

## On Cases, Casebooks, and the Real World of Criminal Justice: A Brief Response to Anders Walker

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This is the monster and the sleeping queen  
And both have roots struck deep in your own mind,  
This is reality that you have seen,  
This is reality that made you blind.<sup>1</sup>

My first reaction to Professor Walker's essay was one of amused horror. "Every year, thousands of law students graduate . . . thinking that they have been trained for criminal practice, when they have not."<sup>2</sup> I read that and thought: "Some whippersnapper is going to expose us at last! And now we will be forced by the Administration to teach our students the skills they really need to practice criminal law, namely fact investigation and negotiation, neither of which I know anything about."

Closer consideration shows that Professor Walker is making a point that is both less dramatic and less plausible. He thinks that by putting at least some emphasis on normative arguments and empirical evidence, modern criminal law casebooks have slighted doctrine, which he equates with cases. As a result, students are not prepared to practice criminal law when they finish the first-year course.

I think Professor Walker is off the mark, less about casebooks than about real-world criminal justice. Unlike private law subjects such as contracts and property law, American criminal law is not a field of appellate cases. Quite the contrary; our criminal justice system is in reality a field of administrative law, organized by statutes that vest very broad discretionary power in public officials, especially prosecutors.

Only a tiny fraction of criminal prosecutions result in trials, and only some fraction of those include disputed points of criminal law. If there is a conviction and an appeal, those points of law will turn less on distinguishing precedents than on interpreting statutory language. Precedents construing the same or like language have a place in the rhetoric of penal statutes, but so too do text, structure, purpose, and background principles like legality and responsibility.

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<sup>1</sup> STEPHEN VINCENT BENET, JOHN BROWN'S BODY 336 (Holt, Rinhard and Winston 1961) (1928).

<sup>2</sup> Anders Walker, *The Anti-Case Method: Herbert Weschler and the Political History of the Criminal Law Course*, 7 OHIO ST. J. CRIM. L. 217, 219 (2009).

Often enough, conventional argumentation can justify interpreting the statutory text in favor of either the government or the accused, and the judges then, either self-consciously or otherwise, will have reasons other than doctrine for their decisions. Far more important than discretion on appeal is discretion before trial.

The simplest course of criminal conduct (say, a teenage boy throws a brick through a store window and steals the merchandise), under modern codes, gives rise to a wide range of possible charges and penalties. The offender ordinarily would be prosecuted in juvenile court with a distinctly limited range of punishments; but there is discretion in the system to try him as an adult. And in the adult system the range of outcomes can be very wide indeed. The defendant might be charged with vandalism, theft, and quite possibly burglary. Perhaps more significantly, he might be charged with multiple counts of theft for removing different articles. He may have a record of similar offenses and be eligible for enhanced punishment under a recidivism statute. If he were armed at the time of the offense he might be subject to a different enhancement. He might have committed the offense while on conditional release, either awaiting disposition of a charge or on probation imposed following a prior conviction. The revocation of his conditional liberty may, or may not, be enough to satisfy the authorities.

The public prosecutor (in an urban felony case, usually an assistant state's attorney with some experience) decides how to characterize the offender's conduct in formal terms by deciding what charges to file. Counsel for the defense, however, will be communicating with the prosecutor, either before or after the charging decision. This, plus a sentencing hearing, simply *is* due process for the great majority of cases.

The lawyers will not try to persuade a judge or a jury, but they will try to persuade each other. The prosecutor needs a guilty plea just as the defense lawyer needs a reduction in liability. If some of the counts alleged by the prosecutor are arguably inconsistent with the statutory language as construed in the cases, defense counsel should certainly point that out (and likewise, when the prosecutor thinks a claimed defense is missing one element or another). These discussions are not, however, by any means limited to the law.

More common than potential legal weaknesses in a charge are potential factual weaknesses. There may be conflicting accounts by the witnesses, and prosecutors learn quite soon that the legal-eagle with a keen eye for statutory loopholes is a less formidable adversary than the squad-car chaser who has learned to obtain a continuance whenever the state's witnesses are present, and to insist on speedy trial at the first appearance when they are not. Whatever the nature of the proof problems facing the government, the defense lawyer will of course point these out.

Proof problems are a more common defense asset than statutory ambiguities, but even proof problems are less ubiquitous than purely discretionary choices about what charges of the many possible to select in a given case. The lawyers in plea bargaining do something very similar to what they do on appeal in a case where the legal issue could go either way. Defense counsel makes normative

arguments as to why the prosecutor should come down on the charges, and the prosecutor makes similar arguments as to why the defense should settle for the charges on the table. Those arguments will appeal to fairness or to consequences—those ancient and abstract ideas of retribution and utility that have cluttered and confused the casebooks since the days of Wechsler.

It turns out, then, that the most practical course of criminal law instruction is richly theorized too. *How* to teach the morality of punishment is a much harder question than *whether*. The book I am privileged to edit<sup>3</sup> was (very probably, as I have not read all of them) the most stodgily doctrinal on the market. I assumed the project after the deaths of Professor Rollin Perkins and Judge Ronald Boyce, and for better or worse the changes made in the ninth and tenth editions were mine alone.

I felt it necessary both to modernize the book and to retain its rigorous doctrinal character. I tried to achieve both objectives by making two choices directly at odds with Professor Walker's apparent views. The first of these was to deal with the philosophical issues raised by criminal law directly and initially, albeit via traditional legal materials. We get at the difference between retribution and utilitarianism by asking why we use criminal law rather than civil commitment for the bulk of the business of social control. And we get at the moral limits on punishment, such as legality, responsibility, equality, and proportionality by examining the Supreme Court's constitutional decisions enforcing, to some modest degree, those moral limits even against contrary judgments by elected legislatures.

The second decision was to emphasize actual statutes. Criminal law either never was, or has long since ceased to be, a body of principles given only superficially different expressions in different jurisdictions. The more realistic classroom question is not "How is the *Smith* case different from the *Jones* case?" but "How does the *Smith* case come out under the statute that governed in *Jones*?" The tenth edition carried forward this focus on the actual system by including a chapter on sentencing, a subject of the greatest importance to both the public and to defendants, and one that has witnessed more change than any other feature of the system over the last three decades.

All criminal law casebooks pay some attention to both doctrine and values. The differences are of degree rather than of kind. Given that practicing lawyers in all fields need to know enough criminal law to stay clear of it, and that lawyers, typically without criminal law experience, play such a prominent role in making criminal justice policy, I am not convinced that preparing students for the actual practice even ought to be our primary goal.

If that is to be our goal we will surely fail. Probably the single most important institutional fact a criminal lawyer can know is the size of the trial penalty—the going rate for pleading guilty. This is a far more elusive question than you might suppose, and it is also one that varies greatly from practice to practice. Like many

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<sup>3</sup> RONALD N. BOYCE ET AL., *CRIMINAL LAW AND PROCEDURE: CASES AND MATERIALS* (10th ed. 2007).

highly important institutional facts, however, it is both all we can do, and quite enough, if we impress on our students the existence of a trial penalty that will be their business to learn in practice.

Of the first year courses I suppose the one on civil procedure remains the least theoretical, but I would not say even the “A+” students at the end of even a six-hour course in civil practice are ready to become litigators. Indeed, the tricks and traps of every courthouse are a little different. The best criminal defense lawyer in New York City is not ready to represent a client facing charges in the Cook County, Illinois Circuit Court. If we enable our students to learn those tricks and traps no slower than anyone else, we will have done what we can to prepare them for practice.

Practice, however, can obscure moral and political issues that deserve at least some sustained consideration during any lawyer’s career. Stuffing the prisons with underclass young men who were tempted into the drug trade by a set of socially-constructed incentives is, of course, important work that can and should be done better rather than worse. We ought indeed to teach our students to do this work as well as it can be done. I do not believe, however, that our intellectual obligations end there.

I enjoyed, and learned much from, Professor Walker’s essay. He has earned the gratitude of all criminal law casebook editors, for two reasons. First, he has connected us with our own tradition, one we can easily lose touch with in the course of preparing successive editions. Second—and this is, perhaps, the most radical aspect of his essay—he has taken our project seriously, as a *bona fide* intellectual enterprise, rather than as a way for senior professors, bereft of any novel ideas that might make for good law review articles, to say something rather than nothing in our annual reports to the Dean (and, perhaps, to help pay for a new car or a recent divorce). His essay is forcefully correct in pointing out that casebook construction implicates controversial intellectual and pedagogical issues, whether those issues get resolved after, or without, reflection. I hope this brief response shows that for at least some (and I expect for most) of us, that reflection was long and serious.