

Toward a Just and Rational Body of Substantive Criminal Law

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When Sandy Kadish writes about “exquisite line drawings,”¹ what he has in mind is not the priceless pen-and-ink artistry of a Rembrandt but something that in its very different way is equally priceless and significant—the outlines and highly-refined inner pathways of the substantive criminal law. Often beautiful, often hazy, often more suggestive than blunt or explicit, often likely to project new meaning when viewed from different angles, the doctrines of substantive criminal law govern the relationship between the state and the individual at its most dramatically important and dangerous point of intersection—the point where formalized societal judgment and officially sanctioned force are brought to bear to deprive the individual of his liberty and perhaps even his life.

The law that serves this function must (no small order) be precise, fair, effective and easily administered. It must “articulat[e] the minimum conditions for the attribution of blame”;² it must insure that, at least usually, punishment will be imposed only when the individual is blameworthy; it must permit “differential judgments of blameworthiness,”³ so that the degree of punishment will always bear a reasonable relationship to the degree of fault; and it must be structured and expressed in a form that can be “administered practically to accomplish its purposes.”⁴ It must provide workable methods to make decisions even “when [we] lack the means to make reliable judgments of facts on which moral blame rests”;⁵ it must recognize that “[a]ministrability . . . is no minor consideration”;⁶ and it must assure that compromises made in the interest of administrability preserve the largest possible role for the “value of personal justice.”⁷

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¹ Sanford H. Kadish, *Why Substantive Criminal Law—A Dialogue*, 29 CLEV. ST. L. REV. 1, 14 (1980).

² *Id.* at 10 (alteration in original).

³ *Id.*

⁴ *Id.* at 11.

⁵ *Id.* at 12.

⁶ *Id.*

⁷ *Id.* at 13.

While busily engaged in a variety of other endeavors, Sandy Kadish has devoted much of his professional life to the enterprise of meeting this challenge, to making the criminal law as good as it can be. That he has done this with great rigor and success in scholarly writing on the criminal law's most challenging topics is too widely known to bear repetition here—except to note that the seven insightful, carefully wrought, wide-ranging essays that comprise this symposium, all inspired by Kadish scholarship, attest to the provocative and influential impact of Sandy's writing.

But even more significant, I think, has been Sandy Kadish's role as an educator. Indeed, for the criminal law community, and most particularly for me personally, he has been *The Educator*. My own experience as Sandy's "student" (in all but the literal sense) serves as a small window into the multitude of relationships he has maintained throughout the profession. Before burdening this introduction with the personal and the sentimental, however, I want first to be more precise about the educational role that has, I think, defined Sandy's tremendously valuable contribution to our field.

In describing Sandy as an educator, I do not mean the obvious—his service as President of the Association of American Law Schools, Dean of the law school at the University of California, Berkeley, and classroom teacher for more than fifty years (the entire second half of the twentieth century!).⁸ Instead, I have in mind a different kind of educational function: Sandy's devotion to nurturing, refining, and carrying forward the ideals that sustain what Sandy has called (in words we have borrowed for the title of this symposium) "respect [for] the importance of a just and rational body of substantive criminal law."⁹

Sandy's casebook (it is *Sandy's* casebook), first published in 1962,¹⁰ revolutionized the teaching of criminal law throughout the United States. It did so by an astute, then-unprecedented combination of qualities—conceptual clarity; doctrinal richness; practical relevance; philosophical, social, and psychological sophistication; pedagogically fruitful hypotheticals; and probing critique. In section after section, indeed all through the book, the goal was not to advance a particular doctrinal solution or policy agenda but to stimulate rigorous analysis and critical thought (to "get those grey cells working," as Sandy once said to me). More fundamentally still, its goal throughout was to nurture and transmit particular values, values that seem uncontroversial but that nonetheless are in constant jeopardy of being trivialized, marginalized or forgotten—neutrality, decent treatment of individuals, fairness in process, justice in results.

Serving a related objective, free of any "agenda" (beyond that of husbanding these core social and intellectual values), is the *Encyclopedia of Crime and Justice*,

⁸ Kadish began his teaching career in 1951 and "retired" forty years later in 1991; he continued to teach classes and seminars for more than ten years thereafter.

⁹ Kadish, *supra* note 1, at 15.

¹⁰ MONRAD G. PAULSEN & SANFORD H. KADISH, *CRIMINAL LAW AND ITS PROCESSES* (1962).

which Sandy helped launch as its editor-in-chief,¹¹ before passing that responsibility to the most capable hands of Joshua Dressler.¹² But I will not dwell on the *Encyclopedia*, because it is time to speak of other contributions, unpublished and intangible, but no less significant for that.

The role of mentor is ascribed so loosely and so often as to approach banality. It is rare for it to be realized fully in all its dimensions. Sandy's case is one of those rare exceptions, and in a way that has had indelible personal meaning for me. Our collaboration began in 1980, almost thirty years ago. At the time I was, hard as it is for me now to admit, virtually "unknown." I had visited for a year at Berkeley and had, I suppose, hit it off with Sandy, despite our very different temperaments. (He is relaxed.) At the time, his landmark criminal law casebook had already been in use for twenty years, and it held a commanding position in the field. Sandy asked me to work with him on its Fourth Edition.

I was honored, to say the least. I expected to gain some visibility for my own work in criminal law, and of course I was not disappointed. What I did not expect was the immense gratification and sheer *learning* that would come from working closely with someone who is at once so knowledgeable, precise, intellectually demanding, unshakeable (when he thinks he is right), and also gracious, perceptive, and flexible (when he needs to be and when he doesn't). Last year, as we completed work on the Eighth Edition, the fifth on which we have collaborated, Sandy was still the indefatigable teacher, working hard to bring greater clarity and fresh, twenty-first century material to his sections, scrutinizing the others for cogency and faithfulness to his original vision of the subject and the values on which it rests.

A casebook looms so large in the life of first-year students and their teachers that it was easy for me to make the mistake of seeing my collaboration with Sandy as the center of his mentorship enterprise. In fact it is but one example of many, and not the most important. A conference in his honor, held in 1999, brought together scholars who saw their work as profoundly shaped by Sandy's influence. There were seventeen of us, a group that spanned roughly three generations and included leading figures in jurisprudence, philosophy, and criminal law: Larry Alexander, Jules Coleman, Meir Dan-Cohen, Joshua Dressler, Claire Finkelstein, George Fletcher, Kent Greenawalt, Leo Katz, Douglas Husak, Christopher Kutz, Michael Moore, Herbert Morris, Stephen Morse, Paul Robinson, Samuel Scheffler, and Jeremy Waldron.¹³

The present issue of the *Ohio State Journal of Criminal Law* again celebrates and bears witness to Sandy's impact, including as it does several recidivists from

¹¹ ENCYCLOPEDIA OF CRIME AND JUSTICE (S. Kadish ed., 1983).

¹² ENCYCLOPEDIA OF CRIME AND JUSTICE (J. Dressler ed., 2d ed. 2002).

¹³ See *The Morality of the Criminal Law: A Symposium in Honor of Professor Sanford Kadish*, 88 CAL. L. REV. 685, 685-86 (2000). Professor Herbert Morris participated in the symposium (and joined in the group photo published in the *California Law Review*) but, unlike the others named above, he did not publish an article in that issue.

the Berkeley group, along with three distinguished additions: Peter Westen, a senior Professor of Law at Michigan; Andrew Ashworth, the Vinerian Professor of English Law at Oxford; and Kimberley Kessler Ferzan, a newly prominent scholar of philosophy and criminal law, whose work and whose participation confirms that the radiating influence and importance of Sandy's vision will continue for generations to come. Stephen Morse puts it best in his contribution here, observing correctly the affinity between Sandy and Sir James Fitzjames Stephen, each of them "a paragon of clear-minded common sense."¹⁴

With uncommon ease and graciousness, exceptional intellectual force and personal humility, Sandy continues to carry his own work forward and to project his values and commitments through his lasting impact on the work of so many others, all of us committed as he is to nurturing "respect [for] the importance of a just and rational body of substantive criminal law."¹⁵

¹⁴ Stephen J. Morse, *Thoroughly Modern: Sir James Fitzjames Stephen on Criminal Responsibility*, 5 OHIO ST. J. CRIM. L. 505, 522 (2008).

¹⁵ Kadish, *supra* note 1, at 15.