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of the Criminal Law Course**

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Recovering the Hidden History of Criminal Law

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THE ANTI-CASE METHOD
RECOVERING THE HIDDEN HISTORY OF CRIMINAL LAW

ANDERS WALKER*

INTRODUCTION

Few areas of legal practice command more popular attention than criminal law.¹ Yet, the manner in which criminal law is taught in law schools has relatively little to do with preparing students for criminal practice. Beginning in the 1930s, law schools intentionally reconfigured their criminal law courses so that students would not become criminal lawyers. The “honors” of criminal law practice, it was believed, were “frequently on the dubious side,” not fitting for law students interested in a respectable career and a superior “social position.”²

The first law school to move away from training criminal lawyers was Columbia.³ Spurred by a sharp “decline in employment” at private law firms during the Great Depression, Columbia administrators modified their criminal law offering, hoping to use the class as a means of preparing students not for criminal practice but for the “phenomenal increase in

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¹ One need only reference a small sampling of the number of television shows dedicated to criminal law. *See, e.g., Law & Order, Law & Order Special Victims Unit, Boston Legal, Shark, and JAG*, to name a few.

² George W. Stumberg, Book Review, 89 U. PA. L. REV. 1123 (1941)(reviewing JEROME MICHAEL & HERBERT WECHSLER, *CRIMINAL LAW AND ITS ADMINISTRATION* (1940)); ARTHUR L. WOOD, *THE CRIMINAL LAWYER* 39-40 (1967).

³ JULIUS GOEBEL, JR., *A HISTORY OF THE SCHOOL OF LAW: COLUMBIA UNIVERSITY* 325 (1955).

governmental functions,” and rapidly increasing “demand for competent lawyers” in Franklin Delano Roosevelt’s New Deal.⁴

Though the New Deal ended in 1939, the casebook that came out of Columbia’s criminal law course went on to revolutionize criminal law teaching in the United States. Co-authored by Columbia Law Professors Herbert Wechsler and Jerome Michael, *Criminal Law and its Administration* became the first law school casebook to successfully synthesize social science materials with cases, inspiring a generation of criminal law teachers to organize their courses along similar lines.⁵ Sanford H. Kadish, to take just one influential example, modeled his 1962 *Criminal Law & Its Processes* after Wechsler, spawning a wave of similar texts in the 1960s and 1970s.⁶ As late as May 2008, Kadish – remaining

⁴ GOEBEL, *supra* note 3, at 325. A similar phenomenon happened at Yale. See LAURA KALMAN, LEGAL REALISM AT YALE, 1927-1960, 182 (1986) [hereinafter KALMAN, REALISM].

⁵ According to Laura Kalman, Wechsler and Michael’s *Criminal Law and Its Administration* was the first casebook that successfully “integrated law with the social sciences.” KALMAN, REALISM, *supra* note 4, at 90. Earlier attempts had been made by Albert Jacobs, Karl Llewellyn, William O. Douglas, and Felix Frankfurter but, according to Kalman, they did not stray far from the Langdellian model. *Id.* at 78-79, 85-86, 88. Jerome Michael and Herbert Wechsler completed the first unpublished version of their casebook for the private use of Columbia University law students in 1935. See Jerome Michael & Herbert Wechsler, Cases and Materials in Criminal Law and Its Administration (1935) (unpublished manuscript on file with the Arthur W. Diamond Law Library, Columbia University). The formal casebook was published in 1940. HERBERT WECHSLER AND JEROME MICHAEL, CRIMINAL LAW AND ITS ADMINISTRATION: CASES, STATUTES, COMMENTARIES (1940) [hereinafter MICHAEL & WECHSLER, CRIMINAL LAW].

⁶ Interview with Sanford H. Kadish, Alexander F. and May T. Morrison Professor of Law, Emeritus, University of California, Berkeley, in Berkeley, California (May 19, 2008) (on file with the author). Monrad Paulsen and Sanford Kadish credited Wechsler directly in their 1962 casebook: MONRAD G. PAULSEN AND SANFORD H. KADISH, CRIMINAL LAW AND ITS PROCESSES: CASES AND MATERIALS (1st ed. 1962). Kadish, Schulhofer, and Steiker still cite to Wechsler in what is now the 8th edition of the casebook, SANFORD H. KADISH, STEPHEN J. SCHULHOFER, CAROL S. STEIKER, CRIMINAL LAW AND ITS PROCESSES (8th ed. 2007). Joshua Dressler credits Wechsler through Kadish. See JOSHUA DRESSLER, CASES AND MATERIALS ON CRIMINAL LAW (4th ed. 2004). Other casebooks that follow the Wechsler and Michael approach include CYNTHIA LEE & ANGELA HARRIS, CRIMINAL LAW: CASES AND MATERIALS (2005); MARKUS D. DUBBER & MARK G. KELMAN, AMERICAN CRIMINAL LAW: CASES, STATUTES, COMMENTS (2005); PAUL H. ROBINSON, CRIMINAL LAW: CASE STUDIES AND CONTROVERSIES (2005); JOHN KAPLAN, ROBERT WEISBERG, GUYORA BINDER, CRIMINAL LAW: CASES AND MATERIALS (5th ed. 2004); RICHARD J. BONNIE, ANNE M. COUGHLIN, JOHN C. JEFFRIES, JR. & PETER W. LOW, CRIMINAL LAW (2nd ed. 2004); LLOYD L. WEINREB, CRIMINAL LAW: CASES, COMMENTS, QUESTIONS (7th ed. 2003); GEORGE E. DIX AND M. MICHAEL SHARLOT, CRIMINAL LAW: CASES AND MATERIALS (5th ed., 2002); WAYNE R. LAFAYE, MODERN CRIMINAL LAW: CASES, COMMENTS AND QUESTIONS (3rd ed. 2001). Even Rollin Perkins has conceded “the modern dominance of statutes,” and included extensive notes with editorial comments and citations to law reviews, see RONALD N. BOYCE, DONALD A. DRIPPS AND ROLLIN M. PERKINS, CRIMINAL LAW AND PROCEDURE (9th ed. 2004).

true to Wechsler's vision – asserted that his book, even in its eighth edition, was not designed for “training legal practitioners.”⁷

Taking the Depression-Era beginnings of criminal law at Columbia as a starting point, this article takes a closer look at the history of the criminal law course, using previously unexamined primary sources to illustrate that the class is animated by a doubly subversive aim. 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. Convinced that the Langdellian method had contributed to the Supreme Court's destruction of early New Deal programs by fostering a view of the law as a “closed-system,” Michael and Wechsler hoped to disrupt Langdell's legacy and open students' eyes to law's interrelationship with society, revolutionizing law teaching in the process.⁸ Whereas Langdell's disciples simply had students read cases, for example, Wechsler and Michael substituted cases for outside materials and editorial comments, including normative questions like whether certain offenses were “objectionable,” whether it was ever “justifiable” to kill a nonviolent offenders, and whether European codes were more “wise” than American ones.⁹

That Wechsler and Michael sought to revolutionize law teaching by making criminal law a vehicle for challenging the case method is not a subject that legal historians have explored.¹⁰ Yet, its implications are potentially profound. 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.¹¹

⁷ Interview by Norman Silber and Geoffrey Miller with Herbert Wechsler, Professor, Columbia University School of Law, in New York City, N.Y. (August 11, 1978; February 23, 1979; March 12 & 13, 1982), [hereinafter Wechsler, Interview]

⁸ *Id.*

⁹ MICHAEL & WECHSLER, CRIMINAL LAW, *supra* note 5, at 145, 201, 224. For descriptions of Langdell's method, see KALMAN, REALISM, *supra* note 5, at 1-26; Howard Schweber, *Before Langdell: The Roots of American Legal Science* in THE HISTORY OF LEGAL EDUCATION IN THE UNITED STATES: COMMENTARIES AND PRIMARY SOURCES, VOL. II 613, 632 (Steve Sheppard, ed., 1999).

¹⁰ In one of the most careful studies of legal education in the United States to date, Laura Kalman concludes that Langdell's “method” remained dominant despite the rise of legal realism. KALMAN, REALISM, *supra* note 4, at 229.

¹¹ WILLIAM M. SULLIVAN, ET AL., CARNEGIE FOUNDATION FOR THE ADVANCEMENT OF TEACHING, EDUCATING LAWYERS: PREPARATION FOR THE PROFESSION OF LAW (2007). Reassessments of first year curricula did not begin with the Carnegie Report. *See e.g.* Jonathan D. Glater, *Harvard Law Decides to Steep Students in 21st Century Issues*, N.Y. TIMES, Oct. 7, 2006. The report has appeared to fuel the debate, however, over whether the first year should be modified. *See e.g.* Dean Claudio Grossman, Address at the Innovations in the First Year Curriculum Conference, American University's Washington

Further, recovering the hidden history of criminal law might enable us to better assess the status of the case method generally in American legal education. For example, even a cursory comparison of the average Twenty-First Century criminal law casebook with Joseph Henry Beale's 1894 text suggests that Langdell's method, at least in the criminal law context, is dead. Though modern casebooks appear to focus on cases, few use more than two cases to illustrate a legal point, few require that students be able to distinguish between more than three cases, and none create the impression that learning legal rules from briefing cases is sufficient for mastering criminal law.¹² Instead, criminal law casebooks push students to consider the philosophical, social, and moral implications of criminalization, punishment, and crime itself, transforming the class into what Sanford Kadish has called "almost liberal arts."¹³

To further illustrate the pedagogical and political ramifications of Michael and Wechsler's innovation in the criminal law course, this article will proceed in four parts. Part I will return to the Langdellian case method, showing how Harvard Professor and Langdell protégé Joseph Henry Beale utilized the method in his popular 1894 criminal law casebook. Part II will show how Herbert Wechsler and Jerome Michael reacted to "Bealeism" by reinventing the criminal law course in the 1930s.¹⁴ Part III will discuss initial responses to Wechsler and Michael's approach, showing how scholars suspicious of criminal practitioners embraced it. Part IV will trace the dramatic rise of the Wechslerian method in American law schools from the 1940s through the 1990s, showing how Michael and Wechsler's tendency to de-emphasize cases led to a new kind of casebook that transformed criminal law.

I. JOSEPH HENRY BEALE AND THE CRIMINAL LAW CASE METHOD

In 1894, a young law professor named Joseph Henry Beale, Jr. assembled a textbook that covered the core subjects of criminal law by referring almost entirely to cases.¹⁵ To those who knew the author, a professor at Harvard Law School, this was no surprise.¹⁶ Beale was a

College of Law (March 21, 2008); Katharine Mangan, "A Plea for Real-World Training in Law Schools," *CHRON. OF HIGHER ED.*, Jan. 19, 2007.

¹² *See supra* note 6.

¹³ Kadish, Interview, *supra* note 6.

¹⁴ Jerome Frank coined the term "Bealism." *See* JEROME FRANK, *LAW AND THE MODERN MIND* 55 (1930).

¹⁵ JOSEPH HENRY BEALE, JR. *A SELECTION OF CASES AND OTHER AUTHORITIES UPON CRIMINAL LAW* (1894) [hereinafter *BEALE, CASES*]. For Beale's dominance in the early years of the Twentieth Century, see E.W. Puttkammer, Book Review, 8. *U. CHI. L. REV.* 386 (1941) (reviewing JEROME MICHAEL & HERBERT WECHSLER, *CRIMINAL LAW & ITS ADMINISTRATION* (1940)).

¹⁶ WILLIAM P. LAPIANA, *LOGIC AND EXPERIENCE: THE ORIGIN OF MODERN AMERICAN LEGAL EDUCATION* 92-99 (1994).

“theologian of the law” who had never worked as a lawyer but was deeply influenced by Christopher Columbus Langdell’s theory that legal principles could be found, classified, and organized simply by reading reported cases.¹⁷

In his preface, Beale made it clear that the cases he had selected were “chiefly intended for the use of classes in schools,” and that in order for students to “get the benefit” of studying them it was necessary to “omit” either commentary or head notes.¹⁸ Instead, Beale made his students sift through relatively large numbers of cases from different jurisdictions to distill, as best they could, basic criminal law principles.¹⁹ He divided his casebook into twenty-two chapters, the first eleven covering what might be considered the general part of the criminal law, “the criminal act,” the “criminal intent,” “justification,” as well as procedural considerations like “the indictment,” “former conviction or acquittal,” and “criminal procedure.”²⁰ The last eleven chapters, conversely, included specific offenses like larceny, embezzlement, false pretences, conspiracy, and nuisance.²¹

For each topic, no matter whether general or specific, Beale included anywhere from six to nine cases. To take just one example, he covered the specific offense of voluntary manslaughter by assigning eight cases and nothing else. The first case, drawn from England, held that words alone could not constitute provocation but, if words led to combat “betwixt two upon a sudden heat,” then any ensuing death could be charged as manslaughter.²² In the next case, a defendant was impressed into “the Majesty’s service” without a valid warrant, leading several men to come to his rescue, killing a police officer in the process.²³ Reluctant to offer “encouragement” to “private men to take upon themselves to be the assertors of other men’s liberties” the Court held that the killing was murder, not manslaughter.²⁴ In the remaining six cases, all drawn from English courts, students were required to actively consider different applications of the principle of provocation, all arising from slightly different factual scenarios, including throwing a pickpocket into an

¹⁷ *Id.* Felix Frankfurter referred to Beale, one of his old professors, as a “theologian of the law.” Felix Frankfurter, *Joseph Henry Beale*, 56 Harv. L. Rev. 701, 702 (1943). See also STEPHEN M. FELDMAN, AMERICAN LEGAL THOUGHT FROM PREMODERNISM TO POSTMODERNISM: AN INTELLECTUAL VOYAGE 92-96 (2000).

¹⁸ BEALE, CASES *supra* note 15, at Preface (no page delineated).

¹⁹ Beale praised Langdell’s pedagogical approach in an article written for the *New York University Law Quarterly Review* in 1931. See Joseph H. Beale, *Langdell, Gray, Thayer and Ames: Their Contribution to the Study and Teaching of Law* 8 N.Y.U. L. Q. R. 385 (1931)[hereinafter Beale, *Langdell*].

²⁰ BEALE, CASES *supra* note 15, at vii.

²¹ *Id.*

²² *Id.* at 473.

²³ *Id.* at 474.

²⁴ *Id.*

“adjoining pond,” stabbing a woman in the back after she delivered a “box on the ear” and killing a constable in response to an “illegal” arrest.²⁵

In none of the scenarios did Beale provide any commentary or outside sources. Nor did he mention any statute. Instead, he presented the students with cases that collectively illustrated classic common law examples of provocation, meanwhile providing some sense of the limits of those rules. From a pedagogical perspective, the section provided students with an active opportunity to learn legal rules by deriving them from factual scenarios, without getting into a critical discussion of why those rules existed.

Even when Beale did include non-case materials, they invariably constituted ruminations on what the common law was, not what it should be. Perhaps foremost among his outside sources was William Hawkins’s *A Treatise of the Pleas of the Crown*.²⁶ Hawkins’s *Treatise* did not encourage students to think critically about whether the common law should be changed, but sought simply to illustrate what it said. For example, Beale introduced the crime of murder by including an excerpt from Hawkins explaining the evolution of the offense from one that initially punished towns for failing to produce the killer of a “Dane,” to a general crime applicable to anyone who killed an “Englishman” with “malice prepense.”²⁷ Immediately following the excerpt, Beale included six cases.²⁸

In the first case, the court held that if a constable “or any of his assistants” were killed during an attempt to suppress “an affray” then the killer was guilty of murder, whether he intended to kill the party or not.²⁹ In the next case, the court held that even if a private citizen attempted to break up a domestic dispute, the accidental killing of that citizen by one of the disputing parties could be considered murder, provided that the killer had “notice” of the victim’s intent.³⁰ For the next three cases, Beale presented similar situations where malice could be implied. They included an instance where an employer used a “bar of iron” to discipline a servant; a father set fire to a house with his retarded son inside, and a killer shot at a man on horseback but mistakenly hit a bystander.³¹ By the final case in the series, students were well versed in the principle that malice could be inferred in cases where the defendant committed an

²⁵ *Id.* at 477-87.

²⁶ *Id.* at 461, citing WILLIAM HAWKINS, A TREATISE OF THE PLEAS OF THE CROWN OR A SYSTEM OF THE PRINCIPLE MATTERS RELATING TO THAT SUBJECT (1824).

²⁷ *Id.* According to Hawkins, the original crime of murder in England was enacted by King Canute simply to save the lives of Danes, not Englishmen. If a Dane was killed, the “the town or hundred where the fact was done was to be amerced to the king.” *Id.*

²⁸ BEALE, CASES *supra* note 15, at 462-471.

²⁹ *Id.* at 462.

³⁰ *Id.* at 462.

³¹ *Id.* at 463-469.

“intentional” deadly act without facing “impending peril to life or member” or some kind of legitimate “provocation.”³²

To further elaborate on the differences between murder and manslaughter, Beale included no less than nine more cases. Again, each case provided students with a relatively clear example of a legal rule. First degree murder required premeditated and deliberate design.³³ Second degree murder included provocation by words alone.³⁴ Manslaughter applied when death was the result of either legitimate provocation or accidental killing.³⁵

What might students have learned from such an approach? Clearly, they learned how to read and organize relatively large groupings of cases, six to nine being common to cover one particular topic, a number that provided students with a framework from within which to assess a wide range of factual scenarios. By excluding extraneous notes and outside sources, Beale pushed students to learn the law much as they would if they were alone in a library at a law firm, going through hundreds of cases to determine the contours of a legal rule.

As Beale himself remembered it, the case method marked a dramatic shift away from passive learning, the process of simply “hearing and reading the knowledge of a teacher” and towards a more active approach in which the student “gains” knowledge “for himself, first hand, from the sources.”³⁶ Though such an approach may not be as “formally correct as that received from a master” noted Beale, it made a deeper impression on students, remained longer in their memories, even to the point of becoming “part of [their] mental fiber.”³⁷ The value of the case method, in other words, was that it was a type of practical, active learning, a learning best facilitated through the assignment of relatively large numbers of cases for students to work through alone.³⁸

In addition to its pedagogic value, Beale’s approach had a certain political aspect as well. By presenting students with nothing but cases, many dating back to sixteenth and seventeenth century England, Beale created an image of the common law as an authoritative source of legal rules, something to be revered rather than reformed. Even cases that begged for statutory reform, like the imputation of malice for accidental killings, for example, marshaled a certain respect in Beale’s universe simply because they derived from the common law.

Beale’s celebration of the common law made him Langdellian. Like Christopher Columbus Langdell, who introduced the case method to Harvard in 1870, Beale instilled in his students an impression of the law as

³² *Id.* at 470.

³³ *Id.* at 472.

³⁴ *Id.* at 474.

³⁵ *Id.* at 474-487.

³⁶ Beale, *Langdell*, *supra*, note 19, at 386.

³⁷ *Id.*

³⁸ ROBERT STEVENS, *LAW SCHOOL: LEGAL EDUCATION IN AMERICA FROM THE 1850S TO THE 1980S*, 54-5 (1983).

something derived not from immutable, natural law principles, but actual, real world cases.³⁹ In Langdell's mind, students should be given the impression that law was a "logically coherent system of technical rules" that were to be learned from a positive rather than a normative standpoint.⁴⁰ Indeed, Langdell believed strongly that the "chief business of a lawyer" was to "learn and administer the law as it is" not as it "ought to be."⁴¹ Even judges should not be engaged in raw policy-making but bound by the common law rule of precedent, discouraged from exercising any kind of radical, reformist impulse.

Langdell's approach coincided nicely with a variety of prevailing educational, political and economic trends in the United States during the latter years of the Nineteenth Century. Thanks to the Civil War, which brought an "abrupt and violent conclusion" to professional faith in natural law, Langdell's emphasis on judicial positivism provided a welcome respite.⁴² Pedagogically, it provided a sophisticated counterpoint to the recitation of legal rules, the primary methodology in the earliest, most primitive law schools.⁴³ It also provided an alternative to the law office apprenticeship, perhaps the most popular means of becoming a lawyer in the Nineteenth Century.⁴⁴

Even more importantly, Langdell's anti-contextual approach coincided nicely with the rise of the industrial revolution. As industry boomed in the final years of the Nineteenth Century, the Supreme Court of the United States found itself in the midst of innumerable disputes over whether democratic majorities had the power to regulate private industry.⁴⁵ Reluctant to impede economic growth, the Court adopted a formalist adherence to presumably fundamental doctrines of liberty of contract and due process, doctrines that it deftly used to strike down wave after wave of regulatory legislation.⁴⁶ Whether Langdell anticipated the rise of this formalism or not, his decision to assign cases, and cases only, complemented the Supreme Court's jurisprudence by instilling in students a respect for private law-ordering along with a concomitant contempt for legislative intervention in the business arena.

The Court's contempt for public law, the apotheosis of which emerged in *Lochner v. New York* in 1905, sparked dissent in the legal academy.⁴⁷ In 1915, for example, future Supreme Court Justice Felix Frankfurter argued that the "growing legislative activity of our time" should guide law schools in revising their curricula, moving them away from strict adherence to the case method and toward a more normative,

³⁹ FELDMAN, *supra* note 17 at 93; KALMAN, REALISM, *supra* note 4, at 10-12.

⁴⁰ LAPIANA, *supra* note 16, at 78.

⁴¹ LAPIANA, *supra* note 16, at 77.

⁴² FELDMAN, *supra* note 17, at 86.

⁴³ *Id.* at 47.

⁴⁴ *Id.* at 48.

⁴⁵ Schweber, *supra* note 9, at 632.

⁴⁶ LAWRENCE FRIEDMAN, A HISTORY OF AMERICAN LAW 472 (2001).

⁴⁷ *Lochner v. New York*, 198 U.S. 4 (1905).

policy-oriented approach.⁴⁸ Animating Frankfurter's pleas were at least two factors: the need for public regulation of rapidly expanding, injury-producing, and sometimes irresponsible private industries, coupled with the inability of the courts and the private bar to respond proactively to large-scale regulatory problems. Noting that courts were "already laboring under too heavy a pressure," and that private lawyers were "overworked" and too "absorbed" in resolving cases to think "consciously" and "systematically" about meeting the demands of a rapidly industrializing mass society, Frankfurter identified "teachers of the law" as the "natural" candidates for arriving at solutions to some of the Progressive era's most tenacious legal problems.⁴⁹

Frankfurter also called for the production of a new type of law student. "It is not enough that young men should come from our schools equipped to become skillful practitioners," he argued, "[w]e must show them the law as an instrument," something that can be used "for human betterment" and not simply a tool in the hands of "clever pleaders."⁵⁰ Though Frankfurter did not go so far as to assert that the case method be abandoned, he alluded to it negatively, noting that students should no longer be taught that law was simply a "Procrustean bed" of precedent "into which all persons and all societies must inexorably be fitted."⁵¹ Such words decried both the strict adherence to common law cases that Langdell and Beale advocated, as well as the type of deductive logic that they sought to instill in their students, a logic that, in Frankfurter's words, simply applied "old ideas to new facts."⁵² Instead, Frankfurter called for "new premises to fit present needs," and an inductive approach to solving legal problems by "assimilating social and economic facts" to cast light on "new conditions."⁵³ These were progressive words, both in the sense that they sought to link legal education to the larger goals of socially-conscious Progressive-Era reformers, and also in the manner that they questioned strict adherence to the Langdellian case method as sufficient preparation for legal practice.

Others agreed. In 1923 Columbia Law School Dean Harlan Fiske Stone declared that while the case method was helpful in negotiating "the jungle of judicial decisions," law professors should not approach legal teaching as simply "a hermetically sealed compartment."⁵⁴ Instead, they should look to the "social and economic forces" which gave law its "form and substance."⁵⁵ No historical event brought this lesson home more poignantly than the Great Depression. Sparked by a stock market crash in

⁴⁸ Felix Frankfurter, *The Law and the Law Schools*, 1 A. B. A. J. 532 (1915).

⁴⁹ *Id.* at 533.

⁵⁰ *Id.*

⁵¹ *Id.*

⁵² *Id.*

⁵³ *Id.*

⁵⁴ Harlan Fiske Stone, *Some Phases of Legal Education in America*, 58 AM. L. REV. 747 (1923).

⁵⁵ *Id.*

1929, the Depression led to massive disruptions in employment, productivity, and consumer confidence, pushing national leaders like Franklin Delano Roosevelt to develop public law solutions to what seemed a massive, nation-threatening, private sector debacle.

Interestingly, the nation's plunge into economic depression following the crash of 1929 had an unexpected impact on law school curricula, particularly course offerings at elite New England schools accustomed to preparing graduates for corporate practice.⁵⁶ As Columbia University law professor Julius Goebel remembered it, the "decline of employment by law offices due to the rigors of the Great Depression," coupled with the "phenomenal increase in governmental functions" during the New Deal, made it "urgent" that the school begin to train students in "public law."⁵⁷ This need led Columbia to hire a promising young graduate and former Goebel research fellow named Herbert Wechsler, a proponent of the New Deal who would come to have a remarkable impact on the teaching of criminal law.

II. WECHSLER & MICHAEL RESPOND TO BEALE

Herbert Wechsler, who graduated from Columbia in 1931 in the midst of a Depression-ravaged job market, brought with him his own reasons for upsetting the case method. Like many young scholars at the time, Wechsler believed that the Great Depression had been caused by problems inherent to *laissez faire* economics, not least of them unregulated banking, an un-policed stock exchange, and an over-confidence in market forces that collectively made a mockery of the formalist premise that economic affairs were best managed through the private adjudication of legal disputes. The case method, which focused on judicial adjudication and therefore perpetuated what Roscoe Pound called the common law's "antipathy to legislation," denigrated state regulation as a lesser form of lawmaking – if not an outright intrusion into fundamental rights of property and contract.⁵⁸ As law's old guard clung to Langdell in the midst of the howling 1930s, Wechsler began to view the case method as limiting, even dangerous. Not surprisingly, he turned to earlier thinkers who had long called for curricular reform, law teachers like Felix Frankfurter among them.⁵⁹

⁵⁶ GOEBEL, *supra* note 3, at 325.

⁵⁷ *Id.*, at 315, 325.

⁵⁸ Roscoe Pound, *Liberty of Contract* 18 YALE L. J. 454, 462 (1909).

⁵⁹ See e.g., Frankfurter, *Law Schools*, *supra* note 48. Interestingly, Wechsler's relationship with Frankfurter lent more than just intellectual support to his decision to break from the case method and produce a different type of lawyer. Thanks to connections that he had with the Roosevelt administration, Frankfurter became a "one-man employment agency" for recent law graduates interested in working for federal New Deal agencies. DAVID M. KENNEDY, *FREEDOM FROM FEAR: THE AMERICAN PEOPLE IN DEPRESSION AND WAR, 1929-1945* (1999), 121. Though he would later become more

To Herbert Wechsler and his senior colleague Jerome Michael, Frankfurter provided theoretical ammunition for fighting the nation's frightening plunge into economic recession, a recession accelerated by doctrinal formalism. Frankfurter's conviction that students should be taught that law is "an instrument" to be used for "human betterment" impressed them; as did Frankfurter's support for President Franklin Delano Roosevelt's New Deal.⁶⁰ Both Wechsler and Michael proudly endorsed Roosevelt, standing out as two of only five "New Dealers" on Columbia's law faculty at the time.⁶¹ When the Supreme Court began striking down New Deal programs like the Agricultural Adjustment Administration and the National Industrial Recovery Act on what they believed were overtly formalist, "closed system" grounds, both Wechsler and Michael placed at least some blame at the feet of the case method for producing an isolated, politically unresponsive judiciary.⁶² As Wechsler later remembered it, the Court possessed no "receptivity to statutory changes of the common law," lacked any "sympathetic treatment of administrative agencies," and clung desperately to the notion of the common law as a "closed system," a position that deserved "unqualified disdain."⁶³

Rather than view law as a closed system, Wechsler came to view it in more "utilitarian" terms, an instrument of "statecraft" that could be used to pull the country out of its fiscal woes.⁶⁴ Before this could happen, however, lawyers and law students needed to learn to think about the law differently; as a tool for change and not a prophylactic to state intervention and control.⁶⁵ Wechsler distilled these notions into four separate "articles of faith" that guided his legal career.⁶⁶ They included: 1) a rejection of the common law as a "closed system," 2) an emphasis on "judicial receptivity to statutory changes of the common law," 3) a presumption that "legal understanding is imperfectly obtained" and, 4) an "unqualified disdain" for the Supreme Court's formalist destruction of New Deal programs "despite the magnitude of the abuse and dislocation incident to the development of an industrial society."⁶⁷

Wechsler let his "articles of faith" guide his selection of materials for teaching criminal law. Not offered at Columbia prior to Wechsler's arrival on the faculty in 1931, criminal law had been virtually ignored due to the fact that it was "generally thought to have no money in it" and was

conservative, Roscoe Pound also called for curricular reform. Roscoe Pound, *Liberty of Contract* 18 YALE L. J. 454 (1908-1909), 470.

⁶⁰ Frankfurter, *Law Schools*, *supra* note 48, at 534.

⁶¹ Wechsler, *Interview*, *supra* note 7.

⁶² *Id.*

⁶³ *Id.*

⁶⁴ *Id.*

⁶⁵ *Id.*

⁶⁶ *Id.*

⁶⁷ *Id.*

therefore “not interesting” to most “bread-and-butter” students.⁶⁸ Precisely for this reason, Wechsler saw teaching the course as an “opportunity” for him to put his philosophical and political assumptions into practice.⁶⁹

Frustrated with what he perceived to be a disconnect between law’s political underpinnings and the apolitical nature of the case method, Wechsler joined his colleague Jerome Michael in putting together a different kind of criminal law casebook in 1934. In thinking about what to include, Wechsler later remembered that he sought to assemble “pedagogical materials” that “invited cogitation outside the closed system.”⁷⁰ The “closed system” in his opinion, was what Langdell advanced, namely a notion that the “whole process of learning, understanding, [and] applying the law was a process of uncovering the leading cases” and through a process of “logical deduction” applying them to “new situations.”⁷¹ To Wechsler, such a “closed” method had contributed to the Supreme Court’s early, anti-New Deal stance. Instead of focusing on the “closed system” of the common law then, which provided “no room for legislative or quasi-legislative judgment,” Wechsler turned instead to a much more open system of legal pedagogy, one that incorporated a variety of materials and posed a variety of questions.⁷² Intent on getting students to think about legislation as an important mode of legal action, Wechsler assembled his casebook so as not to simply require that students “distill the law” from reading cases, but rather ponder “interesting questions” like: “what are the consequences of this or the other type of formulation or norm?” “How can we find out something about consequences?” And “how can we face up candidly to value choices?”⁷³ Such questions, believed Wechsler, constituted a “wholly different way of thinking about the law” than the earlier “Langdellian way.”⁷⁴

To provide a taste of Wechsler’s approach, it is helpful to compare his casebook’s section on voluntary manslaughter with that of Joseph Henry Beale. Unlike Beale, who assigned a total of eight full cases for students to read on the subject, Wechsler assigned one. The case, *Regina v. Welsh*, was one that Beale had included in his casebook and originated from England in 1869. It involved a defendant who had taken his future victim to court for reclamation of a debt only to find the claim repudiated by a judge.⁷⁵ Angry over his defeat, the defendant went to a “public house” or bar, where he met his future victim, who ridiculed him for

⁶⁸ *Id.*

⁶⁹ *Id.*

⁷⁰ *Id.*

⁷¹ *Id.*

⁷² *Id.*

⁷³ *Id.*

⁷⁴ *Id.*

⁷⁵ MICHAEL & WECHSLER, *supra* note 5, at 148.

failing to secure the debt.⁷⁶ Enraged, the defendant approached the victim (who put up his hand in defense), and then stabbed him with a “clasp knife,” killing him on the spot.⁷⁷ Desperate to have his charge of murder reduced to manslaughter, the defendant tried to claim that he acted “under the influence of passion,” only to have the court rule that provocation must be such as would excite “the mind of a reasonable man” and that “mere words” did not suffice, nor did “putting” out one’s hand in defense, as the victim seemed to do when the defendant approached him.⁷⁸

For Beale, that was all that students needed to know.⁷⁹ Compared to the case where the defendant had actually been in combat, *Welsh* did not constitute grounds for provocation, nor could it be synthesized with the case where the defendant was pick-pocketed and threw his thief into an “adjoining pond,” gaining the provocation defense.⁸⁰ If anything, *Welsh* bore distinct similarities to the defendant who had stabbed a woman in the back for boxing him on the ear.⁸¹

Such doctrinal distinctions formed only a small part of Wechsler’s analysis. Throughout the case he included footnotes that referred to law review articles and commission reports, even describing the evolution of the doctrine in the United States over the course of the Nineteenth and early Twentieth Centuries.⁸² Immediately following the case, Wechsler included a series of “Notes” that included brief summaries of several cases along with North Dakota’s statutory prohibition against infanticide, an excerpt from Bentham’s “Theory of Legislation,” an excerpt from Holmes’s “Common Law,” and a statute from India.

What might students have learned from such materials? The brief notes on cases were probably designed to perform a function similar to Beale’s full cases. Each one presented a slightly different factual take on the provocation rule, including a defendant whose girlfriend had confessed to having had an affair, a defendant who hit a neighbor’s wife with an axe after a dispute over a property line, and a defendant who shot a police officer in order to resist an unlawful arrest.⁸³ The other materials, however, particularly the excerpts from Bentham and Holmes, aimed at a different target. Bentham’s selection, for example, argued that punishments should not be reduced for cases where passions were high, but rather should be increased to “exceed the advantage of the offence.”⁸⁴ Precisely because people were more prone to commit offenses while under “the heat of passion,” in other words, the punishment should be “even more an object of dread” than in cases where the defendant was operating

⁷⁶ *Id.*

⁷⁷ *Id.*

⁷⁸ *Id.*, at 149.

⁷⁹ BEALE, CASES, *supra* note 15, at 473.

⁸⁰ *Id.*

⁸¹ *Id.*

⁸² *Id.*, at 149-50.

⁸³ *Id.* at, 151-4.

⁸⁴ *Id.*, at 158.

rationality.⁸⁵ Clearly such a proposition invited debate over the value of the provocation defense, including why it should be allowed at all. This was something that Beale's text did not do. Nor did Beale cite Holmes, who noted that if the "object of punishment is prevention" then punishments should be more severe in cases of "great excitement."⁸⁶ At least twice, in other words, Wechsler included materials that tested the wisdom behind the common law rule, in addition to requiring students to learn the rule. Following his case notes, for example, Wechsler provided discussion questions that included queries like: "Do you agree with Bentham?" and "What justification is there for making criminal homicides which are provoked?"⁸⁷

If nothing else, here was a relatively dramatic shift away from the pedagogical theory originally envisioned by either Beale or Langdell. Though Wechsler and Michael incorporated cases into their text, for example, at least half of their materials were designed not to drive home the basic principles of the common law, so much as to engender debate about what that law, ultimately, should be. From one perspective, such an approach might be viewed as a type of refutation of the common law, an approach to teaching which presumed that the law could be changed and should be changed based not on deducing eternal principles from past cases but rather thinking critically about the law's function in every day life. This type of legal education aimed to create a very different type of lawyer, if you will, than Langdell's method. Instead of an attorney who revered the presumably timeless principles of the common law, or even one who simply limited their professional goals to the representation of clients, Wechsler and Michael's method favored, if not presumed that students would become active players in the legislative process. In certain ways, Wechsler was preparing students to become enlightened leaders whose knowledge of the law would carry directly into public service.

III. EARLY REACTIONS TO THE CASEBOOK

Wechsler and Michael's casebook did not go unnoticed. In 1941, University of Texas law professor George Wilfred Stumberg reviewed the work, commending the two Columbia law professors for doing more than simply updating Beale. In Stumberg's opinion, Michael and Wechsler had raised "a timely question" as to the "purposes that can and should be served by American law schools in giving a course in criminal law."⁸⁸

⁸⁵ *Id.*

⁸⁶ *Id.*

⁸⁷ *Id.*, at 161-2.

⁸⁸ Stumberg, *supra* note 2, at 1123. See also 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 (1941).

Noting that “relatively few law-school graduates practice criminal law” Stumberg downplayed the need for instilling “technical knowledge” about the criminal process.⁸⁹ In fact, he even went so far as to argue that the “ambitious law graduate” should not be “blamed for shunning the criminal courts” a “not very nice” place where success hinged more on being “sharp-witted” than “learned.”⁹⁰

Convinced that law schools would be better off dropping criminal law than offering a course on the nuts and bolts of practice, Stumberg maintained that the course should be used to fulfill “greater obligations.”⁹¹ Such obligations, in his opinion, included training students to think about the “long range social considerations” of criminal law policy, not to mention the contributions of “criminologists” and “psychiatrists” to understanding why crime occurred and how law might be used to control it.⁹² Unimpressed by criminal practitioners, who Stumberg believed were “preoccupied with their day to day tasks” and limited in their understanding of “positive law,” the Texas professor approved Michael and Wechsler’s attempt to go beneath the “surface” and make students think critically about the “law in action.”⁹³

It was a remarkable review, not only for its overwhelming support of Wechsler and Michael’s text, but for the insight that it cast on the pedagogical and professional context of teaching criminal law at the time. For example, Stumberg made it relatively clear that the practice of criminal law was not something that most law students in Texas aspired to do, nor was it something that they should aspire to do. Indeed, he seemed to desire that criminal law teachers not even try to encourage their students to go into criminal law, something that was a poor choice for “bright young” men “with an eye to profit and social position.”⁹⁴ Whether Stumberg worried that criminal lawyers would not match the alumni contributions of students who entered “offices whose clients do not carry even the slightest scent of the jail” is uncertain, yet he clearly did not see criminal practice to be a worthy occupation for University of Texas graduates.⁹⁵

Interestingly, just as Stumberg seemed adamant about discouraging students from criminal practice, so too did he express enthusiasm for using criminal law as a vehicle for getting them to think like policy makers.⁹⁶ Evidence of this emerged in Stumberg’s closing paragraph where he praised Wechsler and Michael for transforming criminal law into a method for encouraging students to engage in “social thinking” not personal

⁸⁹ Stumberg, *supra* note 2, at 1123.

⁹⁰ *Id.*

⁹¹ *Id.*

⁹² *Id.*

⁹³ *Id.* at 1124.

⁹⁴ *Id.* at 1123.

⁹⁵ *Id.*

⁹⁶ *Id.*, at 1125.

“interest.”⁹⁷ “If this emphasis on [social thinking] is unsound,” he noted, for example, then “the shouting of these last years about ‘social engineering’ has been unsound.”⁹⁸ What Stumberg meant by “shouting” about social engineering was not clear. It is possible that he was referring to the work of social scientists like Thorstein Veblen, who posited that governmental institutions could, with the help of scientific means, be used to alter mass behavior.⁹⁹ Yet, Veblen had begun publishing such ideas as early as 1919, long before Wechsler’s casebook.¹⁰⁰ What did the recent “shouting” refer to? One possibility is that Stumberg was responding to a surge of scholarly interest in the late 1930s focusing on the manner in which mass culture and governmental institutions could change social behavior, including criminal behavior, on a mass level. Much of this thinking came out of Germany’s Frankfurt School, an institution founded by scholars like Theodore Adorno, Leo Lowenthal, and Max Horkheimer in the 1920s.¹⁰¹ To them, mass culture created a variety of opportunities for influencing large numbers of people, not always for the better.¹⁰² Adorno, for example, studied the manner in which popular culture led to the creation of something he called the “authoritarian personality” a theory that drew inspiration from the rise of the National Socialist Party in Germany in the 1930s.¹⁰³ Indeed by the time the Nazis seized power in Germany in 1933, much of the Frankfurt School had fled to the U.S., many ending up at the Institute for Social Research at Columbia University.¹⁰⁴

One member of the Frankfurt school who ended up at Columbia and became interested in criminal law pedagogy was Otto Kirchheimer. Kirchheimer, who focused on penal institutions, spent time at Columbia rewriting George Rusche’s *Punishment and Social Structure*, a pioneering text examining the roles that prisons played in modern society, not simply as penal institutions but buttresses to the class structure.¹⁰⁵ In his own work, Kirchheimer explored tensions between pragmatic and theoretical approaches to sentencing, as well as the possibilities of using prison for rehabilitative ends. In a testament to his influence, Wechsler and Michael cited Kirchheimer twice in their casebook, once to support the notion that retribution might be justified “unless the retributive purpose is deemed to

⁹⁷ *Id.*

⁹⁸ *Id.*

⁹⁹ ELIZABETH JORGENSEN & HENRY JORGENSEN, THORSTEIN VEBLER: VICTORIAN FIREBRAND (1998); See also KALMAN, REALISM, *supra* note 4, at 16.

¹⁰⁰ See e.g. THORSTEIN VEBLER, THE VESTED INTERESTS AND THE COMMON MAN (1919).

¹⁰¹ MARTIN JAY, THE DIALECTICAL IMAGINATION: A HISTORY OF THE FRANKFURT SCHOOL AND THE INSTITUTE OF SOCIAL RESEARCH, 1923-1950 (1973); MAX HORKHEIMER & THEODORE W. ADORNO, DIALECTIC OF ENLIGHTENMENT: PHILOSOPHICAL FRAGMENTS (Gunzelin Schmid Noerr, ed., 2002).

¹⁰² Theodore W. Adorno, “Mass Culture as Deception,” in DIALECTIC OF ENLIGHTENMENT, *supra* note 95, at 94-136.

¹⁰³ *Id.*, at 100-115.

¹⁰⁴ Jay, *supra* note 101, at 25-100.

¹⁰⁵ GEORG RUSCH & OTTO KIRCHHEIMER, PUNISHMENT & SOCIAL STRUCTURE (1939).

be authoritative,” a classic Frankfurt School theme, and also to suggest that prisons were rarely reformatory institutions.¹⁰⁶

Though it is unlikely that Wechsler or Michael saw themselves as critical theorists of the Frankfurt School variety, their citations to Kirchheimer suggest that they were aware of the School’s critical work. In fact, Kirchheimer himself gave Wechsler a remarkably positive review in 1941.¹⁰⁷ Noting that criminal law could be structured in at least two ways, either as a course in how to “draw the boundary line” between criminal and non-criminal conduct, or as a “broader” inquiry involving the “integration of law and social science,” Kirchheimer praised Michael and Wechsler for pursuing the latter.¹⁰⁸ In particular, Kirchheimer lauded Michael and Wechsler’s inclusion of “extra-legal” material, or readings that fleshed out the “political and social conditions under which rules arise and are constantly reshaped.”¹⁰⁹ Such an approach, he argued, represented nothing less than a “pioneering work” in the “art” of teaching criminal law.¹¹⁰

Not all scholars agreed. To Chicago Law Professor and Beale successor E. W. Puttkammer, the “enormous” amount of “nonlegal” material that Wechsler and Michael cited made their casebook “as much of a reference work” as a “teaching tool.”¹¹¹ In fact, Puttkammer even lamented that Wechsler and Michael had not published the casebook as a reference text, noting that it was “almost appalling by its sheer length” and a better fit for the reference “category.”¹¹² Others who doubted the wisdom of incorporating social science materials to the extent that Wechsler and Michael did included legal giant and one-time reformer Roscoe Pound. “[C]riminology and penal methods should be put in graduate courses for teachers and administrative officials,” wrote Pound, not courses aimed at law students who have “more than enough to do in learning the lawyer’s technique.”¹¹³ “The need,” that law schools faced, continued Pound in a conservative mood, was not to train administrators but “to give competent fundamental training in criminal law to those who are to take part as counsel, prosecutors and judges.”¹¹⁴ Taking “part” as counselors and judges meant training practitioners, not the kind of federal administrative attorneys that Herbert Wechsler had in mind. Indeed, Pound seemed to think that Wechsler’s type of training would actually harm “first-year law

¹⁰⁶ MICHAEL & WECHSLER, *CRIMINAL LAW*, *supra* note 5 at 11, 15.

¹⁰⁷ Otto Kirchheimer, *Criminal Law and Its Administration: Cases, Statutes, and Commentaries by Jerome Michael and Herbert Wechsler*, 32 J. CRIM. L. & CRIMINOLOGY 451 (1941) (book review).

¹⁰⁸ *Id.*

¹⁰⁹ *Id.*

¹¹⁰ *Id.* at 453.

¹¹¹ Puttkammer, *supra* note 15, at 388.

¹¹² *Id.*

¹¹³ Roscoe Pound, *Introduction to First Edition of* ROLLIN M. PERKINS, *CASES & MATERIALS ON CRIMINAL LAW AND PROCEDURE*, at xiv (1952). For evidence of Pound’s early, reformist impulse, see ROSCOE POUND, *TOWARD A BETTER CRIMINAL LAW* (1935).

¹¹⁴ Pound, *Introduction*, *supra* note 113 at xiv.

students” by instilling in them “wrong ideas” about criminal practice that would be difficult to “dislodge,” ultimately compromising “the administration of justice.”¹¹⁵

Pound’s concern for the administration of justice, coupled with his reluctance to push too far in the social science direction, came from at least two sources. One, interestingly, was the rise of Stalinism in Russia, a political development that led him to fear that abandoning the case method might actually increase the chances of America becoming an authoritarian state.¹¹⁶ Just as Herbert Wechsler believed that the case method fostered private-minded attorneys who prized private, laissez-faire ordering over public law, Pound came to believe the opposite: abandoning the case method risked creating statist attorneys who ignored private interests in favor of big government. “In the Soviet polity,” noted Pound in 1952, “punitive justice has been substantially taken away from the courts and made a matter of administrative action.”¹¹⁷ Something similar, he believed, could happen in the United States, particularly if “advocates, prosecutors, and judges are not well trained in the law.”¹¹⁸ Implying that students who learned from Wechsler and Michael’s approach were not “well trained in the law,” Pound went on to argue that students not inculcated in the common law tradition “may well turn us from the traditional judicial path of the common law into the administrative path.”¹¹⁹ Such a development, feared Pound, would place the United States “on the road to absolute government.”¹²⁰

Pound’s comments suggest, remarkably, that Stalinism raised questions about American legal education.¹²¹ Of course, neither Herbert Wechsler nor Jerome Michael were Stalinists, nor did they believe that abandoning the common law would lead to authoritarianism. Yet, Pound’s fear that their emphasis on administration detracted from the common law’s traditional aversion to statism was not completely unreasonable. As outlandish as Pound’s concerns seemed, even Wechsler and Michael would probably have agreed that America’s adherence to the common law had empowered the private sector, making it capable not only of withstanding state intrusion but, as the destruction of the First New Deal suggested, overcoming it. The very same factors that made Wechsler and Michael New Dealers, in other words, also subjected them to charges of

¹¹⁵ *Id.* at xiii, xiv-xv.

¹¹⁶ *Id.*

¹¹⁷ *Id.* at xviii. Pound began to worry about authoritarian regimes in 1933, when the Nazi Party seized power in Germany and began to reconfigure the nation’s legal system along Nazi lines. See Roscoe Pound, *Contemporary Juristic Theory* 9 (1940); See also EDGAR BODENHEIMER, JURISPRUDENCE 316 (1940); Jerome Hall, *Nulle Poena Sine Lege*, 47 Yale L.J. 165, 186-89 (1940).

¹¹⁸ Pound, *supra* note 113, at xviii.

¹¹⁹ *Id.* at xviii-xix.

¹²⁰ *Id.*

¹²¹ For more on Pound’s fear of authoritarianism, see DAVID CIEPLEY, LIBERALISM IN THE SHADOW OF TOTALITARIANISM 266 (2006).

being unwitting supporters of a tendency towards the kind of authoritarianism emerging in the U.S.S.R, Eastern Europe, and China. Whether Pound thought that Wechsler and Michael were proto-authoritarians or not, he had at least one other reason for lobbying against Wechsler and Michael's approach to teaching criminal law. Like Columbia's administrators in the 1930s, he too recognized that "economic causes" had led "leaders of the [legal] profession" to look down on careers spent in the "criminal courts."¹²² Pound also realized that "no ambitious student in a national law school" would actively seek "practice in criminal cases."¹²³ Yet, this left the question open as to students who were not enrolled in national schools. What were they to do? Rather than waste their time questioning the common law, Pound believed that students at less prestigious regional schools should learn how to practice.¹²⁴ He made this apparent by agreeing to write an introduction for a casebook assembled by University of California Los Angeles Law Professor Rollin M. Perkins in 1952.¹²⁵

Perkins declared an open concern for the practitioner in his Preface, rejecting Michael and Wechsler's approach to criminal law teaching on the grounds that it did not prepare students for actual practice.¹²⁶ Blasting Michael and Wechsler for tailoring their casebook to students who had "other purposes" for taking criminal law than entering the criminal bar, Perkins made sure to note in his preface that "the first need of the lawyer is to know what the law is."¹²⁷ "A class made up of beginning law students," he continued, "should not be conducted as if it were a 'lawyer's seminar,'" nor should professors use cases as "mere pegs" on which to hang "general discussions of criminology."¹²⁸

Determined not to focus on criminology – or any other type of social science for that matter – Perkins assembled a casebook that was classically Bealean. Just as Beale presented students with large numbers of cases and few outside sources, Perkins did the same. To cover the broad topic of homicide, he included no less than twenty-five cases and no subheadings. This meant that students had to determine for themselves which cases applied to murder, manslaughter, negligent homicide and so on.¹²⁹

The UCLA professor also ignored materials that questioned the common law. Unlike Michael and Wechsler, who had students debating whether European codes were "wiser" than American ones, or whether Oliver Wendell Holmes's theory of increasing punishment for heat-of-

¹²² Pound, *supra* note 113, at xviii.

¹²³ *Id.*

¹²⁴ *Id.* at ix.

¹²⁵ See Pound's introduction to Perkins's casebook, Pound, *supra* note 113, at xiii-xix.

¹²⁶ Rollin M. Perkins, *Preface to the First Edition of ROLLIN M. PERKINS, CASES & MATERIALS ON CRIMINAL LAW AND PROCEDURE* (1952) [hereinafter Perkins, *Preface*].

¹²⁷ Perkins, *Preface* in PERKINS *supra* note 126, at x.

¹²⁸ *Id.*

¹²⁹ BEALE, CASES, *supra* note 15, at 461-487; PERKINS, *supra* note 126, at 1-62.

passion killings improved the common law, Perkins used outside sources only when he thought it necessary to illustrate black letter rules. For example, to help students grasp the law of homicide he included in his appendix an abbreviated version of a law review article that he himself had written on the distinction between murder and manslaughter.¹³⁰ Organized much like a legal treatise, the article presented murder, manslaughter, and partial defenses like provocation in relatively straightforward, uncritical terms. Though the excerpt discussed the provocation defense, for example, it failed to ask whether defendants acting in the heat of passion deserved harsher penalties, as Holmes's piece had; opting instead to simply classify and explain common law examples of when provocation applied, cases like battery, mutual combat, trespass, and adultery.¹³¹

Interestingly, even though Perkins adopted a much more conservative approach than Wechsler and Michael, he still appropriated what might be called a Wechslerian "look." Instead of simply entitling his book *Cases on Criminal Law* as Beale did, for example, Perkins used the more suggestive, *Cases and Materials on Criminal Law*, even though there were few "materials" to be found.¹³² He also downplayed the reactionary nature of his text, being sure to mention in his *Preface* that his casebook was not a reaction to the social science method so much as a move toward a "middle position" between Langdell and the social science approach.¹³³ Of course, this raised an obvious question, why bother downplaying the text's aversion to social science? One possibility is that Perkins wanted to sell copies. By 1952, the year Perkins's casebook was published, Michael and Wechsler's casebook was enjoying widespread popularity.¹³⁴ In fact, the authors were considering a second edition when Michael died in 1953.¹³⁵

Driving the popularity of Wechsler and Michael's text was a convergence of forces that placed social science at the center of criminal law teaching in the 1950s. Perhaps foremost among these was an ascendant faith in the ability of science and experts to improve almost all aspects of human life.¹³⁶ Though faith in experts impacted law in myriad ways, one manifestation emerged in calls by legal academics and professional associations to reform criminal law, a field that had long suffered from academic and professional "neglect."¹³⁷ In 1951, the

¹³⁰ PERKINS, *supra* note 126, at 771-808.

¹³¹ *Id.* at 783-790.

¹³² *Id.*

¹³³ *Id.* at x.

¹³⁴ HERBERT WECHSLER, 1956 SUPPLEMENT TO MICHAEL AND WECHSLER CRIMINAL LAW AND ITS ADMINISTRATION iii (1956) [hereinafter WECHSLER, SUPPLEMENT].

¹³⁵ *Id.* Michael's death in 1953 was one reason that Wechsler later cited for not coming out with revised editions of their casebook. *Id.*

¹³⁶ See e.g. SEYMOUR K. FREIDIN & GEORGE BAILEY, THE EXPERTS (1968).

¹³⁷ Herbert Wechsler, *The Challenge of a Model Penal Code* 65 HARV. L. REV. 1097, 1099 (1952) [hereinafter Wechsler, *Challenge*].

Rockefeller Foundation granted the American Law Institute, or ALI, money to put toward a model penal code that would revise irrational, arbitrary aspects of the common law.¹³⁸ Though the ALI had envisioned such a code before, rapid developments in “disciplines concerned with social aspects of behavior,” revitalized interest in the late 1940s and early 1950s.¹³⁹ Convinced that state legislatures could benefit from new developments in social science, the ALI hoped to make its criminal code available to legislatures for possible adoption by the end of the decade.¹⁴⁰

To facilitate the MPC’s completion, the ALI asked Herbert Wechsler, now renowned for his criminal law casebook, to serve as the chief Reporter for the model penal code project.¹⁴¹ Long interested in shifting emphasis away from the courts and toward public law solutions, Wechsler not only took the offer but quickly applied the policy-oriented approach that he had developed in class to the MPC, incorporating new discoveries in social science, particularly psychology, to the criminal law context. To take just a few examples, one initiative that Wechsler supported was the replacement of common law notions of malice for more dispassionate classifications of purpose, knowledge, and recklessness. Another revision that Wechsler supported was the incorporation of social science studies on human sexuality to decriminalize moral offenses, most notably adultery.¹⁴²

Inspired by his work with the ALI, Wechsler began to incorporate model penal code materials into his teaching, using them to reinforce his longstanding view that cases were not enough. In 1956, for example, Wechsler published a supplement to *Criminal Law & Its Administration* that included ALI reports on subjects as diverse as robbery, extortion, theft, mistake of law, and insanity.¹⁴³ Again and again, the ALI materials that Wechsler included presented the common law as irrational and outdated; a message that coincided nicely with Wechsler’s longstanding goal of undermining student reverence for judicial law-making, meanwhile casting favorable light on public law solutions. Though the New Deal played no role in the development of the MPC, the Code’s emergence only reinforced Wechsler’s ongoing interest in awakening students to the world of public law.

Interestingly, the fact that most states had begun to codify their criminal law long before the MPC was even envisioned did not stop

¹³⁸ *Id.* at 1097.

¹³⁹ *Id.*

¹⁴⁰ *Id.* at 1097, n 1.

¹⁴¹ Wechsler, *Challenge*, *supra* note 137, at 1097.

¹⁴² *Id.* at 1106.

¹⁴³ WECHSLER, SUPPLEMENT *supra* note 134, at 1-3 (homicide-culpability), 23-24 (homicide-causation), 64-66 (rape), 72-74 (robbery and extortion), 76-77 (acquisition by fraud), 86-88 (theft-acquisitive methods), 91-92 (theft-intent and motive), 112-115 (theft-treatment problems), 153-156 (accomplice liability), 157-162 (corporate liability), 174-183 (mistake of law), 212-222 (insanity), 249-252 (recidivism).

Wechsler from using the model code to criticize judges.¹⁴⁴ Indeed, he found instances where judicial interpretations of state codes had corrupted the original intent of those codes, providing him with an opportunity to show students, again, that they needed to be critical of cases. To take just one example, Wechsler focused on Pennsylvania's codification of murder in 1794, showing how the crime had been intentionally separated by the state legislature into two degrees for the purposes of reducing the number of defendants given the death penalty.¹⁴⁵ As originally envisioned by the statute's drafters, defendants needed to premeditate and deliberate on their crime in order to be convicted of first-degree murder.¹⁴⁶ If they did not plan their crime in advance but simply acted on impulse or anger, then the highest charge that they might face was second degree murder.¹⁴⁷ While this move gained widespread attention and praise for its progressive approach to limiting the death penalty, common law judges quickly began to confuse the distinction between first and second degree, grouping crimes where defendants had taken only an instant to deliberate into the first degree category.¹⁴⁸ For Wechsler and the ALI alike, this tendency warranted a substantial statutory revision, one that eliminated first degree murder completely.¹⁴⁹ According to the Model Penal Code, murder could be charged wherever an offender killed with "purpose," regardless of whether they premeditated or deliberated.¹⁵⁰

While the drafting of the MPC provided Wechsler with an opportunity to bolster his innovative approach to teaching criminal law, the completion of the MPC in 1962 canonized it. Suddenly, the idea of teaching criminal law as a common law course, without attention to public law solutions or policy considerations seemed completely out of step with real world trends. This became even more true when New York and other states began substantial revisions of their criminal codes in the early 1960s, ultimately adopting large portions of the MPC. Though reactionaries like Rollin Perkins continued to feed students a steady diet of cases, a younger generation of criminal law teachers emerged who de-emphasized case law just as much, if not more than Wechsler, substituting in their place law review articles, statistical studies, open-ended policy questions and, of course, the MPC.

¹⁴⁴ For a history of pre-MPC codification, see Sanford H. Kadish, *Codifiers of the Criminal Law: Wechsler's Predecessors* 78 COL. L. REV. 1098 (1978).

¹⁴⁵ WECHSLER, SUPPLEMENT, *supra* note 134, at 167-170. Wechsler had been interested in the judicial obliteration of the distinction between premeditated and non-premeditated murder since the 1930s. See Herbert Wechsler & Jerome Michael, *A Rationale of the Law of Homicide: I*, 37 Col. L. Rev. 701, 707-708 (1937).

¹⁴⁶ WECHSLER, SUPPLEMENT, *supra* note 134, at 167-170.

¹⁴⁷ *Id.*

¹⁴⁸ *Id.*

¹⁴⁹ *Id.*

¹⁵⁰ *Id.*

IV. SANFORD H. KADISH AND THE TWENTY-FIRST CENTURY CASEBOOK

One of the first casebooks to carry the torch lit by Michael and Wechsler in the 1930s was a text assembled by Monrad G. Paulsen and Sanford H. Kadish in 1962. Entitled *Criminal Law & Its Processes*, Paulsen and Kadish's casebook represented, as Kadish himself remembered it, a direct "descendant" of Wechsler and Michael's *Criminal Law and Its Administration*.¹⁵¹ In fact, both Paulsen and Kadish directly acknowledged "an intellectual indebtedness" to "Professor Herbert Wechsler of the Columbia Law School," who in their opinion had "left an impress upon the teaching and thinking in the criminal law," that in their opinion, was both "lasting" and "profound."¹⁵²

The link to Wechsler, at least for Kadish, began in law school. Following World War II, Kadish enrolled at Columbia and took Wechsler's criminal law course, a class that he remembered for being "intellectually exciting" in a way that "other classes were not."¹⁵³ Struck by Wechsler's "utilitarian," even "Benthamite" approach to the law, Kadish was particularly impressed with Wechsler's tendency to approach the subject "from a legislative point of view."¹⁵⁴ When Monrad Paulsen approached Kadish with the idea of assembling a casebook in the late 1950s, Kadish agreed, eventually drafting the largest section of the text on substantive criminal law, leaving Paulsen to criminal procedure.¹⁵⁵ Though criminal procedure was originally intended to dominate the book, the "tail wagged the dog," as Kadish later remembered it, leaving Paulsen's section to the very end; ultimately to be eliminated in subsequent editions.¹⁵⁶

In honor of Wechsler, Kadish began his portion of the casebook with a section on "crime, morals, and personal liberty" that did not include a single case.¹⁵⁷ Eschewing the common law, he immersed his first year students in the Model Penal Code, the Scottish Home Department's "Report on Homosexual Offenses and Prostitution," Lord Justice Devlin's lecture on "the Enforcement of Morals," and an excerpt from H.L.A. Hart's article "Immorality and Treason."¹⁵⁸ Knowing full well that "adultery, fornication, and prostitution" were all still offenses in the United States, Kadish pushed his students to consider whether such offenses should be eliminated.¹⁵⁹ Regardless of the answer that individual

¹⁵¹ Interview with Sanford H. Kadish, *supra* note 6.

¹⁵² Monrad G. Paulsen & Sanford H. Kadish, *Preface to the First Edition* of MONRAD G. PAULSEN & SANFORD H. KADISH, *CRIMINAL LAW AND ITS PROCESSES*, at xiii (1st ed. 1962).

¹⁵³ Interview with Sanford H. Kadish, *supra* note 6.

¹⁵⁴ *Id.*

¹⁵⁵ *Id.*

¹⁵⁶ *Id.*

¹⁵⁷ MONRAD G. PAULSEN & SANFORD H. KADISH, *CRIMINAL LAW AND ITS PROCESSES* 3-17 (1st ed. 1962).

¹⁵⁸ *Id.*

¹⁵⁹ *Id.* at 5 n.b.

students arrived at – either morals offenses should be eliminated or not – the underlying lesson was clear: criminal law – and perhaps law generally – was neither immutable nor absolute. It relied not on longstanding principles culled from common law cases, but policy considerations, statistical data, and academic studies. Students, once required to kneel at the arcane oracle of the common law judge, were now asked to be legislators – and to come up with their own opinions of what the law should be.

Even when Kadish did include cases, the basic mission of getting students to think like legislators did not change. For example, to explain the distinction between first and second-degree murder, Kadish asked his students to read only one case from Utah where the common law judge lamented the fact that the distinction between first and second degree murder was meaningless.¹⁶⁰ “It is true,” noted the judge, “that quite a number of courts” had approved jury instructions allowing jurors to find premeditation even though there was “no appreciable space of time between the intention to kill and the act of killing.”¹⁶¹ Convinced that this trend was bad, the judge nevertheless held that jurors should be allowed to find premeditation so long as the defendant developed a “fixed design or purpose” in a “space of time” no matter how “brief.”¹⁶² For students assigned to brief the case, the legal rule was both clear and ridiculous: some time should be allowed for the development of premeditation, yet no time was actually needed to premeditate a murder. Rather than use the opinion to present one piece of a larger puzzle, like Perkins’s twenty-five cases on homicide, Kadish used one case to present the whole puzzle, then revealed it to be a travesty of justice.

The approach won instant praise. In a 1964 edition of the *Harvard Law Review*, Stanford University Law Professor Herbert L. Packer commended Kadish for assembling “the best conventional teaching book” in what was otherwise a “grimy” field of law usually reserved for the “most disfavored segment of the bar.”¹⁶³ In particular, Packer praised Kadish’s beginning chapters on legislative choice, legality, and sentencing, all of which boasted “relatively little reliance on case material.”¹⁶⁴ Rather than decry the absence of specific offenses like kidnapping, arson, and robbery, Packer rejoiced that “the dreary round of differential definitions” which formed the most “conspicuous feature” of many criminal law courses was gone, leaving professors obligated to only instruct their students in two crimes, homicide and theft.¹⁶⁵ In a laudatory mood, Packer declared that

¹⁶⁰ *Id.* at 558, citing *State v. Anselmo*, 148 Pac. 1071 (1915).

¹⁶¹ PAULSEN & KADISH, *supra* note 157, at 558-559.

¹⁶² *Id.* at 560.

¹⁶³ Herbert L. Packer, Book Review 77 HARV. L. REV. 790 (1964) (reviewing MONRAD PAULSEN & SANFORD H. KADISH, CRIMINAL LAW & ITS PROCESSES).

¹⁶⁴ *Id.*, 791.

¹⁶⁵ *Id.*, 794.

Paulsen and Kadish's casebook represented the "only reasonable alternative" to Michael and Wechsler's text "now available."¹⁶⁶

Packer's review indicates that Michael and Wechsler's text was still something of a benchmark by which other casebooks were judged even in the 1960s. Though condescending in his attitude towards criminal practice, nothing new among law scholars, Packer clearly believed that Michael and Wechsler had elevated the subject's intellectual status. In fact, he even dated the "arrival" of "full intellectual respectability" to criminal law with the publication of their textbook in 1940, over twenty years earlier.¹⁶⁷ Yet, Michael and Wechsler's book had never gone through a second edition and sorely needed an overhaul. For example, the text did not take into consideration the recent completion of the Model Penal Code in 1962 nor did it address the increasing criticism of morals offenses like adultery and fornication in the academic literature and press nationwide.¹⁶⁸

Kadish and Paulsen addressed both subjects directly. Not only did their first chapter focus on the policy behind punishing morals offenses, but they included substantial portions of the MPC commentaries in their text.¹⁶⁹ This emphasis on the MPC carried through the entire substantive criminal law portion of the book, providing students with a timely counterpoint to common law doctrine.¹⁷⁰ As the 1960s progressed, such a counterpoint to the common law proved more and more relevant as states began adopting portions of the MPC, including New York, which enlisted Herbert Wechsler himself to serve on a temporary commission to revise the state's criminal law in 1961.¹⁷¹

By 1969, interest in the MPC and, by extension, *Criminal Law & Its Processes* was so high that Paulsen and Kadish put together a second edition. In this version, they continued to use cases as pegs upon which to hang discussions of criminology, criminal law theory, and ethics. For example, they included one case on narcotics possession to push students to consider whether users who suffer addiction should be punished.¹⁷² They also added material culled from the civil rights movement in the American South, including a case from South Carolina where the U.S. Supreme Court had declared that the state's segregation statutes did not grant black sit-in demonstrators "fair warning" to stay out of white

¹⁶⁶ *Id.*

¹⁶⁷ *Id.*, 791.

¹⁶⁸ ALFRED C. KINSEY, ET AL. *SEXUAL BEHAVIOR IN THE HUMAN MALE* (1948); *See generally* JONATHAN GATHORN-HARDY, *SEX THE MEASURE OF ALL THINGS: A LIFE OF ALFRED C. KINSEY* (2000).

¹⁶⁹ KADISH & PAULSEN, *supra* note 157.

¹⁷⁰ *Id.*

¹⁷¹ *State Picks Panel on Criminal Law*, N.Y. TIMES, June 21, 1961, at 39; *New State Penal Law Takes Effect on Friday*, N.Y. TIMES, Aug. 30, 1967, at 54. By 1988, almost forty states had enacted at least some portion of the MPC into law. Richard G. Singer, *Foreword*, 19 RUTGERS L. J. 519 (1988).

¹⁷² SANFORD H. KADISH & MONRAD G. PAULSEN, *CRIMINAL LAW & ITS PROCESSES* 106-22 (2nd ed. 1969).

restaurants.¹⁷³ Given that Jim Crow had banned African Americans from white restaurants for fifty years, the ruling was hard to square with reality.¹⁷⁴ Yet, by showing how the Supreme Court manipulated the law to protect black demonstrators, the case underscored law's plasticity, pushing students to consider normative goals over interpretive rules.¹⁷⁵

Though times had changed considerably since the 1930s, Kadish and Paulsen continued down Wechsler's road in the 1960s away from the case method and towards a more open-ended inquiry into why the law existed as it did. The advent of the Model Penal Code fueled this approach, as did the political climate of the 1960s.¹⁷⁶ Questions of racial justice, police brutality, and the arbitrary definition of crime all became issues of real concern thanks to the civil rights movement in the South, urban riots in the North, and rising crime nationally.¹⁷⁷ Yet, unlike the 1930s, the 1960s did not push criminal law scholars to develop a new approach to teaching so much as build on the approach that Wechsler and Michael had already devised.¹⁷⁸

That approach continued to thrive through the end of the Twentieth Century. From 1962 to 1975, *Criminal Law & Its Processes* went through three editions.¹⁷⁹ By the turn-of-the-century it had gone through six.¹⁸⁰ In 2007, it emerged in its eighth revised form, with Stephen J. Schulhofer and Carol S. Steiker replacing Monrad Paulsen.¹⁸¹ *Processes* even inspired disciples, most notably Joshua Dressler, who designated his own casebook, first published in 1994, a "son of Kadish."¹⁸²

¹⁷³ *Id.* at 43-46.

¹⁷⁴ *Id.*

¹⁷⁵ *Id.*

¹⁷⁶ Kadish, interview, *supra* note 6.

¹⁷⁷ Michael J. Klarman, *Is the Supreme Court Sometimes Irrelevant? Race and the Southern Criminal Justice System in the 1940s* 89 J. AM. HIST. 119 (2002). See generally MICHAEL J. KLARMAN, *FROM JIM CROW TO CIVIL RIGHTS: THE SUPREME COURT AND THE STRUGGLE FOR RACIAL EQUALITY* (2004).

¹⁷⁸ See e.g. TED GEST, *CRIME & POLITICS: BIG GOVERNMENT'S ERRATIC CAMPAIGN FOR LAW AND ORDER* 5-40 (2001); JONATHAN SIMON, *GOVERNING THROUGH CRIME: HOW THE WAR ON CRIME TRANSFORMED AMERICAN DEMOCRACY AND CREATED A CULTURE OF FEAR* 4 (2007).

¹⁷⁹ SANFORD H. KADISH & MONRAD G. PAULSEN, *CRIMINAL LAW & ITS PROCESSES* (2nd ed. 1969); SANFORD H. KADISH & MONRAD G. PAULSEN, *CRIMINAL LAW & ITS PROCESSES* (3rd ed. 1975).

¹⁸⁰ SANFORD H. KADISH, STEPHEN J. SCHULHOFER, & MONRAD G. PAULSEN, *CRIMINAL LAW & ITS PROCESSES* (4th ed. 1983); SANFORD H. KADISH & STEPHEN J. SCHULHOFER, *CRIMINAL LAW & ITS PROCESSES* (5th ed. 1989); SANFORD H. KADISH & STEPHEN J. SCHULHOFER, *CRIMINAL LAW & ITS PROCESSES* (6th ed. 1995).

¹⁸¹ SANFORD H. KADISH & STEPHEN J. SCHULHOFER, *CRIMINAL LAW & ITS PROCESSES* (7th ed. 2001); SANFORD H. KADISH, STEPHEN J. SCHULHOFER & CAROL S. STEIKER, *CRIMINAL LAW & ITS PROCESSES* (8th ed. 2007).

¹⁸² JOSHUA DRESSLER, "Preface," in *CASES & MATERIALS ON CRIMINAL LAW* (1st ed. 1994); JOSHUA DRESSLER, *CASES & MATERIALS ON CRIMINAL LAW* (2nd ed. 1999); JOSHUA DRESSLER, *CASES & MATERIALS ON CRIMINAL LAW* (3d ed. 2003); JOSHUA DRESSLER, *CASES & MATERIALS ON CRIMINAL LAW* (4th ed. 2007).

Even scholars who did not directly credit Wechsler or Kadish built on their basic model, providing students with a relatively small number of carefully selected cases along with a rich assortment of notes, questions, and outside sources. In 1969, for example, Harvard professor Lloyd L. Weinreb published a casebook that separated criminal law from criminal procedure, a move that other authors would quickly make, but then retained the model developed by Wechsler and Kadish for his substantive criminal law portion.¹⁸³ He began with three chapters on the general and special parts of criminal law, including a limited number of cases along with notes, commentary, newspaper excerpts, and law review citations, and then concluded with a Wechslerian chapter on “Crime and Punishment” that incorporated what one reviewer called an “unusual mélange” of materials.¹⁸⁴ The materials included “quotations from classics in philosophy,” excerpts from sentencing reports, and portions of a debate between H.L.A. Hart, John Stuart Mill, and James Fitzjames Stephen.¹⁸⁵ Though ordered differently than Kadish’s introductory chapters, Weinreb’s inclusion of outside sources as well as philosophical and criminological materials nevertheless represented an obvious variation of Wechsler’s approach. Weinreb himself explained that he wanted his students to consider the “moral, political, and social issues” surrounding criminal law, not just the rules.¹⁸⁶

Four years later, in 1973, George E. Dix and M. Michael Sharlot, both of the University of Texas, continued the Wechslerian tradition with *Criminal Law: Cases and Materials*, which began with an excerpt from “The Challenge of Crime in a Free Society” a report on rising crime rates put together by Lyndon Johnson’s special commission on law enforcement and criminal justice.¹⁸⁷ The text continued with sections on the criminalization of alcohol intoxication, pulling together excerpts from scholarly treatises, statistical studies, and “criminal histories of alcoholics.”¹⁸⁸ Throughout, the casebook aimed to be “more than a vehicle” for students to learn “the law of crimes,” shooting instead to “facilitate inquiry” into the “broadest issues” of the “relationship of the individual to the state.”¹⁸⁹

Without describing each subsequent casebook to emerge since 1973, suffice it to say that no new approaches to teaching criminal law arose in the Twentieth Century.¹⁹⁰ Though different authors stressed different

¹⁸³ LLOYD L. WEINREB, *CRIMINAL LAW: CASES, COMMENT, QUESTIONS* xi (1969).

¹⁸⁴ Philip J. Mause, Book Review, 84 Harv. L. Rev. 504, 512 (1970) (Reviewing LLOYD L. WEINREB, *CRIMINAL LAW: CASES, COMMENT, QUESTIONS*).

¹⁸⁵ *Id.*

¹⁸⁶ *Id.* at xii.

¹⁸⁷ GEORGE E. DIX AND M. MICHAEL SHARLOT, *CRIMINAL LAW: CASES AND MATERIALS*, 1 (1st ed. 1973).

¹⁸⁸ *Id.* at 148-59.

¹⁸⁹ *Id.* at xi.

¹⁹⁰ See *supra* note 9.

areas, the general method remained the same.¹⁹¹ Cases remained central, but were fewer in number and more heavily supplemented by outside materials than during Beale's time.¹⁹² Normative questions also frequently followed cases, pushing students to think critically about why the law was as it was, and whether it should be changed.¹⁹³

So far, Wechsler's model has survived into the Twenty-First Century, with perhaps one exception.¹⁹⁴ Paul Robinson, on the faculty at Pennsylvania, substantially altered the casebook format in 2005 by beginning each section with a crime scenario followed by extensive statutory materials and only brief case excerpts.¹⁹⁵ Following each scenario, Robinson asked students to behave as practitioners and determine "what liability, if any" existed under the prevailing law.¹⁹⁶ At first glance, this method marks an interesting turn towards a more practitioner-oriented approach, one that pushes students to evaluate facts as if they were prosecutors. Yet, even Robinson includes a Wechslerian twist. After each problem, he locates a "discussion materials" section that includes excerpts from law reviews, academic studies and so on, providing law teachers with the option of finishing topics on a normative, policy-oriented note.¹⁹⁷ Assuming that discussion sections are assigned, Robinson's text is the least case-friendly to have been compiled yet, marking in certain ways the culmination of Wechsler's revolt against the case method.¹⁹⁸

This raises a question of cause and effect. While it is undoubtedly true that Wechsler viewed the addition of non-case materials to be a rebellion against the case method in the 1930s, could the same be said of scholars who came after him?¹⁹⁹ Is it not possible that they might have moved away from the method on their own, independent of Wechsler's influence? Perhaps: even if Wechsler had never joined Jerome Michael in the compilation of a criminal law casebook in 1940, for example, the completion of the Model Penal Code in 1962, which Wechsler directed, essentially transformed the field so dramatically that even the most unreconstructed adherents to Langdell's method, Rollin Perkins being perhaps the best example, ultimately had to concede the "dominance" of

¹⁹¹ *Id.*

¹⁹² *Id.*

¹⁹³ *Id.*

¹⁹⁴ Twenty-first century casebooks tend to be improvements on Wechsler rather than digressions from. *See e.g.* DUBBER & KELMAN, *supra* note 6 and LEE & HARRIS, *supra* note 6.

¹⁹⁵ PAUL H. ROBINSON, CRIMINAL LAW: CASE STUDIES & CONTROVERSIES (1st ed. 2005).

¹⁹⁶ *Id.*

¹⁹⁷ *Id.*

¹⁹⁸ *Id.*

¹⁹⁹ For example, Sanford Kadish later recalled that even though his casebook was a direct "descendant" of Wechsler's, he himself was not "burning with some reformist zeal" when he wrote it. Interview with Sanford H. Kadish, *supra* note 6.

statutory materials to the study of criminal law by the end of the century.²⁰⁰

Yet, just because statutes became a bigger part of the criminal law does not mean that casebooks necessarily had to follow Wechsler's model to the extent that they did. For example, it could have been possible for scholars to do what Paul Robinson has done, namely include statutory materials side by side with cases, without any additional discussion section pushing students to reflect on why the law says what it does. One thing that Wechsler contributed to the field was a particular "perspective," to borrow from Kadish, not so much of a lawyer but a type of hypothetical legislator, interested in both normative and intellectual questions of ethics, science, sociology, and politics.²⁰¹

V. CONCLUSION

While most criminal law scholars would probably not attribute the structure of their casebooks to Herbert Wechsler, they could. Beginning in the 1930s, Wechsler intentionally transformed the manner in which criminal law casebooks were organized, reducing cases in favor of supplementary materials culled from philosophy, criminology, and other disciplines. The result not only proved popular, but helped elevate the status of a course that many scorned for being associated with a professionally undesirable, disreputable field. By the 1960s, Wechsler's model had become the dominant format for criminal law casebooks, and criminal law courses, in the United States.

That dominance continues today. Precisely for this reason, it is worth recovering the history behind why Wechsler organized his course in the way that he did. For example, much of Wechsler's innovation was made possible by the fact that elite law schools like Columbia were not interested in training criminal lawyers. This freed Wechsler to innovate in a way that professors who taught contracts, property, and commercial law could not.²⁰² It also transformed the mission of the course, if you will, nudging it away from practical training to policy considerations and ethics. While Columbia initially thought that this would better train administrative attorneys and policy analysts for Roosevelt's New Deal, Wechsler's innovation proved permanent. Two decades after the publication of his casebook in 1940, Wechsler's approach was fast defining the field, transforming criminal law from a skills course to what

²⁰⁰ Donald A. Dripps, "Introduction to the Ninth Edition," RONALD N. BOYCE, DONALD A. DRIPPS, ROLLIN M. PERKINS, *CRIMINAL LAW & PROCEDURE: CASES AND MATERIALS* (9th ed. 2004).

²⁰¹ Kadish, Interview, *supra* note 6.

²⁰² KADISH, interview, *supra* note 6.

Sanford Kadish remembers as an attempt to produce “good, sensitive, aware, socially conscious,” citizens.²⁰³

That law schools should strive to produce better citizens is hard to refute. However, the Carnegie Foundation’s recent recommendation that law school education return to an emphasis on legal practice raises questions about the possible tension between skills and ethics.²⁰⁴ For example, do law schools still view criminal practice to be undesirable? If so, then perhaps Wechsler’s innovations should remain in place, regardless of the Carnegie report. Then again, what if schools decide to get more serious about training criminal law practitioners? Do they not sacrifice some amount of practical training by pursuing Wechsler’s approach? What good are ethics, philosophy, and sociology if graduating students do not know the law?

Of course, scholars might argue that Wechsler’s approach is unavoidable given the dramatic rise in codification over the course of the past four decades. Yet, even a brief glimpse at the history of the criminal law course suggests that codification was not what inspired Wechsler to change his approach. He rejected the case method for political reasons, blaming the method for inculcating a narrow view of the law that contributed to the Supreme Court’s destruction of the first New Deal. This explains why he moved towards normative questions in his notes. He did not simply want students to be able to analyze and interpret statutes; he wanted them to question the law, and to recognize its relationship to society. If Wechsler had not felt anger at the case method, it is entirely possible that a criminal law textbook would have evolved, like Robinson’s evolved, which merged statutes and cases in a problem-oriented fashion.

Recovering the political motivations behind Wechsler’s anti-case method raises questions about the political implications of legal education generally. To take just one example, Duncan Kennedy’s now legendary attack on legal education as a “reproduction of hierarchy” fails to recognize that Wechsler and Michael’s approach to criminal law sought to reproduce a very different type of hierarchy than the one Langdell had originally intended in 1870.²⁰⁵ Rather than engender a reverence for judicial precedent and the private ordering of economic affairs, as Langdell had sought, Wechsler and Michael aimed to instill a respect for public ordering and governmental intervention in private matters, in line with Roosevelt’s statist New Deal.²⁰⁶ The success of their approach, which coincided with realist calls for reform at Yale in the 1930s, hints at a larger thesis: not only did the New Deal usher in the decline of *Lochner-*

²⁰³ *Id.*

²⁰⁴ Sullivan, *supra* note 11.

²⁰⁵ DUNCAN KENNEDY, LEGAL EDUCATION AND THE REPRODUCTION OF HIERARCHY: A POLEMIC AGAINST THE SYSTEM (2004).

²⁰⁶ For Langdell’s interest in bolstering private ordering and laissez-faire, see KALMAN, REALISM, *supra* note 4, at 13.

era jurisprudence, but it hastened the demise of *Lochner*-era lawyers.²⁰⁷ Out of our nation's greatest economic crisis came a push to create a new kind of attorney, one who believed that society's most pressing problems were best solved by public, not private law.²⁰⁸

Even if Wechsler and Michael's antipathy to private law did not transform the American lawyer, criminal law remains the only first year course to represent an open revolt against the case method. This means that at a basic pedagogical level, criminal law does not necessarily teach the things that the method teaches, including legal reasoning, deductive analysis, or how to think like a lawyer. In fact, criminal law might be teaching students how not to think like lawyers. This, after all, was Wechsler's intention. Lawyers, in his opinion, had blindly endorsed legal fictions like substantive due process and liberty of contract at the expense of the nation, driving it to economic ruin. What needed to happen, in his opinion, was an explosion of this "closed-system," in favor of a much more critical mode of analysis.²⁰⁹

Whether law schools should be in the business of teaching such analysis is worth reconsidering, if for no other reason than to justify current practice in the face of mounting doubt. For example, one could easily read the Carnegie Report and argue that the battles that Wechsler was fighting in the 1930s are over. No longer do common law courses dominate law school. Administrative law, contracts, commercial transactions, and tax all push students to deal with statutory materials as well as judicial opinions. Further, the Model Penal Code is not only an established part of the criminal law in most states, but it is over half a century old and has begun to produce its own body of common law interpreting it. Though it may be too early to say that we have entered a new common law era, it is certainly true that the MPC has taken on a life of its own as states have adopted portions of it and modified others to meet particularized, local needs. Are students who have undergone Wechsler's

²⁰⁷ Laura Kalman only touches on the impact that the New Deal had on legal pedagogy in the United States. She notes, for example, that Yale was more open to realist approaches due to the shifting job market of the Great Depression. KALMAN, *REALISM*, *supra* note 4, at 182. She also notes that Jerome Frank stepped up his criticism of Langdell once he was appointed general counsel to Roosevelt's Agricultural Adjustment Administration in 1933. *Id.* at 168. Beyond that, she does not venture to argue that the Depression shifted legal pedagogy towards the production of attorneys who believed that legal solutions to society's most pressing problems lay in public, not private law. Instead, Kalman draws a much narrower conclusion, namely that legal realism made a "positive contribution" to legal education by making it impossible to understand traditional subjects "without acknowledging the relevance of history, sociology, and psychology." *Id.* at 229.

²⁰⁸ The notion that the New Deal transformed legal pedagogy in a way that pushed lawyers to become more public minded challenges the notion, advanced perhaps most eloquently by Anthony Kronman, that lawyers were once public-minded "statesmen" who devolved into litigious, pettifogging attorneys over the course of the Twentieth Century. See ANTHONY KRONMAN, *THE LOST LAWYER: FAILING IDEALS OF THE LEGAL PROFESSION* (1993).

²⁰⁹ Wechsler, Interview, *supra* note 6.

method prepared to deal with those needs? Can they perform the kind of case analysis that is currently needed to find legal answers? And can law schools, particularly regional schools, continue to afford to adopt the elite mentality that criminal law is not a worthy profession?

While such questions may not strike criminal law teachers as particularly important, recovering Wechsler's revolt against Langdell sheds light on how at least one law school course moved away from a practitioner's perspective. Recovering this process for other courses may be the next step towards explaining why the Carnegie Foundation discovered the problems that it did, setting the stage for more widespread curricular reform. Or, recovering Wechsler may do something else entirely: it may help law school administrators counter the Carnegie findings with a larger vision of what legal education, ultimately, should be about.