

Did Legal Realism Engage the Real World of Criminal Law?

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Professor Walker's provocative article strikingly retells the story of the Wechsler revolution in American law books, and its depiction of the larger scholarly significance of the change in textbook materials is quite convincing. Yet it reveals one big lacuna or, to change the metaphor, it has left out its back-story. Much of Walker's retelling rests on his notion that the pre-Wechsler, pure common law books were designed to help train young lawyers in the arts of regular criminal law practice, while, by contrast, Michael and Wechsler et al. set out quite deliberately to produce a new "'liberal arts' course, precisely so that law students would not become criminal lawyers."¹ Thus, Professor Walker piques our curiosity about the historical origins of a question that all of us who teach in the field deal with all the time: how does a first-year course in *substantive* criminal law address the needs or aspirations of students interested in practicing day-to-day criminal law? But I find Professor Walker's retelling insufficiently curious about how the common law educators thought they had addressed this question, and incomplete as to the degree to which the Wechslerites intended to reconfigure—or utterly jettison—this project. Thus, as impressively as Professor Walker's essay treats the larger intellectual goals of this transition in legal education, it leaves me wanting to know more about the mundane, but arguably pivotal, part of the transition—the part about practical pedagogy.

Professor Walker implies that in principle, proponents of the Joseph Henry Beale School of teaching and casebook editing wanted to train criminal lawyers every bit as much as they wanted to train corporate and wills-and-trusts lawyers, but that they actually were somewhat ambivalent about this goal.² On the one hand, Professor Walker leads us to think that some proponents of Bealism must have thought purer common law casebooks aimed at, and succeeded in, giving students the practical tools to engage in ground-level criminal litigation.³ But Walker also leads us to think that these pure common law educators recognized the low status of the criminal practitioner and may have indirectly endorsed that perception of low status by signaling that they wanted their students to enjoy the higher prestige of a practice with more savory clients.⁴ I am cautious in drawing

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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, 217 (2009).

² *Id.* at 226.

³ *Id.* at 224.

⁴ *Id.* at 231.

this inference, but the inference finds some support in Walker's second major premise, one on which he seems clearer: this is the point that the proponents of the new "impure" casebooks recognized the futility of enticing elite students to enter conventional criminal practice and opportunistically endorsed this disdain. Thus, the Wechslerites took advantage of the irrelevance of the Beale method as a means of practical training (and Wechsler himself of the actual disappearance of the criminal law course from the Columbia curriculum⁵) to push their non-common-law, reformist goals. Even here, Professor Walker is somewhat elusive, because, as I will note below, he does not clarify the nature of the Wechslerites' interest in the world of criminal practice. There are hints—but only hints—in Walker's discussion of Wechslerism that a major value of the new style casebook was its educational value for a new type of practitioner, namely, the "public" criminal lawyer.⁶ But, whether or not I am right in these interpretations of Professor Walker's essay, I believe that he has left us wanting more about the implications of his historical retelling for the relationship between the basic substantive criminal law course and legal practice. So let me elaborate my concerns here, and perhaps even fill the lacuna a bit.

I. BEFORE WECHSLER

Professor Walker suggests that the Bealist notion of parsing cases to understand legal doctrine served the perceived needs of the pre-New Deal lawyer. He also associates the Beale method with a *Lochner*-ite⁷ aversion to public policymaking as a legitimate goal of the courts, and a commitment to private ordering as a solution to economic and even social disputes.⁸ These two strands of Bealism are not necessarily contradictory, but their relationship merits some further consideration. Most obviously, criminal practice only clumsily fits the Langdellian vision of what lawyers need and what lawyers do, and in its *Lochner*-ism, the closed Langdellian system was committed to a principle of private ordering that hardly captures the ground-level world of criminal courts and jails. On the other hand, it may be that the Beale school believed that analytic training produced by exercises in inferring legal rules from cases would help any kind of law practice, even one that did not involve private ordering, because all legal practice depended on knowing the law and the rhetorical arts of common law advocacy. Or, perhaps if this question were put to them, the pure common law educators would have imagined the local criminal courts as a form of local dispute resolution that somewhat mimicked private ordering. By either of these reckonings, it may simply have been an independent fact, and a lamentable one to

⁵ *Id.* at 227.

⁶ *Id.* at 231–32.

⁷ *Lochner v. New York*, 198 U.S. 45 (1905).

⁸ Walker, *supra* note 1, at 224–25.

the common law educators, that criminal lawyers were not role models for Harvard or other elite students.

Thus, Professor Walker's implication that the Bealist educators were at least somewhat committed to the value of common law teaching as training for criminal lawyers leaves many things untold. And a look at some of the early commentators Professor Walker cites does help us imagine a direct link between the old case law method and practice by suggesting that fine parsing of doctrine and taxonomic classification of client behavior was a crucial skill for the criminal lawyer, especially as advocate. But neither Walker nor his early sources say anything about trial practice or investigation; instead, they somewhat carelessly elide appellate legal thinking and those lower realms, and thereby vaguely reinforce the idea that in some under-specified way, common law skills helped the lawyer serve client needs. In any event, as the implied story goes, the low status of criminal practice was just too powerful a force, so the first year substantive course became less and less relevant.

Two other angles are unexplored: first, Walker and some of his sources make only a few side references to criminal procedure, but perhaps this is because that area, at least as we now know it, had not been fully invented before the Warren Court, so the purveyors of Bealism did not consider the intrusively plausible notion that procedure was more closely tied to practice.⁹ No—it was substantive law or nothing (although one might imagine that the course in Evidence played a role here). Second, in Walker's discussion (and in those of the scholarly authorities he cites), prosecutors are hardly mentioned, so their role is a side-back story that itself needs some inquiry. Perhaps as public prosecutors emerged late in the Nineteenth Century they were just low-level government functionaries of no status at all, whereas defense lawyers were clearly low-rent figures because their clients were inherently unsavory and because their working context was the local courts and jails, rather than boardrooms.

Overall, Professor Walker is both strong and puzzlingly indirect in selling the point that the Bealist vision served practical training needs. Walker says that Beale himself thought the case method “a type of practical, active learning,”¹⁰ but despite that pragmatic emphasis, his reading of Beale never quite gets us to the technical skills that criminal lawyers daily use. To look farther for this connection, I revisited some of the commentary Professor Walker cites—with equivocal results.

One of those sources is Harlan Fiske Stone,¹¹ whom Walker implicitly views as an important transitional figure for criminal law, even though Stone's essay does not address criminal law specifically. Stone offered a high-minded, indeed Panglossian notion of how Langdellian education helped train lawyers, suggesting that Beale and Langdell provided “systematic training in the principles of common

⁹ See *infra* Part II.

¹⁰ Walker, *supra* note 1, at 223.

¹¹ Harlan F. Stone, *Some Phases of Legal Education in America*, 58 AM. L. REV. 747 (1924).

law.”¹² He lauded the modern (i.e., the Landgellian, university-based) law schools for attending to practical training needs by marrying by “rule-of-thumb acquaintance with settled legal rules and doctrines for the use of the practitioner” to a higher service to mankind, and supplying “a more profound knowledge of legal principles and their more perfect adjustment to social and economic needs.”¹³

Stone stressed the concept of “technique,” as if to suggest that the transition from old legal treatises to common law casebooks was a crucial development in practical lawyerly training,¹⁴ although he too left the connection between analytic technique and daily practice work unspecified. However, Stone also asserted that Landgellian education widened the social vision of lawyers by conceiving law as a larger science of social improvement looking beyond the needs of individual clients. He also noted the stirrings of further educational development as the social science disciplines began taking on a greater role in American jurisprudence. Stone is as vague as a commencement speaker in this apologia for the American law school, but since he writes in 1924, well before the Wechsler revolution, his essay offers the spiritually high-end version of the common law educational method, perhaps defensively anticipating the later Wechsler argument that practice training actually *disserved* greater social concerns.

Less high-mindedly, an early Felix Frankfurter essay offered some back-of-the-hand compliments to common law education as a source of practical skill development. In promoting a larger social vision for legal education, then-Professor Frankfurter suggested that private lawyers—perhaps including criminal defense lawyers—have been, ironically, all too good at what they did thanks to their common law training.¹⁵ That is, Langdellian education made them all too skillful as narrow-mindedly zealous advocates. Whatever the implications for professional ethics, Frankfurter indirectly, if sardonically, implies faith that the common law education method actually helped train lawyers—perhaps criminal as well as civil, business lawyers and other civil lawyers. But he leaves the mechanism as unspecified as do the other commentators.

Still less high-mindedly, another academic, George Stumberg, somewhat sarcastically credited pre-Wechsler legal education with helping criminal lawyers learn their practice arts.¹⁶ Half in detached observation, half in approval, Stumberg noted that criminal lawyers are viewed as “sharp-witted rather than learned” and that their undistinguished clients work in environments that relegate them to low professional status.¹⁷ Hence, he suggested that if law schools were trying to prepare and encourage students to enter criminal practice, they were failing. But

¹² *Id.* at 747.

¹³ *Id.* at 751.

¹⁴ *Id.* at 753.

¹⁵ See Felix Frankfurter, *The Law and the Law Schools*, 1 A.B.A. J. 532, 538–39 (1915).

¹⁶ See George Wilfred Stumberg, Book Review, 89 U. PA. L. REV. 1123 (1941) (reviewing JEROME MICHAEL & HERBERT WECHSLER, *CRIMINAL LAW AND ITS ADMINISTRATION* (1940)).

¹⁷ *Id.* at 1123.

Stumberg seems to think this failure curable, crediting common law education with the capacity to train for criminal practice:

Since the material which is contained in traditional criminal law casebooks consists almost entirely of decisions by appellate courts, the natural assumption would be that the purpose of a law school course in criminal law is to equip the student with the technical knowledge which is necessary for practice in this particular field.¹⁸

Stumberg's statement is emblematic of Professor Walker's sources, in both its clear acknowledgment that common law training aids the practitioner in the criminal law's daily rounds, and in its startling non-sequitur in leaping from appellate case study to ground-level advocacy.

One intriguingly more fertile view of the link between common law education and practice comes from Roscoe Pound.¹⁹ As Walker notes, Pound was writing in a somewhat delicate posture: he was praising an arguable reactionary casebook by Rollin Perkins, one committed to restoring the Bealist vision of common law education, but he hoped to portray the book in a somewhat progressive light. Walker suggests that Pound was just a bit dotty in insisting that Bealism was a bulwark against creeping Stalinism.²⁰ And if Pound had invoked the Stalinist specter because he associated New Deal regulatory progressivism with totalitarian social engineering, that would be dotty indeed. But a fuller look at the Pound essay Walker cites suggests that Pound believed that the analytic rigors of the common law method enabled criminal defense lawyers to engage in zealous and effective advocacy, and that advocacy served a laudable democratic goal of putting state power to the test of proof and due process.²¹ Moreover, and without evident condescension, Pound showed concern for the non-elite law schools' students who would lose the training resource of the old, pure common law if Wechslerism were adopted wholesale. Pound also valorized the common law of crimes as serving a crucial cultural role in helping set and reset the difficult balance of the conflicting principles of liberty and order. Indeed, Pound identified the source of the need for common law training in criminal law in particular, lamenting that for all the noble jurisprudence we inherited from Roman Law, Rome did not give us a reliable criminal jurisprudence.²²

The most explicit elaboration of this linkage came from David Riesman. Ironically, it came in his review of Michael and Wechsler, and in his praise of the older, pure case method as a having value for social science—the very goal of the

¹⁸ *Id.*

¹⁹ Roscoe Pound, *Introduction* to ROLLIN M. PERKINS, *CASES AND MATERIALS ON CRIMINAL LAW AND PROCEDURE*, at xiii–xix (1952).

²⁰ Walker, *supra* note 1, at 234.

²¹ Pound, *supra* note 19, at xviii–xix.

²² *Id.* at xvii.

Wechsler revolution.²³ Responding to the charge that the case method pre-digests the raw facts of cases, Riesman suggests that if aided by such resources as legal clinics and moot court work, the case method helps the trial lawyer develop an instinctive eye and ear for relevance. Further, he suggests that the dialectical skill for dissection of cases is useful to advocates, and even includes such ground-level skills as an ability to bluff and to predict and adjust to the expectations of what judges will do.²⁴

Mostly missing in Professor Walker's account is whether criminal *procedure* was part of the Bealists' plan to educate practical lawyers, or whether courses on criminal procedure mitigated whatever the perceived defects of the common law substantive criminal law course suffered as a training tool. Pound briefly alluded to procedure, suggesting, almost apologetically, that the common law method he indirectly valorizes in his Perkins introduction may not be able to help, but that into the breach had come the Federal Rules, as if we could not expect anything from case law on this score.²⁵ On the other hand, a very amusing E.W. Puttkammer essay²⁶ intriguingly alluded to at least one book that may have completed the Bealist project: the presumably not forgotten Mikell book on criminal procedure.²⁷ Puttkammer offered an amusingly wry, indeed cynical, take on how criminal practitioners have to deal with arbitrary and even absurd doctrinal distinctions to win their cases, and he found in Mikell's book the procedure equivalent to substance in terms of take-it-or-leave-it positive law. The Mikell book is a revealing example of pre-Warren Court criminal procedure common law, with cases drawn from what roughly can be called the customary procedural law of the various states, though this set of doctrines is not quite subject to the degree of classification that can be achieved with substantive criminal law. The Mikell book tracks many of the topics of a modern criminal procedure course (at least the "bail-to-jail" topics of indictment, joinder, verdict; it does examine the topic of arrest, but not for its Fourth or Fifth Amendment implications, as there were none at the time), but rather for its linkage to substantive criminal law.²⁸ This book alone merits some attention to discover whether it played any role in practical training.

So ultimately, Professor Walker leaves us wanting more knowledge about how the Bealist vision could harmonize its view of pure common law case learning with (a) its reverence²⁹ for the beauties and scientific clarity of the common law,

²³ David Riesman, Jr., *Law and Social Science: A Report on Michael and Wechsler's Classbook on Criminal Law and Administration*, 50 *YALE L.J.* 636, 653 (1941).

²⁴ *Id.* at 637.

²⁵ Pound, *supra* note 19, at xvi-xvii.

²⁶ E.W. Puttkammer, Book Review, 8 *U. CHI. L. REV.* 386 (1941) (reviewing JEROME MICHAEL & HERBERT WECHSLER, *CRIMINAL LAW AND ITS ADMINISTRATION* (1940)).

²⁷ WILLIAM E. MIKELL, *CASES ON CRIMINAL PROCEDURE: SELECTED FROM DECISIONS OF ENGLISH AND AMERICAN COURTS* (abr. ed. 1912).

²⁸ *Id.* at 32-35 (right to resist unlawful arrest as defense to homicide).

²⁹ Walker, *supra* note 1, at 223.

(b) its scientific commitment to positive law as the core of lawyerly learning, and (c) its implicit commitment to private ordering as a political and economic philosophy along with (d) its belief that the older case method was the best way to train lawyers for the daily grind of practice, and, possibly, (e) its (ambivalent) hope that criminal practice might be viewed as at least a modestly respectable, if not highly socially favored, way of making a lawyerly living.

II. WECHSLER AND AFTER

The second part of the story may seem clearer than the first. Professor Walker suggests that if the justification for a Bealist course in criminal law was to train for legal practice, it was costless for the (elite) academy to jettison it when another major value of substantive criminal law education arose. That becomes the basis of Walker's major story about the triumph of the new casebook, with its fewer cases, infusion of interdisciplinary expository materials, and new goal of encouraging policy-oriented thinking about the legal system and about the purpose of punishment. By this reckoning, Wechsler et al. virtually (whether or not intentionally) ensured that the newly conceived course would be useless to training, because they redesigned it as a liberal arts course.

Professor Walker suggests that one predicate for the New Deal reconception of the casebook was the state of the lawyer market, noting that job opportunities for private lawyers generally had dwindled.³⁰ However, the connection between unemployment for private lawyers and the economic situation for those who did criminal defense work is left unclear, along with the subtler question of whether Wechsler et al. were sympathetically aiming to find alternative careers for their students or were exploiting the situation for their own progressive intellectual and political ends.

Here is an important sentence from Professor Walker: "Not only did Wechsler and Michael reorient criminal law away from the practitioner, but they organized it in such a manner as to undermine the case method itself."³¹ I see a non sequitur here: Did Wechsler believe that the Langellians thought that reading pure cases would encourage criminal practice? Here is another statement: "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."³² Once again, Walker leaves unspecified what *both* sides of the historical divide thought was the practical connection between the case method and mundane lawyering skills. And as I will note at the end, this statement also leaves the reader curious about what Walker believes could now be the role of a substantive criminal law course in helping students become mundane criminal lawyers.

³⁰ *Id.* at 226.

³¹ *Id.* at 219.

³² *Id.*

Some of Professor Walker's sources suggest that Wechsler conceived a new role of the criminal lawyer as an actor in the New Deal progressive-regulatory project.³³ Frankfurter hints at this,³⁴ but this is most evident in Riesman's review. Riesman sketches out that role in modest detail, but with a curious focus on the private lawyer as "counsel to large power-units in society"³⁵—presumably the clients who must navigate the world of regulation that includes, but is hardly defined by, criminal liability.

All we know for sure is that the Bealist substantive criminal law course law course had failed, and that Wechsler filled the gap with a new course concept serving different purposes. Let me suggest and summarize the remaining mysteries by offering a litany of questions Professor Walker has inspired in me, as I wonder about untold strands of the story line.

Did Wechsler et al. themselves disdain conventional criminal practice? If so, why? Were the New Deal progressives social snobs who disdained the low-rent world of the criminal courthouse? Were they intellectual snobs who believed that the pure common law of crimes was shallower than that of the world of private law? Were they indifferent to criminal practice altogether because they disdained the zealous representation of individual clients and saw the lawyer's role rather as an engine of larger social causes? If the latter, did they simply take advantage of the exogenous social and economic forces that rendered criminal practice irrelevant to elite law schools, but realized that the nominal place in the curriculum for criminal law created an opportunity for a course in social policy planning? To what extent did they see the New Deal image of the lawyer as creating a new identity for criminal lawyers, as Riesman vaguely suggests: as defense lawyers for business leaders? As prosecutors? Only as federal prosecutors?

Did Wechsler et al. envision a new kind of criminal defense lawyer for the *poor* as cause lawyer? As he evaluates some of the Wechsler progeny among major casebooks, Professor Walker suggests that a major appeal of the Kadish casebook was its emphasis on civil rights cases.³⁶ He also notes that the Dix-Sharlot book offered the notion that alcohol crimes should be reconceived as disease conditions, thereby implying a social welfare role for the defense lawyer who could marshal the necessary arguments on this score.³⁷ To what extent did Michael and Wechsler et al. anticipate that associating criminal defense with civil

³³ Laura Kalman notes one now-forgotten casebook, with an interestingly ambiguous title, seemingly designed for just that purpose. See LAURA KALMAN, *LEGAL REALISM AT YALE, 1927-1960*, at 151 (1986) (citing GEORGE DESSON, *CRIMINAL LAW, ADMINISTRATION AND PUBLIC ORDER* (1948)).

³⁴ Walker, *supra* note 1, at 224-25.

³⁵ Riesman, *supra* note 23, at 638.

³⁶ Walker, *supra* note 1, at 241-42 (citing SANFORD H. KADISH & MONRAD G. PAULSEN, *CRIMINAL LAW AND ITS PROCESSES* 43-46 (2d ed. 1969)).

³⁷ Walker, *supra* note 1, at 243 (citing GEORGE E. DIX & M. MICHAEL SHARLOT, *CRIMINAL LAW: CASES AND MATERIALS* 148-59 (1973)).

rights would help create such a new identity?³⁸ We might credit them with great prescience had they indeed anticipated this, because criminal defense did indeed become a high-prestige (if low-pay) area of practice for elite law students once the linkage to civil rights occurred. But that linkage, of course, had much to do with the revival, or invention, of criminal procedure as a major part of the curriculum, and as the key academic instrument of education in the moral principles, if not the practical training, needed to launch criminal defense careers. If so, a major question becomes the extent to which the New Deal casebook writers coordinated their vision of the substantive course with the procedural course. A striking but inconclusive datum on this score is in Professor Walker's citation of Herbert Packer's laudatory review of the Kadish book.³⁹ That book originally contained a large section on procedure. But Packer speaks somewhat dismissively about this part, thinking it alien to the identity of the Kadish book and suggesting that it should be the subject of a separate, more advanced course or seminar. Perhaps Packer thought the procedure course crucial in training the criminal lawyer, and that this advanced course would be a sort of practicum, but Packer leaves unclear what role he believes the substantive law core of the Kadish book should play in that training.

III. CONCLUSION

Although I have described my key concern here as a back story to Professor Walker's main subject, the questions raised by his essay are central to the role of those who teach from any modern Wechslerite substantive criminal law book. Most of us recognize that even with the typical new interdisciplinary and expository materials in the casebooks, the course often disappoints students, who find it disconnected from the image of criminal law they have derived from more general reading or from the popular media. And it is not just a question of popular culture: several times since I began teaching this course I have met with very experienced criminal litigators who have been summoned as adjuncts, or appointed mid-career to law schools, and who have been asked to teach the substantive course, and they tend to say that the course and the casebooks seem quite disconnected from the vast body of legal knowledge that is their major credential as teachers.

The books may be less abstract and theoretical than they used to be, but they are still about the definition of crimes. Whereas in private law there is a transactional arena where substance plays an independent role for actual lawyers,

³⁸ Professor Walker notes Wechsler's interest in sentencing and rehabilitation as being a more important subject than the binary question whether the defendant's conduct was criminal or legal. Walker, *supra* note 1, at 232–33. Did that interest entail (should it have entailed) an interest in training defense lawyers to see the sentencing phase of the criminal trial as a new and important venue for practice skills?

³⁹ Herbert L. Packer, Book Review, 77 HARV. L. REV. 790 (1964) (reviewing MONRAD G. PAULSEN & SANFORD H. KADISH, CRIMINAL LAW AND ITS PROCESSES (1962)).

separate from litigation, criminal law practice is defined and conceived by most as almost entirely about ground-level litigation, where crime definition may be the least of the lawyers' problems on either side. As Professor Walker notes, a partial exception to the rough uniformity of modern casebooks is Paul Robinson's new innovation of working with crime scenarios and problem questions for the students.⁴⁰ That book is admirable and a creative alternative, but it is still about crime definition. Thus, Walker's reference to it makes one think that the type of book that would be a true practice-focused alternative, but which has little academic prestige, would consist of a compilation of investigatory and adjudication documents into a "story of a criminal case" volume of the sort that appears occasionally.⁴¹

Meanwhile, to the extent that we are concerned with teaching students about what criminal lawyers do, we can stress more technical lawyerly skills by addressing procedural topics that actually fit very well in a dominantly substantive appellate-focused course. These include the division of authority between trial and appellate courts, and the distinctions between questions of law and fact, and between problems arising as jury instructions or admission or exclusion of evidence. Or (and?) we can fall back on reminding students that before they practice any kind of law they still need common law analytic training for its own sake, and that substantive criminal law nicely complements torts, contracts, and property because it has a better mix of case and statutory materials—and far more compelling fact patterns. But, how we got to this set of professional concerns is an interesting question arguably rooted in the transition from Beale to Wechsler. I hope it does not sound euphemistic to credit Professor Walker for raising it.

⁴⁰ Walker, *supra* note 1, at 243–44 (citing PAUL H. ROBINSON, CRIMINAL LAW: CASE STUDIES AND CONTROVERSIES (2005)).

⁴¹ Walker, *supra* note 1, at 243–44.