

Criminal Law Textbooks and Human Betterment

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Anders Walker makes several fascinating observations about the contents of textbooks and how they relate to competing visions of what courses in substantive criminal law should seek to accomplish. He advances at least two theses. He states that “every year” (1) “thousands of law students graduate thinking that they have studied criminal law using the case method, when they have not”; and (2) “the same law students graduate thinking that they have been trained for criminal practice, when they have not.”¹

These theses require a bit of modification, for Walker is not really interested in what students *think*. He offers no empirical evidence, for example, that students are systematically misled. I suspect that many students are explicitly informed that their course in criminal law will not adequately prepare them for criminal practice, and they cannot help but notice that their textbook devotes less space to cases than their textbooks in torts, contracts or property. If I am mistaken, and surveys indicate that recent graduates have false beliefs about these matters, more candor would easily remedy their misconceptions. The fact that Walker does not recommend that we professors be more forthright suggests that he is not really worried about truth in advertising. Thus I will suppose that Walker’s theses are better construed to be about reality rather than belief. I will interpret him to contend that students (1) do not read enough cases in criminal law; and (2) are poorly prepared for careers in criminal practice.

Why do these two theses merit a special symposium in the *Ohio State Journal of Criminal Law*? I cannot imagine that many full-time criminal law faculty would dispute them. What I take to be valuable about Walker’s contribution is twofold. First, he offers a novel historical explanation of how these theses came to be true. According to Walker, Herbert Wechsler played a pivotal role in contributing to our predicament. Wechsler not only created the blueprint that most subsequent textbooks would follow, but did so with a conscious purpose. He de-emphasized cases and included more (non-case) materials precisely *because* he wanted to discourage criminal practice. Instead of training legal professionals, he hoped to lead students to appreciate the “integration of law and social science.”² Why would a law professor edit and adopt a textbook with the objective of steering students away from careers in penal practice? According to Walker, Wechsler “rejected the case method for political reasons.”³ He was distressed by the

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¹ Anders Walker, *The Anti-Case Method: Herbert Wechsler and the Political History of the Criminal Law Course*, 7 OHIO ST. J. CRIM. L. 217, 219 (2009).

² *Id.* at 233.

³ *Id.* at 245.

unwillingness of the United States Supreme Court to uphold New Deal legislation, and believed that their ideological resistance could eventually be overcome by training a new generation of lawyers to appreciate the potential of law to serve, in the words of Felix Frankfurter, as a tool of “human betterment.”⁴ Even his critics apparently shared Wechsler’s views about the ideological implications of the case method. Roscoe Pound, we are told, wanted to preserve the case method because he feared the rise of authoritarian Stalinism and worried about “creating statist attorneys who ignored private interests in favor of big government.”⁵ Walker’s political explanation of why criminal law textbooks came to include relatively few cases is interesting and provocative.

Second, Walker defends a controversial normative claim. He calls attention to what we all know about courses in criminal law in order to inquire “whether this trend is worth reversing.”⁶ In short, Walker clearly believes that something is amiss about the way most of us teach Criminal Law today. He rhetorically asks whether “law schools still view criminal practice to be undesirable,” and sympathizes with a recent recommendation of the Carnegie Foundation that “law school education return to an emphasis on legal practice.”⁷ Perhaps his most damning criticism is that “criminal law might be teaching students how not to think like lawyers.”⁸ Walker believes we *should* teach more cases and we *should* do more to prepare our students for criminal practice. His normative thesis is also important and worthy of extended discussion.

Before proceeding to my main reservations about Walker’s theses, I want to introduce an important qualification with which I think he would agree. I indicated that most *full-time* criminal law faculty would concur with Walker’s theses. We full-time faculty assign few cases and do little to prepare our students for careers in criminal practice. I suspect, however, that relatively few courses in Criminal Law are taught by full-time faculty. Although no respectable law school would fail to employ full-time faculty who are experts on the latest theoretical developments in other subjects, a surprising number of law schools do not retain full-time faculty who are knowledgeable about criminal law theory. Instead, adjuncts with ample experience in prosecution or defense frequently are hired to staff these courses. In my (admittedly limited) experience, many of these adjuncts are more likely than full-time faculty to share Walker’s normative views that textbooks are too theoretical and do a poor job of training persons to become lawyers. Wechsler’s objective of discouraging students from careers in criminal law would be undermined if large numbers of classes are taught by practitioners who share Walker’s apparent hostility to criminal theory.

⁴ *Id.* at 225.

⁵ *Id.* at 234.

⁶ *Id.* at 220.

⁷ *Id.* at 245.

⁸ *Id.* at 246.

Whether courses are led by full-timers or part-timers, the voice of the professor is curiously absent from Walker's analysis. After all, the content of textbooks is only one of several factors that influence what students will learn. Whether readings are used to develop a mastery of existing law or to instruct students in how law can be used "for human betterment" depends not only on *what* is assigned but also on *how* professors choose to discuss it. Students are bound to devote the most attention to the issues we expect them to understand for their final examinations. If we ask them to evaluate the strengths and weaknesses of retributive theories of punishment we will do less to directly prepare them for legal practice than if we ask them to assess whether Bernard Goetz's experience as the victim of a mugging was relevant to his plea of self-defense in his prosecution for attempted murder.⁹ The influence of the professor is most evident in what parts of the textbook will actually be assigned. Selectivity is inevitable since no one attempts to finish the entire textbook. Walker seems dismayed by the fact that an opening chapter of Kadish's leading textbook¹⁰ discusses "crime, morals and personal liberty" and does "not include a single case."¹¹ But the teacher's manual recommends skipping these materials in a one-semester course. Needless to say, virtually all required courses in substantive criminal law span only a single semester. Although I do not know what percentage of professors follow this advice, we should not assume that those who actually teach Criminal Law will cover those parts of textbooks that are most abstract and least relevant for penal practice.

In short, before we can say much that is definitive about what students are taught, we need to know more about who is teaching them and what they are expected to learn. The reluctance of many law schools to hire specialists in criminal theory deserves more attention in Walker's article (as well as more attention generally). Why is a specialty in criminal law theory devalued in the legal academy? I am not confident that I know the answer to this question. Perhaps law school hiring committees seek to bridge the chasm between criminal theory and practice by hiring teachers who are more knowledgeable about the latter than the former. Whatever the explanation, I simply mention that many students are taught by experienced practitioners and thus are likely to receive more advice about the realities of criminal practice than one would gather simply by examining the contents of leading textbooks and the motivations of those who edit them. I submit that a better methodology to discover what students actually are taught would begin by collecting data about the types of questions on their final examinations.

⁹ *People v. Goetz*, 497 N.E.2d 41 (N.Y. 1986).

¹⁰ In fact, the second chapter of the most recent textbook to which Walker refers now includes a handful of cases and is titled "The Justification of Punishment." See SANFORD H. KADISH, STEPHEN J. SCHULHOFER & CAROL S. STEIKER, *CRIMINAL LAW AND ITS PROCESSES: CASES AND MATERIALS* (8th ed. 2007).

¹¹ Walker, *supra* note 1, at 239.

But my main reservation about Walker's theses does not depend on who happens to be teaching courses in law schools. Instead, I propose to challenge his view about the *relation* between his two theses. Walker clearly believes that the historical transition from Langdellian casebooks to texts that include an abundance of non-case materials has helped to *cause* the regrettable failure to prepare students for careers in criminal practice. Thus he suggests that a restoration of the case method in criminal law pedagogy would do much to reverse the latter trend. Since we no longer should share an antipathy towards criminal practice, Walker prescribes a diet richer in cases. But is he correct? As we have seen, the two phenomena he identifies may have had a common cause; Wechsler was led to include more materials precisely *because* he hoped to discourage students from becoming practitioners. But even though Walker may be correct about the motivations of Wechsler himself, the fact that most textbooks include a high ratio of non-case materials to cases strikes me as largely unconnected to the fact that students are poorly trained for careers in penal practice. I will support my skepticism about the relation between these two theses by asking how we would be advised to change our pedagogy if we aim to prepare students for work in prosecution or defense. In my judgment, requiring students to read more cases and fewer materials would be far down the list of reforms that should be implemented by a school that was persuaded to follow the recommendations of the Carnegie Foundation.

Why should we believe that a return to the case method would better prepare students for careers as prosecutors or defense attorneys? Walker seems to assume that the study of cases is the best way to learn existing law, and a practicing lawyer cannot be effective unless he knows what the law is. Each assumption contains only a grain of truth. Teachers who aspire to ensure that their students learn the law as it is are not advised to adopt a textbook that includes more cases and less commentary. As we all know, the criminal law today is almost entirely statutory. Thus Joseph Beale's position that the law can be found, classified, and organized simply by reading reported cases is antiquated, at least in the criminal domain. It is noteworthy that the Carnegie Foundation itself faulted the case method as a cause of the lack of attention to practice.¹² Even if Beale were correct, students gain the skills learned through the case method in other courses; I see no reason why every class in the first-year curriculum should duplicate the same methodology and focus almost exclusively on cases. Moreover, I contend that a hornbook is superior to a casebook to help students understand existing law.¹³ I suspect that most professors supplement their required textbooks with a

¹² See WILLIAM M. SULLIVAN ET AL., *THE CARNEGIE FOUND., Summary of EDUCATING LAWYERS: PREPARATION FOR THE PROFESSION OF LAW* (2007), available at http://www.carnegiefoundation.org/files/elibrary/EducatingLawyers_summary.pdf.

¹³ Walker might have pondered why the market in the United States includes so few sophisticated hornbooks in criminal law. Dressler's *Understanding Criminal Law* is easily the best; Wayne LaFave's *Criminal Law* is second. JOSHUA DRESSLER, *UNDERSTANDING CRIMINAL LAW* (5th ed. 2009); WAYNE R. LAFAVE, *CRIMINAL LAW* (4th ed. 2003). The remaining hornbooks are a distant

hornbook, and many students spend as much time reading the latter as the former. If so, they learn more existing law in their courses than is covered in their textbooks.

But even a thorough knowledge of the law gained through cases and hornbooks would be only marginally effective in preparing students for careers in criminal law. The root of the problem is that the penal law itself is not very important in criminal practice.¹⁴ Instead, the daily work of the criminal lawyer is an exercise in what some commentators deride as *McJustice*.¹⁵ Overburdened prosecutors and impossibly overworked public defenders participate in the plea bargaining assembly line. No casebook or textbook that focuses on the law as it is can possibly assist aspiring practitioners to play an effective role in this travesty of justice. Coaching students to become more proficient at the bargaining table would do more to train them for criminal practice than imparting an encyclopedic knowledge of the substantive criminal law.

If I am largely correct about the irrelevance of law to contemporary criminal practice, what might be done to improve the situation? What reforms would allow us to dispense real justice rather than assembly-line justice? As many commentators have pointed out, our criminal justice system would collapse if fewer bargains were struck and cases were less likely to be resolved through guilty pleas. Perhaps criminologists and social scientists can call attention to the sorry state of criminal practice and propose a range of possible solutions. But any discussion of these alternatives in the classroom would only exacerbate the problem Walker has identified by requiring students to read more materials and, by default, fewer cases.

Conversely, why should we believe that the study of non-case materials is the more effective device to reveal the connections between law and social policy? These relations can be explored just as well by selecting appropriate cases. Consider, for example, the single case I imagine is read by a higher percentage of students than any in the criminal law canon: *R. v. Dudley and Stephens*.¹⁶ There is little point in assigning this case to discover what the law *is*. Whatever may have been true a century ago, cannibalism on lifeboats has thankfully become rare.¹⁷ I would be astonished to learn that class discussion about this case did not raise the following sorts of theoretical inquiries. *Should* these defendants have a defense for their deliberate killing? If not, why not? If so, what *kind* of a defense should they have? Are killings permitted in these exigent circumstances, in which case the

third. The corresponding market in the United Kingdom is generally of higher quality—another fact (if I am correct) that deserves more attention from persons interested in the teaching of criminal law.

¹⁴ See Douglas Husak, *Is the Criminal Law Important?*, 1 OHIO ST. J. CRIM. L. 261, 262 (2003).

¹⁵ See Erik Eckholm, *Citing Workload, Public Lawyers Reject New Cases*, N.Y. TIMES, Nov. 9, 2008, at A1.

¹⁶ [1884] 14 Q.B.D. 273.

¹⁷ See A.W. BRIAN SIMPSON, *CANNIBALISM AND THE COMMON LAW* ix, 271 (1984).

defendants are justified, or do we simply withhold blame from persons who perform wrongful acts under necessity, in which case the defendants are excused? Is the answer to this question important; does the distinction between justification and excuse matter? Why or why not? What interests would be served by punishing these defendants? *Can* such terrible acts be deterred, and is it desirable to try to do so? Are executive pardons an adequate remedy for situations in which the rigid application of legal rules produce injustice? Would a judgment of acquittal exceed the boundaries of the judicial role and impinge on the function of the legislature? Of course, this list could continue. My point is that cases can be used to examine the very kinds of abstract issues that Walker contends are raised more effectively by what he calls the anti-case method.

Obviously, *Dudley* is only one of countless cases that might be used to explore broad issues of social policy. Comparable illustrations could be multiplied indefinitely, although it is almost patronizing to do so. Here are three examples. Consider the decisions about whether to retain and how to restrict the felony-murder rule. Or the various cases about whether persons have a defense for the possession and distribution of drug paraphernalia when they dispense needles to heroin addicts. Or the cases about the circumstances under which deadly force may be used to stop fleeing felons. Clearly, the case method itself need not produce students who are “politically unresponsive.”¹⁸

If Walker wants to rewrite textbooks to better assist students in learning the body of law they are most likely to need for legal practice, he might have been more critical of what topics these texts actually canvass. Obviously, editorial judgment is needed to decide which crimes a casebook should include or exclude. By what criterion should such decisions be made? It seems reasonable to suppose that legal realities would furnish the dominant (but not the sole) criterion. In other words, statutes that are breached and enforced most frequently deserve a prominent place in books that help students learn the law. If teaching is geared toward practice, why focus on topics that practitioners are unlikely to confront?

By the foregoing criterion, all of the leading textbooks are dismal failures. Many include a chapter on theft, homicide, and (more recently) rape, but relatively few criminal lawyers will confront the latter two issues in their practice. By contrast, drug offenses have become the meat and potatoes of our criminal justice system. About thirty-five million arrests for drug offenses have occurred since 1980, with the latest figure over 1.84 million.¹⁹ Needless to say, these figures dwarf those for homicide or rape. Yet no leading textbook devotes a chapter to this important area of law, and some do not include a single case involving drugs.²⁰ Students who are remarkably adept in distinguishing voluntary from involuntary

¹⁸ Walker, *supra* note 1, at 227.

¹⁹ Bureau of Justice Statistics, U.S. Dep't of Justice, Drug Law Violations and Enforcement, <http://www.ojp.usdoj.gov/bjs/dcf/enforce.htm> (last visited Sept. 7, 2009).

²⁰ Yet another fascinating question is why this is so. One answer is that cases are assembled to teach students about the Model Penal Code, and drug offenses are not included there.

manslaughter are clueless (for example) about whether the law proscribes possession of a controlled substance in circumstances in which the defendant is uncertain about the nature of the substance possessed. If we professors want to prepare our students for careers in criminal practice, we would be well advised to change the topics our leading textbooks cover. Walker's solution of substituting more cases for non-case materials would do nothing to improve this situation unless the cases to be substituted examine topics that are more reflective of legal realities. As an added bonus, a chapter on drug offenses would not only prepare students for issues they are likely to confront in criminal practice, but also would invite the very sort of political and policy inquiries Wechsler hoped to stimulate. No statutory schemes enforced with such vigor have triggered more reasonable opposition from scholars and the public than the regime of drug proscriptions.²¹

What are our pedagogical objectives if we are aware that our courses do not prepare students for criminal practice? Most of us have a multiplicity of purposes, and I cannot speak for others. One of my aspirations, however, is to make a small contribution to legal literacy. I wince when I overhear licensed attorneys make comments about the criminal justice system that are no more informed than those of the general public. Laypersons often complain that we are too soft on crime and allow too many dangerous persons to escape punishment. Law school graduates should be able to correct these common misconceptions about our penal institutions. I have no doubt that my attitudes about the objectives of a course in criminal law are shaped by the fact that I have spent most of my professional career in a department of philosophy rather than on a faculty of law. Still, I make no apologies for the goals I try to achieve. Since few students will become prosecutors or defense attorneys, it makes little sense to focus solely on the skills needed for practice. *If* a course in criminal law continues to be required in the first-year curriculum, we have reason to examine issues that are not directly germane to practice.

Walker seemingly believes that the kind of course we teach does a great disservice to our students. As we have seen, he laments that "criminal law might be teaching students how not to think like lawyers."²² What exactly does he mean? I tend to favor the view that there is nothing very distinctive about how lawyers ought to think,²³ and Walker says little about why he apparently believes otherwise. He *does* indicate, however, that the non-case materials collected in textbooks are designed to "[get] students to think like legislators."²⁴ I am unsure why the thought processes of legislators should be fundamentally unlike those of lawyers. Good legislators must anticipate the problems criminal justice officials will confront in interpreting and applying the statutes they enact, and thus must think like lawyers in order to craft good legislation. Moreover, if law schools do

²¹ See, e.g., DOUGLAS N. HUSAK, *DRUGS AND RIGHTS* 51 (1992).

²² Walker, *supra* note 1, at 246.

²³ See LARRY ALEXANDER & EMILY SHERWIN, *DEMISTIFYING LEGAL REASONING* 3 (2008).

²⁴ Walker, *supra* note 1, at 240.

not train students to think like legislators, what discipline *will* do so? The topic is far too important to relegate to us philosophers.

I want to conclude on an ironic and pessimistic note. Criminal law strikes me as an odd choice in which to instruct students of law's potential to serve broad policy objectives. Almost any other course in the first-year curriculum—Constitutional Law in particular—would be more suitable to convey this message. Still, Wechsler undoubtedly attained his goal to “revolutionize law teaching.”²⁵ But how would he have assessed the effects of this revolution? Wechsler would have been thrilled at his own success in influencing legions of subsequent editors to include more materials and fewer cases in the textbooks assigned to students. Moreover, the practice of criminal law remains unpopular. But I suspect that Wechsler would have been devastated if his ambition in rewriting textbooks was to lead students to appreciate the potential of law to serve as a tool of human betterment. After all, the reason to help students to gain this appreciation is the expectation that they will *use* their knowledge to better humanity. I see little evidence that students have internalized this lesson, for the criminal law today is probably responsible for more injustice and misery than at the time Wechsler published his first textbook. The fact that a couple of generations of law students allegedly have been encouraged to think like legislators rather than lawyers has not reaped discernible benefits in the quality of penal legislation. In my judgment, states continue to respond to social problems through hastily enacted and poorly conceived *crimes du jour*. As a result, our prisons are bulging and our budgets are strained by the size of our criminal justice institutions. How can we reduce the number of penal laws that are enacted while improving their content? Legal philosophers might contribute by defending a minimalist theory of criminalization,²⁶ but comprehensive solutions remain elusive.²⁷ In any event, if the goal of adopting non-case materials is to improve the quality of lawmaking in the criminal arena, few sensible persons should conclude that the effort has been successful. Surely Walker is correct that we do a poor job of training lawyers. Unfortunately, Wechsler's dream to use the criminal law as a tool of human betterment remains unfulfilled.

²⁵ *Id.* at 219.

²⁶ DOUGLAS HUSAK, *OVERCRIMINALIZATION* (2008).

²⁷ Some commentators have recently defended aspects of the status quo that usually are criticized. See, for example, Darryl K. Brown, *Democracy and Decriminalization*, 86 TEXAS L. REV. 223 (2007) (arguing that criticism has been muted even though the criminal law in the United States has overcriminalized since colonial times); and Samuel W. Buell, *The Upside of Overbreadth*, 83 N.Y.U. L. REV. 1491 (2008) (arguing that broad penal statutes serve a number of important utilitarian functions).