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## Teaching Criminal Law from a Critical Perspective

Angela P. Harris\* and Cynthia Lee\*\*

Professor Anders Walker has written a provocative and important article that raises two essentially contested questions in the legal academy: What are the appropriate goals of legal education, and what methods are best suited to those goals? His essay also prompted us, as authors of a current criminal law casebook, to think about the aims of our book and our teaching of criminal law in a new light. We offer some reflections on both these issues.

Walker argues that Herbert Wechsler and Jerome Michael's 1940 casebook, *Criminal Law And Its Administration: Cases, Statutes and Commentaries*, was important in at least two ways.<sup>1</sup> First, it represented a rebellion against the case-centered, doctrine-dominated teaching method represented by Christopher Columbus Langdell—a rebellion that successfully changed the way substantive criminal law was taught in law schools to this day. Second, Walker suggests the book was important because of the messages it transmitted, or was intended to transmit, about the value of practicing criminal law. Wechsler and Michael, Walker argues, were New Dealers and Progressives, interested in getting their students to think about changing the law, not just applying “old ideas to new facts,” and they were invested in the Legal Realist vision of law as grounded in social science, not a closed and insular system.<sup>2</sup> The book they wrote was not so much about the practice of criminal law as it was about law reform and sound policymaking; and in this way, the book was received by some as a welcome turn away from preparing students to be district attorneys and defense counsel. Walker cites as an example University of Texas law professor Wilfred Stumberg, who praised the book for its attention to “long range social considerations” and denigrated the actual practice of criminal law as perhaps below the capacities of the “ambitious law graduate.”<sup>3</sup>

What light does this history shed on present-day criminal law casebooks and the teaching and practice of criminal law? Walker suggests that today's students are not being adequately prepared to practice criminal law. He writes:

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

<sup>2</sup> 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).

<sup>3</sup> *Id.* at 230.

Every year, thousands of law students graduate thinking that they have studied criminal law using the case method, when they have not. Every year, the same law students graduate thinking that they have been trained for criminal practice, when they have not. At a time when law schools are confronting mounting pressure to increase the practical nature of their first year curricula, the history of criminal law might provide a clue into how certain courses became more theoretical, and whether this trend is worth reversing.<sup>4</sup>

Several assumptions in this argument should be identified and examined. First, Walker invokes the well-worn distinction between “theory” and “practice.” The idea is that practicing lawyers don’t need “theoretical” knowledge, since that is (by definition) useless; they need “practical” knowledge, like how to draft a motion to suppress. But the distinction—though familiar to every first-year student who wants his or her teachers to just teach “black-letter law” and leave “policy” alone—is as unhelpful as it is ubiquitous in conversations about legal pedagogy. For practicing lawyers and judges do not simply “apply” existing law to new facts in mechanical ways. They are also constantly in the business of pushing the law in new directions, or seeking to clarify doctrinal areas that have become hopelessly muddled by trying to move back to first principles. In order to make either of these sophisticated moves, practitioners have to understand the theory underlying existing doctrine, or else invent their own.

Kay Levine provides an example in a recent article about statutory rape in California.<sup>5</sup> Levine’s qualitative empirical work reveals that in the 1990s California prosecutors, flush with new funds to prosecute statutory rape cases, found it necessary to develop a theory of statutory rape that would allow them to decide which cases to prosecute and how to resolve particular cases.<sup>6</sup> They settled on the theory that statutory rape is a crime of exploitation, and they thus sought to fit statutory rape cases into one of two paradigms: (1) the “predator” cases, involving older men and younger women and no plans for marriage, and (2) the “peer” cases, involving partners close to the same age and long-range plans for intimate partnership.<sup>7</sup> Levine disagrees with this theory as a substantive matter, but the point is that the prosecutors needed to have one. “Theory” and “practice” are not opposed but rather points on a continuum.

Now perhaps what Walker is trying to say is that the purpose of the basic course in substantive criminal law is to produce students capable of representing

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<sup>4</sup> *Id.* at 219.

<sup>5</sup> Kay L. Levine, *The Intimacy Discount: Prosecutorial Discretion, Privacy, and Equality in the Statutory Rape Caseload*, 55 EMORY L.J. 691, 725 (2006) (“The constructions of intimacy and exploitation explained in the previous section help[ed] prosecutors to classify statutory rapes, and statutory rapists, on a theoretical level.”).

<sup>6</sup> *Id.* at 709–11.

<sup>7</sup> *Id.* at 715.

clients, and teaching students to think about what the law should be does not accomplish this. But even the most “practical” criminal law course could not produce students ready to practice criminal law. In many law schools, substantive criminal law is a first-year course. The reason why law school is three years long, however, is that one year of introductory courses is not sufficient to prepare students to practice. Moreover, a course in substantive criminal law can give students only one small piece of what they need to know as practitioners. In order to not commit legal malpractice, a student needs not only instruction in criminal law, but also instruction in criminal procedure, evidence, legal ethics, trial advocacy, and perhaps appellate advocacy. Indeed, a student aspiring to practice criminal law should get supervised experience representing actual clients, ideally in a clinical situation or a field placement. Finally, the well-prepared student might want to take more advanced criminal law courses, such as adjudicatory criminal procedure, white-collar crime, and/or federal criminal law. An increasing number of law schools offer these courses and opportunities; and in light of this broad curriculum it seems unnecessarily harsh to blame Wechsler and Michael’s casebook for failing to prepare students to practice criminal law.

Walker’s essay contains a second buried assumption: the assumption that to “practice” criminal law means only to be an assistant district attorney or public defender. Walker’s history shows that Wechsler and Michael had practice very much in mind. Their idea of practice, however, included legislative and administrative work. Legislators and agency officials, along with judges, may not practice criminal law full-time, but they certainly are essential players in the criminal justice system. Moreover, a majority of state and federal legislators and agency officials today are trained as lawyers for good reason. We live in an age of statutes and regulations, and in such an age it is important not only to be able to read judicial opinions and deduce rules from them, but also to be able to interpret, and draft, legislation and administrative rules. We might, in this light, add Legislation and Administrative Law to the skills toolkit for all practicing lawyers.<sup>8</sup>

A related point: Walker seems to assume that being exposed to the case method is the same as being prepared to practice law. But, as Walker himself acknowledges, American criminal law is now almost entirely codified, and many state penal codes have incorporated, to a greater or lesser extent, the Model Penal Code. Reading and interpreting judicial opinions is and remains an important skill for lawyers to have; but reading and interpreting statutes is equally important. Reading seven cases on the heat of passion doctrine in the classic Langdellian style will not prepare today’s students to make their way through the federal sentencing guidelines. Finally, some basic knowledge of “policy” is, we would contend,

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<sup>8</sup> We might also add Restorative Justice to the list. This is a course regularly offered at Berkeley, and many students taking that class intend to spend their careers developing alternatives to criminal punishment. In order to build an effective alternative, however, they need first to understand the workings of the existing criminal justice system, and the course in substantive criminal law is an essential element of that education.

necessary for the budding lawyer as well. An understanding of separation of powers, federalism, and institutional competence is necessary to understand and usefully contribute to debates over whether the Eighth Amendment's Cruel and Unusual Punishment Clause contains a bar on disproportionate punishments, and to what extent judges should permit defendants to raise the defense of necessity in "political" cases.

Although we disagree with the conclusions Walker seems to be drawing from his history, we do think that he has shed useful light on the contemporary teaching of criminal law, and indeed on our own casebook. Our casebook, *Criminal Law: Cases and Materials*, situates us squarely as granddaughters of Herbert Wechsler and Jerome Michael, as well as daughters of Sandy Kadish, who describes his aim in teaching criminal law as to produce "good, sensitive, aware, socially conscious" citizens.<sup>9</sup> Like the original Wechsler and Michael casebook, our book presents very few cases for each doctrinal point; like the Kadish book, we supplement these cases with commentary in the form of excerpts from law review articles, books, and other non-case materials. Our book is also heir to the Legal Realist legacy, but in a different way than Wechsler and Michael. The original Legal Realists were scathing critics of what they saw as transcendental nonsense in Langellian legal reasoning, but they also had a positive agenda of opening up legal studies to the burgeoning social sciences of the day, including psychology and economics.<sup>10</sup> Although Legal Realism as a coherent movement evaporated under accusations that their critical project was undermining patriotism as the Second World War approached (Pound's suggestion that the Wechsler and Michael book somehow supported "Stalinism"<sup>11</sup> is fascinating in this light), it left behind the seeds of at least two contemporary movements in legal scholarship. The positive part of its project branched, in the late twentieth century, into both law-and-economics and the law-and-society movement. From the critical part of its project emerged critical legal studies, alongside which shortly appeared feminist legal theory and critical race theory.

What is left of this legacy, surveying contemporary criminal law casebooks? We think Walker is right to suggest that the main residue of this history is the prominence of the Model Penal Code in contemporary casebooks on substantive criminal law. In its time, the Model Penal Code, as Walker suggests, encapsulated the aspirations of a generation of progressives who hoped to bring criminal law, and law generally, fully into the twentieth century by situating it within the social sciences.<sup>12</sup> Today, however, the significance of the Model Penal Code has

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<sup>9</sup> See Walker, *supra* note 2, at 247 (quoting Interview with Sanford H. Kadish, Alexander F. and May T. Morrison Professor of Law, Emeritus, Univ. of Cal., Berkeley, in Berkeley, Cal. (May 19, 2008)).

<sup>10</sup> Anthony Kronman, *Jurisprudential Responses to Legal Realism*, 73 CORNELL L.REV. 335, 336 (1988).

<sup>11</sup> See Walker, *supra* note 2, at n.120 and accompanying text.

<sup>12</sup> *Id.* at 236–37.

changed. Its usefulness in our casebook, for example, is still to challenge common law doctrine. In some areas, such as *mens rea*, it seduces our students with its promise of clear and unchanging definitions, but in other areas, such as sexual assault, it is beginning to look quite dusty and antiquated. More importantly, now that the Model Penal Code has been absorbed into the penal codes of many states, it is no longer a bold “policy” alternative to existing law, but simply a different model of existing law.

To this extent, the teaching of substantive criminal law today is perhaps much more conventional, much more based in teaching “what is” instead of “what ought to be,” than Walker’s history suggests. Some scholars, such as Dan Kahan, Neil Katyal, and Tracey Meares, have called for a new movement in criminal law pedagogy that would revive the Wechsler and Michael vision.<sup>13</sup> For Kahan, Katyal, and Meares, criminal law ought to be taught alongside new discoveries in behavioral economics and cognitive psychology.<sup>14</sup> They are right to observe, however, that most existing casebooks do not do this.

Our own casebook owes a debt to the other branch of Legal Realism’s family tree: the critical branch. The premise of our book is that substantive criminal law is an expressive enterprise: Legislatures pass criminal laws in large part to reflect their constituents’ moral outrage at certain kinds of behavior. Moreover, as an expressive enterprise, substantive criminal law is inevitably entwined with culture, and American culture is shot through with subordination on the bases of race, gender, sexuality, and class (to name the most obvious dimensions). Criminal law from this perspective is an exercise in distinguishing “us” from “them” and in using the state’s power to punish Them.

Even when subordination is not immediately in view, cultural traditions shape the norms that produce substantive criminal law. The distinction between “hot blooded” and “cold blooded” killings, for instance, is rooted in distinctions between reason and passion that are central to American culture, and Western culture more generally. The question of whether voluntary intoxication should exculpate is at heart a cultural question affected by recent changes in the social acceptability of drunk driving. The legitimacy of “stand your ground laws,” being enacted around the country to strengthen claims of self defense in public places, is entwined with American cultural values of self-reliance and honor. And discussions of “the cultural defense” for ethnic immigrants, we think, raise the question of which taken-for-granted doctrines within American criminal law are themselves homegrown “cultural defenses.”<sup>15</sup>

The theory of our casebook, and our pedagogical goals, clearly draw on Wechsler and Michael’s legacy. We want our students not just to learn what the law is, but to think critically about whether it should be the way it is, and if not,

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<sup>13</sup> Tracey L. Meares et al., *Updating the Study of Punishment*, 56 STAN. L. REV. 1171 (2004).

<sup>14</sup> *Id.*

<sup>15</sup> See Cynthia Lee, *Cultural Convergence: Interest Convergence Theory Meets the Cultural Defense*, 49 ARIZ. L. REV. 911 (2007).

how it ought to be changed. We draw freely on the Legal Realist tradition of getting students to see the contradictions between what judges say they are doing and what they are actually doing, and the degrees of freedom afforded by legal reasoning. We share our students' commitment to ideals of equality and the rule of law. We disagree with Walker, however, that these commitments interfere with the project of professional training; we think they enhance it.