry M. Hart, Jr., *The Business of the Supreme Court at October Term, 1934*, 49 HARV. L. REV. 68, 90-91, 94-96 (1935); Hart, *supra* note 7, at 617-24.

¹⁰ See JAMES M. LANDIS, *THE ADMINISTRATIVE PROCESS* 6-46 (1938); Felix Frankfurter, *The Task of Administrative Law*, 75 U. PA. L. REV. 614, 617-19 (1927).

¹¹ Primary sources are discussed in EDWARD A. PURCELL, JR., *THE CRISIS OF DEMOCRATIC THEORY* 159-78 (1973); David M. Bixby, *The Roosevelt Court, Democratic Ideology, and Minority Rights: Another Look at United States v. Classic*, 90 YALE L.J. 741, 746-61 (1981); and Neil Duxbury, *Faith in Reason: The Process Tradition in American Jurisprudence*, 15 CARDOZO L. REV. 601 *passim* (1993).

¹² See LON L. FULLER, *THE LAW IN QUEST OF ITSELF* 123 (1940) ("[I]t is only in a democratic and constitutionally organized state that ideas [i.e., principles] have a chance to make their influence felt.").

¹³ See, e.g., FREDERICK J. DE SLOOVÈRE, *CASES ON THE INTERPRETATION OF STATUTES* at ix-xi (1931) (used at New York University); FRANK E. HORACK, JR., *CASES AND MATERIALS ON LEGISLATION* at iii (1940) (used at Indiana University).

to 1936, integrated the doctrinal material into larger jurisprudential debates.¹⁴ Additionally, Frankfurter loosely organized his courses in "Public Utilities" and "Federal Courts" around the concept that successful legal policy depends upon the proper structure and allocation of institutional responsibilities.¹⁵ Two of Frankfurter's students, Henry Hart and Willard Hurst, transformed the teaching of public law in American law schools.

Together with Lloyd Garrison, Hurst developed a first-year course on "Law in Society" at the University of Wisconsin.¹⁶ The first integrated treatment of public lawmaking, the 1940 edition of the *Law in Society* materials¹⁷ used the history of legal remedies for industrial accidents to develop both systematically and concretely the three key legal process concepts identified above. Although Hurst's materials were the first effort to integrate these three concepts into the teaching of public law, it was Henry Hart who completed the project of synthesizing the three pre-World War II concepts into a systematic way of teaching and thinking about legislation (specifically) and public law (more generally).

A. Feller, Gellhorn, and Hart, "Materials on Legislation," 1940-1942

Although Hart had joined the Harvard faculty in 1934, he did not teach "Legislation" until the 1938-1939 academic year. In 1940, the Harvard Law School Catalog described Hart's class as one "concerned with study of the function of legislation and its operation as part of the legal process."¹⁸ By 1940, Hart entered into a joint enterprise to develop legislation materials with his friends Abe Feller (at Yale) and Walter Gellhorn (at Columbia); the trio produced its first unpublished edition of *Materials on Legislation*¹⁹ for use at the three schools in the 1941-1942 academic year.

Like the Garrison and Hurst materials, the Feller, Gellhorn, and Hart materials were organized around the concept that the dynamic

¹⁴ See Letter from Henry J. Fox, Professor, Stetson University College of Law, to Henry M. Hart, Jr., Professor, Harvard Law School (May 3, 1940), in Papers of Henry M. Hart, Jr., Harvard Law School Library, Box 3, Folder 6 [hereinafter Hart Papers]; Letter from Erwin N. Griswold, former Dean, Harvard Law School, to William N. Eskridge, Jr. & Philip P. Frickey att. at 1 (Oct. 12, 1993) (on file with the Harvard Law School Library).

¹⁵ Telephone Interview with J. Willard Hurst, Professor Emeritus, Wisconsin Law School (Aug. 24, 1993).

¹⁶ *Id.*

¹⁷ See Lloyd K. Garrison & Willard Hurst, *Law in Society: A Course Designed for Undergraduates and Beginning Law Students* (rev. ed. 1940) (unpublished manuscript, on file with the Harvard Law School Library).

¹⁸ *Program of Instruction*, OFFICIAL REG. HARV. UNIV., Apr. 29, 1940, at 20-21.

¹⁹ A.H. Feller, Walter Gellhorn & Henry M. Hart, Jr., *Materials on Legislation for Use in 1941-1942* (1st unpublished ed., n.d.), in Albert M. Sacks Papers, Harvard Law School Library [hereinafter Sacks Papers].

interaction of different institutions creates public policy. The 1941–1942 materials began with “An Introduction to Methods of Law-Making,” originally drafted by Hart and Feller to make explicit comparisons of lawmaking through the common law, statutes, administrative rulemaking, and private interaction.²⁰ The chapter included Chief Justice Lemuel Shaw’s opinion in *Norway Plains*,²¹ which deployed a policy-based methodology to generate common law rules regarding common carrier liability for damages to goods stored after transit.²² The authors traced the evolution of carrier liability rules as established by private behavior, common law regulation in and after *Norway Plains*, legislation, and, finally, administrative regulation. As Gellhorn put it, this exercise revealed “the lack of adaptation of judicial machinery for acquiring insight into the social and economic data upon which ‘policy’ judgments rest,” in contrast to “the availability to the legislature of information or machinery the courts do not possess,” such as the power to delegate to agencies, the fact-finding capability of legislative investigations and designated commissions, and a greater “arsenal of sanctions.”²³ Hart saw the *Norway Plains* exercise as a general introduction to the “processes by which this ‘law’ is created.”²⁴

Unlike Hurst’s materials, Hart’s materials did not restrict themselves to the single issue of carrier liability; he and his co-authors planned to treat numerous other problem areas in the first chapter, which in the 1941–1942 edition was followed by materials on stare decisis, retroactivity, and other doctrinal topics. The materials used by Hart in 1941–1942 concluded with chapters on “Some Basic Conditions of the Exercise of Law-Making Power” through the coordination of the legislature, courts, and agencies, and on “Statutory Interpretation.”²⁵ Hart used these latter chapters to pursue the doctrinal ramifications of thinking about law as the interplay of various insti-

²⁰ See *id.* at 1; Henry M. Hart, Jr., Suggested Outline of a Legislation Casebook for Use in 1941–1942, at 5–8 (n.d.), in Sacks Papers, *supra* note 19 (laying out Hart’s vision of this chapter); Letter from Walter Gellhorn, Professor, Columbia University School of Law, to A.H. Feller, Professor, Yale Law School, & Henry M. Hart, Jr., Professor, Harvard Law School (Jan. 29, 1941), in Hart Papers, *supra* note 14, Box 24, Folder 1 (describing the chapter as drafted by Hart and Feller).

²¹ *Norway Plains Co. v. Boston & M.R.R.*, 67 Mass. (1 Gray) 263 (1854).

²² See *id.* at 270–76.

²³ Letter from Walter Gellhorn to A.H. Feller & Henry M. Hart, Jr., *supra* note 20, at 2.

²⁴ Hart, *supra* note 20, at 3. He wrote in his *Suggested Outline of a Legislation Casebook*: “I conceive of law as concerned with the ordering of society and of that ordering as involving an interplay[,] actual or potential, in a host of variant combinations, between doctrinal formulations (law in a narrower sense) on the one hand and the exercise of official powers on the other.” *Id.* at 1–2.

²⁵ The version of the materials actually used by Hart differs from the version labeled “first unpublished edition,” collected in the Sacks Papers, cited above in note 19.

tutions, each of which has a special competence and special procedures tailored to its institutional functions.

During the 1941–1942 academic year, the co-authors exchanged proposals for organizing the book. Gellhorn pressed for a doctrinally focused structure, while Hart envisioned a more conceptual approach.²⁶ Feller, Gellhorn, and Hart executed a contract for publication with Foundation Press on February 18, 1942,²⁷ but World War II pulled the co-authors away from this project and into government. Hart took a leave of absence from Harvard in 1942 to become Associate General Counsel of the Office of Price Administration (OPA), and the legislation course was not offered at Harvard during World War II. After the war, the authors, by mutual agreement, abandoned their “unfinished symphony.”²⁸

B. Hart, “Legislation,” 1946–1954

Hart’s experience in OPA exposed him to the integrated legal system in action. The agency devised general economic plans at the same time it confronted myriad particular problems of application all over the country. The OPA experience filled Hart with a new enthusiasm for teaching legislation.²⁹ In contrast to its pre-war predecessor, Hart’s post-war legislation class was more optimistic about the possibilities of developing law as a policy science to facilitate the smooth operation of society; offered a more sophisticated theory of institutional competence; and, more explicitly normativist, insisted that law be developed through a process of reasoned application of basic principle.³⁰

²⁶ Compare Letter from Henry M. Hart, Jr., Professor, Harvard Law School, to Walter Gellhorn, Professor, Columbia University School of Law, and Abe Feller, Professor, Yale Law School (Sept. 11, 1941), in Sacks Papers, *supra* note 19 (emphasizing a simplified structure, including an introduction to lawmaking and basic conditions on its exercise, a section on the formulation and execution of legislative policy, and concluding with statutory interpretation and application) with Walter Gellhorn, Suggested Outline of a Legislation Casebook (Jan. 2, 1942), in Sacks Papers, *supra* note 19 (insisting on a more elaborate, doctrinally focused organization, with eleven chapters).

²⁷ The contract can be found in the Hart Papers, cited above in note 14, Box 24, Folder 1. A proposed outline of *Materials on Legislation* started with chapters on lawmaking generally (Hart’s project) but then continued with a series of doctrinal chapters (Gellhorn’s project) on the legislative process, indefinite statutes, delegation to public and private decisionmakers, execution of legislative policy, administrative procedure, drafting statutes, promulgation and form, and interpretation and application of statutes. See Hart, *supra* note 20.

²⁸ Letter from Walter Gellhorn, Professor, Columbia University School of Law, to Henry M. Hart, Jr., Professor, Harvard Law School (Apr. 8, 1947), in Hart Papers, *supra* note 14, Box 24, Folder 1.

²⁹ Interview with Abram Chayes, Professor Emeritus, Harvard Law School, in Cambridge, Mass. (Aug. 17, 1993). Chayes was a student in Hart’s 1948 legislation course.

³⁰ See generally Letter from Henry M. Hart, Jr., Professor, Harvard Law School, to Robert Kramer, Professor, Duke University (Jan. 23, 1948), in Hart Papers, *supra* note 14, Box 4,

Hart started the class with the question: "What is our idea of law?"³¹ He then suggested that "[law] is the aggregate of the processes of social ordering . . . [w]ith a view to promoting ends accepted as valid in the society."³² This answer reflected the eve-of-war consensus, which Hart contrasted with the traditional views of law as predicting judicial decisions: "The one is an inert, remote-from-life notion, summoning up a picture of a desiccated English solution. . . . The other [is] dynamic and vital."³³ Hart maintained that law plays an important role in the entire system for meeting human wants and desires in a complex society, and that the goal of social ordering is "not [] dividing up a pie of fixed size but [] making a larger pie in which all the slices will be bigger."³⁴ This claim reveals at the core of the course a very optimistic view of government. Hart also pressed his students to think in cost-benefit terms: What is the objective, and is it socially acceptable? What means will fairly and efficiently achieve the objective? Is the cost reasonable given the value of the objective and the alternative means available?³⁵

After exploring what law is, Hart turned to the creation of legal duties. As in his pre-war course, Hart started with *Norway Plains* but mined the case to develop a theory of appropriate judicial lawmaking, the relationship among the different institutional lawmakers, and their comparative institutional capabilities. Hart aggressively criticized Judge Shaw's opinion for "making a judgment as to what would be a good rule,"³⁶ rather than making a "reasoned application . . . of basic principle"³⁷ to the case. Shaw's approach was unacceptable, not because it was judicial lawmaking (inevitable in the case), but because

Folder 11 (noting that the post-war course was "on another track" than the pre-war course). We have a precise picture of how Hart taught the course because his own thoroughly composed class notes are preserved, as are the mimeographed materials he used to teach the seminar in 1950, 1951, and 1952. See Henry M. Hart, Jr., Notes and Other Materials for the Study of Legislation (1950) [hereinafter Study of Legislation] (unpublished manuscript, on file with the Harvard Law School Library, Red Set); Sacks Papers, *supra* note 19 (containing mimeographed versions of the 1951 and 1952 materials).

³¹ Henry M. Hart, Jr., Legislation Notes, Summer Term 1947, at 9 (June 11, 1947) [hereinafter Legislation Notes, Summer 1947], in Hart Papers, *supra* note 14, Box 15, Folder 5. In the 1948 course, Hart's first question was, "What is our idea of 'law,' Mr. Sacks, President of the 'Law Review?'" Interview with Abram Chayes, *supra* note 29.

³² Legislation Notes, Summer 1947, *supra* note 31, June 11, 1947, at 9-10; see also Henry M. Hart, Jr., Legislation Notes, Oct. 22, 1946, at 6-7 [hereinafter Legislation Notes, 1946-1947], in Hart Papers, *supra* note 14, Box 15, Folder 4.

³³ Legislation Notes, Summer 1947, *supra* note 31, June 13, 1947, at 2.

³⁴ *Id.* at 4. Hart's notes suggest that "in any situation of conflict of interest within a society it is always possible to work out a solution in which all interests are better off than they were before." *Id.* at 5.

³⁵ These queries are recorded in Sacks's notes, taken during Hart's legislation course in 1948. See Sacks Papers, *supra* note 19. The exact date is not clear from the notes.

³⁶ Legislation Notes, 1946-1947, *supra* note 32, Oct. 29, 1946, at 7.

³⁷ *Id.* at 6.

it was lawmaking beyond the capability of a court. "A court in making law is bound to base its action, not on free judgment of relative social advantage, but on a process of reasoned development of authoritative starting-points (i.e., statutes, prior judicial decisions, etc.,) etc.)."³⁸ From this conception of judging, Hart developed the outline of a distinctive theory of reasoned adjudication that linked judges' roles in common law and statutory interpretation cases.³⁹

Like Hurst, Hart explored the comparative advantages that legislatures and agencies have vis-à-vis courts. The function of legislatures should be to ascertain "legislative facts" about society in order to determine general rules. Courts should defer to the legislature's findings and policy judgments. Agencies have comparative institutional advantages over both courts and legislatures in applying rules or principles to problems, because they have the legislature's ability to engage in ambitious fact-finding and the courts' option of focusing on one problem at a time.⁴⁰ Hart discussed the various factors that should determine the mode of action agencies should take in particular situations: Should the agency proceed through legislature-like rule-making or through court-like adjudication?

Starting in 1946-1947, Hart explored issues of statutory interpretation in particular detail. He developed as a "useful starting point" an approach similar to the one pressed in the academic literature after 1938: "Find out the purpose of your statute, and [c]onstrue it to carry out the purpose, if . . . [t]he language will bear that meaning [and] . . . [t]he policy of clear statement will [not] be violated by giving it that meaning."⁴¹ In exploring many different statutory interpretation decisions, Hart preferred practical, dynamic, policy-oriented applications of statutes over legalistic, static, and linguistically or historically oriented interpretations. He supported the authority of agencies to change their statutory interpretations and endorsed judicial deference to any "permissible" administrative construction.⁴²

Hart's legislation course evolved more slowly after 1946-1947, continuing in the directions suggested by his first post-war classes. Hart's course changed dramatically when Harvard (in response to the recommendation of a committee chaired by Lon Fuller that "perspectives" courses be offered) made "Legislation" a special second-year elective.⁴³ During the first year of the experiment, Hart wrote Stanley

³⁸ *Id.* at 9 (emphasis omitted).

³⁹ See *infra* text accompanying notes 41-42.

⁴⁰ This argument is made at scattered points in Legislation Notes, Summer 1947, cited above in note 31.

⁴¹ Legislation Notes, Summer 1947, *supra* note 31, Aug. 15, 1947, at 1.

⁴² See Legislation Notes, 1946-1947, *supra* note 32, Dec. 10, 1946, at 2, 8-9.

⁴³ Interview with Erwin N. Griswold, former Dean, Harvard Law School, in Washington, D.C. (May 19, 1993).

Surrey of his course — which he dubbed “Processes of Lawmaking, with a Heavy Infusion of Jurisprudence” — that he had altered its format considerably.⁴⁴ The new format impelled Hart to develop mimeographed materials for the larger classes. The materials for the 1950–1951 academic year commenced with a long initial chapter on “The Nature and Function of Law and Legislation” and then delved into “Some Problems of Case-by-Case Lawmaking,” starting with *Norway Plains* and concluding with issues of *stare decisis*. Hart then taught additional materials on statutory interpretation and, after 1950, drafted a new chapter on that topic.⁴⁵

The materials developed by Hart between 1947 and 1953 contain the most carefully worked-out theory of law to appear in teaching materials of this period.⁴⁶ The centerpiece was a “Note on Some Essentials of a Working Theory of Law,”⁴⁷ which went through at least one extensive rewrite after 1950.⁴⁸ The Note rejected the traditional social contract view that law’s role is to keep atomistic human beings from one another’s throats. Instead, Hart posited that “perhaps *the* crucial fact about any society is the interdependence of its members” and that law’s role is “the task of creating and maintaining the conditions for collaboration among the members of society.”⁴⁹ In his post-1950 revision, Hart argued that, as a response to social problems, law “is dynamic and not static. It is a doing of something, an activity with a purpose. . . . We come to see that every legal problem is a problem of purpose, of means to an end.”⁵⁰ Deepening the perspective that coalesced in legal academe between 1938 and 1941, this theory of law resembled the then recently published work of faculty colleague and friend, Lon Fuller.⁵¹ Like Fuller, Hart insisted that law cannot

⁴⁴ See Letter from Henry M. Hart, Jr., Professor, Harvard Law School, to Stanley Surrey, Professor, University of California School of Jurisprudence, at 1 (Feb. 18, 1950), in Hart Papers, *supra* note 14, Box 6, Folder 15.

⁴⁵ See Henry M. Hart, Jr., untitled draft of ch. IV, in Hart Papers, *supra* note 19, Box 18, Folder 3. We found the original handwritten draft for this chapter in the Sacks Papers, but the penned segments (interspersed with notes to the secretary to copy excerpts from cases) are in Hart’s distinctive and elegant handwriting. See Sacks Papers, *supra* note 19. The chapter is virtually identical to the statutory interpretation chapter in the four drafts of “Legal Process” materials Hart assembled with Sacks. See *infra* note 64.

⁴⁶ See, e.g., LON L. FULLER, THE PROBLEMS OF JURISPRUDENCE: A SELECTION OF READINGS SUPPLEMENTED BY COMMENTS PREPARED BY THE EDITOR (temp. ed. 1949); Garrison & Hurst, *supra* note 17.

⁴⁷ See Study of Legislation, *supra* note 30, at 48–59.

⁴⁸ See Henry M. Hart, Jr., Note on Some Essentials of a Working Theory of Law (revised, n.d.), in Hart Papers, *supra* note 14, Box 17, Folder 1.

⁴⁹ Study of Legislation, *supra* note 30, at 49.

⁵⁰ Hart, *supra* note 48, at 29.

⁵¹ See Lon L. Fuller, *The Case of the Speluncean Explorers*, 62 HARV. L. REV. 616, 621, 623–24 (1949) (presenting the fictitious opinion of Foster, J., a stand-in for Fuller); see also William N. Eskridge, Jr., *The Case of the Speluncean Explorers: Twentieth-Century Statutory*

be just descriptive science, for what the law "is" at any given time is "indissolubly connected" with what it ought to be.⁵²

In the 1950 version of the Note, Hart developed a section entitled "Law as system of institutional settlement,"⁵³ which emphasized a procedural understanding of law as "a series of institutionalized processes for settling by authority of the group various types of questions of concern to the group."⁵⁴ Law as institutional process was a theme that similarly inspired Fuller's curricular reform efforts and on which Fuller had published in 1948.⁵⁵ The post-1950 revision of the Note, entitled "Law as a Process (or System of Processes) of Institutional Settlement," argued that "the first recourse of law, in dealing with intractable questions, is to seek not final answers but an acceptable procedure for getting acceptable answers."⁵⁶ In an important intellectual move, Hart then maintained that process mediates law and morals: "decisions which are the due result of those [institutional] processes must, by that fact alone, have a moral claim to acceptance."⁵⁷ In this and accompanying passages, Hart advanced a procedural theory of legitimacy that gave moral as well as legal sanction to the status quo, albeit with a narrowly defined normative escape clause: "Only when institutional procedures bar change, or fail to produce it, do morals and law come in direct conflict. The individual conscience has then the question whether to respect the institutional decision."⁵⁸

C. Hart and Sacks, *The Legal Process*, 1953-1958

After 1953 (when Hart and Wechsler's *The Federal Courts and the Federal System* was published⁵⁹), Hart concentrated on expanding and redrafting his legislation materials. During the 1954-1955 academic year, Hart was a visiting professor at Ohio State University College of Law, and Albert Sacks taught the legislation elective at

Interpretation in a Nutshell, 61 GEO. WASH. L. REV. 1731, 1742-43 (1993) (discussing Fuller's role as "a parent of legal process theory").

⁵² Hart, *supra* note 48, at 32; cf. FULLER, *supra* note 12, at 9-10 (analogy between law and anecdote); Fuller, *supra* note 6, at 452 (interconnection between "is" and "ought" in law).

⁵³ Study of Legislation, *supra* note 30, at 53-56.

⁵⁴ *Id.* at 54.

⁵⁵ See Lon L. Fuller, *What the Law Schools Can Contribute to the Making of Lawyers*, 1 J. LEGAL EDUC. 189, 192-95 (1948-1949). We have no clear view of how much Hart owed to Fuller. Cf. Lon L. Fuller, *Mediation — Its Forms and Functions*, 44 S. CAL. L. REV. 305, 307 (1971) (attributing institutional competence theory to Hart and Sacks).

⁵⁶ Hart, *supra* note 48, at 34.

⁵⁷ *Id.* at 36.

⁵⁸ *Id.* Even then, Hart claimed, "institutional procedures do not cease to be relevant. For the moral claim to acceptance of the result of those procedures varies, and must vary, according to the fairness of the procedures by which the currently prevailing result was reached and according to the fairness of the corrective process provided for changing that result." *Id.*

⁵⁹ HENRY M. HART, JR. & HERBERT WECHSLER, *THE FEDERAL COURTS AND THE FEDERAL SYSTEM* (1953).

Harvard.⁶⁰ Sacks had been a student in Hart's legislation course in 1948 and was one of Hart's favorite students of all time. Sacks had joined the Harvard faculty in 1952 and had taught the legislation course since the fall of that year.

By 1954 (and probably earlier), Hart had entered into a collaborative arrangement with Sacks to develop much more ambitious materials on the legal system. Each year between 1955 and 1958, Hart and Sacks produced a new (and longer) draft of materials that, in 1957, they entitled *The Legal Process: Basic Problems in the Making and Application of Law*.⁶¹ Ironically, Hart and Sacks were not the first to use this title for a law school course and its materials. Carl Auerbach and Samuel Mermin of Wisconsin revised the Garrison and Hurst materials and published them in multilithed form in 1956 (and regular print in 1961) as *The Legal Process*,⁶² the same title that Hart and Sacks chose in 1957. It appears that the two groups of authors came up with the same title independently.⁶³

The overall plan of *The Legal Process* was similar to that of Hart's legislation course: it began with the nature and institutions of law, examined the different lawmaking institutions (including private lawmaking), and concluded with statutory interpretation. The architecture of the materials remained quite stable, even as the materials expanded in length.⁶⁴ There are two notable exceptions to this gen-

⁶⁰ See Letter from Henry M. Hart, Jr., Professor, Harvard Law School, to Carl A. Auerbach, Professor, Wisconsin Law School, and Samuel Mermin, Professor, Wisconsin Law School (Mar. 4, 1959), in Hart Papers, *supra* note 14, Box 1, Folder 3 (discussing Hart's visit and Sacks's taking over the course).

⁶¹ See *id.* The first (1955) draft was entitled *Materials for a General View of the American Legal System* and was used in the 1955-1956 "Legislation" course. The draft was also the basis for the contract Hart and Sacks entered into with Foundation Press on March 23, 1956 to publish a casebook entitled [*The*] *American Legal System*. The second (1956) draft of the materials had the same title, but the name of the course in the 1956-1957 school year was "The American Legal System." During the winter of 1956-1957, Hart and Sacks decided to call both the course (taught in academic year 1957-1958) and the third (1957) draft of the materials, *The Legal Process: Basic Problems in the Making and Application of Law*. The fourth (1958) draft and the course taught in 1958-1959 bore the same title. The four drafts of the materials can be found in the "Red Set" of faculty works at the Harvard Law School Library.

⁶² See CARL A. AUERBACH & SAMUEL MERMIN, *THE LEGAL PROCESS: AN INTRODUCTION TO DECISION-MAKING BY JUDICIAL, LEGISLATIVE, EXECUTIVE AND ADMINISTRATIVE AGENCIES — A REVISION OF LAW IN SOCIETY* BY LLOYD K. GARRISON & WILLARD HURST (rev. ed. 1956) (multilithed materials).

⁶³ Hart wrote to his OPA friends Auerbach and Mermin that he and Sacks had not known of Auerbach and Mermin's title and that the "main part" of their own title was the idea of David Cavers; Hart opined that there was probably no legal problem with publishing books with the same title (but different subtitles). See Letter from Henry M. Hart, Jr. to Carl A. Auerbach and Samuel Mermin, *supra* note 60. Auerbach and Mermin acquiesced in Hart's overture. See Letter from Samuel Mermin, Professor of Law, University of Wisconsin, to Henry M. Hart, Jr., Professor, Harvard Law School (Mar. 7, 1959), in Hart Papers, *supra* note 14, at Box 5, Folder 6.

⁶⁴ The 1958 draft, for the most part, included the same chapters as the 1955 draft (though

eralization. One is Chapter II of the 1955 draft, on "The Making and Amending of Constitutions." The text of this chapter was eliminated in 1956, but in the 1956 through 1958 editions the table of contents retained a marker for a proposed Chapter VIII on constitutional law.⁶⁵ The other exception was Chapter I, which introduced students to the nature and function of law, and to most of the concepts and vocabulary in the materials. The co-authors substantially rewrote this chapter in every draft and experimented with different expositions of the key concepts, different orderings of the problems and exposition, and different ways of presenting the problems.

The intellectual effort invested in this chapter was worthwhile. Chapter I sounded the main themes for the entire project, which was an ambitious synthesis and elaboration of the three pre-war traditions: law as policy, the importance of institutional relationships, and legitimacy based on principle and democratic openness. The materials set forth for a 1950s audience a familiar yet original way of thinking about law and the legal system.

1. *The Reasoned Elaboration of Purposive Law.* — The Hart and Sacks materials posit a theory of society inspired by the New Deal that differs from traditional liberal (social contract) theory. Central to society is people's recognition of "the fact of their interdependence with other human beings and the community of interest which grows out of it. So recognizing, people form themselves into groups for the protection and advancement of their common interests . . ." ⁶⁶ The state is the "over-riding, general purpose group" ⁶⁷ that has the greatest responsibility for "establishing, maintaining and perfecting the conditions necessary for community life to perform its role in the complete development of man." ⁶⁸ In accord with this activist view of the state, Hart and Sacks concluded: "Law is a doing of something, a purposive activity, a continuous striving to solve the basic problems of social living." ⁶⁹

in a different order). Most of the chapters were not rewritten but just got longer from year to year; the materials grew from 864 pages (1955) to 1177 pages (1956) to 1343 pages (1957) to 1417 pages (1958).

⁶⁵ Hart's notes to the 1956 draft reveal that he hoped Chapter VIII would consist of five or six problems on protections against ex post facto laws, the Eighteenth Amendment, home rule for municipalities, the election of judges, constitutional interpretation, and constitutional torts (with the last two possibly combined). His expectation was that Chapters VIII and IX (constitutional remedies) of the 1958 draft would be combined into a single chapter. See Hart Papers, *supra* note 14, Box 26, Folder 2.

⁶⁶ HART & SACKS, *supra* note 1, at 2.

⁶⁷ *Id.*

⁶⁸ *Id.* at 110 (quoting Joseph M. Snee, *Leviathan at the Bar of Justice*, in GOVERNMENT UNDER LAW 91, 96 (Arthur E. Sutherland ed., 1968)).

⁶⁹ *Id.* at 166.

The purposiveness of law generates Hart and Sacks's theory of "reasoned elaboration."⁷⁰ General directives often do not transparently tell officials and citizens what to do in specific situations, but that does not mean that officials simply interpret ambiguous language to reflect their own political values. To the contrary, an official applying a "general directive arrangement" must "elaborate the arrangement in a way which is consistent with the other established applications of it" and "must do so in the way which best serves the principles and policies it expresses."⁷¹ Hart and Sacks extended this idea to legal interpretation and presumed that "every statute and every doctrine of unwritten law developed by the decisional process has some kind of purpose or objective,"⁷² and that each should be applied in ways that subserve both their purposes and the general purposes of the law.⁷³ Chapter I's "Case of the Spoiled Heir," for example, suggested that state inheritance statutes might be interpreted to exclude a murderer from sharing in the estate of his victim.⁷⁴

2. *Law as an Institutional System: Rules & Standards, Policies & Principles.* — As a purposive system, law contains a number of substantive arrangements to coordinate people's conduct. But Hart and Sacks emphasized the greater importance of the "constitutive or procedural understandings or arrangements" by which the substantive arrangements are applied, interpreted, and changed.⁷⁵ To tackle the complex issues of a dynamic and diverse society, Hart and Sacks advocated the broad dispersion of decisionmaking.⁷⁶ Because of the "boundless and unpredictable variety" of our dynamic society, they asserted that "private ordering is the primary process of social adjustment."⁷⁷ To the extent that private ordering does not work, Hart and Sacks contemplated an interaction between private and public institutions — with authority allocated according to each institution's relative "competence" to handle the matter. For example, although they accepted the conventional view that the common law is the "initial resort" for problems not solved privately, Hart and Sacks were concerned "with the shortcomings of the common law" and sought

⁷⁰ See generally *id.* at 162–68 ("The Process of Reasoned Elaboration of Purportedly Determinate Directions"); *id.* at 168–71 ("The Reasoned Elaboration of Avowedly Indeterminate Directions").

⁷¹ *Id.* at 165.

⁷² *Id.* at 166; see also *id.* at 1156 ("The idea of a statute without an intelligible purpose is foreign to the idea of law and inadmissible.").

⁷³ See *id.* at 421–27 (regarding the judicial interpretation of common law precedents); *id.* at 166–67, 1179–1203 (regarding the judicial interpretation of statutes).

⁷⁴ See *id.* at 75–110 (drawing upon *Riggs v. Palmer*, 22 N.E. 188 (1889)).

⁷⁵ *Id.* at 3 (emphasis omitted).

⁷⁶ See *id.* at 180–83.

⁷⁷ *Id.* at 183.

solutions in "the more sophisticated types of administered regulation or non-regulatory control."⁷⁸ Hart's old *Norway Plains* exercise introduces students to this problem in Chapter II.

Hart and Sacks then explored the ways in which legislated policy choices interact with implementational discretion. One way is through the choice of rules versus standards.⁷⁹ If the legislature decides to deal with a problem through specific rules, it expresses its confidence that it has sufficient information to solve the social problem. If the legislature is unsure of how to proceed, it will adopt a standard, which essentially delegates rulemaking responsibilities to courts, agencies, or private institutions. In the New Deal tradition, Hart and Sacks accepted the legislature's power simply to set forth a "policy," or social objective, and vest discretion in an agency to carry it out.⁸⁰ Even then, official discretion is usually limited by more specific statements of a policy or by an underlying "principle" (that is, a policy supported by reasons it will be good for society). If underlying statutory policy is ambiguous, "the official should interpret it in the way which best harmonizes with more basic principles and policies of law."⁸¹ Recall the "Case of the Spoiled Heir."⁸²

3. *The Centrality of Process.* — In a government of dispersed power and diverse views about substantive issues, frequently "the substance of decision cannot be planned in advance in the form of rules and standards," but "the procedure of decision commonly can be."⁸³ Procedure is important in three different ways. To begin, a procedure that "is soundly adapted to the type of power to be exercised is conducive to well-informed and wise decisions. An unsound procedure invites ill-informed and unwise ones."⁸⁴ The suggestion that "the best criterion of sound legislation is the test of whether it is the product of a sound process of enactment" epitomizes the legal process philosophy.⁸⁵ Additionally, procedure is the means by which each part of the interconnected institutional system works together smoothly. Process not only defines the roles and duties of the different institutions, but also provides mechanisms for controlling discretion

⁷⁸ *Id.* at 366.

⁷⁹ *See id.* at 155–58.

⁸⁰ *See id.* at 159–60.

⁸¹ *Id.* at 165. Thus, basic principles and policies form the basis for extending a rule or statute to a novel context, *see id.* at 386–406; for reformulating old rules or provisions, *see id.* at 1407–26; and even for replacing prior rules or practices with new ones, *see id.* at 565–89.

⁸² *See supra* p. 2043 and note 74.

⁸³ HART & SACKS, *supra* note 1, at 173.

⁸⁴ *Id.* The procedures that facilitate good policy decisions by legislatures, for example, are openness to the views of all affected persons and groups, focus on factual information subjected to expert and critical scrutiny, and public deliberation through which the pros and cons are thoroughly discussed. *See id.* at 715–16.

⁸⁵ *Id.* at 715. The quotation is a rhetorical question in *The Legal Process*.

and for self-correction.⁸⁶ Lastly, process is critical to law's legitimacy. The "principle of institutional settlement" was, for Hart and Sacks, "the central idea of law."⁸⁷ In a passage that was the most revised in the materials, the authors insisted that "decisions which are the duly arrived at result of duly established procedures [for making decisions] of this kind ought to be accepted as binding upon the whole society unless and until they are changed."⁸⁸

This statement of legal obligation was succinct, elegant, and straightforward: citizens have a duty to follow "duly arrived at" decisions by the state. This was a more sweeping expression of legitimacy than those (such as Fuller's) made on the eve of World War II. Gone were the idealistic appeals to either democracy or reason. What remained was a procedure-based positivism that lacked even the recognition Hart was willing to make in the post-1950 legislation materials that law and morals might clash when "institutional procedures bar change, or fail to produce it."⁸⁹ This flatter statement of legal obligation reflected a deep satisfaction and confidence that lawyers felt during the era of economic growth and consensus politics in America after World War II. It epitomized the hopeful, yet implicitly defensive, philosophy of an entire generation in the law.

III. DENOUEMENT: THE LEGAL PROCESS TRADITION, 1959-PRESENT

Hart and Sacks contemplated that their materials would be published for use in the 1958-1959 academic year, a date that was pushed back on a yearly basis after the co-authors failed to meet their 1958

⁸⁶ For the administrative process, such safeguards include "the arrangements which prescribe the procedure to be followed in exercising . . . power: the information which must be secured; the people whose views must be listened to; the findings and justification of the decision which must be made; and the formal requisites of action which must be observed." *Id.* at 173. For the legislative process, the safeguards include the constitutional requirements of bicameralism and presentment, the rules and safeguards adopted voluntarily by Congress, and the "ultimate check" of the ballot box. *See id.* at 172-73, 178-79. For the judicial process, safeguards include the due process guarantees of notice, an impartial decisionmaker, and a right to appeal, as well as prudential limitations on the types of cases or controversies that courts hear. *See id.* at 652-69.

⁸⁷ *Id.* at 4.

⁸⁸ *Id.* Hart and Sacks continue:

When the principle of institutional settlement is plainly applicable, we say that the law "is" thus and so, and brush aside further discussion of what it "ought" to be. Yet the "is" is not really an "is" but a special kind of "ought" — a statement that, for the reasons just reviewed, a decision which is the duly arrived at result of a duly established procedure for making decisions of that kind "ought" to be accepted as binding upon the whole society unless and until it has been duly changed.

Id. at 4-5.

⁸⁹ Hart, *supra* note 48, at 36.

deadline.⁹⁰ Although we can only speculate about why the materials were never published, the authors' ill health⁹¹ derailed their one-new-draft-a-year pace for revising the materials, and they never got back on track. Another contributory factor was Hart's longstanding perfectionism, which became more pronounced after 1959.⁹² Moreover, he and Sacks must have seen revision as a daunting task, as the Warren Court's constitutional activism was changing the landscape of public law.

Hart's death in 1969 left the materials without their "senior editor," and Sacks (just as much a perfectionist as Hart) was preoccupied by his service as Dean of the Harvard Law School from 1971 to 1981. Nonetheless, Sacks retained a series of talented research assistants to develop new problems and update the old ones, and beginning in 1983 he discussed the possibility of collaborating with Norman Dorsen of New York University to publish an updated version of *The Legal Process*.⁹³ The task of updating the materials properly would have been overwhelming, however. Sacks himself suffered severe health problems in the late 1970s and 1980s. He died in 1991, still hoping to revise *The Legal Process*.

Notwithstanding its tentative and (until later this year) unpublished status, Hart and Sacks's *The Legal Process* is an important document. It has had a great run as teaching materials. *The Legal Process* was the basis for the first- and second-year perspectives course

⁹⁰ Compare Letter from Henry M. Hart, Jr., Professor, Harvard Law School, to Thomas H. Eliot, Professor, Washington University (Sept. 26, 1957), in Hart Papers, *supra* note 14, Box 2, Folder 18 (indicating that Hart's goal then was possibly to get into print for student use in the fall of 1958) with Allen M. Singer, *Harvard's New Course in the Legal Process — A Pattern for a More Comprehensive New Legal Education*, 12 J. LEGAL EDUC. 251, 251 n.1 (1959) (indicating that the materials were expected to be published for academic year 1959-1960).

⁹¹ Sacks had back problems that incapacitated him and kept him from working on the materials in early 1959, and a series of operations on his wife Sadelle diverted him before that. See Letter from Albert M. Sacks, Professor, Harvard Law School, to Eugene V. Rostow, Dean, Yale Law School (July 14, 1959), in Sacks Papers, *supra* note 19. Hart's several-pack-a-day cigarette habit fueled emphysema and other lung ailments. In the spring of 1960, Hart was incapacitated by an aneurysm, a condition that was remedied by one of the earliest open heart surgeries. Elizabeth Hart Miller, Hart's daughter, provided us with information on his personal habits. Telephone Interview with Elizabeth Hart Miller (Jan. 19, 1994).

⁹² Hart's 1963 Holmes Lectures illustrate the intellectual paralysis engendered by his perfectionism. He presented a detailed argument in the first two lectures. During the third and final lecture, Hart announced that his proposed resolution did not work and sat down before a stunned audience. Although the terms of the Holmes Lectures required a manuscript to be delivered for publication, Hart never worked out the problems with his argument and never delivered a manuscript. Interview with Erwin N. Griswold, *supra* note 43.

⁹³ See Letter from Norman Dorsen, Professor, New York University School of Law, to William N. Eskridge, Jr. and Philip P. Frickey 2 (Feb. 8, 1994) (on file with the Harvard Law School Library). Dorsen taught from the materials for three decades at New York University and at Harvard in 1983 and 1984 and developed his own extensive supplemental materials. See *id.*

at Harvard Law School for three decades⁹⁴ and was regularly taught at dozens of other schools during that period.⁹⁵ Alumnae and alumni of the course include some of the most prominent public law scholars of this period, as well as four current Justices (Antonin Scalia, Anthony Kennedy, David Souter, and Ruth Bader Ginsburg) and a Justice-designate (Stephen Breyer) of the Supreme Court. *The Legal Process* has influenced new generations of law professors who never took the course.⁹⁶ The materials figure prominently in the recent revival of statutory interpretation as a field of academic inquiry and in much-discussed theories of constitutional law and jurisprudence.

A. *The Legal Process Generation*

Hart and Sacks's materials represent a collective effort to synthesize the lessons of pre-war American law and present them to a post-war nation. The effort was that of a generation, not just a pair of scholars. To illustrate, many of the most important public law thinkers of that generation came together at the "Legal Philosophy Discussion Group" organized at Harvard Law School in the 1956-1957 academic year. Its membership of more than thirty professors included Hart and Sacks, Lon Fuller, Paul Freund, and three visiting professors, H.L.A. Hart, Herbert Wechsler, and Julius Stone.⁹⁷

The topic for the year was "Judicial and Administrative Discretion," and the chief issue was how to have a dynamic, problem-solving

⁹⁴ According to the Law School's catalogs, compiled for us by the Harvard Law School Registrar, "The Legal Process" was continuously taught as a second-year elective from the Fall Term 1958 through the Spring Term 1979, with a lapse in academic year 1976-1977. "The Legal Process" was offered as a first-year elective by Sacks in Spring Terms 1973-1976, 1978, and 1983-1990.

⁹⁵ Among the schools using the materials were the law schools at Albany, Boston College, Boston University, Buffalo, Catholic, Colorado, Columbia, Connecticut, Georgetown, Indiana, Maine, Maryland, Michigan, Mississippi, New York University, Ohio State, Stanford, Texas, Vermont, Virginia, Washington, and Yale. Interview with Donna Chiozzi, former secretary to Dean Albert M. Sacks, Harvard Law School, in Cambridge, Mass. (Aug. 19, 1993). See also Byse, *supra* note 2, at 1076 n.28 (estimating that 40 to 50 law schools taught *The Legal Process* at its peak); Sacks Papers, *supra* note 19 (containing billing records that show orders for *The Legal Process* from various schools).

⁹⁶ We set forth our explication in greater detail in *An Historical and Critical Introduction to The Legal Process*, which will accompany our Foundation Press edition of *The Legal Process*. See HENRY M. HART, JR. & ALBERT M. SACKS, *THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW* (William N. Eskridge, Jr. & Philip P. Frickey eds., forthcoming 1994). See also Duxbury, *supra* note 11, at 670-703 (discussing the philosophies and contributions of legal process scholars like Wechsler, Bickel, Ely, Dworkin, and Wellington).

⁹⁷ See Memorandum [from Paul Freund, Henry Hart, and Lon Fuller] to Members of the Harvard Law School Faculty (Oct. 3, 1956), in Hart Papers, *supra* note 14, Box 35, Folder 7; Letter from Erwin N. Griswold to William N. Eskridge, Jr. & Philip P. Frickey, *supra* note 14, at 3 (noting Dean Griswold's effort to bring H.L.A. Hart, Wechsler, and Stone to Harvard as visitors in order to stir jurisprudential debate).

government that is also lawlike and legitimate.⁹⁸ In the wake of that remarkable seminar, several legal process classics emerged. Not only did Hart and Sacks's *The Legal Process* assume its final "tentative" form, but Hart published his Foreword, *The Time Chart of the Justices*;⁹⁹ Fuller published his reply to H.L.A. Hart's defense of positivism;¹⁰⁰ and Wechsler published *Toward Neutral Principles of Constitutional Law*,¹⁰¹ an article generated by Wechsler's year as a visitor at Harvard.

These authors were centrally concerned with the control of discretion — Hart and Sacks at the retail level of statutory and common law interpretation, Wechsler at the wholesale level of constitutional law, and Fuller at the meta-level of jurisprudence. They all believed that the control of discretion is necessary for a polity that operates under the rule of law. They designated the judiciary as the guardians of rule-of-law values and envisioned the duty of judges to be the "reasoned elaboration"¹⁰² of "neutral principles"¹⁰³ and legislative "purposes."¹⁰⁴ These authors sharply contrasted such a rule-of-law polity with the alternatives — a return to *Lochner*-era jurocracy according to Wechsler,¹⁰⁵ the danger of "disintegrating resort to violence" for Hart and Sacks,¹⁰⁶ and the Nazi totalitarianism recalled by Fuller.¹⁰⁷

These works, together with Hart and Wechsler's *The Federal Courts*¹⁰⁸ and Fuller's *Forms and Limits of Adjudication*,¹⁰⁹ comprise

⁹⁸ See, e.g., Memorandum to the Legal Philosophy Discussion Group (n.d.), in Hart Papers, *supra* note 14, Box 35, Folder 7 (announcing the next meeting for Nov. 20, 1956, and circulating Hart's paper, *The Place of Discretion in the Legal System*).

⁹⁹ Henry M. Hart, Jr., *The Supreme Court, 1958 Term — Foreword: The Time Chart of the Justices*, 73 HARV. L. REV. 84 (1959).

¹⁰⁰ Fuller's response reflected a toned-down version of his natural law position. See Lon L. Fuller, *Positivism and Fidelity to Law — A Reply to Professor Hart*, 71 HARV. L. REV. 630 (1958) (responding to H.L.A. Hart, *Positivism and the Separation of Law and Morals*, 71 HARV. L. REV. 593 (1958)).

¹⁰¹ Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1 (1959). On the importance of Wechsler's year at Harvard to Wechsler, see Norman Silber & Geoffrey Miller, *Toward "Neutral Principles" in the Law: Selections from the Oral History of Herbert Wechsler*, 93 COLUM. L. REV. 854, 925–26 (1993).

¹⁰² HART & SACKS, *supra* note 1, at 162–71; see also Wechsler, *supra* note 101, at 15 ("reasoned explanation").

¹⁰³ Wechsler, *supra* note 101, at 16; HART & SACKS, *supra* note 1, at 165, 386–406, 1407–26 ("principles"); Hart, *supra* note 99, at 99 ("impersonal" principles).

¹⁰⁴ Fuller, *supra* note 100, at 663; see also HART & SACKS, *supra* note 1, at 166–67, 1178–1203, 1405–17.

¹⁰⁵ See Wechsler, *supra* note 101, at 19–20, 23–24.

¹⁰⁶ HART & SACKS, *supra* note 1, at 4–5.

¹⁰⁷ See Fuller, *supra* note 100, at 657–61, 671–72.

¹⁰⁸ HART & WECHSLER, *supra* note 59.

¹⁰⁹ Lon L. Fuller, *The Forms and Limits of Adjudication*, 92 HARV. L. REV. 353 (1978). Fuller presented this as a draft in the 1956–1957 discussion group but revised it and incorporated parts of it into articles for two decades. It was published after his death.

the canonic texts of what is now considered the legal process tradition.¹¹⁰ Although *The Legal Process* was neither the most influential work in that corpus (that would be Hart and Wechsler's *The Federal Courts*), nor the most philosophically sophisticated (those would be Fuller's articles), nor even the most discussed (probably Wechsler's *Neutral Principles*), *The Legal Process* was the most comprehensive. It offered the most worked-through vision of our polity as a set of interlocking institutional relationships and set forth the freshest ideas and the tradition's classic vocabulary. The most influential public law scholars of the post-World War II generation utilized the vocabulary and built on the ideas.¹¹¹

B. *The Rebel Generation*

The Legal Process seized the attention of so many law professors in the 1950s and 1960s because the materials summed up that generation's vision of public law, which had crystallized just before World War II and had achieved consensus status after the war. Ironically, this vision achieved its classic expression at the very point when its intellectual foundation — the remarkable consensus between 1938 and 1959 — was evanescent.¹¹² Although the legal process materials had little to say about constitutional issues, it is those issues that best revealed the limitations of legal process philosophy for the next generation.¹¹³

The most riveting legal development of the 1950s was the civil rights movement, which sought judicial and legislative measures to end racial apartheid. The prominence of civil rights on the nation's public law agenda unraveled the intellectual consensus achieved during World War II, and hence undermined important conceptual foundations of *The Legal Process*. The civil rights struggle also revealed the sinister possibilities of state power by revealing the state's authority

¹¹⁰ See Gary Peller, *Neutral Principles in the 1950's*, 21 U. MICH. J.L. REF. 561, 566-67 (1988).

¹¹¹ We are specifically thinking of scholars such as Alexander Bickel, Robert Bork, Clark Byse, Abram Chayes, Kenneth Culp Davis, Reed Dickerson, Walter Gellhorn, Willard Hurst, Louis Jaffe, Louis Pollak, David Shapiro, and Harry Wellington.

¹¹² On this phenomenon in teaching materials generally, see Mark V. Tushnet, *Metaprocedure?*, 63 S. CAL. L. REV. 161, 162-71 (1989).

¹¹³ Norman Dorsen defends Hart and Sacks for ignoring the Warren Court's constitutional decisions on the ground that *The Legal Process* was a statutory rather than a constitutional law text. See Norman Dorsen, *In Memoriam: Albert M. Sacks*, 105 HARV. L. REV. 11, 13-14 (1991). However, the 1955 draft had a full chapter on constitutional law, and Hart and Sacks apparently intended to include such a chapter in the published product. Indeed, the failure to address constitutional law would be a shortcoming in a book designed to discuss "the legal process" in toto. Our view is that the Warren Court's sea change in constitutional law is one reason *The Legal Process* was not published in the 1960s: the authors realized that much of the 1958 edition would have to be rethought and not just "updated."

to exclude citizens from Hart's expanding pie. *The Legal Process* never mentioned *Brown v. Board of Education* and included no problem dealing with judicial scrutiny of race discrimination. The omission is ironic, for both authors had a deep interest in civil rights matters,¹¹⁴ and both defended *Brown* elsewhere.¹¹⁵ Legal process thinkers talked about democratic government as a set of interconnected institutions and, sometimes, as an integrated collection of policies and principles. Yet, strikingly, these same thinkers, including those who mainly wrote about constitutional and legislative issues, seldom discussed elections, popular accountability of representatives, or equal participation of different groups.¹¹⁶

These gaps and omissions reveal the thin theory of democracy under which legal process scholars operated. The principle of institutional settlement suggested that legal process thinkers did not consider substantive fairness to be a primary element of political legitimacy, and this suggestion amounted to an acquiescence in the status quo.¹¹⁷ That principle and such acquiescence were discordant with

¹¹⁴ Albert and Sadelle Sacks both served on the Governor's Civil Rights Commission in Massachusetts and were active in civil rights work for their entire careers; the couple marched on Washington in 1963 with Dr. Martin Luther King, Jr. and were tear-gassed on Dupont Circle during a 1967 protest against the War in Vietnam. Interview with Sadelle Sacks, in Belmont, Mass. (Aug. 21, 1993). Hart was also concretely committed to racial integration and was one of the few Harvard faculty of the period to send his child to integrated public schools, as Sadelle Sacks informed us. See *id.*; Letter from Elizabeth H. Miller to William N. Eskridge, Jr. (Feb. 27, 1994) (on file with the Harvard Law School Library).

¹¹⁵ See, e.g., Albert M. Sacks, *The Supreme Court, 1953 Term — Foreword*, 68 HARV. L. REV. 96, 96–99 (1954) (defending *Brown* as a great and principled decision); Letter from Henry M. Hart, Jr., Professor, Harvard Law School, to Harry H. Wellington, Professor, Yale Law School, 1 (Dec. 3, 1959), in Papers of Felix Frankfurter, Harvard Law School Library, Box 187, Folder 20 (praising "*The Segregation Cases*" and criticizing the Court for not striking down Virginia's anti-miscegenation law in *Naim v. Naim*, 350 U.S. 985 (1956)).

We do not share the view of Professor Horwitz, see HORWITZ, *supra* note 2, at 266–68, 342 n.137, and Professor Peller, see PELLER, *supra* note 110, at 563–66, that Wechsler's questioning of *Brown* was representative of the legal process crowd, many of whom (like Hart and Sacks) went on record in defense of the decision. See, e.g., Alexander M. Bickel, *The Supreme Court, 1960 Term — Foreword: The Passive Virtues*, 75 HARV. L. REV. 40, 50 (1961); Charles Fairman, *The Supreme Court, 1955 Term — Foreword: The Attack on the Segregation Cases*, 70 HARV. L. REV. 83, 83 (1956); Paul Freund, *Storm Over the American Supreme Court*, 21 MOD. L. REV. 345, 349–51 (1958).

¹¹⁶ Chapter IV of *The Legal Process*, in fewer than 50 pages, provided no more than a glimpse at direct democracy, the election of public officials, and reapportionment. For example, the chapter expresses doubts about the judicial capacity to force reapportionment, especially where a federal court order concerns a state legislature. See HART & SACKS, *supra* note 1, at 698–713. In "Note on the Relation Between the Voters' Choice and the Determination of Public Policy by the Legislature," see *id.* at 708–13, Hart and Sacks considered the responsiveness of elected officials to public preferences but did not concern themselves with whether discernible groups with demonstrably less power in the political process should receive any judicial protection against legislation that disadvantages them.

¹¹⁷ See Peller, *supra* note 110, at 611–17.

the experiences of women, people of color, gay men and lesbians, people living in poverty, and non-English-speaking immigrants, whose problems the "duly established mechanisms for change" did little to alleviate.¹¹⁸ This lack of interest in the dysfunctions of American democracy is all the more striking insofar as it represented a suppression of themes being worked out on the eve of World War II, when both scholars and judges insisted that America's claim to be a working democracy required attention to race-based and other exclusions from equal citizenship.¹¹⁹

Between 1963 and 1973, the socio-political conditions for the legal process synthesis ended.¹²⁰ Not only was the ideological consensus exploded, but so too was Hart's notion of the expanding pie. After a generation of legal and economic binging, America rediscovered scarcity in the 1970s, the decade of oil price shocks and stagflation. Likewise, our legal culture came to emphasize scarcity, and the concern with limited resources rendered controversies that involved civil rights and fair resource allocation even more intense. For these and other reasons, a new generation found the optimistic legal process baselines "out of touch with reality."¹²¹ Hart and Sacks's synthesis was rejected by some of their most thoughtful students, from both the right (Richard Posner's law and economics movement) and the left (the critical legal studies movement founded by Morton Horwitz, Duncan Kennedy, Mark Tushnet, and Roberto Unger).¹²² In the more cynical, conflictual world of the 1970s, the halls of Harvard Law School during Sacks's tenure as dean echoed with faculty announcements that "legal process is dead."

¹¹⁸ See generally DONALD W. CORY, *THE HOMOSEXUAL IN AMERICA* 38-56, 281-92 (1951) (discussing the legal prohibitions and penalties faced by gay men and lesbians); BETTY FRIEDAN, *THE FEMININE MYSTIQUE passim* (1963) (discussing how social forces prevented women from participating in economic and political life); GUNNAR MYRDAL, *AN AMERICAN DILEMMA: THE NEGRO PROBLEM AND MODERN DEMOCRACY* 523-69 (1944) (describing the American justice system as a source of humiliation and oppression for African-American citizens).

¹¹⁹ See PURCELL, *supra* note 11, at 197-217; Bixby, *supra* note 11, at 762-79 (outlining the philosophical and social views of Justices Stone, Frankfurter, Murphy, Black, Douglas, Roberts, Rutledge, and Reed).

¹²⁰ See generally GODFREY HODGSON, *AMERICA IN OUR TIME* 153-273 (1976) (describing the breakdown of American social consensus wrought by Vietnam and worsening race relations); SEYMOUR M. LIPSET, *A Concept and Its History: The End of Ideology, in* CONSENSUS AND CONFLICT: *ESSAYS IN POLITICAL SOCIOLOGY* 81, 87-98 (1985) (describing the intellectual reaction against the "decline in ideology" posited by some in the 1950s and 1960s); LESTER C. THURLOW, *THE ZERO-SUM SOCIETY: DISTRIBUTION AND THE POSSIBILITIES FOR ECONOMIC CHANGE* 5-6 (1980) (noting the relative economic decline of the United States during the early 1970s).

¹²¹ Mensch, *supra* note 2, at 30.

¹²² Posner and Unger were students in Harvard's elective, "The Legal Process." Kennedy and Tushnet read *The Legal Process* while at Yale Law School and have both taught the subject, Kennedy from Hart and Sacks's materials and Tushnet from his own update of the old Garrison and Hurst materials. See Mark V. Tushnet, *Government Processes* (1992) (unpublished teaching materials, on file with the Harvard Law School Library).

C. "New" Legal Process: A Fresh Generation of Centrists

Like Mark Twain, *The Legal Process* has enjoyed a flourishing afterlife. The materials have been cited and (usually) discussed in more than three hundred law review articles and notes since 1982¹²³ and have molded and influenced significant public law scholars of the period. Some scholars, such as Harry Wellington, David Shapiro, and Reed Dickerson, were rough contemporaries of Hart or Sacks and carried on the Hart and Sacks project in their chosen areas of constitutional law, administrative law, and statutory interpretation, respectively.¹²⁴ Others were students in Hart's "Legislation" class or "The Legal Process" class and applied the core ideas of those classes in new ways to issues of administrative law (Stephen Breyer, Richard Stewart), constitutional law (Abram Chayes, Owen Fiss, Frank Michelman), and statutory interpretation (Richard Posner).¹²⁵ Others did not take the class but absorbed the legal process agenda and vocabulary by osmosis and applied it toward ambitious rethinkings of the Constitution (John Hart Ely), statutes (Guido Calabresi), and jurisprudence (Ronald Dworkin).¹²⁶ Still others read *The Legal Process* after it had ceased to be taught at their law schools; this generation of "new legal process" academics¹²⁷ has been inspired by Hart and Sacks to rejuvenate statutory interpretation as a central area of intellectual inquiry.¹²⁸

¹²³ Search of LEXIS, Law Rev library (Spring 1993).

¹²⁴ See, e.g., REED DICKERSON, *THE INTERPRETATION AND APPLICATION OF STATUTES* 137-64 (1975); J. WILLARD HURST, *DEALING WITH STATUTES passim* (1982); ROBERT KEETON, *VENTURING TO DO JUSTICE* at v-vi (1967); SAMUEL MERMIN, *LAW AND THE LEGAL SYSTEM* 91-135 (1973); David Shapiro, *The Choice of Rulemaking or Adjudication in the Development of Administrative Policy*, 78 HARV. L. REV. 921, 929-42 (1965); Harry H. Wellington, *Common Law Rules and Constitutional Double Standards: Some Notes on Adjudication*, 83 YALE L.J. 221, 222-25 (1973).

¹²⁵ See, e.g., STEPHEN BREYER, *REGULATION AND ITS REFORM* 346-68 (1982); RICHARD A. POSNER, *THE FEDERAL COURTS: CRISIS AND REFORM* 286-93 (1985); Abram Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281, 1307-16 (1976); Owen M. Fiss, *The Supreme Court, 1978 Term — Foreword: The Forms of Justice*, 93 HARV. L. REV. 1, 5-17, 33-35, 44-58 (1979); Richard B. Stewart, *The Reformation of American Administrative Law*, 88 HARV. L. REV. 1667, 1760-1802 (1975).

¹²⁶ Professor Ely testified to this fact in a conversation with William Eskridge, Interview with Professor John H. Ely, in Washington, D.C. (Aug. 30, 1993); Dean Calabresi has indicated his debt to Hart and the legal process school in GUIDO CALABRESI, *A COMMON LAW FOR THE AGE OF STATUTES* 87-90 (1982); and Professor Dworkin has been pinned with a substantial debt in Vincent Wellman, *Dworkin and the Legal Process Tradition: The Legacy of Hart & Sacks*, 29 ARIZ. L. REV. 413, 416-28 (1987).

¹²⁷ Robert Weisberg, *The Calabresian Judicial Artist: Statutes and the New Legal Process*, 35 STAN. L. REV. 213, 239-49 (1983); see Daniel B. Rodriguez, *The Substance of the New Legal Process*, 77 CAL. L. REV. 919, 919-20 (1989) (reviewing WILLIAM N. ESKRIDGE, JR. & PHILIP P. FRICKEY, *CASES AND MATERIALS ON LEGISLATION* (1988)).

¹²⁸ See, e.g., T. Alexander Aleinikoff, *Updating Statutory Interpretation*, 87 MICH. L. REV. 20, 24-32 (1988); William N. Eskridge, Jr., *Dynamic Statutory Interpretation*, 135 U. PA. L.

As long as American government is procedurally complex, involves interacting institutions, and affects our lives pervasively, *The Legal Process* will remain instructive. Hart and Sacks's "Case of the Spoiled Cantaloupes,"¹²⁹ in which the court held Joseph Martinelli & Co. liable in damages for rejecting a state-certified shipment of cantaloupes Martinelli found to be spoiled, can be analyzed simply as a miscarriage of justice, especially from Martinelli's perspective. But Hart and Sacks insisted that the student consider the case from other perspectives as well. The rules of state certification served the useful purpose of facilitating the operation of the market for fresh fruit by assuring the seller that its goods would be paid for. The value of such a rule, Hart and Sacks suggested, might exceed the costs of its occasional harsh application. If so, the court was right and Martinelli was wrong. Although the government no longer regulates fresh cantaloupes in this way, Hart and Sacks's problem is a sophisticated introduction to the complex issues arising out of the interaction of state policies, administrative procedures, and private responses. The problem is also jurisprudentially instructive. On the one hand, it insists upon the law's capacity to serve as a focal point for human interactions and thereby "to counter the tendency for drift or inertia to predominate often in shaping affairs."¹³⁰ On the other hand, it is an occasion to recall that state regulations might not work any better than the dysfunctional private markets they displace.

Viewed with critical distance, the legal process philosophy is, in some respects, even more productive today than it was in the 1950s. For example, new positive theories of political institutions are finding their way into public law scholarship.¹³¹ These theories not only suggest more sophisticated ways of thinking about the differing competencies of institutions and about the dynamics of their relationships — in other words, a more sophisticated Hart-and-Sacks analysis — but they have also introduced Hart and Sacks to a new audience of political scientists and allied law professors. These theorists view Hart and Sacks as an attractive normative countervision to the law-as-deals

REV. 1479, 1544-49 (1987); Jonathan R. Macey, *Promoting Public-Regarding Legislation Through Statutory Interpretation: An Interest Group Model*, 86 COLUM. L. REV. 223, 250-51 (1986); Edward L. Rubin, *Law and Legislation in the Administrative State*, 89 COLUM. L. REV. 369, 408-11 (1989); Cass R. Sunstein, *Interpreting Statutes in the Regulatory State*, 103 HARV. L. REV. 405, 434-37 (1989).

¹²⁹ HART & SACKS, *supra* note 1, at 10-75.

¹³⁰ Letter from J. Willard Hurst, Professor, Wisconsin Law School, to William N. Eskridge, Jr. (Sept. 21, 1993) (on file with the Harvard Law School Library).

¹³¹ See Symposium, *Positive Political Theory and Public Law*, 80 GEO. L.J. 457 (1992); Daniel A. Farber & Philip P. Frickey, *Foreword: Positive Political Theory in the Nineties*, 80 GEO. L.J. 457 *passim* (1992).

or law-as-text vision that now prevails on the Supreme Court.¹³² Indeed, this is an enduring value of *The Legal Process*, especially its chapter on statutory interpretation, which remains the best teaching material on the topic. Hart and Sacks's optimistic vision of citizens as interdependent and law as purposive has a continuing and perhaps growing audience for a society roasting in a cynical bonfire of the vanities.

Although the civil rights movement undermined the cogency of the legal process agenda in the 1960s, the renaissance of legal process thinking may indeed be facilitated by America's explicit multiculturalism. Values and assumptions in law are more contested today than they were in the 1950s. But at some point, there is pressure either to settle points of contention or to reach a peaceful accommodation among the contested views. In short, after periods of sharp ideological disagreement, centrism — a moderation that seeks change without disruption, accommodation without great cost — tends to make a comeback in American public law. As Norman Dorsen wrote in his memorial tribute to both Al Sacks, the friend and mentor, and *The Legal Process*, the teaching materials, "[d]espite continuing divisions within society, a more realistic assessment of prospects for fundamental change makes incremental reform more appealing these days."¹³³ And Hart and Sacks staked out useful strategies for centrism, based upon dialogue among diverse points of view, deferral of issues until agreement can be reached, deliberation and openness to new facts and points of view, a search for common ground, and a willingness to approach issues from a different angle and to devise structures for working out disagreements.¹³⁴

If legal process — old or new — is to make a solid contribution to American public law in the next generation, however, it must develop satisfactory responses to the main challenges posed in the 1970s: If law is a policy science, must law professors not provide more than a casual armchair analysis of substantive issues? If citizens are interdependent and the state necessarily purposive, does law's legitimacy not depend upon the state's capacity to serve the interests of all

¹³² See William N. Eskridge, Jr. & John Ferejohn, *Politics, Interpretation, and the Rule of Law*, in *THE RULE OF LAW* 265, 273-78 (Nomos XXXVI, 1994).

¹³³ Dorsen, *supra* note 113, at 13.

¹³⁴ For examples of modern centrist scholarship in the direction suggested by Hart and Sacks, see Frank I. Michelman, *The Supreme Court, 1985 Term — Foreword: Traces of Self-Government*, 100 HARV. L. REV. 4 *passim* (1986); Martha Minow, *The Supreme Court, 1986 Term — Foreword: Justice Engendered*, 101 HARV. L. REV. 10 *passim* (1987); and Margaret J. Radin, *The Pragmatist and the Feminist*, 63 S. CAL. L. REV. 1699 *passim* (1990).

its citizens? If institutions are central to law's unfolding, is it not our responsibility to develop theories of comparative institutional legitimacy and efficacy? Hart and Sacks posed good questions. Their would-be heirs in the 1990s face the challenge of answering *those* questions as well as the *new* ones posed by the critics of the legal process.