1974

# Hart and Wechsler's *The Federal Courts and Federal System*

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# BOOK REVIEWS

HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM. By Paul M. Bator,[1] Paul J. Mishkin,[2] David L. Shapiro [3] & Herbert Wechsler.[4] Mineola, New York: The Foundation Press, Inc. 1973. Pp. lxxxvi, 1657. $22.00.

*Reviewed by Henry P. Monaghan* [5]

The first edition of Hart & Wechsler's *The Federal Courts and the Federal System*, published in 1953, has deservedly achieved a reputation that is extraordinary among casebooks and, indeed, rare even among learned treatises. *Hart & Wechsler I* is more than a stimulating collection of cases and basic source material, and its scope is not confined to the operation and functioning of the federal courts in the federal system. Through its extensive notes and its inimitable leading questions, the book constantly raised questions which have "prodded . . . students and [teachers] to think over their heads about the deepest problems of the legal process." [6] Thus, after twenty years, at an age when the typical casebook slumbers peacefully in retirement, *Hart & Wechsler I*, unsupplemented, remained vigorous and active as a tool for teachers and an authority for lawyers and judges.[7]

The second edition has been prepared by three outstanding scholars, Paul M. Bator, Paul J. Mishkin, and David L. Shapiro, and Herbert Wechsler has contributed an excellent reworking of the chapter on federal government litigation. The authors avow that their object is to produce a second edition and not a new book (p. xvii). Given the conceded excellence of the first edition, the limited objectives of the second, and the considerable talents of the new contributors, any reviewer confronts more than the usual difficulties that come from attempting to review a casebook — a formidable, highly impressionistic, and perhaps futile task under the best of circumstances. Be all that as it may, my view is that the second edition is at nearly every material point better than its

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[6] Address by Kingman Brewster, Jr., President of Yale University, in awarding an LL.D. posthumously to Professor Hart, New Haven, Connecticut, June 9, 1969, *quoted in* Monaghan, Book Review, 83 HARV. L. REV. 1753 (1970).

[7] The influence on other casebook writers is pronounced. *See, e.g.*, R. CRAMTON & D. CURRIE, CONFLICT OF LAWS: CASES — COMMENTS — QUESTIONS *xii* (1968); G. GUNTHER & N. DOWLING, CASES AND MATERIALS ON CONSTITUTIONAL LAW (8th ed. 1970).

predecessor. *Hart & Wechsler II* would have greatly pleased the late Henry Hart.

Those familiar with the first edition will readily recognize its successor. The format is unchanged, the familiar landmark cases are still there, and the flavor of the first edition has been successfully retained. Still, the new authors' contributions are everywhere in evidence: the editing of the original material has been skillfully done — successfully pruning what, to my mind, had been an overelaborate presentation of several cases.[8] New cases and other materials have been adroitly integrated into the book's structure.[9] Moreover, the authors have contributed perspicacious questions of their own to the book's famous notes.[10] Perhaps most importantly, despite the authors' modest description of their undertaking, there is much in the second edition which finds no real counterpart in the first. New notes have been added and old ones substantially recast. The chapter on habeas corpus (ch. 10) is perhaps the most dramatic illustration of change; for all practical purposes it is wholly new, and it provides the most satisfactory presentation of these materials I have seen. Ironically, it may be the first to need further revision, since recent Supreme Court decisions in that area foretell important changes in doctrine, including limitations on the use of habeas corpus as a vehicle for collateral attack of criminal convictions.[11] In short, while one may

[8] Of particular interest is the elimination of the wonderfully confusing cases (1st ed. pp. 504–19) dealing with the relationship between the Illinois postconviction procedure and the "adequate state ground" problem.

[9] The excellent integration of new historical materials into chapter 1, "The Development of the Federal Judicial System," deserves special mention. New materials have been added to existing footnotes (*see, e.g.*, p.1 n.1; p.2 n.2), and on occasions new notes have been supplied (*see, e.g.*, p.9 n.34).

[10] There are particularly incisive notes on the extent to which article III might be thought to limit the power of Congress to place "article III" cases in federal legislative courts or administrative agencies (pp. 396–400). Other stimulating notes include those on the "political question" doctrine (pp. 233–41) and Supreme Court "discretionary" refusals to adjudicate appeals (pp. 656–62).

[11] Schneckloth v. Bustamonte, 412 U.S. 218, 249 n.38 (1973), reserved the question whether Kaufman v. United States, 394 U.S. 217 (1969), should be overruled — a position expressly urged in a concurring opinion signed by three justices. 412 U.S. at 250–51. *See also* Davis v. United States, 411 U.S. 233 (1973) (holding FED. R. CRIM. P. 12(b)(2) a limitation on the claims available on collateral attack); Tollett v. Henderson, 411 U.S. 258 (1973) (dealing with the effect of a guilty plea on claims under habeas corpus); Preiser v. Rodriguez, 411 U.S. 475 (1973) (preventing restrictive habeas corpus doctrine from being sidestepped by use of 42 U.S.C. § 1983 (1970)). Against these restrictive precedents, however, a majority of the Court has succeeded in virtually eliminating the requirement that the petitioner be "in custody." *See* Hensley v. Municipal Court, 411 U.S. 345 (1973). For related developments, see *The Supreme Court, 1972 Term*, 87 HARV. L. REV. 55, 263 n.2 (1973). *See also* Braden v. 30th Judicial Circuit Court, 410 U.S. 484 (1973) (repudiating Ahrens v. Clark, 335 U.S. 188 (1948)). For citations to

quarrel with details here and there,[12] the overriding impression is of an undertaking superbly accomplished.

## I.

The core of *Hart & Wechsler I* is the relationship between state and federal law — that is, the factors governing judicial "choice-of-law" where a constitutional or congressional judgment to displace state law is possible, but not unmistakable. While the importance of the subject is apparent from the "case or controversy" materials in chapter 2, it stands out in chapter 5's consideration of Supreme Court review of state court decisions. Here the student first becomes aware of the constant need to discriminate carefully between issues of state and federal law and of the irritating difficulty of that task. As a teacher, I found the first edition overelaborate at this point, particularly the materials on the application of law to fact and on adequacy of state procedural grounds, and the second edition (pp. 526–620) unfortunately continues and, indeed, aggravates that defect. Chapter 5 suffers from a substantial "overbreadth" which ultimately is confusing rather than clarifying.[13]

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the recent literature and an illuminating empirical study, see Shapiro, *Federal Habeas Corpus: A Study in Massachusetts*, 87 HARV. L. REV. 321 (1973).

[12] Typical of these are the following comments on chapter 5. The elimination (p. 470) of the first of the two paragraphs of Judge Curtis' argument on the relationship between the original and appellate jurisdiction seems to me to be an educational loss and to have reduced the force of the paragraph retained. On the application of law to fact, the various opinions in Beck v. Ohio, 379 U.S. 89 (1964), seem to me a particularly striking example of how the constitutional issues raised are affected by whether the Court thinks that it is being called on to pass on a question of law, of law application, or of fact. I wish it had been reprinted as a principal case, rather than simply partially excerpted (pp. 591–92, 594). The new material on the scope of appellate review in free speech cases (pp. 603–10) seems to me needlessly unclear. My own widely ignored article, Monaghan, *Obscenity, 1966: The Marriage of Obscenity Per Se and Obscenity Per Quod*, 76 YALE L.J. 127, 151–57 (1966), made a conscious effort to separate out the various free speech issues raised on appeals in obscenity cases. I have, moreover, never understood why Dice v. Akron, C. & Y.R.R., 342 U.S. 359 (1952) (p. 562), is not broken down into its procedural and substantive aspects and integrated into earlier parts of the chapter. Its substantive aspects — treating the validity of a release of a federal right as a matter of federal common law — could be contrasted, for example, with the materials in note 4 (p. 524) to Ward v. Love County, 253 U.S. 17 (1920) (p. 517) on the limits of state law defenses to federally created rights. Plainly, in *Dice* the Court could have held that the validity of the release was initially a matter of state law, but the particular state rule on the subject was incompatible with the policies of the federal act. *See* United States v. Little Lake Misere Land Co., 412 U.S. 580, 595–97 (1973).

[13] At the same time, the well-integrated nature of the text makes it difficult to overcome this problem by picking and choosing from among these materials.

Chapter 6, *The Law Applied in Civil Actions in the District Courts*, is the heart of the "choice-of-law" inquiry. It deals, of course, with *Erie* [14] and its convolutions, as well as with the ubiquitous and resilient federal common law. The revised presentation of the *Erie* materials reflects the developments in thinking about conflict of laws which have occurred in the past two decades. For example, the cases and notes illuminate the difference in views as to whether the federal diversity court should be considered a "disinterested forum" of the state in which it is located, or rather a disinterested forum in which the "accident of diversity" is an important factor.[15] And they raise the question of the extent to which the federal courts have an "interest" in diversity litigation simply by virtue of being a separate judicial system with its own rules of procedure and its own statutory and constitutional powers. Focusing on these issues has obvious bearing for such problems as the extent to which the court may fashion remedies that the state law does not afford (the "equitable remedial rights" doctrine), whether the federal court should or must follow state choice-of-law rules, and the extent to which the diversity jurisdiction may permit efficient resolution of multiparty litigation which, at least today, transcends the capacity of any single state.

I think that the presentation of the materials on the federal common law is among the most stimulating I have ever encountered. But I have some reservations about the treatment of *Erie*. Professor Currie's materials, of which I have written critically,[16] seem to me superior to *Hart & Wechsler II* in making clear to students at the outset that *Erie* is, fundamentally, a limitation on the federal court's power to displace state law absent some relevant constitutional or statutory mandate which neither the general language of article III nor the jurisdictional statute provides.[17] More generally, I mourn the loss of some illuminating materials contained in the first edition [18] and the elimination of some of the authors' penetrating questions, particularly the searching and

[14] Erie R.R. v. Tompkins, 304 U.S. 64 (1938).

[15] *See* D. CURRIE, FEDERAL COURTS: CASES & MATERIALS 620 (1968). It may be that the district court is simply a "disinterested forum" having no interest in applying a substantive law other than state law, but that insight provides no necessary answer to the question of what state's substantive law should be applied. HART & WECHSLER II 713–18; D. CURRIE, *supra*, at 649–50.

[16] *See* Monaghan, *supra* note 6.

[17] D. CURRIE, *supra* note 15, at 617–20. *But cf.* Ely, *The Irrepressible Myth of Erie*, *supra* p. 693, 700–06.

[18] For example, the first edition contained an excellent description of the history of federal substantive equity (pp. 650–52) which has been truncated (pp. 728–29); for some reason Guardian Sav. Co. v. Road Imp. Dist., 267 U.S. 1 (1925), has been eliminated despite the contrast it provides to the important decision of Pusey & Jones Co. v. Hanssen, 261 U.S. 491 (1923) (p. 732).

destructive criticism of *Ragan v. Merchants Transfer & Warehouse Co.*[19] I think, too, that the materials on the relationship between *Erie* and the federal arbitration act (pp. 730–31) are too cryptic; that the famous "juster justice" defense of the equitable remedial rights doctrine has been drained of the grandeur with which it was originally expounded;[20] and that the important decision in *Van Dusen v. Barrack* [21] deserves more than a terse and unilluminating reference (p. 718) in the revisers' rather elaborate exploration of the basis of *Klaxon Co. v. Stentor Electric Manufacturing Co.*[22] Choices have to be made, of course; still, as a teacher, I regret these.

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[19] 337 U.S. 530 (1949) (holding FED. R. CIV. P. 3 inapplicable in a diversity suit, at least on the facts before the Court). After noting that the opinion might be one in which "lots of different things are being indiscriminately decided," the first edition asked (p. 674):

> Rule 3 has the force of statute, does it not? Must not Justice Douglas then be saying either that the rule cannot constitutionally be applied in this case, or that it ought not to be interpreted as excluding the operation of the Kansas statute in this case? Which?
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> Is there any foundation for a constitutional doubt? . . . . Do states have unrestrained power under the Constitution to measure the life of causes of action they create by events occurring after litigation has begun, by federal rules, in a federal court, even though the result is to confuse and render uncertain the application of the federal rules?
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> Apart from constitutional doubt, is the treatment of Rule 3 justified by any doctrine or policy of interpretation? What was the purpose of the Federal Rules of Civil Procedure, in the light of which they are to be construed? . . . . Is this purpose served by making it impossible for counsel to rely on the efficacy, in accordance with the terms of the rules, of action taken in conformity with the rules?

*But see* Ely, *supra* note 17, at 714–15 n.125.

[20] The first edition asked (p. 652):

> Can Guffey be defended on the ground that the federal court was merely giving a fuller and fairer remedy in the enforcement of state-created rights and obligations than the state courts would give? Does it offend the constitutional plan, or any valid principle of federalism, to have the federal courts administer in favor of diverse citizens, this kind of juster justice? An affirmative answer would require, would it not, a root-and-branch repudiation of the tradition of federal equity in its positive aspects?

The second edition formulates the question as follows (p. 730):

> Can Guffey be defended on the ground that the federal court was merely giving a fuller and fairer remedy in the enforcement of state-created rights than the state courts would give? Is this simply a matter of a "juster justice"? What if the courts of a state decide that they will not grant specific performance of land contracts except in extraordinary cases? Should a federal court in that state grant specific performance of land contracts in "ordinary" cases?

The central question, slighted in the second edition, is what the federal diversity court's "interest" is in providing "juster justice" than that available under state law.

[21] 376 U.S. 612 (1964).

[22] 313 U.S. 487 (1941). *Barrack* is reprinted as a main case at p. 1125 in a chapter dealing with problems of process and venue. I see no reason why its choice-of-law aspects could not have been added at p. 718. Compare the imaginative handling of Textile Workers Union v. Lincoln Mills, 353 U.S. 448 (1957) (pp. 779, 859).

The initial section of chapter 7 continues the choice-of-law inquiry in the context of a first-rate presentation of "federal question" jurisdiction. The remainder of chapter 7 addresses itself to various other problems of federal question and diversity jurisdiction in a very satisfactory manner, although the materials bearing upon the elements of diversity jurisdiction (pp. 1050–1102) seem a little more complicated than necessary. Chapter 8, "General Problems of District Court Jurisdiction," and Chapter 9, "Federal Government Litigation," seem to me to be very good, but I must confess that I have not tried to teach them in a systematic way.

A teacher using this casebook quickly learns that students must be helped to cope with the cases' lack of precision and consistency in the use of such terms as "right of action," "duties," "remedial rights," "remedies," "cause of action," and "federal right to a remedy." [23] Some conscious effort should be made to provide the student with a vehicle for an examination into the terminology,[24] as the revisers did in their own exceedingly helpful description (p. 770) of what is meant by federal common law.

## II.

The role of the federal courts in the protection and enforcement of federally secured rights has changed remarkably since publication of the first edition. The Supreme Court has virtually discarded the notion that constitutional exegesis is simply a by-product of the vindication of private rights and has come to see itself as having a "special function" to expound on the meaning of the Constitution and, more generally, to give coherent development to the entire corpus of national law. Not surprisingly, the doctrinal barriers previously limiting Supreme Court jurisdiction (standing, mootness, ripeness, and the political question doctrine) have been substantially eroded; [25] and the Court has begun to erect new barriers to protect its new role, as, for example, in its decisions declining original jurisdiction of complicated factual litigation.[26]

Perhaps even more importantly, the lower federal courts, acting with the approval of the Supreme Court, have begun to

[23] The last term is the revisers' (p. 916) and, so far as I can tell, it has no analytical utility. Presumably, the revisers mean federal right of action. Questions relating to the appropriate remedy, federal or state, must be separately identified and considered. For gross confusion in the use of terms, see Justice Douglas' opinion in Sullivan v. Little Hunting Park, Inc., 396 U.S. 229, 238–40 (1969); compare *id.* at 255–57 (Harlan, J., dissenting).

[24] For one such effort, see H. HART & A. SACKS, THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW 135–55 (tent. ed. 1958).

[25] I have discussed these matters in Monaghan, *Constitutional Adjudication: The Who and When*, 82 YALE L.J. 1363 (1973).

[26] *See, e.g.*, Ohio v. Wyandotte Chems. Corp., 401 U.S. 493 (1971).

demonstrate a similar effort to enlarge their own role in the vindication of federal rights. The trend of decisions since *Hart & Wechsler I*, however halting and uncertain, has been to confirm those courts as the "*primary* and powerful" instruments for the vindication of federal rights, particularly where actions of state officials are in issue.[27] The net result of these developments has been the emergence of a federal judicial system of a distinctly different quality from that described in *Hart & Wechsler I*.

Thus, I think that *Hart & Wechsler* now really embraces two major and dissimilar subjects — the relationship between state and federal law, and the role of the federal courts in the enforcement of federally secured rights. Despite their many overlaps, these subjects now justify more distinct treatment in a logical course of study. Relying heavily on the book reviewer's customary license to chide his authors for the book they might have written but did not, I urge that, in the third edition, serious consideration be given to a realignment of the book's format to reflect these developments. Part I might concern itself with the relationship between state and federal law; part II, with the role of the federal courts in the enforcement of federal law; and part III, with miscellaneous problems in the operation of the federal court system.

Reorganization of the materials along lines explicitly concerned with the operation of the federal courts in enforcement of federal rights would result not only in consolidation of some now widely dispersed materials,[28] but, more importantly, in a sharper presentation. The initial focus would center on the constitutional barriers to judicial review (such as "case or controversy") and the closely related, judicially-fashioned principles governing the availability of prospective relief, as in actions for declaratory and injunctive relief.[29] Consideration could also be given to other federal remedies, such as "mandamus," [30] removal,[31] preconviction habeas corpus,[32] and postconviction relief.[33] General statutory

[27] F. FRANKFURTER & J. LANDIS, THE BUSINESS OF THE SUPREME COURT 65 (1927), *quoted in* Zwickler v. Koota, 389 U.S. 241, 247 (1967).

[28] The present format of the book inevitably involves some duplication and repetition throughout. The theory of "protective jurisdiction" is discussed at pp. 859–70, yet the clearest exposition of the doctrine I have ever seen (or expect to see) is the revisers' note at pp. 416–17. The materials on the duty of the state courts to enforce federal rights appear in at least two different places, pp. 431–38 and pp. 517–26.

[29] O'Shea v. Littleton, 42 U.S.L.W. 4139, 4142 (U.S. Jan. 15, 1974). Note here should be made of the close relationship between these problems and the underpinnings of the doctrine of sovereign immunity. *See* Monaghan, *supra* note 25, at 1386–89.

[30] *See* 28 U.S.C. § 1651 (1970).

[31] *See* HART & WECHSLER II (pp. 1218–30).

[32] *See* Braden v. 30th Judicial District, 410 U.S. 485 (1973).

[33] In addition to the materials in chapter 10 of the casebook, see Preiser v.

problems such as the anti-injunction and three-judge court acts, and the jurisdictional amount requirement, while important, do not operate as substantial judicial door-closing devices, and they could easily be woven into these materials. Suits against *state* officials to vindicate federal rights, particularly civil and political rights, could be considered in light of whatever supposed federalism considerations, statutory or judge-made (principally abstention, exhaustion, and limitations on prospective relief against enforcement of state criminal laws), might be thought to bear upon these problems.

I have found the educational perspectives gained by such an approach quite useful. *Hart & Wechsler II* does not foreclose such a teaching approach, but neither does it facilitate it, given the revisers' rigid determination to adhere to the format of the first edition. The "case or controversy" materials, particularly on "mootness" (pp. 107–20) and "standing" (pp. 150–214) are, in my judgment, both bulky and tedious. They obscure the inquiry whether, and in what circumstances, constitutional adjudication should be viewed as simply a byproduct of the vindication of private rights rather than as an opportunity to formulate and refine basic uniform principles of constitutional law within judicially imposed limitations and subject to some congressional control.[34] Moreover, the constitutional and discretionary considerations bearing upon the availability of prospective relief would have benefited from a comparison with considerations governing the Supreme Court's "discretionary" refusals to review ostensibly obligatory appeals (pp. 649–62) or to exercise its original jurisdiction (pp. 277–87). And I see little to be gained by separate treatment of the "sovereign immunity" of the United States (pp. 1339–77) and of the states (pp. 926–37), to say nothing of separate treatment of sovereign immunity in the Supreme Court's original jurisdiction (pp. 256–58). Surely so far as the role of the federal courts in vindicating federal rights is concerned, that mat-

Rodriguez, 411 U.S. 475 (1973), *noted in The Supreme Court, 1972 Term, supra* note 11, at 263, on the relationship between habeas corpus and actions under § 1983. 42 U.S.C. § 1983 (1970).

[34] *See* Monaghan, *supra* note 25. Moreover, several interesting case-or-controversy problems are wholly ignored: the role of Congress in substantive constitutional definition, *see* Cox, *The Role of Congress in Constitutional Determination*, 40 U. CIN. L. REV. 199, 233–34 (1971); prospective overruling, *see* G. GARVEY, CONSTITUTIONAL BRICOLAGE, 61–65 (1971); Miskin, *The Supreme Court, 1964 Term — Foreword: The High Court, The Great Writ, and the Due Process of Time and Law*, 79 HARV. L. REV. 56, 70–71 (1965); the act-of-state doctrine, *see* First Nat'l City Bank v. Banco Nacional de Cuba, 406 U.S. 759 (1972); and Justice Black's suggestion that for a court to overrule its previous construction of a statute may pose article III problems, *see* Boys Markets, Inc. v. Retail Clerks Local 770, 398 U.S. 235, 257–58 (1970) (dissenting opinion).

ter could usefully be approached as a single unit.[35]

Once the present dimensions of the federal judicial system are explored, the extent of its dependency upon the sufferance of the political branches of government would be considered, in my proposed reorganization, by examining the role of Congress in regulating the jurisdiction of and remedies available in the federal (and state) courts. The present materials (ch. 4) on this complicated and intriguing subject deserve special mention. Not only have they been carefully updated, but the revisers have supplied valuable contributions of their own. The result is an excellent and exciting piece of work. Hart's famous "Dialogue", a very valuable feature, is preserved (pp. 330–60). To compensate for its age two techniques have been used: first, some new footnotes have been supplied; second, there is a supplementary section of new developments.

I do have some minor criticisms of this chapter. I see very little point to the extensive discussion of the selective service cases (pp. 365–72). And the revisers might have given more prominent attention to two matters. The first is the extent to which the substantive constitutional guarantees, such as the first amendment, might themselves constitute sources for inferring a limitation on the power of Congress to regulate the jurisdiction and remedies available in the federal courts. While that issue is considerably clearer now than when Professor Hart wrote, it is treated by the revisers quite tersely.[36] The second matter to which I believe far more explicit attention should be given is the impact of recent thinking discarding "privilege" notions in cases of government benefits, licenses, etc. (p. 347 n.27), with respect to a right to judicial review of cases where "Plaintiffs [are] Complaining about Decisions in Connection with Non-Coercive Governmental Programs" (pp. 346–48). These "new property" concepts[37] do not necessarily mean that some judicial review must exist; but they do make more likely Hart's suggestion (p. 348) that in principle many of the cases should be assimilated to those where a plaintiff is complaining of "extrajudicial" coercion by the government.[38]

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[35] Professor Gunther has, in fact, presented a most satisfactory brief integration of the foregoing materials in his casebook on constitutional law, G. GUNTHER & N. DOWLING, *supra* note 7, at 1–198, and I have made a similar effort in a recent Article, Monaghan, *supra* note 25.

[36] Compare p. 334 n.7 & p. 339 n.16 with, *e.g.*, the suggestions in my Article, Monaghan, *First Amendment "Due Process"*, 83 HARV. L. REV. 518, 520–26, 543–51 (1970).

[37] Reich, *The New Property*, 73 YALE L.J. 733 (1964).

[38] It may be that the time has come to recognize that the due process clause guarantees some judicial review of the constitutional propriety of all governmental

## III.

While I cannot shake the feeling that the time has come for a thorough reexamination of the book's format, I do not advance the suggestion with any considerable confidence. I do not know whether the restructuring here proposed would have costs exceeding the gains for *Hart & Wechsler*. In any event, *Hart & Wechsler II* is, like its predecessor, a great work. We are fortunate to have it.

One final comment. Regular supplements, please!