

St. John's University School of Law

St. John's Law Scholarship Repository

Faculty Publications

2010

The Excitement of Interdictory Ideas: A Response to Professor Anders Walker

Marc O. DeGirolami

St. John's University School of Law

Follow this and additional works at: https://scholarship.law.stjohns.edu/faculty_publications



Part of the [Criminal Law Commons](#), and the [Legal Education Commons](#)

This Article is brought to you for free and open access by St. John's Law Scholarship Repository. It has been accepted for inclusion in Faculty Publications by an authorized administrator of St. John's Law Scholarship Repository. For more information, please contact selbyc@stjohns.edu.

The Excitement of Interdictory Ideas: A Response to Professor Anders Walker

Marc O. DeGirolami*

The very first time that I taught criminal law, I would occasionally tell my six-year-old son, Thomas, about selected cases and situations that I had come across. Thomas enjoyed these discussions—more than I would have guessed: he was captivated by the horror of *Dudley & Stephens*,¹ he was uncomfortably intrigued by shaming punishments, he was appropriately outraged at all manner of outcomes that seemed to him too harsh or too lenient. But most of all, he wanted to test his own burgeoning intuitions about right and wrong, good and evil, the permitted and the forbidden, against my “criminal law stories.” He was, in a word, excited by criminal law.

Criminal law provokes. It stimulates and incites. Criminal law often is taught in the second semester of the first year, so it labors under something of a disadvantage. It begins just after students have been faced with the realities of their first semester grades. One might therefore expect some disenchanting reticence—a bit of yawning ‘*plus-ça-change-isme*’—but that has not been my experience. More than any other course, criminal law challenges students to confront the deep places of their own moral and political architecture, erected in fragments over a lifetime, with realities that are, often enough, unknown and frightening to them. At its best, criminal law induces alienation in students, shocks the safety, piety, and certitude of their worlds. It does this, at times, by confronting students with their own fears about their fellow human beings and demanding that they reflect on those fears with care—not with the express aim that they should be solved or overcome, but in order that they may be better understood.

Having canvassed admirably the historical changes to the criminal law case book over the twentieth century, Professor Anders Walker’s article² suggests that criminal law ought to concern itself with the business of training future prosecutors and defense attorneys by eliminating, or at least greatly reducing, the place of moral and political reflection in the course, which was in any event the supercilious indulgence of elite law schools that disprized criminal practice. His normative prescriptions are of a piece with much that is currently in vogue in criticisms of legal education: that it is impractical, that it does not respond to the

* Assistant Professor, St. John’s University School of Law. Thanks to Anders Walker, John Barrett, Dan Markel, Mark Movsesian, Michael Simons, and Brian Tamanaha for gracious comments.

¹ The Queen v. Dudley and Stephens, (1884) 14 Q.B.D. 273 (Eng.).

² Anders Walker, *The Anti-Case Method: Herbert Wechsler and the Political History of the Criminal Law Course*, 7 OHIO ST. J. CRIM. L. 217 (2009).

urgencies of quotidian lawyerly concerns, and that it deludes itself that it ought to be something like a liberal education. “That law schools should strive to produce better citizens is hard to refute[,]” he writes, but “[w]hat good are ethics, philosophy, and sociology if graduating students do not know the law?”³

This brief response to Professor Walker’s article makes two points. First, “knowing the law,” in the sense that Walker seems to intend the phrase, has very little to do either with what state prosecutors (to take the criminal practice with which I am somewhat familiar) actually do or, more importantly, with the reasons that lawyers decide to become criminal practitioners in the first place. Second, adopting the normative prescriptions pressed by Walker will extinguish precisely the excitement that criminal law can bring to the generally educated and interested lawyer. There have been, and there will always be, few lawyers who become prosecutors and criminal defense attorneys; no structural amendments to the course will change that. But bleeding the criminal law course of the very ideas that stimulate passion about the subject will ensure that law schools continue to contribute to the stultifying process by which students forget, inexorably, what it is that is worthwhile and fulfilling about becoming a lawyer at all.

I.

Professor Walker claims that we ought to reconsider Herbert Wechsler’s mid-twentieth century model of criminal legal education in favor of something more like the approach that preceded it: an assiduous case-crunching program in which many cases were digested in order to develop a sense of the complex nature of the common law, each case presenting nuanced differences in and subtle varieties of approach to any given rule.⁴ Walker then wheels out the modern-day reformist chestnut that this older common law method is optimal training in “how to think like a lawyer.”⁵ What exactly is that?

Before turning to that question, and in fairness to Walker, his article is really more about a historical development in legal education than a conceptual argument about the essence of legal learning. As to the historical picture of Joseph Beale that emerges from his piece, Walker seems to subscribe to the traditional view first propounded by Jerome Frank,⁶ namely, that Beale believed that law was “an authoritative source of legal rules, something to be revered rather than reformed.”⁷ Recent scholarship has largely debunked this caricature of both Beale and many of the so-called “formalists.”⁸ Here is Beale in 1914:

³ *Id.* at 245.

⁴ *Id.* at 223, 229.

⁵ *Id.* at 246.

⁶ JEROME FRANK, *LAW AND THE MODERN MIND* 55 (1930).

⁷ Walker, *supra* note 2, at 223.

⁸ See BRIAN Z. TAMANAHA, *BEYOND THE FORMALIST-REALIST DIVIDE: THE ROLE OF POLITICS IN JUDGING* (2010).

The vocation of our own age, then, is to study our law with a view to its readjustment and reform. . . . [W]e must examine the law objectively to learn its social purpose and to see how far that purpose is being accomplished. Such a study is the object of the new sociological jurisprudence. The importance of these investigations cannot be overestimated. Every part of the law ought to be tested to find out how far it is conforming to its purpose.⁹

And here is Beale in 1905, little more than a decade after he published the criminal law case book investigated by Walker,¹⁰ on the nature of change in the law:

The spirit of the time molds and shapes its law, as it molds and shapes its manner of thought and the whole current of its life. For law is the effort of a people to express its idea of right; and while right itself cannot change, man's conception of right changes from age to age, as his knowledge grows. The spirit of the age, therefore, affecting as it must man's conception of right, affects the growth both of the common and of the statute law.¹¹

Beale is speaking in both of these passages of the academic study of law, and it is conceivable that he was directing these decidedly historicist and reform-minded remarks at legal academics rather than law students. But two points are worth making. First, in light of these statements and many others like them,¹² it is exceedingly unlikely that Beale would have completely insulated his students from sociological, political, and moral reflection in his criminal law course in the way that Walker claims—compelling common law prostration from his students or, in Walker's colorful locution, forcing them to “kneel at the arcane oracle of the common law judge.”¹³ Second, Walker's argument that we can guess how Beale and his followers taught their criminal law classes simply by examining the sorts of materials that were included in their case books is not convincing. These may be more matters of degree than qualitative differences: Perhaps Beale emphasized the reading and analysis of cases to a greater extent than is usual in contemporary

⁹ Joseph H. Beale, *The Necessity for a Study of Legal System*, 1914 AALS PROCEEDINGS 31, 39 (1914), quoted in TAMANAHA, *supra* note 8, at 16.

¹⁰ JOSEPH HENRY BEALE, JR., *A SELECTION OF CASES AND OTHER AUTHORITIES UPON CRIMINAL LAW* (1894).

¹¹ Joseph H. Beale, Jr., *The Development of Jurisprudence During the Past Century*, 18 HARV. L. REV. 271, 272 (1905).

¹² For similar “realist” reflections by Beale, see TAMANAHA, *supra* note 8.

¹³ Walker, *supra* note 2, at 239. It might be interesting to know whether Beale's course notes have been preserved in Harvard's archives.

criminal law courses. On the other hand, most criminal law case books today are just that—texts littered with hundreds of cases aimed at developing analytical dexterity—and so it is difficult indeed to know what conclusions about the history of legal pedagogy to draw from Walker’s evidence. At least on this record, Walker’s own rather aggressive conclusions are not warranted.¹⁴

But it is Walker’s normative claims that I want primarily to address here: What does “thinking like a lawyer” mean to Walker? The critical component, it seems, is that “thinking like a lawyer” means exactly *not* asking direct questions about the law’s political wisdom; it means knowing about the positive law, as it exists in its great variety, full stop. This theoretical asceticism is what Walker seems to admire about Beale’s approach, though it gives the distinct impression that Walker is far more “Bealist” than Beale himself. It is also what Walker praises in Professor Paul Robinson’s case book:

Paul Robinson . . . begin[s] each section with a crime scenario followed by extensive statutory materials and only brief case excerpts. Following each scenario, Robinson asked students to behave as practitioners and determine “what liability, if any” existed under the prevailing law. 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.¹⁵

Yet it quickly becomes clear that for Walker, Robinson, too, has been infected by the Wechslerian virus of thinking deep thoughts because Robinson includes “discussion materials” that “provid[e] law teachers with the option of finishing topics on a normative, policy-oriented note.”¹⁶ Even the *availability* of such materials, it is suggested, does not adequately respect the difference between the legal is/ought distinction. The practice of law is one thing; its theory and wisdom entirely another.

It is popular nowadays to call this the theory/practice divide (or gap, gulf, chasm, etc.), and there is no denying that law school is in some ways a vocational school, designed ultimately to prepare students for the practice of a particular professional trade. Nevertheless the modishly overused (Professors Angela Harris and Cynthia Lee gently call it “well-worn”¹⁷) dichotomy of theory versus practice tends to obscure the fact that “legal theory” is not a special type of fancy thinking that people with pointy heads deploy to impress one another at conferences and

¹⁴ Walker claims that doctrinal similarities and differences were, for Beale, “all that students needed to know.” Walker, *supra* note 2, at 229.

¹⁵ *Id.* at 243–44.

¹⁶ *Id.* at 244.

¹⁷ Angela P. Harris & Cynthia Lee, *Teaching Criminal Law From a Critical Perspective*, 7 OHIO ST. J. CRIM. L. 261, 262 (2009).

symposia; legal theory is thinking about law. Legal theory is asking questions about the law's nature and wisdom.

Walker goes on to claim that the earlier, case-crunching approach is well recovered because it is likely to be more pedagogically in keeping with the contemporary movement to emphasize "skills" in the "training" of lawyers, including "the Carnegie Foundation's recent recommendation that law school education return to an emphasis on legal practice"¹⁸ Before getting to the question of the appeal of such a vision for the future of the criminal law course, it may be worth considering whether "thinking like a [criminal] lawyer" or the sort of "skills training" that Walker advocates corresponds with the realities of criminal legal practice—whether it is actually good, to say nothing of the best, training. Professor Douglas Husak says much that I agree with on this score—that most of criminal law is codified today, that a return to the pure case method approach would be rejected by the Carnegie Report itself, and that training in negotiation would be at least as useful for aspiring practitioners as learning the penal law itself.¹⁹ But Husak also indulges in the unfortunate academic snipe (unworthy of such a keen thinker) that "the daily work of the criminal lawyer is an exercise in what some commentators deride as *McJustice*," observing further that the criminal justice system is in actuality no such thing and undeserving of the name (in Husak's view, "a travesty of justice").²⁰ Law, Husak concludes, is "irrelevan[t]" to criminal practice.²¹

Since it is the education of criminal practitioners that is the subject of discussion, it may be useful to know what at least one of them thinks of these reforming proposals. I no longer practice, but my own relatively recent legal experience was as a criminal appellate litigator for the state of Massachusetts for just over two years, a position and an experience that I most definitely do not look back on as a pointless and shameful exercise in "*McJustice*." While it may be dangerous to generalize based on comparatively limited personal experience and observation, such sources of information perhaps have some place in these sorts of discussions, particularly because it is in state court (not in federal court) and as prosecutors and defense attorneys (not legislators, or judges, or administrative law specialists, and so on²²) that the overwhelming majority of criminal lawyers practice.

With the obvious caveat that I cannot speak for all prosecutors, state prosecutors, or even state appellate prosecutors, my own observations are that state prosecutors do, in fact, know a great deal about the penal law. They rely on it

¹⁸ Walker, *supra* note 2, at 245.

¹⁹ Douglas Husak, *Criminal Law Textbooks and Human Betterment*, 7 OHIO ST. J. CRIM. L. 267, 270–71 (2009).

²⁰ *Id.* at 271.

²¹ *Id.*

²² Compare Harris & Lee, *supra* note 17, at 263 (emphasizing, too much in my view, these other areas).

daily in their fast-paced practices, and they are extremely well versed in the legal issues that tend to arise frequently, so well that they can react quickly to many complicated legal issues without needing to research them. Appellate prosecutors—the group that might seem the most natural beneficiaries of Professor Walker’s suggested pedagogical reforms—are, unsurprisingly, even more knowledgeable about doctrine, though not in the way that Professor Walker seems to commend. They are not knowledgeable globally, inter-jurisdictionally, about, for example, the felony-murder rule or the requirements of involuntary manslaughter. Instead, their attentions are in the usual course trained on a particular legal issue within a specific jurisdiction: not, “What is the law of choice-of-evils?” but “What have Massachusetts appellate courts said about the ‘no adequate legal alternative’ prong of the choice-of-evils defense where the underlying charges are being a felon in possession of a weapon and driving under the influence of alcohol?”

Since they are perpetually focused on the excruciatingly particular, appellate prosecutors do not need to “think like a lawyer” in anything like the way urged by Walker’s hypothesized Joseph Beale. Instead, they need to be able to (1) research and report on the relatively few cases that address their specific legal issue; and (2) think creatively about how to analogize or disanalogize the facts of the litigated case to (or from) existing precedent, or, if that is not possible, to argue that a statute ought, or ought not, to be extended to reach the case under consideration.

None of this is earth-shattering news. It does tend to puncture, however, some of Walker’s claims about the value of the “Bealist” case method for criminal practice. In the first place, there are often very few cases that even remotely address a specific issue within a state jurisdiction, so there is little law to learn on an issue that is complex enough to have been appealed. True, it can help to have an understanding of the ways in which other jurisdictions have addressed similar questions, particularly if there is no binding authority to be had. Even then, however, the cases that are marshaled to support a point are, as a general matter, few in number. All of the ineffable parsing, distinctions, and nuances that seem to form the core of Walker’s favored method of education are infrequently, if ever, needed.

Second, what *is* necessary is a creative mind about the sorts of arguments for extension or limitation of a law or precedent that are likely to move a court. Thinking like a “hypothetical legislator”²³ is not quite an accurate description, since it is not the appellate criminal lawyer himself who is charged with law-making or law-changing. But it is not so far off the mark either, since the skill in demand is one of imaginative and persuasive argument-crafting. And in order to develop that skill, extensive training in conceiving and developing arguments about the purpose and wisdom of a law is absolutely essential.

Another point: The attraction of becoming a state prosecutor was, at least for me, very much about just these sorts of concerns—about having a direct, albeit

²³ Walker, *supra* note 2, at 244.

vanishingly small, hand in the shape of a vitally important and interesting branch of the law. Criminal law is intellectually exhilarating, and a good thing too, since it is definitely not financially remunerative. I recognize that economic stresses have made it more difficult for aspiring lawyers to choose a field simply because it appeals to them, but given the low pay (in good times and bad), one has always needed a *reason* to choose criminal law. One very good reason is the attraction of public service, whether on behalf of the state or the accused. For me, and I suspect for many appellate prosecutors, intellectual excitement was another important reason. And I am far from certain that Professor Walker's rather insipid recipe of four cups cases and no more than a pinch of political and moral reflection will be edible at all, let alone sufficient to convince too many students to have a taste.

II.

I have claimed that criminal law is intellectually "exciting," "exhilarating," "stimulating," and the like. Someone might well object that much the same could be said about other areas of law. Is there anything distinctively exciting in criminal law, and do Professor Walker's prescriptions threaten to snuff that something out?

I think that the answer to both of these questions is yes. One of the modern textbooks that Walker criticizes as representative of the Wechslerian model²⁴ is Joshua Dressler's *Cases and Materials on Criminal Law*, and one can sense something of an answer to the first question (though almost certainly not the only answer) by considering that book's beginning. Dressler opens with what may be a familiar tract by Henry Hart, wherein Hart argues that what distinguishes criminal from civil sanction is a certain type of community condemnation.²⁵ Quoting George Gardner and echoing James Fitzjames Stephen, Hart writes that punishment is an "expression of the community's hatred, fear, or contempt for the convict" himself.²⁶

This is of course a grossly underinclusive and overinclusive description. As students proceed through the course, they meet many crimes and criminals that do not elicit such responses in them (say, certain strict liability crimes, to take only one obvious example). Likewise, there are many contemptible acts that are, quite properly, well outside the province of the criminal law: "nothing is more evident," Herbert Morris keenly observed, "than moral evil outside the law's compass."²⁷

²⁴ *Id.* at 218 n.6.

²⁵ JOSHUA DRESSLER, *CASES AND MATERIALS ON CRIMINAL LAW* 1–3 (5th ed. 2009).

²⁶ *Id.* at 2 (citing Henry M. Hart, Jr., *The Aims of the Criminal Law*, 23 *LAW & CONTEMP. PROBS.* 401, 402–06 (1958)). The point was made elegantly by Herbert Morris, who argued that in addition to being "culpably responsible for legal wrongdoing," the criminally "guilty [actor] is in a state deserving of some negative attitude, condemnation appearing the most apt term for this attitude, and the delivered verdict of guilt provides a formal expression of this attitude by an authoritative social organ." Herbert Morris, *The Decline of Guilt*, 99 *ETHICS* 62, 64 (1988).

²⁷ Morris, *supra* note 26, at 69.

And the degree of hatred, fear, or contempt that different crimes elicit in students can be quite various. For some, drunk driving is deeply contemptible, for others less so. For many, narcotics offenses, and particularly possession, are not at all contemptible. Murder and rape tend to draw out emotions of fear and contempt, but again, the degree and quality of such feelings varies substantially with the particulars of the case. In one of the book's battered woman syndrome cases, *State v. Norman*,²⁸ it is the victim who is the object of intense contempt and hatred (and, quite rightly, in light of his vicious, sadistic, and horrifyingly interminable degradation of his wife), while the battered woman murderer is often praised, or at least excused. Child abuse draws universal condemnation and revulsion, even hatred, and the word "evil" seems ever to be just at the tips of many students' tongues. I have had more than a few students tell me that they were extremely uncomfortable just reading such cases precisely because the facts stirred these disturbing emotions in them.

Yet I do think that there is something unique in criminal law that is captured by Hart's observations, though it is not a quality that is conceptually necessary or essential for all of criminality. It is a feature of several types of criminal acts and actors, sometimes present, sometimes not, but rarely existing in other legal contexts and subject areas—or if existing, not at all with the same intensity.

That quality, I think, is the interdictory uniqueness of criminal law. There are certain types of human acts that, when combined with certain mental states, do elicit intense fear, opprobrium, revulsion, and condemnation. These fears run deep. Criminal law is a field where students arrive with highly developed sentiments and opinions that bubble up and froth out of them. Their intuitions about wrongfulness—about what *must not* be done—are rather muscular by comparison with, say, their intuitions in civil procedure or professional responsibility.²⁹ Like all of us, they know fear. Certain crimes, and certain defenses, too, elicit a powerful sense of foreboding.

If human beings will know fear, if their sense of foreboding is so keen, much depends upon which fears they know most intimately. The fears they know best—those with which they are most familiar—they want given voice by the powerful interdictions and necessary denials of the criminal law. When the great "*No! Do it not!*" of criminal law is transgressed, when one's deepest fears have been actuated, there is not only the sense that punishment is owed to right the wrong, but the rather more potent and much more problematic feeling that anything less than a perfectly proportionate retaliation is unacceptable, intolerable. It is this sense of forbiddenness, transgression, and—close on its heels—the desire for commensurately severe punishment³⁰ that laces a good deal of criminal law and

²⁸ *State v. Norman*, 366 S.E.2d 586 (N.C. App. 1988), *rev'd*, *State v. Norman*, 378 S.E.2d 8 (N.C. 1989), *excerpted and discussed in* DRESSLER, *supra* note 25, at 532–546.

²⁹ Certain intentional torts may be analogous, though even here I think that there may be a qualitative difference from the emotions that various particularly odious criminal acts can elicit.

³⁰ "Castigo," the Spanish term for punishment, better evokes the feeling in question.

bathes it in dark hues. The ideas of the interdictory and the retaliatory are unique to criminal law. And it may well be, in Philip Rieff's acute assessment, that "[w]ithout credal prohibitions, deep inside its necessary, modern casuistries, our law[] cannot help us govern ourselves."³¹

Hart's passage remains a leitmotiv of Dressler's case book, needling students to persist in their reflections about whether this or that crime does, and should, dredge up the specters of fear, hatred, and revulsion that haunt the core of criminal law. The sections on self-defense are particularly powerful in this respect, and not only *People v. Goetz*,³² but the selections of pieces under the note, "Race and the 'reasonable person.'"³³ Here Dressler includes three pieces, two journalistic and one academic, making different arguments about the relationship of "reasonableness" in self-defense to race and racism. In the first piece, Richard Cohen writes that racist fears by whites of African Americans may indeed be reasonable in many mundane interactions, from entering a shop to walking along the street.³⁴ In the second, Rosemary Bray describes her fears when her African American husband is late for supper: "I fear white men in police uniforms; white teenagers driving by in a car with Jersey plates; thin, panicky, middle-aged white men on the subway. Most of all, I fear that their path and my husband's path will cross one night as he makes his way home."³⁵ Finally, Professor Jody Armour makes the obviously deeply felt argument that reasonable racism is a contradiction in terms and that we ought at least to strive as a society and a political culture not to equate the typicality of a fear with its rationality.³⁶

Throughout, students are stimulated to sense the strain and swirl among conflicting values, impulses, and fears. How can racism, that rare modern universal moral and political taboo, be legally reasonable? At what point should a subjective fear become a basis for action that the law will excuse? That it will justify? Even if most people think that under some circumstances, race consciousness is reasonable insofar as self-defense is concerned, should the criminal law demand more? Should the criminal law be an instrument of society's highest aspirations? Should it be concerned with social, cultural, and political improvement or should it instead content itself with comparatively minimalist ends—not the perfect world, but the world as it is? Is fear a virtue, a vital internal armament to be used liberally against a hostile world, or is it destructive, creating its own evil as it does its protective work?

These provocations, and so many others like them in Dressler's book, excite. And this remains true whether or not a student is actively contemplating a career in

³¹ PHILIP RIEFF, CHARISMA: THE GIFT OF GRACE, AND HOW IT HAS BEEN TAKEN AWAY FROM US 151 (2007).

³² 497 N.E.2d 41 (N.Y. 1986).

³³ DRESSLER, *supra* note 25, at 518.

³⁴ *Id.* at 518–19.

³⁵ *Id.* at 519.

³⁶ *Id.* at 520–23.

criminal law. For those students who are interested in criminal practice, this style of instruction illuminates the sometimes suppressed fact that the world of criminal law, and so a career in criminal law, is intimately connected with the rest of the world around them. The Wechslerian pedagogical mode cultivates an intellectual link between a lawyer's professional and personal life, one which can be returned to again and again for sustenance.

Studies and commentary that document the dissatisfaction of lawyers with their work are legion, but explanations for the malaise for some reason have not tended to dwell on the intellectual component of lawyer unhappiness. Lawyers are accustomed to the stimulus of ideas; they have been sustained for the great majority of their pre-practice lives on academic intellectual exchange. As much as law students grouse about the burdens of legal education, and as eager as many of them are for emancipation into the world of practice, my sense is that many harbor the tacit hope that their chosen legal field will be at least somewhat intellectually fulfilling. Perhaps some students pursue a legal career solely to sate a slavish hunger for the profession's riches (though I doubt this can be said of those who choose criminal law), but many are drawn to law because they in some measure desire a career that will continue to nourish the life of the mind. Criminal law can do this.

And what of the vast majority of law students who do not become criminal lawyers? For them, Professor Walker's prescriptions seem even less apt. One possibility that Professor Walker does not consider, but that seems to issue naturally from his position, is that criminal law ought to be made an elective, available for those who are already strongly predisposed toward criminal practice, but not required for anyone else. There are at least two reservations I would have about such a reform. First, it assumes that a class in criminal law is incapable of persuading students of the intellectual interest and worth of criminal law; and the assumption becomes a reality only because it is fulfilled by Professor Walker's very own pedagogical program. Second, and more importantly, it presupposes that criminal law has nothing to contribute other than the processing and digestion of case holdings. Law here is viewed as a kind of liquid, the students as empty jars. We pour in the fluid and it sits there, stored up and unused, until such time as a client may need it for some practical end.

Again, I see no reason to make these assumptions. They run contrary to everything that I have observed about the criminal law course and my own students' feelings about it. It is admittedly difficult to know how to measure the usefulness of criminal theorizing to the scores of practitioners who are not criminal lawyers—how to quantify in economic or other utils the "value added" of political and moral reflection. That is just as well. It may be better simply to think on the kind of feelings that a successful class session of criminal law can elicit: an electric buzz of excitement, genial interest in the workings of society's dark corners, and a certain apprehensiveness and incertitude about one's own ideas, fears, and prejudices. Surely, there is some value in that.

* * *

Law students sometimes, perhaps often, come to law school expecting that their professors will teach them the law, that they will learn it, and that both sides will go their separate ways fully satisfied from the encounter, as if a complicated math problem had thereby been solved neatly, tidily, and with no remainder. But it is a significant part of the overlap between a legal education and a liberal education to transport students out of the legal concepts and categories that are of comfort to them, and to induce in them a sense of alienation and uneasiness. At its best, criminal law cultivates that sense of foreignness and discomfiture; one of the primary ways it does this is by demanding that students interrogate their own fears when confronted with the bleak realities of the world of crime—a world which is, though they may not know it, their own. As an object of study, criminal law is indeed an “instrument” of “human betterment”³⁷—not a Wechslerian device of social engineering or a tool with which “enlightened leaders”³⁸ can save the world, but rather a type of learning that can enrich future lawyers’ professional and personal lives, within criminal practice and outside it. Even if students, in the end, retain their own view of the particular matter at hand, it will invariably be all the more interesting, sophisticated, layered, and complex from the engagement.

“Almost liberal arts,” says Professor Sanford Kadish of the criminal law class.³⁹ One hopes that he continues to be right. Criminal law, as much as any other legal subject, can awaken in students the realization that a substantial overlap between legal and liberal learning does, in fact, exist—for them and, in teaching them, for us.

³⁷ Walker, *supra* note 2, at 227 (footnote omitted).

³⁸ *See id.* at 230.

³⁹ *Id.* at 220, quoting Interview with Sanford H. Kadish, Alexander F. and May T. Morrison Professor of Law, Emeritus, Univ. of Cal., Berkeley, in Berkeley, Cal. (May 19, 2008).

