



# DIGITAL ACCESS TO SCHOLARSHIP AT HARVARD

## Teaching Criminal Law

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*(Article begins on next page)*

# Teaching Criminal Law

Lloyd L. Weinreb\*

When I was preparing to teach my first class in Criminal Law at Harvard Law School in 1965, the choice of which casebook to use seemed obvious. Although it was still in its first edition, published in 1940, Jerome Michael and Herbert Wechsler's *Criminal Law and Its Administration*<sup>1</sup> was far and away the one that came closest to my barely formed, inchoate conception of a first-year course. And so, despite the evident need to add supplementary materials to bridge the twenty-five year gap, I adopted it. The supplementary materials burgeoned as my sense of what the course should include developed until, in 1968, a representative of the Foundation Press stopped in my office and, following the usual script, asked what I was working on. I told him that I was working on materials for a course in Criminal Law, and he promptly asked, "Can we publish them?" I had, in fact, no plans for their publication; I was intent on publishing a casebook on criminal procedure, which I was also teaching and for which there was no usable casebook at all. But the question prompted an affirmative answer—at least, "Why not?"—and in due course, my own casebook, now in its seventh edition,<sup>2</sup> followed.

Unlike most casebooks at the time, which really were books of cases, Michael and Wechsler's book contained an abundance of additional material: reports, essays, questions, problems, and, above all, representative legislation. The result was a very fat book of more than 1400 pages, which in some respects resembled a treatise. Although I was receptive to the variety and breadth of its contents, I did not perceive fully its intellectual and political agendas, which Professor Walker has well described.<sup>3</sup> It never occurred to teachers at that time (or shortly before, when I was still a student) to explain the intellectual premises of their pedagogy; as for promoting a political or social agenda, they would mostly have disclaimed any such intention. My reason for choosing Michael and Wechsler's book was simply

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<sup>1</sup> JEROME MICHAEL & HERBERT WECHSLER, *CRIMINAL LAW AND ITS ADMINISTRATION* (1940).

<sup>2</sup> LLOYD L. WEINREB, *CRIMINAL LAW: CASES, COMMENT, QUESTIONS* (7th ed. 2003). The first edition was published in 1969.

<sup>3</sup> See Anders Walker, *The Anti-Case Method: Herbert Wechsler and the Political History of the Criminal Law Course*, 7 OHIO ST. J. CRIM. L. 217 (2009).

that it was the most intelligent, thorough, and interesting approach to the subject that was available.<sup>4</sup>

Now, almost half a century later, I am still an admirer of the book, but the bookshelf on which it sits has changed considerably. The struggle to liberate criminal law and legal education generally from the case method and the jurisprudential philosophy that engendered it is long since over. No one would assert anymore that the only question of interest to aspiring lawyers is what the law is, which question is to be answered exclusively by an examination of cases. The legislative function is recognized unstintingly. And the relevance of empirical disciplines like psychology and sociology, as well as historical, philosophic, and economic insights, is not doubted. All of that would surely have happened eventually, without the appearance of Michael and Wechsler's book; the intellectual forces pushing in that direction are too strong to have been ignored. But its publication may fairly be regarded as a watershed moment. Thereafter, everything before was suspect and everything after was tested against a new standard.

Professor Walker makes much of the legal academy's disdain for the practice of criminal law when Michael and Wechsler wrote their book,<sup>5</sup> which, he suggests, made acceptance of their approach, oriented away from private practice toward governmental and, more particularly, legislative roles, easier. Although there certainly was disdain, I doubt that it had much to do with the abandonment of the case method in criminal law classes, as it was then practiced by Beale and others. Nor do I think it likely that law schools in the thirties "intentionally reconfigured their criminal law courses so that students would not become criminal lawyers."<sup>6</sup> There was no need. They would not have become criminal lawyers in any event. Then, as now, the number of students in a class on criminal law who subsequently take up the practice of criminal law is small. But so is the number of students in a class on antitrust law, bankruptcy law, or, for that matter, constitutional law, who subsequently practice in those areas. Michael and Wechsler both taught criminal law, and for aught that appears, they might have written a similar casebook on torts or contracts, had that been their subject. Wechsler did co-author another acclaimed

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<sup>4</sup> Looking again after many years at Michael and Wechsler's book for this essay, I was surprised to see how many cases that are in my casebook today I found originally there, among them: *United States v. Falcone*, 109 F.2d 579 (2d Cir. 1940), *aff'd* 311 U.S. 205 (1940) (conspiracy); *State v. Polzin*, 85 P.2d 1057 (Wash. 1939) (theft); *State v. Frazier*, 98 S.W.2d 707 (Mo. 1936) (homicide, causation); *People v. Caruso*, 159 N.E. 390 (N.Y. 1927) (murder); *People v. Rizzo*, 158 N.E. 888 (N.Y. 1927) (attempts); *People v. Beardsley*, 113 N.W. 1128 (Mich. 1907) (homicide, failure to act); *Wellar v. People*, 30 Mich. 16 (1874) (homicide, intention to injure); and some others. Each time I did a new edition, I found that those cases, despite their age, got closer to the heart of the matter than more recent cases.

<sup>5</sup> See Walker, *supra* note 3, at 217–19. Walker speculates that there may be a lesson there for the present, when calls are made for a more practice-friendly curriculum. *Id.* at 219–20.

<sup>6</sup> *Id.* at 217.

casebook, which displayed the same inquiring, undogmatic, nuanced approach as did his book with Michael.<sup>7</sup>

A law school's curriculum, caught between the sometimes opposed models of a professional school and an academy, is a complicated matter, on which schools tend to focus rarely, in the wake of some disturbing external event or an internal propulsion toward change, or, more rarely, as in this instance, an intellectual shift. Michael and Wechsler had a political agenda that had to do with a lawyer's proper practice, but I am inclined to believe that the intellectual shift from a view of the law as a hermetically sealed system derived from (self-evident or demonstrable?) first principles, to a view of law as a dynamic process grounded in the purposes and values of a community, had more to do with their program and its rapid acceptance, not only in criminal law but in the curriculum generally.

For all that, Michael and Wechsler's book has a curiously old-fashioned look today. In the introduction, the authors urged strongly that even in the study of actual cases, it was not necessary (in order to avoid "specious generalization about what the rules *are*"<sup>8</sup>) to apply the case method "anew and equally laboriously with respect to every topic."<sup>9</sup> Yet a comparison with more recent casebooks reveals how extensive their reliance on cases was, and how often they included rambling opinions of excessive length (presumably in order to foster the habits of case analysis). If the parallel inclusion of legislation called attention, as they intended, to "general normative ideas rather than specific legal rules,"<sup>10</sup> nevertheless, the raw material of the criminal law—the crimes and the people who commit them and suffer them—comes already refined in the paragraphs of an appellate opinion. There are no newspaper accounts, statements of those who were involved, or references to the broader social context.

My own casebook follows the lead of Michael and Wechsler in broadening the materials for study and pursues it further. Far fewer cases are set forth at length. Instead, the main cases are followed by extensive questions, problems, abbreviated case notes, and other materials, including nonlegal materials, of all kinds, which direct students' attention directly to the issues that a full discussion of the main case should provoke. Although the close study and analysis of cases—in almost every instance an appellate opinion—is an invaluable pedagogical tool, it is not the tool for every task. Its great virtue is that an opinion is typically an exemplar (good or bad) of the logic and method of the law: moving analogically from the decisions of past cases to the decision of another case with more or less similar facts. Asking a student to "state the case" not only sets the stage for discussion, but also, more substantially, it invites students to begin the process of

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<sup>7</sup> HENRY M. HART, JR. & HERBERT WECHSLER, *THE FEDERAL COURTS AND THE FEDERAL SYSTEM* (1953), now in its sixth edition, RICHARD H. FALLON, JR. ET AL., *HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM* (6th ed. 2009).

<sup>8</sup> MICHAEL & WECHSLER, *supra* note 1, at 3.

<sup>9</sup> *Id.*

<sup>10</sup> *Id.*

sorting the facts of the case into those that are relevant and those that are not, on which an apt analogy depends. (Students sometimes believe that the more inclusive their statement, the better it is, which is rarely so.) On the other hand, if one's object is not so much to apply a pre-existing rule but to determine what the rule ought to be, the inquiry must be different. For all the open-ended questions not only of means but also of ends are, in principle, on the table, and the answers are not cabined by past decisions. Teachers of generations past might have responded to such a statement that their concern, i.e., what ought to be their students' concern, was not at all what the law ought to be but only what the law is. Insistence that there was such a sharp distinction, which could be sharply maintained, followed from their devotion to the case method, but it betrayed a woeful misconception of the law.

If the extensive resort to legislative materials in Michael and Wechsler's book alleviated the heavy reliance on cases, nevertheless it tended to present the issues as the cases defined them, contained within prepackaged legal materials and, therefore, confined within a predetermined form and scope. To a considerable extent, more, I think, than Michael and Wechsler realized, the dependence on distinctly *legal* material subverted their effort to address directly questions of social policy and the fundamental normative issues, while at the same time supporting their confidence that a rational, normatively defensible criminal law was achievable. Current teaching materials in criminal law are still called "casebooks," but that description is more time-honored than accurate. Although I have probably extended the range of materials further than most of the current books, they all have expanded the range, one way or another, far beyond cases themselves.

In another respect also, I have followed the lead of Michael and Wechsler, which in this instance others have not generally followed. So far as seems practicable, I have treated material that is commonly referred to as the "general part" of criminal law in the context of specific crimes, mostly homicide. Matters like the nature of a criminal act or omission, intention, criminal negligence, causation, and justification and excuse are presented as they arise concretely rather than as abstractions. My reason for that may not be—indeed, I think is not—the reason that inspired it in their book. I am convinced that although one may refer for convenience to the law of conspiracy, attempts, insanity, and some other such topics, which attach themselves to various substantive offenses, as the "general part," and study those topics as applied in different contexts collectively, that approach is not helpful for study of the content of an act, omission, causation, and the like. The doctrines that go by those rubrics are not principles from which their application to particular crimes is deduced but rather generalizations composed of particular applications and "rationalized" by scholars and treatise writers. Too often, it seems to me, students are led to believe that *mens rea* is something other than or in addition to the state of mind that reduces an intentional homicide from murder to manslaughter or raises it from second-degree murder to first, or that *animus furandi* is something other than specific intent. Or they talk about an

attempt as if it were a distinct crime rather than shorthand for attempted robbery, attempted burglary, and so forth. Pedagogy imposes its own restraints, but I believe that so far as practicable, criminal law ought to be presented as it has developed historically and as it is currently practiced, rather than reworked as an intellectual artifact.<sup>11</sup>

One respect in which I parted from Michael and Wechsler's book is that it followed the usual practice at that time of appending a section on criminal procedure, for which there was generally not a separate course. A final chapter called "The Criminal Law and Civil Liberties" included a section on "Administrative Problems," with materials on Search and Seizure, Entrapment, Third Degree, Fair Trial, and Double Jeopardy. Bucking the trend, I included no such material in my casebook. Since I was then engaged in teaching a course called Criminal Process, which included all that material, and was preparing a separate casebook for that course,<sup>12</sup> the decision was easy. Although I incurred some criticism for keeping the two separate, that is now standard, as are separate courses in the substantive law and procedure.<sup>13</sup>

An innovation in my casebook that reflected nothing in Michael and Wechsler's book was the inclusion of cartoons illustrating some of the finer points of the law. In the first edition, there was only a series of cartoons illustrating various felony-murder scenarios, the point being to display how everything might be the same from one case to another, except the roles of the person who killed and the person who was killed (criminal, accomplice, victim, bystander, police officer), and to ask students how that factual variation affected, or ought to affect, the result. The cartoons were drawn by a student in one of my classes, whom I had observed doodling when the discussion dragged and some of whose work I had seen. In subsequent editions he and I added additional cartoons, of which there are now twenty-nine, for the fun of it, I providing the idea and he the illustration. I was confident that other authors would follow suit, but no one has.<sup>14</sup>

The disposition of the general part in my casebook reflects a conviction that law generally is built, and is better understood, from the "bottom-up" rather than from the "top-down." That, I believe, points to the largest difference between Michael and Wechsler's book and mine. The difference is jurisprudential rather

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<sup>11</sup> To be sure, some of law's artifacts may take on a life of their own and have to be studied as such. The "insanity defense" is probably an example. All the same, to attend only to that and disregard the method and material from which it was constructed is likely to communicate a false impression of conceptual clarity and order.

<sup>12</sup> LLOYD L. WEINREB, *CRIMINAL PROCESS: CASES, COMMENT, QUESTIONS* (7th ed. 2004).

<sup>13</sup> Harvard Law School, which retained a course including both substantive criminal law and constitutional criminal procedure (Fourth, Fifth, and Sixth Amendments) in the required curriculum (as well as separate courses in criminal procedure generally) longer than most, gave it up in 2008, a decision that I regret. I used different books for the two parts of the course.

<sup>14</sup> In forty years, except for one grumbling student who told me that criminal law is too serious a subject to be treated lightly, the reaction of students, at any rate, has been favorable. If nothing else, they tell me, the cartoons shorten the reading assignments.

than pedagogical, although, as one should expect, it has pedagogical consequences, and it is concerned specifically with criminal law and not with law in general.<sup>15</sup> To state the matter summarily, the Michael and Wechsler casebook is premised on the assumption that the criminal law is—or should be and could be—a product of reason, that it is possible to shape the law to achieve ends that commend themselves to reasonable persons, by means that are likewise rationally defensible. Michael and Wechsler did not suppose that either ends or means were uncontroversial, still less self-evident. But they believed that careful, conscientious reflection, unswayed by blinkered vision or special pleading, would lead to an outcome that reasonable people generally would—and should—regard as acceptable. The casebook was intended to set students on that path.<sup>16</sup>

I do not share that confidence in the power of reason. On the contrary, I believe that the proper aims of the criminal law do not fit easily together and that no amount of ratiocination will overcome their ill fit, which goes to the heart of the human condition. Although attention to ends and means may bring order to this or that corner of the law and is desirable on its own terms, the deepest puzzles defy resolution. The solutions that we adopt are inevitably a product not of reason but of experience ratified by convention.<sup>17</sup> The overriding pedagogical objective of a course in criminal law is to expose and explain this aspect of the law, and, at a further remove, to account for it, not in order to advance any narrowly professional agenda but simply so that persons embarking on the study and practice of law may understand one of its most prominent features.<sup>18</sup>

It was part and parcel of Michael and Wechsler's approach to the study of law that it be regarded as an instrument of social control, a rational instrument of governance: "[T]he criminal law, like the rest of the law, should serve the end of promoting the common good; and . . . its specific capacity for serving this end inheres in its power to prevent or control socially undesirable behavior."<sup>19</sup> Retribution, justice as desert, is rejected as "the ultimate end of the criminal law,"

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<sup>15</sup> A strong argument could be made that general considerations of justice, as discussed below, have a bearing on the correct outcome in civil cases as much as they do in criminal law. Although economic analysis contributes a great deal to our understanding of the law, the *strictly* economic analysis of tort law, for example, seems to me to be an abstract and unconvincing exercise appropriate more for the classroom than for practical application. Deep down, the same could be said, I believe, about, say, the law of contracts and the law of property. But classes in those subjects rarely go down that deep. Unlike considerations of retributive justice, which are immediately called in question in criminal law, considerations of distributive justice usually lie well below the surface and may not even be admitted as relevant.

<sup>16</sup> In an article discussing the project to draft a model penal code, Wechsler observed: "The law that carries such responsibilities [of a penal code] should surely be as rational and just as law can be." Herbert Wechsler, *The Challenge of a Model Penal Code*, 65 HARV. L. REV. 1097, 1098 (1952).

<sup>17</sup> The difference between Michael's and Wechsler's views and mine is hardly novel. It can be traced broadly to the difference between Platonic and Aristotelian epistemology.

<sup>18</sup> I believe strongly, however, that an accurate understanding has great value for someone who is engaged in the practice of criminal law.

<sup>19</sup> MICHAEL & WECHSLER, *supra* note 1, at 10.

and “does not constitute a valid criterion for the evaluation of particular legal provisions . . . . [N]o legal provision can be justified merely because it calls for the punishment of the morally guilty by penalties proportioned to their guilt, or criticised merely because it fails to do so.”<sup>20</sup>

Acknowledging that “[b]oth the lawmaker and his critic necessarily employ ethical and political ideas,” Michael and Wechsler asked “whether the ultimate propositions in ethics and politics, those which concern ends rather than means, can reasonably be asserted as anything more than a personal preference.”<sup>21</sup> Answering the question unequivocally, they said:

If . . . the ultimate propositions of ethics and politics can be asserted on some broader basis than personal preference, the reason must be that it is possible, *as we think it is*, to achieve some grasp of the fundamental and permanent in human desires in general, the specifically human in the capacities of men. This is the groundwork upon which ethical and political thought must build in the articulation of ultimate ends and the ordering of more immediate ends and means.<sup>22</sup>

That is to say, the rationalization of the criminal law is possible, but only according to the instrumental criteria of utilitarianism.

The same deep commitment to the rationalization of criminal law along utilitarian lines is evident in Wechsler’s grand project, the Model Penal Code,<sup>23</sup> as well as in his legal scholarship generally. Three years before the casebook was published, Michael and Wechsler had published *A Rationale of the Law of Homicide*, in which they sought to explain and elaborate longstanding doctrines of English and American criminal law along strictly instrumental lines.<sup>24</sup> When, in 1952, he became Chief Reporter for the American Law Institute’s effort to draft a penal code as a model for state legislatures, Wechsler pursued the same objective throughout the criminal law. Section 1.02 of the Code makes clear that its overriding purpose is the prevention of crime. The commentary to that section observes that “[t]he major goal [of the definition of conduct as criminal] is to forbid and prevent conduct that threatens substantial harm to individual or public interests and that at the same time is both unjustifiable and inexcusable,” and that the sentencing provisions are set “within the general framework of a preventive

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<sup>20</sup> *Id.* at 10–11. See also Wechsler, *supra* note 16, at 1103 (“[R]etributive objectives[] constitut[e] nothing more than vengeance in disguise.”).

<sup>21</sup> MICHAEL & WECHSLER, *supra* note 1, at 5.

<sup>22</sup> *Id.* (emphasis added).

<sup>23</sup> MODEL PENAL CODE (1985) [hereafter MPC].

<sup>24</sup> See generally Herbert Wechsler & Jerome Michael, *A Rationale of the Law of Homicide I* 37 COLUM. L. REV. 701 (1937); Herbert Wechsler & Jerome Michael, *A Rationale of the Law of Homicide II* 37 COLUM. L. REV. 1261 (1937). The purpose to prepare a code is already evident. See *id.* at 702.



scheme.”<sup>25</sup> Although few people would object to that comment by itself, the absence of any reference to the retributive notion of desert is striking. Throughout the Code, Wechsler’s determination to rationalize its provisions instrumentally and to perceive any trace of a retributive purpose through an instrumental lens is evident. The same concern for rationalization and the belief that it could be accomplished color also his best known (and most controversial) scholarly work, the essay *Toward Neutral Principles of Constitutional Law*.<sup>26</sup> A principle, obviously, was not “neutral” in the sense that it did not affect the outcome of a case, but rather because it was rationally justified and could, therefore, be explained and justified “neutrally,” that is, without drawing strength from unprovable and variable individual interests or preferences.<sup>27</sup>

Wechsler’s ambition for constitutional adjudication famously inspired a continuing debate, many constitutional scholars questioning whether the ambition is achievable or, indeed, desirable.<sup>28</sup> His ambition for a criminal code, put concretely to the test in the drafting of a Model Penal Code, is similarly uncertain. Studying its provisions, one may conclude that imperatives other than the rational pursuit of rational ends repeatedly proved too strong, and one way or another, the provision that results embraces a felt necessity the instrumental consequences of which are either unknown or unproved. So, for example, looking for a general principle to rationalize the distinction between murder and voluntary manslaughter under the common law, the Code provides:

Criminal homicide constitutes manslaughter when . . . a homicide which would otherwise be murder is committed under the influence of extreme mental or emotional disturbance for which there is reasonable explanation or excuse. The reasonableness of such explanation or excuse shall be determined from the viewpoint of a person in the actor’s situation under the circumstances as he believes them to be.<sup>29</sup>

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<sup>25</sup> MPC § 1.02 explanatory note at 3 (1985).

<sup>26</sup> See generally Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1 (1959).

<sup>27</sup> I revert . . . to the problem of criteria as it arises for both courts and critics—by which I mean criteria that can be framed and tested as an exercise of reason and not merely as an act of willfulness or will . . . . Those who perceive in law only the element of fiat, in whose conception of the legal cosmos reason has no meaning or no place, will not join gladly in the search for standards of the kind I have in mind . . . . So too must I anticipate dissent from those . . . who . . . make the test of virtue in interpretation whether its result in the immediate decision seems to hinder or advance the interests or the values they support.

*Id.* at 11.

<sup>28</sup> For a review of early objections to the “neutral principles” principle and a strong defense, see Kent Greenawalt, *The Enduring Significance of Neutral Principles*, 78 COLUM. L. REV. 982 (1978). For another general discussion twenty years on, see Barry Friedman, *Neutral Principles: A Retrospective*, 50 VAND. L. REV. 503 (1997).

<sup>29</sup> MPC § 210.3 (1985).

The commentary observes that the crux of this provision is the requirement that reasonableness be considered “‘from the viewpoint of a person in the actor’s situation,’” which requirement, it says, is “‘designedly ambiguous.”<sup>30</sup> The ambiguity contains within itself a hodgepodge of normative and instrumental considerations (stated in the commentary)<sup>31</sup> and, perforce, applies to a host of issues that arise regularly in such cases. Are there some kinds of explanation or excuse (e.g., mere words) that should be ruled out as unreasonable no matter what the circumstances? What is the significance of personal idiosyncrasies that exacerbate the “‘disturbance””? Does it matter whether the person who is killed is the source of the disturbance or is someone who is entirely innocent or, indeed, whether the source is some circumstance not connected with an individual person at all? Even in the standard case, in which the source of the provocation is the person who is killed, whether instrumental considerations call for a greater penalty than the penalty for an unprovoked killing (in order to counterbalance the provoked killer’s short fuse) or a lesser penalty (because the unprovoked killer’s instrumental calculation threatens to be repeated) is impossible to say. All that is clear is that, at least in some circumstances, having been provoked mitigates culpability.

The Code eliminates the doctrine of felony murder, long a subject of criticism.<sup>32</sup> In its place, it provides that there is a presumption that a killing is committed recklessly, with “‘extreme indifference to the value of human life,” which warrants a conviction of murder, if it is committed in the course of one of half a dozen serious felonies.<sup>33</sup> The commentary observes: “‘The result may not differ often under such a formulation from that which would be reached under some form of the felony-murder rule. But what is more important is that a conviction on this basis rests solidly upon principle.”<sup>34</sup> The only discernible principle is that of splitting the difference—murder if the underlying felony is serious, not murder if it is not serious—when the difference between intention and result is fortuitous. The difficulty in such cases is not that there is an instrumental justification for greater punishment if the underlying felony is serious—which would call for a greater penalty for the felony itself, not the fortuitous death—but that the fact of a death cries out for a commensurately severe response, whereas in

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<sup>30</sup> MODEL PENAL CODE AND COMMENTARIES § 210.3 cmt. 5 at 62 (Official Draft and Revised Commentaries 1980) [hereafter MPC COMMENTARIES]. The commentary adds: “‘In the end, the question is whether the actor’s loss of self-control can be understood in terms that arouse sympathy in the ordinary citizen.” *Id.* at 63.

<sup>31</sup> *Id.* at 62.

<sup>32</sup> MPC § 210.2.

<sup>33</sup> *Id.*

<sup>34</sup> MPC COMMENTARIES § 210.2 cmt. 6 at 39.

the absence of a death, the underlying felony does not.<sup>35</sup> The Code does not rationalize the common law's doctrine; it merely accommodates it.

The same treatment of fortuity is evident in the Code's provisions for criminal attempt, which require "a substantial step in a course of conduct planned to culminate in [the] commission of the crime," which is "strongly corroborative of the actor's criminal purpose."<sup>36</sup> If the latter criterion is met, almost any step, including some that would previously have been qualified merely as (noncriminal) "preparation," is sufficient. Considering only the instrumental arguments, the Code provides, furthermore, that the penalties for the attempt and the completed crime are the same.<sup>37</sup> Although, if it is assumed that from the actor's point of view the failure is fortuitous, the instrumental arguments for equivalence are convincing, that pattern proved to be too much for the drafters of the Code, who backtracked regarding the most serious felonies,<sup>38</sup> and for state legislatures, who have mostly not followed it.<sup>39</sup> In this instance, the result being (albeit fortuitously) less than the intention, the sense of justice dictates a lesser penalty.

Confronting the matter of fortuity directly in the provision regarding causation, the Code provides that causation is not established:

if the actual result is not within the purpose or the contemplation of the actor [and] . . . the actual result involves the same kind of injury or harm as that designed or contemplated and is not too remote or accidental in its occurrence to have a [just] bearing on the actor's liability or on the gravity of his offense.<sup>40</sup>

Whether the bracketed word "just" is included may not make much difference. What is significant is that the Code perforce departs from a strictly

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<sup>35</sup> I should go further and argue that in the face of a fortuitous calamity, there is a human impulse to assign blame, if it is possible, in order to restore order and fend off fear of a normatively indifferent universe. However threatening a human killer, for a great many people, the threat is less than the threat of random, unmotivated catastrophe. That was well illustrated after the assassination of President Kennedy. Many persons accepted the repeated conclusion of serious investigators that, however unlikely the occurrence, Oswald acted alone. Many other persons, in the face of the evidence, concluded that there was a conspiracy. (Having worked on the staff of the Warren Commission, I am in the former group.) See generally Lloyd L. Weinreb, *Desert, Punishment, and Criminal Responsibility*, 49 LAW & CONTEMP. PROBS. 47 (1986).

<sup>36</sup> MPC § 5.01(1)-(2).

<sup>37</sup> MPC § 5.05(1).

<sup>38</sup> See *id.*

<sup>39</sup> See Joshua Dressler, *Reassessing the Theoretical Underpinnings of Accomplice Liability: New Solutions to an Old Problem*, 37 HASTINGS L.J. 91, 100 n.44 (1985).

<sup>40</sup> MPC § 2.03(2)(b). The word "just" in brackets is in the text.

instrumental standard in favor of a felt necessity, the substance of which is altogether retributive.<sup>41</sup>

The source of the difficulty in each of these cases is not so much a matter of means or ends, about which a fair measure of agreement probably is attainable. It is rather an inability to reconcile the outcome that a strictly instrumental approach dictates and the outcome dictated by considerations of justice, which is according to the defendant's desert. There are intractable problems with the very notion of desert,<sup>42</sup> which is why Wechsler dismissed it as an indigestible ingredient in the stew. But the claim, "You deserve it," or the responsive claim, "I don't deserve it," is not so easily set aside. The utilitarian objective fails at the outset, pervasively, and not merely here and there, as a matter for debate.

It is important to add that the Model Penal Code itself is not at all a failure. On the contrary, it has been one of the outstanding accomplishments of the American Law Institute. Many states have adopted it in whole or in part, and most, if not all, states have relied on it when preparing revisions to their criminal code. Although the Code as such is the law nowhere, courts and scholars regard it as the best approximation of "American" criminal law.<sup>43</sup> It is unlikely that the Code would have been nearly so useful as a model if it had adhered strictly to Wechsler's utilitarian principles.

I doubt that Wechsler himself would have viewed the fruits of his labors in this way. His commitment to the rationalization not only of the law but of human experience altogether was too strong. If he had, would it have led him to revise his casebook accordingly? Probably not. More likely he would have said that we must proceed *as if* rationalization is possible; not to do so is to proceed in the dark, inevitably subject to the will of the stronger. In any case, the great difference between Michael and Wechsler's book and my casebook lies there. The principled reconciliation of opposed aims that they sought, which was a critical element of their legislative approach, is, I believe, unattainable. The profound puzzles of the criminal law do not betoken a flaw or accumulation of flaws that will, with further

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<sup>41</sup> One can, of course, assert that there is an instrumental justification for distinguishing cases according to a fortuitous result, on the basis that juries, under the sway of a felt necessity, will not otherwise follow the law. *E.g.*:

Distinctions of this sort are essential, at least when severe sanctions are involved, for it cannot be expected that jurors will lightly return verdicts leading to severe sentences in the absence of the resentment aroused by the infliction of serious injuries. Whatever abstract logic may suggest, a prudent legislator cannot disregard these facts in the enactment of a penal code.

MPC COMMENTARIES § 2.03 cmt. 1 at 257 (1985). Surely that rationalization is not more than saving the appearances.

<sup>42</sup> Some of the problems are discussed in Weinreb, *supra* note 35. *See generally* LLOYD L. WEINREB, *NATURAL LAW AND JUSTICE* 194–265 (1987).

<sup>43</sup> That is not true in every instance. The law of rape and related sexual offenses has changed dramatically since 1962, when the Code's provisions, MPC §§ 213.0–213.6, were promulgated in a "Proposed Official Draft." The provisions, which were not changed in the Official Draft, published in 1985, do not reflect current law.

deliberation and reflection, be rectified, but are inherent. They are concrete reflections of the great general conundrum of desert versus utility, which is itself responsive to the existential situation: individual responsibility in a causally determinate natural order. It is not necessary to rehearse here the well-known arguments in that debate.<sup>44</sup> Although neither side of the debate makes a convincing affirmative case, each has a sufficient argument against the other. The two positions are antinomic.

The various compromises that have been proposed serve only to illustrate the strength of the antinomy. Herbert Packer argued, for example, persuasively to many, that retribution, or desert, alone should determine whether a person is susceptible to punishment but that the extent of punishment should be measured along utilitarian lines.<sup>45</sup> But that suggests that punishment is indivisible and that desert operates like a sluice gate that, once opened, allows any amount of punishment at all. We all know, however, that punishment can be greater or less and that its extent is of crucial importance to the person who is punished and to ourselves. Does anyone believe, for example, that the distinctions among forms of homicide are all concerned only with the instrumentally appropriate response and otherwise have no bearing on what the punishment should be, provided only that the defendant deserves to be punished at all? Alternatively, it may be urged that the definition of conduct as criminal and how it is punished generally ought to be based on utilitarian considerations but that individual desert should determine the application and extent of punishment in a particular case. No such separation between the rules and their application is possible, however, for the rules are meaningless unless they are applied concretely.<sup>46</sup>

What then do I take to be the objective of a course in criminal law? Pedagogy has its own demands. Michael and Wechsler brought to an end the exclusive reliance on legal analysis of cases and substituted legislative materials because they thought that more students would eventually have a practical use for the latter in their professional lives than would be served by the former alone. Predictions of that kind can hardly be what dictates a curriculum. Students' professional paths vary in familiar patterns from one law school to another, but in few of them is the regular practice of criminal law a likely path for many students. An understanding of criminal law is part of a qualified lawyer's competence, not because, in any narrow sense, she or he necessarily uses it in practice but because their subject is the law, a significant part of which is criminal law. The justification for teaching criminal law, especially as a required course as it commonly is, is intellectual not professional. And the justification for including legislative materials in particular

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<sup>44</sup> I have discussed the arguments, in the context of criminal law, in Weinreb, *supra* note 35.

<sup>45</sup> See HERBERT L. PACKER, *THE LIMITS OF THE CRIMINAL SANCTION* 35-70 (1968).

<sup>46</sup> This approach evidently intends that utilitarian considerations determine only the kinds of conduct that are criminal and not the inculpatory or exculpatory effect of the actor's individual circumstances. But the latter are an integral part of the former and cannot be hived off from the rules and considered apart.

is not that many students will become legislators but that the criminal law is a purposive human activity and cannot be understood if that perspective is not taken into account.<sup>47</sup>

Professor Walker's retrospective view of the great Michael and Wechsler casebook reminds us that pedagogy counts, and is more than a sum of scores on a "popularity" meter. He locates the book's pathbreaking approach convincingly in the intellectual, political, and professional context of its time. Authors and users of casebooks would do well to evaluate books that they write and use from the same broad perspective. What of incoherence and antinomy? The short answer is that, within the limits of a curriculum and a classroom, one has to teach what he believes to be true. I see no value in presenting the criminal law "without its warts," as a monument to human will and reason. Students learn quickly to discredit such affirmations, in any case. Exposing the intractable problems and explaining or, if not explaining, accounting for their intractability may temporarily leave students uneasy and frustrated, although not as much, I believe, as unpersuasive assertions that the problems are not there.

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<sup>47</sup> Michael and Wechsler would not disagree. See MICHAEL & WECHSLER, *supra* note 1, at 1–2.