

LAW AND SOCIAL SCIENCE: A REPORT ON MICHAEL AND WECHSLER'S CLASSBOOK ON CRIMINAL LAW AND ADMINISTRATION*

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"Law and social science" has been shouted by enthusiasts for a quarter century with very little done about it. Legal education has suffered a plethora of programs, first from the school of "sociological jurisprudence" and then from the school of "legal realism." Many of our Benthamic expectations for social engineering through law have been millenarian. As in any area of living, great expectations are bound to create moods of frustration or disillusion, of tired admission that the tried and tested ways are best after all. What has been wanting has been someone who would tackle the job of social science integration, not in fitful law review articles or books, but in methodical and tangible material to be used in teaching in a particular field. Only in that way could permanent advance be made in training a new generation of students. Only in that way could the ambitious programs of the legal realists be given demonstrative substance. Professors Michael and Wechsler, in seven years' joint work at Columbia, have developed such a tool for teaching, now for the first time made available for general circulation as *Criminal Law and its Administration: Cases, Statutes and Commentaries*. This Article will attempt to review the reasons why an integration of law with the other social sciences is important for legal education, to examine the failure of the case-method to provide that integration, and to indicate some of the exceptional contributions of Michael and Wechsler's work to the future of legal education.

CASE-ANALYSIS, SOCIAL SCIENCE AND PROFESSIONAL TRAINING

The case-study of law is certainly not geared, nor should it be, to teach the student what the law is, in the sense of general principles or minor rules. Instead, cases are usually arranged to indicate the historical development of legal doctrine, or to test the extent and application of principles by borderline cases. The settled areas of law are not litigated, and the study of cases teaches the content of the law only as a by-product of teaching how to learn the law as needs arise in practice. Nonetheless, the case-method is often utilized as an inefficient vehicle for imparting settled

*CRIMINAL LAW AND ITS ADMINISTRATION: CASES, STATUTES AND COMMENTARIES. By Jerome Michael and Herbert Wechsler. Chicago: The Foundation Press, Inc., 1940. Pp. xi, 1410.

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doctrine. Such teaching satisfies the poorer students and the poorer bar examinations. But it compares to case study which is scientific rather than dogmatic as memorizing of words and their declensions compares with the general study of language. Brilliant social inventions, which once pushed developments forward onto a new level, seem inevitably in their old age to have a retarding influence. The inventions come to be misused, or reverently modified in small particulars. This is as true of the minor invention of Langdell as of the major methodological innovations of Marx and Freud.

Much case-study is not devoid of import for social science. A well-chosen selection of cases in any field can illustrate the social problem of legal and judicial method. It can show how courts use words and how legal doctrines are developed. As compared with text or office study, the case system of teaching inculcates unusual semantic astuteness and—in recent casebooks—awareness of the complexity of the common law. The method has been criticized because the “facts” in an upper court opinion are pre-digested and selected, so that the student does not learn to marshal and relate events into the frame of legal controversy. But as extended by the study of records, by “problem” cases, by moot court work, by clinics and by legal aid, the case system can provide some analytical training. The results of that training are best exhibited by the lawyer’s eye for relevance—an eye (and in the good trial lawyer, an ear) which comes to be almost instinctive. The lawyer can listen to his client’s story, pick out the factors relevant to the legal doctrines he knows, and bring them out by questioning, just as a good diagnostician finds out what is wrong with his patient in large part by good history-taking. Anybody who has listened, without interrupting, to clients’ stories or patients’ histories knows that the average layman’s instinct for relevance is feeble. That may be not for lack of training but for lack of mind; I wish to avoid here the psychological controversy of whether there is such a thing as mind-training. The study of law, if it does not develop, does attract the analytical mind, grades it highly, gives it law review advantages and a head start. Analogous to analytical training is the dialectical skill developed by repeated dissection of cases, distinguishing them, arguing with them. This skill is useful to advocates, whether in courts, legislatures, or directors’ meetings. With it goes an articulateness, and an ability to bluff—skills fostered by class discussions and by examinations; both with obvious utility for the lawyer. But study of the judicial process aims chiefly at giving the student an informed and sensitive ability to predict what courts will do. Or rather, an ability to predict what they won’t do and to estimate the probabilities of their choice among the limited alternatives. Success in business involves similar predictive vision of what competitors and customers may do; politicians’ stock-in-trade is artful guessing about voters’ choices. This predictive skill, the

ability to persuade courts to follow one course rather than another, and the eye for relevance, are gifts of no mean sort.

Today these gifts are not enough for the law student about to enter practice. The lawyer is likely to need more social science than is afforded by case-study of how courts behave. At the time the case system was invented, the lawyer did not need more, or, if he did, more was not available. Moreover, in 1890 a college-educated lawyer did not possess a mental horizon vastly different from that of all but a handful of thinkers. In a more stable world, values were less questioned, and the lawyer, if he did not truly understand his world, thought that he did, and could rule his life according to a syncretistic, consistent, usually ethical, pattern. The triumphs of deflationary understanding of Sumner, Max Weber, Veblen, Marx, Brooks Adams, Freud had not yet burst open the old values, and were not to unsettle the average American until the World War of 1914 or the depression of 1929. Nor did the scientific elaboration of these insights and methodologies—permitting the construction of a revised scheme of values and understanding on a more complex and sophisticated level—get going with its present momentum until recent years. Even an expanded case system, which delves facts from trial records and from Brandeis briefs (both litigious rather than evaluative), and which provides a limited clinical experience in legal aid work, cannot give the student adequate orientation on this level. For neither facts nor experience have meaning without interpretation; and the interpretations worked out by social scientists, though usually controversial and often rudimentary, have become too ramified and systematic to be picked up without explicit study. By the same token, neither chance conditioning nor the smattering of argumentative information which filters through cases or case-records can be relied on to prepare lawyers for their life and work.

Today, the lawyer is counsel to large power-units in society: to government, business, labor, farm cooperatives. As such, he is called upon to organize social forces—in other words, to plan. No course of law studies which deals with cases alone can possibly train lawyers for planning, or for the draftsmanship which is both its symbol and its technique. The student has bent his efforts to constructing legal rules out of case-book cases by inductive reasoning. That is essentially an analytical job. He has used his imagination in extrapolating cases to cover hypothetical situations suggested by his teachers, but he has seldom invented such situations. The draftsman's job, on the other hand, is imaginative and synthetic. He must envisage the controversies of the future, and organize opposed social forces into harmony for the resolution of these controversies. In this kind of prediction, courts are only one of a congeries of institutions, and the case system gives knowledge only of upper courts. The case system's feeling for words is semantic, but the drafts-

man needs another feeling, creative as well as critical. Planning the future with words, he must compromise divergences with them; he must educate or manipulate congresses and courts and publics.

The social sciences which the lawyer should study for this kind of work are not simply informational; they are also normative. It might be thought that the lawyer need only be told the sort of future his clients desire, and that he can then plan it for them if given the proper tools as part of his professional social science training. If this were true, the lawyer could do without making up his mind about social issues and values. But he cannot. He is called upon constantly, whether he be judge, legislator, or practicing lawyer, to make "policy" judgments. Clients, business or government, don't know what kind of a future they want. They want, partly, what they should have, and turn to their counsel for guidance as men once turned to the clergy. But training in the making of value judgments is not simply useful for lawyers in becoming bigger success boys. The agreed aim of legal education is to turn students into better citizens and community leaders. Even as technicians, the means they use to carry out their clients' policies shape the ends which are achieved. In human affairs, there are no machine tools. The lawyer as technician plays a part in bringing about the future even when he may not wish to, even when he may be unconscious of his role. The historical study of cases can check pharasaical complacency over the present state of the law, and the analytical study can indicate the values which are now immanent in the cases themselves. But a course of studies which is to be responsible for future values must take a transcendental attitude towards past and present expositions of the law.

The difficulties of forecasting what training will be helpful to students five, ten, twenty, thirty years hence are obvious enough. Yet the difficulties are no excuse for not making the inquiry. The inquiry involves much the same kind of investigation that went into Alfred Weber's path-breaking essay on the location of industry. What law school graduates are actually doing at present should be surveyed, not guessed at, as some indication of what law school graduates may be doing in the future. What they are doing and will be doing, of course, is in part a function of the training they get, though also a function of the opportunities and peculiarities of each locality. Professions do die. New professions arise and belatedly win academic recognition in the form of "schools." Unless the law schools trust in a *laissez-faire* which is discredited in other areas, they should survey the future's need for special types of trained lawyers to the extent that this can be foreseen. It might have been foretold some years ago, for example, that lawyers would be needed to act as counsel for housing authorities, and as members of housing administrations. A particular school might set itself the task of building a program that would fit men for that job and for related jobs. Its courses in real

property and mortgages would be oriented towards the history and present and future extent of the legal control of land use. They would teach the relation between mortgage and conveyance law and land speculation, and the relation of speculation to rural erosion and urban blight. Landlord and tenant law, waste and nuisance and lateral support law, perpetuities and restraints on alienation — these doctrines would be related to the way men live and to current efforts at reform. Zoning, eminent domain, valuation, municipal corporations, taxation (including schemes of differential taxation), tort liability of public bodies, civil service law — all would appear where relevant to housing. The law school would call on the resources of the attached university for architects and city planners, for authorities on case-work and urban sociology. Articulate practitioners and experts in land assembly, real estate management and tenant selection would come in for consultation. The administrative law course might use problems of a housing administration as illustrative material, rather than those of the ICC. Students would, in some degree, come to the school because this program appealed to them, rather than because of tradition or similar irrelevant lure. The community would have a body of trained men who are now wanting. Another school in an agricultural region, attached to a university possessed of a good school of agriculture, might fill a crying need by training lawyers to act as counsel for farm cooperatives or for processors. Such schools and such courses would not only mean that new and important subjects would be explored, but also, necessarily, that new training would be given. Without surveys, our common sense tells us that method-training rather than subject-training will have more useful residue later on. Without surveys, we know that the future will probably see an increase of social controls, of "planning," and that in the American tradition, lawyers are likely to be called on to do the work. Rather than seek to salvage a declining profession by rear-guard attacks on trust companies, unauthorized practice of the law, and administrative agencies, schools can help to develop new fields for their graduates, as well as to expand existing fields to serve larger sections of the population. Only in that way will law schools continue to attract their present bulky share of able and alert young men and women who are seeking a constructive professional career.

Despite this variety of present and future functions performed by law school graduates, matched no doubt by a variety of faculty personnel and of student background and desires, most law schools aspire to be isomorphic. Schools which draw men from all over the country often aim to be all things to all men, rather than to specialize on turning out qualified men for unusual types of counsel-work. And what holds for schools holds as clearly for courses within schools. Not all courses have to be courses in draftsmanship or planning. But certainly three years

are not required to teach judicial method through the study of upper court cases. Like the division of labor which should take place among schools, the division of labor among courses is a question of balancing personnel, library resources, community needs.

Theoretically, almost any course could serve as a vehicle for training lawyers in methods for present and future needs. But, for the initial experiment, criminal law has advantages (beside the absence of pressure for laying out the law) of which the classbook of Michael and Wechsler makes most striking use. In the first place, social science data, though inadequate, are more extensive here than in most other fields bounded by the course-concept. The "crime problem" has called forth a wealth of literature, of surveys, of journalism.¹ Some law students will have had courses in criminology, or will have dealt with it in survey courses in urban sociology. In the second place, criminal law is the law about which laymen mostly talk, and about which law students and their friends and families have vehement opinions, interest and, occasionally, first-hand experience. In the third place, criminal law raises the ultimate problems of social control more starkly, more inevitably, than do other subjects. It is obvious there that social pressures come to focus in administrative action by officials, and that bearing on the criminal law are ethics, politics, criminology, social science methodology, economics, and psychology. Similar pressures and problems are hidden in the interstices of all the substantive law courses. But capital punishment, the third degree, entrapment, the right to shoot fleeing felons — these, and a host of problems like them, must necessarily rouse controversy by their very statement. Finally, as a first year course, criminal law offers an opportunity to orient students at once in constitutional law, statutory interpretation, administrative law, labor and civil liberties problems. Postponement of these matters runs the risk of allowing common-law habits of thought to become irremovably fixed, weighted as they are with all the respectability of tradition and the skill of long-experienced teachers.

Members of the bar, as prominent citizens, have a responsibility for the "crime problem." The public's derogation of lawyers because of general mishandling of crime gives the bar special incentives towards improvement of criminal administration. Lawyers can assume a central position as public officials, as voluntary defenders, as vigilant and informed critics and reformers of criminal law, procedure, and administration, and as professional protectors of civil liberties.

1. A periodical, *The Journal of Criminal Law and Criminology*, is devoted to it exclusively, as are many European reviews, while there are no law journals devoted to contracts or torts, sales or agency — let alone to the social implications of these subjects. See the thoughtful article by Professor Cavers, *New Fields for the Legal Periodical* (1936) 23 VA. L. REV. 1.

THE ORGANIZATION OF COURSES AND CURRICULA

It is training for this professional position, as well as orientation in the methodology of social control, that Michael and Wechsler's volume seeks to give. The book is divided into four parts. The first part is an introduction which outlines the contents and methods of the course, and broaches the basic philosophical problems of the criminal law. The second part is *The Prevention of Socially Undesirable Behavior*; the third, *The Problem of Criminal Responsibility*; the fourth, *The Problem of Conflicting Values*. These titles alone reveal a profound difference from orthodox casebooks, which arrange their cases in legal rather than social categories: offer and acceptance, presentation, last clear chance, or, in the criminal field, first by crimes: murder, larceny, rape, etc., and then by defenses: insanity, compulsion, mistake of fact, etc. Since Michael and Wechsler's part on *The Prevention of Socially Undesirable Behavior* contains the materials on the various crimes, and the part on *The Problem of Criminal Responsibility* contains materials on the various defenses, it may be asked what difference the label makes. There has been a good bit of ridicule of the now so popular renaming of courses: turning agency and corporations into "Business Organizations," and sales and bills and notes into "Contracts II." Moreover, any given material can logically or analogically be organized according to various schemes of equal inclusiveness, and any scheme struggles vainly against the necessity for understanding all of the material before any of it can be fully comprehended. And a teacher can pattern his own course differently from the consecutive plan suggested by the editor. Nonetheless, the label does make a difference, as any advertiser knows. The headings in a casebook are often the teacher's or student's only clue as to how the compiler viewed his field. It indicates which problems he deems to be central, and which peripheral. Whether we go all the way with Kant or not, the categories in which we view "reality" are obviously of vital importance. The categories "economics," "political science," "psychology," have limited, as well as directed, our thinking about social problems. A division of a criminal law course into categories of "larceny," "arson," and "insanity" will tend to engender one kind of attitude, and "prevention of socially undesirable behavior" and "the problem of conflicting values" another, preferable, point of view.

The problem of the organization of the body of law and related materials within a school curriculum is essentially no different from the problem of its organization within a course. If anything, the propagandistic need for a socially significant plan of organization is greater for the curriculum as a whole, since the area to be correlated is enormous and since the division into "courses" taught by different men imposes an initial obstacle. Students fail to relate their common-law courses despite the similarity of methods and materials. In crimes and torts, for

example, in the face of the obvious overlapping of the objectives of what is called criminal law and what is called tort law, a coherent view of controls of deviant behavior through law is seldom achieved.²

Professors Michael and Wechsler do not feel themselves bound by prevailing curricular morphology. They follow the trail of their specialty, criminal law administration, whether or not it leads into the domains of other courses. From the course in personal property, they take what they need to present the history of larceny, making use of Jerome Hall's pioneering *Theft, Law and Society*. From the domain of legislation, they borrow cases like *McBoyle v. United States*³ to indicate problems of construction. They treat the constitutional and legislative issue of uncertainty in statutory definition (the *Cohen Grocery* case,⁴ the *Nash* case,⁵ etc.) along with the debate over the creation of common law crimes, and with cross-reference to the extensive case material on conspiracy; a Hague Court case coming up from Danzig indicates the Nazi approach to the same problem. These questions lead on into the most complete collection yet made of civil liberty materials, comprising in addition to the leading Supreme Court decisions relevant matters which are not "constitutional law": criminal libel, civil rights laws (including the important *Powe v. United States*⁶), wire tapping, the third degree, and vigilantism. Adjective law appears as it bears on specific substantive issues: burden of proof appears in connection with the burden of showing justification for homicide, and again in connection with the insanity defense; presumptions turn up in connection with receiving stolen goods and "disorderly conduct" laws; testimonial issues are raised by hypothetical questions to insanity experts.

The usual curricular divisions have left obvious lacunae. Just as many casebook-makers have sought to fill gaps by a simple process of addition: adding statutes, or "fact" material, or footnote citations to other cases and to law journals; so the curriculum-makers have added subjects to the curriculum: writing courses to teach research and organization of material; courses in labor law, corporate reorganization, government control of business to bring in economic materials and relate law to public policy;

2. Even where the same concepts are employed, such as negligence or intent, students fail to draw either parallels or discriminations. Torts negligence is Mr. A's "negligence," Monday, Wednesday and Friday, at 2:00; crimes is Mr. B's "negligence," Tuesday and Thursday at 9:00. Personal experience in teaching both crimes and personal property to first year men demonstrates that the use of different books, different hours, and different names for the hours overbalances efforts to deal with the concepts of possession and property as a whole, running through theft as well as many of the problems in personal property.

3. 283 U. S. 25 (1931).

4. *United States v. L. Cohen Grocery Co.*, 255 U. S. 81 (1921).

5. *Nash v. United States*, 229 U. S. 373 (1913).

6. 109 F. (2d) 147 (C. C. A. 5th, 1940).

courses in administrative law (where they are not concentrated on delegation and judicial review) to examine the problems and procedures of administrative agencies; courses in comparative law (where they are not surveys of continental systems) to broaden the critical base for understanding a segment of American law; courses in legislation to rub students' noses in statutes, and perhaps deal with drafting on a modest scale (though many legislation casebooks simply deal with the judicial process as it controls the legislative process or interprets statutes); courses in legal history to trace the development of earlier legal doctrines; courses in jurisprudence (where they are not taxonomic studies of what has been thought and said) to raise permanent ethical and epistemological issues in the law. Neither in casebooks nor curricula is there any systematic attempt to relate law and social science as a whole. All law is public law. The more "private" it seems, the more difficult, and therefore the more necessary, to display its public implications in the classroom. All law worth teaching involves legislative problems, which can be illumined by comparative examples and by economic, political, or psychological analysis. To label a series of elective courses as "comparative law," "legislation," "jurisprudence," etc., persuades students and faculty that these essential approaches to all law are remote, "cultural," frilly dressings to the main dish of cases.

The consequent hostility to comparative and legislative materials pro-
longs the parochialism of the common law. By limiting legal studies to a particular type of institution, it keeps those studies from having any universal quality. Mere description or classification is not science. The failure to generalize is perhaps the most important factor preventing law from assuming its full status as a social science, in addition to its special, non-generalized status as systematic, sovereign definition. This failure gives a truncated answer to the critical question: what is law? It confines law to the study of the past or predicted conduct of officials who are judges or jurymen within a particular jurisdiction, rather than making it include the regularized conduct of officials everywhere, no matter what they are called. In the second place, common law parochialism tends toward a positivistic definition of and attitude towards law. If law is considered to be merely what goes in a particular jurisdiction or system of jurisdictions, critical and even normative slants implicit in comparative studies are likely to be excluded. To be sure, the presence of some fifty American jurisdictions minimizes the evil and curbs the ever-present tendencies towards Blackstonian rationalism and smugness. But these systems spring from a common source, and by failure to compare (at least within the culturally relevant and linguistically feasible limits of Western civilization) we unnecessarily confine the available alternatives for the law's adjustment of pressing social problems.

CRIMINAL LAW AND ADMINISTRATION AS A SOCIAL SCIENCE

Michael and Wechsler make law a social science by being steadily comparative, legislative, and jurisprudential—drawing upon the resources of the other social sciences to explain comparisons, assist legislation, and give content to jurisprudence. Where other compilers use illustrative cases, Michael and Wechsler incline to the use of illustrative statutes; reports preparatory or supplementary to legislation, such as the Criminal Law Commissioners' Reports and Macauley's Notes on the Indian Code, are extensively excerpted and cited. Robbery, arson, burglary are presented by selected statutes, with cases as annotations. The procedural distinctions between larceny, embezzlement, and false pretenses are dealt with as a problem in statutory consolidation, exemplified by the New York, English, Massachusetts, and California statutes, with several leading cases indicating the techniques and problems of interpretation. Even the common-law rules as to homicide are illumined in part through American declaratory statutes or through the codifications of the Cyprus and British Indian codes. Italian and Soviet homicide statutes are included for comparison.⁷ Thus comparative law is not taught simply by juxtaposition, but is made an integral part of the entire book.

The authors have drawn upon collaborators from other social sciences wherever possible. Such collaboration is essential for any far-reaching researches which cross the railroad tracks separating law from the other social sciences. Collaboration need not necessarily be personal; where the relevant studies have been published, they can be read. Michael and Wechsler have ransacked the literature with exceptional thoroughness and imagination. A glance at the 24-page table of articles, books, and other publications shows the inclusion of such recondite sources as Catherine II's instructions to Commissioners Appointed to Frame a New Russian Code; of such fugacious pieces as articles in *The Nation* or in various trade journals, and newspaper accounts of criminal trials and vigilante activities; of the seldom-cited but valuable reports of a century of efforts by reforming and investigatory bodies. By this unremitting attention to efforts at law reform, past and present, they give their book a sense of social movement, even hopefulness, lacking in casebooks whose sense of progress is confined to the decided cases. They reprint the writings of alienists like Singer and Zilboorg as well as those of Stephen and

7. The Italian penal code was chosen for comparison, here and elsewhere, rather than French or German codes, because it is the product of the "advanced" Italian criminological movement. Like the Soviet code, though less self-consciously, it marches under the banner of "measures of social defense" rather than the more traditional slogans common to the United States and the countries of Western Europe. Comments relating the Italian code to the Anglo-American materials, particularly useful in the tricky fields of attempts, conspiracy, and mistake, were written for inclusion in the volume by Professor Nino Levi, formerly of the University of Genoa.

Ferri for their bearing on insanity and feeble-mindedness; psychoanalytic literature has influenced the authors' approach to questions of deterrence and motivation. In dealing with juveniles, they set forth, in addition to legislation in New York, Italy, and Russia, and several leading cases, the Youth Correction and Youth Correction Authority Acts of the American Law Institute and Professor Waite's comments thereon, extracts from *The Forgotten Adolescent*, and Michael's extended book review of the Gluecks' *One Thousand Juvenile Delinquents*.

But reading the literature is not enough where it is sought to get at unrecorded practice — unrecorded because unapproved, or recent, or taken for granted. Here, personal contacts have been made. The authors or their assistants have talked with policemen and fire marshals, with insurance officials and grandjurymen, with parole officers and district attorneys, with victims of theft and with reformers. In the field of theft, for example, the classbook indicates the crucial importance of fences; the use of the criminal law as a club to force civil recoveries, especially in embezzlement cases, and the administrative difficulties of law enforcement where restitution has been made; the dubious roles of insurance companies and "no questions asked" advertisements in condoning theft.

In reprinting such materials, Michael and Wechsler are not simply eclectic. Prevailing theories of liability are related to the authors' own analysis of the ways in which the criminal law can and should operate, that is, to the question of what behavior it is possible and desirable to deter. Nor do they include criminological data merely because interesting; where, for example, they reprint three case histories of thieves, they do not leave to chance the interpretation of these probation officers' reports. They write:

"Whatever the significance of statutory penalty variation in marking extreme limits, the heart of the sentence process is the exercise of judicial and administrative discretion. This is especially true in dealing with non-violent theft where statutory minima are rare, the injury often reparable, the crime not commonly terrifying and the demand for severity frequently subdued. To picture the working of discretion with precision and detail is necessarily a task for special investigation. The following case reports do no more than illustrate typical problems of the sentencing judge and suggest the type of assistance that may be obtained from competent pre-sentence investigation."⁸

Thus, legislative, comparative, and sociological materials are organized insistently around the central questions of legal and social policy: how does one decide what behavior is socially undesirable; what sorts of behavior should be made criminal; and what should be done with per-

8. P. 569.

sons who engage in criminal behavior, or in behavior which is indicative of dangerousness? In demanding answers to these questions, Professors Michael and Wechsler do not view the criminal law anthropologically, as do the emancipated realists — as a question of folkways. They believe in evil, which is a necessary condition for achieving good. The question of what is good is raised at the outset, in presenting the argument between positivists and retributionists; and the authors never let the student forget that civil liberty problems are inherent in all criminal law administration. The folkways are to be studied, in addition to ethical theory — ancient, medieval, and modern — for suggesting, though not controlling, what is good; and for indicating the limits of effective legal action in the achievement of any particular goal.

The first goal discussed in the book is the prevention of homicide, the undesirability of which is not open to serious question. The extended discussion of homicide focuses around two related problems: legislative individualization and administrative individualization. The distinctions between the degrees of murder and manslaughter, the problems of intention and negligence, of the felony-murder and misdemeanor-manslaughter rules — these are viewed from the standpoint of the critic of present and the draftsman of future penal codes. These legislative problems are considered with deterrence and reformation as the objectives of treatment, and nullification and administrative convenience as limitations. Whereas case-by-case treatment fosters the pigeonholing of decisions, a process aided for lawyers by the careful but unimaginative indexing of their paid retainers, *Shepard's*, *Corpus Juris*, etc., the legislative approach broadens the range of analogy and the choice of alternative policies. The labels: murder, manslaughter, non-criminal homicide, are subordinated to comparisons, in terms of social undesirability and the limits of effective legal action, between, for instance, the intentional killer who unreasonably believes he is justified in self-defense; the negligent killer; the killer who makes a mistake of law.

The problem of administrative individualization within the limits permitted by legislation is especially pointed up by the homicide field because of the discontinuous gradation between capital punishment and imprisonment, even for life. The authors give English and American figures on the actual use of the death penalty, and quote prison officials on the deteriorating effect of long (over ten years) prison terms. The famous Romilly-Paley debate (1810) over rule versus discretion in capital punishment is reprinted, as are excerpts from the report and minutes of evidence of the Select Committee on Capital Punishment (1930). The authors, here as elsewhere, include textual comments of their own, many of them taken or developed from their article, "A Rationale of the Law of Homicide."⁹ Executive clemency, judicial discretion, jury discretion (statu-

9. (1937) 37 COL. L. REV. 701, 1261.

tory) and jury nullification, and sentencing boards, are dealt with as agencies of mitigation, extant or possible. The offered materials include, for example, messages of the Governor of New York in pardon or commutation cases, the few court opinions on sentence, and statistics on probation or suspended sentence. The problem of sentencing is kept in the foreground not only by these separate materials devoted to it but by footnotes to the cases in other sections, calling attention to the penalty imposed and its relation to the maxima and minima provided by statute. But the administrative problem—what should be done in a particular case—is always subordinated to the legislative problem—what is the design of a just and administratively workable penal code?

THE RISKS AND REWARDS OF SOCIAL SCIENCE STUDY FOR LAWYERS

There is no denying that these problems are difficult to teach. The usual case-course either tests the extent of substantive law principles by borderline cases, or presents the historical development of the principles by a series of cases chronologically arranged. Class discussion runs usually to "stating the case," discussing the soundness of its reasoning within the doctrinal framework of the other cases, and distinguishing cases which resemble the stated case. Sometimes there is debate as to the merits of a "majority" or "minority" point of view, usually revolving around the two "leading" but opposed cases which follow each other in the casebook, each trailing its footnote citing the other decisions in accord. This debate is the form of exercise students are provided for developing their sense of justice and their sense for social problems. The usual hypothetical case question: should the conviction of defendant be affirmed or reversed on appeal, is simpler by far than the problem questions which Michael and Wechsler append to each section in the book, or utilize in the course examinations at Columbia. Take for example the questions following the materials on violation of property rights accompanied by danger to the person:

"(1) What is the nature of the evil or evils threatened by the various kinds of behavior comprehended within the categories of robbery, extortion and criminal coercion?

(2) What significance should be accorded to the following factors in distinguishing criminal from non-criminal coercion:

- a. The nature of the injury with which the victim is threatened?
- b. The immediacy of the injury?
- c. The nature of the act demanded as the price of avoiding the injury?
- d. If the person who will be injured and the person to whom the threat is directed are not the same, their relationship, if any?

- e. The ends which the person making the threat seeks to achieve?
- f. The means employed to express the threat?

To what extent are these considerations legally material (a) in New York and (b) in England?

(3) Viewing the New York robbery, extortion and related statutory provisions as a unit:

- a. To what extent do the various sections overlap?
- b. What treatment discriminations do they make?
- c. To what extent are the treatment discriminations justifiable or unjustifiable?

To what extent are they significant?

(4) Is the statistical data with respect to the treatment of persons convicted of robbery in New York of any value (a) in evaluating the statutory provisions or (b) in guiding administrative policy? If so, in what respects?

(5) In what respects do the English and New York statutes differ? Which is preferable?"¹⁰

How can students be taught to answer questions like these? Some will fail. With others, the problem is, in part, one of making statutes teachable. The case method continues to hold sway partly because cases, though seldom "literature," make easy reading. They are discursive, concrete, and, especially in criminal law, dramatic.¹¹ Statutes are abstract, unliterary. They require imaginative and creative spelling out, not routine condensation. A statute cannot be skimmed, and does not appeal to most students, who become rigid common-law lawyers on the day they enter law school, sharing with their elders at the bar an unwarranted admiration for judges as compared with legislators and administrators. Michael and Wechsler have no panacea for this problem. Their homicide statutes are gathered in an appendix, and appendices, like footnotes, are "skipped." New York students will read New York statutes because that is their "law," but balk at Massachusetts or California, and ignore India or Italy. In other words, they will study cases comparatively but not statutes. This comparative law method is fashionable for cases, for it has behind it the prestige of the big Eastern "national" schools where most case-books are manufactured. Moreover, you can sometimes cite an Indiana case as currency before a New York court, but not an Indiana statute. Statutes, however, reveal patterns: they can be compared as cases can for imitation (precedent) and innovation. The English criminal law commissioners made use of Livingstone's code, and Italian statutes have

10. P. 400.

11. The very practice of abstracting shows how much padding the usual case contains. (Abstracted cases make up the bulk of case material in the Michael and Wechsler collection, although many of the leading decisions are reprinted in full).

influenced American criminologists. But students habitually think of themselves as advocates-to-be, and not as participants in the legislative process, much less as persons whose views on legislative issues, on public policy, have any importance.

Clearly, however, a class using Michael and Wechsler's book have no reason to resort to case-stating and case-argument of the usual sort. Nor is there any point in searching out and comparing other cases, other text-book theories; the book itself is a reference work, and covers more ground than can possibly be handled in class in a year's two-hour course. Nor will it be profitable simply to ask questions about the material, as it is not possible to add much to the problem questions in the book. As the classbook is recent, the assumed need to keep the students up to date with the advance sheets will not appear for a year or so. How is the hour best to be spent, then? Only in discussion. Discussion on the basis of the concrete descriptive and questioning materials common to teacher and class. Discussion and criticism of the hierarchy of values which Michael and Wechsler set forth at the outset and assume as a frame of reference throughout. Undeniably, many of the student's first thoughts about public policy and ethics will be banal and unsophisticated. So are the first critical and creative thoughts of anyone. The teacher must take the student seriously as he fumbles and explores, and must also compel his classmates to do so. Otherwise, the student will not take himself seriously. He must be made to feel that what he has to say about social policy has weight, and will have weight. It is clear, moreover, that the relation of the book's stimulating scholarship to its pedagogic utility is not very different from the relation of research to teaching in the work of an individual professor. Professors actively engaged in research can acquaint students with how knowledge is gained, how scholars' judgments are formed — aiding the students to discover criteria for their own judgment, on the intellectual side, and showing them what responsible scholarship signifies in the way of investigation and decision, on the moral side. Thus, by example and experience in class, the student can gradually develop the habit of independent thinking about policy and learn to have confidence in his critical and integrated judgments about values. These are the habits essential for Democracy.

But these are not the habits which law students develop today, on the basis of case-training. Some first-year instructors, desirous of turning out hard-boiled professionals, indicate that debates about values and about law reform are "college stuff," and frown on the expression of lay ethical views. Where this teaching takes hold, it tends to turn out cynical relativists. Other teachers try to do more than study the judicial method "realistically." They try to raise social issues under one of the current slogans, such as "balancing the interests," "competing social policies," or "reasonableness." But many casebook cases are only fossils to remind

us of departed vitality: "There are laws which are like old houses: they endure and stand upright but no one lives in them anymore." It is inevitable that, where the social problems dealt with in the cases are dead or insignificant, students will be driven again to a cynical conclusion: it doesn't matter how a case is decided: there are always cases either way; pay your money and take your choice. But even where the problems are obviously real and pressing, and even where the traditional over-valuation of common-law wisdom does not stultify criticism, class debate about what is "reasonable" and how the interests should be balanced turns into a bull session. Information and philosophy are lacking on which sophisticated discussion could proceed. Discussion is, therefore, ended at a question-begging phrase about "competing social policies" at the very point where it should properly begin. Consequently, many students tend to develop the opinion that the lawyer does not balance the interests; he merely reflects them. Lawyers are on the mechanical fringe of policy-determination. The law is thought to follow, rather than reflect, the progressive insights of science or the drives of class. The law is like a chaperone at a gay party who is shocked and turns her back on the goings-on but eventually, though covertly, approves them. The lawyer so chaperoned will not study social science—it is strange and different and too difficult. Law is easy, but even there you need a course for every subject on the bar exam. How, then, can you aspire to cope with marginal utility economics or the determination of probable error in statistics or the classification of symbol data in social psychology? Those higher domains where the important truths are examined and revealed are outside the province of a mere legal technician. Thus law, which is the keystone of the arch of public policy, is robbed of vitality and significance. Partly, this is the human foible of seeing the green pastures elsewhere, but partly it is the consequence of pedagogic failure which for three years drowns imagination in technique.

There are, of course, a few schools and a number of law teachers who have made an effort to look over departmental walls. We talk in torts about the distribution of economic risks, in trusts about the economic effect of limiting investment to "legals," in constitutional law about "the national market" or the beatitude of minimum wage laws. But these superficial doses are as dangerous as the proverbial short drink. Able law students are apt to emerge from this training with an alarming confidence in their ability to master any social science. They are jacks of all trades. They evince a genuine scorn for social science, feeling there is nothing they cannot learn in six weeks' time by talking to the experts and reading a few books. Their exceptional case-trained sophistication about the meaning of meaning leads them not only to contempt for social scientists whose use of words is less self-conscious but also to a habit of underrating ideas which are not authoritatively defined.

That this pervasive contempt may in large part be justified is immaterial. It is equally immaterial that a crop of young lawyers may be so able and industrious as to overcome remarkably their handicaps in training. The point is that training, which produces such attitudes, diminishes to some extent the potential ability of these lawyers to work understandingly and critically with what good people and materials there are in the social science fields. Moreover, these lawyers who, without theoretical orientation, rummage around in economics or political science or labor or city planning, run the danger of falling for the current plausible fad, unaware of the controversy in the field surrounding it. The lawyer may carry on the fad after the experts in the field have long abandoned it. Sometimes the lawyer takes an attitude designed to prevent such ensnarement: "It is all bunk. You can find experts on any side of a question; why look into it deeply? Nobody *knows* anything."

These are the dangers in the prevailing shy advances toward social science integration. There are dangers likewise in the traditional case-limited teaching, and this, too, sometimes produces a devastating contempt for the work of other social scientists. Moreover, the assumed incompetence of lawyers to act as responsible individuals is largely a convenient fiction; no one can be judgment-proof. The only solution, then, is to go forward towards the development of a conscious and sophisticated judgment based on the type of thoroughgoing work Professors Michael and Wechsler have exhibited in their chosen field. We must realize in the meantime, however, that failure on our part to take sides on social problems does not always rest on a venial ignorance of social data, or on the naive optimism that in the struggle of opposing counsel the issues will be clearly stated and the right will triumph. "Facts" never determine values. And so we cannot wait for the last word in social science before taking a position; such waiting often really springs from timidity or cynicism or the hypocrisy of "objectivity" — and these are not venial. For they leave a vacuum of good leadership in the community, and if daring and democratic leadership is not provided from within the educational system, destructive anti-democratic leadership is amply provided from without. It is the peculiarity of democratic teaching that while it presents positions candidly, it also asks for criticisms. A student may read the Michael and Wechsler chapter on Civil Liberties and conclude that they are a bad thing, that Sacco and Vanzetti were properly electrocuted, and that the maxim *nulla poena sine lege* is decadent or overcautious. But he cannot read the chapter carefully without knowing that the authors disagree with him and without having to consider as a problem what he may previously have unreflectingly assumed. Naivete and cynicism are the characteristic reactions of today's adolescents, and the law students who succumb to them in turn repeat the legal phylogeny that runs from the simple symmetries of analytical jurispru-

dence to the revolt from an emaciated logic of Freudian, Marxian, and mixed-breed determinists. Naivete unfits lawyers as practitioners; cynicism unfits them as democratic citizens. Michael and Wechsler are not only informed and critical; they are also ethically vigorous and mature. Their book is proof that the progressive elements in sociological jurisprudence and in legal realism have finally overcome the period of growing pains and can pass free and adult among men. As its pattern becomes a model for the organization of equally inclusive materials around similarly vital problems of social control, we may expect a major shift in teaching, and, consequently, an improvement in the character and competence of the bar.