JUSTICE THEATER IN THE CRIMINAL LAW CURRICULUM

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For the last half-century, law students have been required to take a criminal law course that ostensibly trains them to think critically about the justifications for criminal punishment. The same students have then gone on to serve as central actors in a system of mass incarceration that millions of Americans today view as profoundly unjust.

How did this happen?

A number of legal scholars, notably including Alice Ristroph in her 2020 Article "The Curriculum of the Carceral State," have argued that the traditional criminal law curriculum has played a role in creating and reproducing the practices of mass incarceration. This Article agrees, and focuses on two concrete critiques, alongside two corresponding curricular reforms.

First, criminal law courses routinely introduce the field in part by discussing a series of theoretical "justifications of punishment" such as retribution, deterrence, incapacitation, and rehabilitation. These discussions often provide students with tools for arguing in favor of punishment, and in particular incarceration, without providing relevant empirical evidence that shows the limits of the theoretical justifications. Students are invited to focus on the theoretical benefits of incarceration without being adequately exposed to the negative effects of incarceration as it is actually practiced in the United States today.

The tradition of introducing criminal law through the discussion of theoretical justifications for punishment should be abandoned. Instead, this Article proposes beginning the criminal law course with an empirically informed discussion that

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frames criminal law as one response among many to the social problem of public safety.

Second, the bulk of most criminal law casebooks consists of excerpts from judicial opinions. These excerpts tend to describe harmful acts carried out by defendants without providing adequate context for thinking seriously about justice. The excerpts send the message that criminal harms result from isolated, individual choices by bad people, rather than being conditioned by situational and other factors, including policy choices by the state.

This Article proposes replacing criminal law case excerpts with a method of instruction based on case studies, similar to the case study method used in many professional schools. Case studies could provide students with more context for understanding criminal harms, and in particular could better equip future prosecutors to serve as "problem-solver[s] responsible for considering [the] broad goals of the criminal justice system," as the ABA Criminal Justice Standards demand.

In the coming years, the arrival of the NextGen bar exam will offer an occasion to reconsider how criminal law is taught in the United States. Rather than continuing to train students in ways of thinking that facilitate mass incarceration, the curriculum should be changed.

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INTRODUCTION: JUSTICE THEATER

In the summer of 2020, millions of Americans filled the streets to protest the murder of George Floyd and the racial injustices of policing and criminal punishment in the United States. I had recently moved to South Dakota and was preparing to teach criminal law for the first time. As a former public defender, I wanted to give my students the resources to think critically about criminal punishment in a way that my own criminal law education, a little over a decade earlier, had not prepared me to do. Rather than simply ignoring the controversies that were provoking the largest demonstrations in U.S. history,[1] I wanted to equip my students to decide for themselves the extent to which "criminal justice" in the United States was in fact "just," in light of their own values, whatever those values might be.

For three years, I have done my best to realize these goals. But all too often, doing so has required "teaching against"[2] the casebook I assign to my students, an excellent casebook that reflects the standard approach to teaching criminal law.[3] This Article arises out of my sense that the standard approach is no longer justifiable, if it ever was.

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1 *See* Larry Buchanan, Quoctrung Bui & Jugal K. Patel, *Black Lives Matter May Be the Largest Movement in U.S. History*, N.Y. TIMES (July 3, 2020), [https://perma.cc/6JJP-HBPA]. At the request of the author, non-perma.cc hyperlinks have been omitted.

2 On the difficulties of "teaching against" a casebook, see Alice Ristroph, *The Curriculum of the Carceral State*, 120 COLUM. L. REV. 1631, 1683–84, 1684 n.250 (2020) (collecting critiques). In addition to providing supplementary material during lectures, I require my students to view streaming video of in-custody initial court appearances and then to write a journal about their observations. We also read and discuss BRYAN STEVENSON, JUST MERCY: A STORY OF JUSTICE AND REDEMPTION (2014), and I try to arrange a tour each year of a nearby jail.

As the citations throughout this Article suggest, Ristroph's Article provided an invaluable resource for developing my arguments, although the arguments themselves arose primarily out of my own experiences, especially as a professor. For other valuable recent works criticizing criminal law education for facilitating the reproduction of racialized mass incarceration, see Shaun Ossei-Owusu, *Criminal Legal Education*, 58 AM. CRIM. L. REV. 413 (2021); Shaun Ossei-Owusu, *The New Penal Bureaucrats*, 170 U. PA. L. REV. 1389 (2022); Robin Peterson, *The Complicit Canon of Criminal Law: A Critical Survey of Syllabi, Casebooks, and Supplemental Materials*, 57 U. MICH. J.L. REFORM 565 (2024); *see also* ALEC KARAKATSANIS, USUAL CRUELTY: THE COMPLICITY OF LAWYERS IN THE CRIMINAL INJUSTICE SYSTEM 2 (2019) ("[T]he culture of elite law schools produces professionals who tolerate a legal system that is profoundly unjust."). For a variety of practical proposals on how to teach first-year Criminal Law from a critical perspective, see *Guerrilla Guides to Law Teaching No. 2: Criminal Law*, GUERILLAGUIDES (Aug. 29, 2016), https://guerrillaguides.wordpress.com/2016/08/29/crimlaw [https://perma.cc/DZ66-2PF2].

3 I use Jens David Ohlin's criminal law casebook, now in its third edition. JENS DAVID OHLIN, CRIMINAL LAW: DOCTRINE, APPLICATION, AND PRACTICE (3d ed. 2022). I use Ohlin's casebook in part because substantive criminal law is a three-credit, one-semester course at my law school, and Ohlin's casebook is exceptionally concise. Another of the signature advantages of the casebook is

Another feature of the summer of 2020 may provide a helpful analogy. Months into the COVID-19 pandemic, it was increasingly clear that the virus was spreading primarily through airborne transmission. Despite widespread fears early on, there was little evidence of people becoming infected by touching germ-infested surfaces. Yet in the summer of 2020, many businesses continued to publicize their extraordinary efforts to "sanitize" or "deep clean" the surfaces in their facilities.[4] Critics described this obsessive attention to surface cleaning as a form of "hygiene theater," a series of "risk-reduction rituals that make us *feel* safer but don't actually do much to reduce risk."[5] The term echoed similar criticisms of the TSA's post-9/11 pat-down procedures, which some observers had ridiculed as "security theater."[6]

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that it provides a summary of legal doctrine at the start of each chapter. *See* Jens David Ohlin, *The Changing Market for Criminal Law Casebooks*, 114 MICH. L. REV. 1155, 1170 (2016) (defending inclusion of doctrinal summary at the start of each chapter, as opposed to "excessive hide-the-ballism"); *cf. id.* at 1162 ("[I]t is just false that legal research requires the reading of cases without any prior doctrinal introduction to the subject.").

The leading criminal law casebooks are, citing their latest editions as of this writing, SANFORD H. KADISH, STEPHEN J. SCHULHOFER & RACHEL E. BARKOW, CRIMINAL LAW AND ITS PROCESSES: CASES AND MATERIALS (11th ed. 2022), and JOSHUA DRESSLER & STEPHEN P. GARVEY, CRIMINAL LAW: CASES AND MATERIALS (9th ed. 2022). On the popularity of the Kadish and Dressler casebooks and the immense influence of the Kadish casebook, see Ristroph, *supra* note 2, at 1644 n.59, 1648 & n.82, 1652 n.102 (2020) (stating that Kadish's casebook has the highest market share, and that Dressler and other criminal law casebook authors have described their approaches as descending from the Kadish casebook approach).

As a first-year law student in the spring of 2008, I was assigned SANFORD H. KADISH, STEPHEN J. SCHULHOFER & CAROL S. STEIKER, CRIMINAL LAW AND ITS PROCESSES: CASES AND MATERIALS (8th ed. 2007). According to my notes, the first day of class began with a discussion of the theories of punishment, including the observation that "on the margins, deterrence can have great effects," although the professor noted objections to deterrence "*as theory*" because, for example, "criminals might not know the law." We also learned "that probability of detection . . . is twice as important as severity," but without receiving any hint that increasing the severity of punishment might make no difference to deterrence at all, or that incarceration could, under some circumstances, have criminogenic effects. After discussing the justifications for punishment, we turned to *Dudley and Stephens*. R v. Dudley & Stephens, [1884] 14 QB 273. My ninety-five pages of ten-point type notes for the semester contain no references at all to the quantitative scale of incarceration in the United States, even though I was studying criminal law in what turned out to be the peak year for the U.S. incarceration rate. Occasional references to "racial disparities" appear, but the notes contain no reference to the quantitative scale of racial disparities in incarceration. I recall that, years later, I still remembered the theoretical justifications for punishment, even after I had forgotten nearly everything else from the course.

4 The same organizations sometimes ignored or downplayed the importance of more effective public health measures, such as opening windows. *See* Zeynep Tufekci, *We Need to Talk About Ventilation*, ATLANTIC (July 30, 2020), [https://perma.cc/HH8E-WUWB].

5 Derek Thompson, *Hygiene Theater Is a Huge Waste of Time*, ATLANTIC (July 27, 2020), [https://perma.cc/X7L8-EZAD].

6 *See, e.g.*, Bruce Schneier, *Airplane Hackers*, SCHNEIER ON SECURITY (Nov. 15, 2003), https://www.schneier.com/crypto-gram/archives/2003/1115.html [https://perma.cc/XVA5-2VTV] ("Most of what the TSA does is security theater—window dressing.").

This Article, in essence, argues that the traditional criminal law curriculum can be fairly criticized as a form of training in "justice theater."[7] It gives students the *feeling* that they are gaining greater insight into justice, but at the same time systematically deprives them of materials that would obviously be relevant to reaching informed conclusions about justice.

By drawing attention to the ways in which the traditional criminal law curriculum excludes and distorts, the Article also helps to explain what might otherwise seem to be a puzzling incongruity between criminal law education and criminal law practice. Over the last several decades, most law students in the United States have received a mandatory education in criminal law that routinely emphasized critical thinking about justice.[8] Then, the same students have proceeded to participate in the creation and reproduction of a system of racialized mass incarceration that many millions of Americans, including many law students today, perceive as profoundly unjust.[9] Presumably any reader of this Article will already be familiar with the statistics, but among other notable features, in recent years our system of criminal punishment has incarcerated

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7 Whether the criminal legal system itself is "justice theater"—a sham performance of justice, an elaborate window-dressing around practices that do not actually result in justice—is not my focus in this Article, which is concerned only with criminal law education. Certainly, criminal legal processes are often highly theatrical, from the judge's costume, props, and scripts, to the presence of an audience, to the dramatic verbal performances during trial. Practices of human sacrifice, punishment, and torture have a long history of theatricality. *See, e.g.*, Pieter Spierenburg, *The Body and the State: Early Modern Europe*, *in* THE OXFORD HISTORY OF THE PRISON: THE PRACTICE OF PUNISHMENT IN WESTERN SOCIETY 49, 51–61 (Norval Morris & David J. Rothman eds., 1995) (describing "the theater of physical punishment" and its "audience," and noting that "[t]he scaffold served as a stage on which the drama of justice was enacted in its most visible and conspicuous form before the people of the day"); ELAINE SCARRY, THE BODY IN PAIN: THE MAKING AND UNMAKING OF THE WORLD 28 (1985) (noting that "[i]t is not accidental that in the torturers' idiom the room in which the brutality occurs was called the 'production room' in the Philippines, the 'cinema room' in South Vietnam, and the 'blue lit stage' in Chile," because "torture is a grotesque piece of compensatory drama" (footnotes omitted)).

8 For a history of the criminal law curriculum, see Ristroph, *supra* note 2, at 1640–50. On the role of justice in the traditional curriculum, see, for example, Anders Walker, *The Anti-Case Method: Herbert Wechsler and the Political History of the Criminal Law Course*, 7 OHIO ST. J. CRIM. L. 217, 220 (2009) ("[C]riminal law casebooks push students to consider the philosophical, social, and moral implications of criminalization, punishment, and crime itself."). For more details on the role of justice in the criminal law curriculum, see *infra* Parts II–III.

9 *See, e.g.*, Buchanan et al., *supra* note 1 (describing the 2020 protests); Colleen Long & Hannah Fingerhut, *AP-NORC Poll: Nearly All in US Back Criminal Justice Reform*, APNEWS (June 23, 2020, 11:02 AM), [https://perma.cc/PH3U-2AHV]; Karen Sloan, *'This Is the Civil Rights Movement of My Lifetime': Black Law Students Demand Action*, LAW.COM (June 18, 2020, 3:40 PM), https://www.law.com/2020/06/18/this-is-the-civil-rights-movement-of-my-lifetime-black-law-students-demand-action [https://perma.cc/S78L-C3WD]. On the central role of prosecutors, virtually all of whom took a criminal law course, in driving the rise in incarceration rates, especially beginning in the 1990s, see JOHN F. PFAFF, LOCKED IN: THE TRUE CAUSES OF MASS INCARCERATION AND HOW TO ACHIEVE REAL REFORM 127–60 (2017).

people at a higher rate than any other country in the world.[10] It incarcerates various minority groups, including Black and Indigenous Americans, at even higher rates than Americans in general.[11] The conditions of incarceration are often violently inhumane and degrading.[12] Finally, despite the enormous human and financial costs of incarceration and supervision, public safety from lethal violence in the United States remains worse than in any comparably wealthy country.[13]

How can we make sense of the fact that lawyers who were exposed to debates about justice in their first-year criminal law courses went on to serve as facilitators of a "carceral state" that is so widely perceived today as unjust?[14]

The answer, this Article suggests, is not that students forgot the lessons they learned about justice in criminal law once they entered practice. Rather, the traditional criminal law curriculum encouraged and encourages ways of thinking about criminal justice that facilitate mass incarceration. The indoctrination was presumably never planned. Law professors work in one of the most left-leaning occupations in the United States,[15] and many criminal law professors have become vocal critics of

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10 Emily Widra, *The United States Incarcerates More of Its Population than Any Other Nation—Including Nations that Have Similar or Higher Rates of Crime*, PRISON POL'Y INITIATIVE (Sept. 2021), https://www.prisonpolicy.org/graphs/global_2021_scatterplot.html [https://perma.cc/8XNF-9ER5]. Since I began work on this Article, El Salvador has surpassed the United States' incarceration rate. Kejal Vyas & Santiago Pérez, *The Country with the Highest Murder Rate Now Has the Highest Incarceration Rate*, WALL ST. J. (July 10, 2023, 9:17 AM).

11 According to the Prison Policy Initiative's latest statistics, Black Americans make up 12% of the U.S. population and 38% of the population in jails and prisons. Wendy Sawyer & Peter Wagner, *Mass Incarceration: The Whole Pie 2023*, PRISON POL'Y INITIATIVE (Mar. 14, 2023), https://www.prisonpolicy.org/reports/pie2023.html [https://perma.cc/X6LG-JCGW].

12 *See, e.g.*, *infra* notes 87–88.

13 *See, e.g.*, Erin Grinshteyn & David Hemenway, *Violent Death Rates: The US Compared with Other High-Income OECD Countries, 2010*, 129 AM. J. MED. 266, 266, 271 (2016) ("US homicide rates were 7.0 times higher than in other high-income countries, driven by a gun homicide rate that was 25.2 times higher").

14 On the idea of a "carceral state" or "prison state," see generally Marie Gottschalk, *Hiding in Plain Sight: American Politics and the Carceral State*, 11 ANN. REV. POL. SCI. 235 (2008); MARIE GOTTSCHALK, CAUGHT: THE PRISON STATE AND THE LOCKDOWN OF AMERICAN POLITICS (2015). Gottschalk's framing is not simply a rhetorical flourish meant to condemn the state as a whole by identifying it with incarceration. Rather, the notion of a "carceral state" draws attention to the powerful, often overlooked indirect effects of mass incarceration on "key democratic and governing institutions in the United States." *Id.* at 257. The scale of incarceration has grown so large, for example, that penal disenfranchisement has compromised election results, and various government statistics (such as the unemployment rate and measures of public health) have been distorted by the exclusion of the incarcerated population. *See id.* at 251–57.

15 On the relative liberalism of law professors, at least as measured by political donations to Democrats, see Adam Bonica, Adam Chilton, Kyle Rozema & Maya Sen, *The Legal Academy's Ideological Uniformity*, 47 J. LEGAL STUD. 1, 3, 5 (2018) (finding that only "approximately 15

racialized mass incarceration.[16] But to the extent that they have taught criminal law in the way it has usually been taught over the last few decades, law professors have participated, however unwittingly, in the reproduction of a punitive ideology of individual blame and retribution that facilitates the carceral practices many of them now criticize.[17]

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percent of law professors are conservative," and noting that five previous studies also found "that between 75 percent and 86 percent of law professors are liberal"); Derek T. Muller, *Law School Faculty Monetary Contributions to Political Candidates, 2017 to Early 2023*, EXCESS OF DEMOCRACY (Mar. 11, 2024), https://excessofdemocracy.com/blog/2024/3/law-school-faculty-monetary-contributions-to-political-candidates-2017-to-early-2023 [https://perma.cc/34XG-BC4L] (finding that between 2017 and early 2023, 95.9% of the author's data set of law faculty contributed only to Democrats, while 2.7% contributed only to Republicans).

Of course, some prominent Republicans have opposed mass incarceration in recent decades. *See, e.g.*, Richard A. Viguerie, Opinion, *A Conservative Case for Prison Reform*, N.Y. TIMES (June 9, 2013). But in the aggregate, Democrats express much less punitive attitudes regarding criminal justice than Republicans. *See, e.g.*, John Gramlich, *U.S. Public Divided over Whether People Convicted of Crimes Spend Too Much or Too Little Time in Prison*, PEW RSCH. CTR. (Dec. 6, 2021), https://www.pewresearch.org/short-reads/2021/12/06/u-s-public-divided-over-whether-people-convicted-of-crimes-spend-too-much-or-too-little-time-in-prison [https://perma.cc/BFR8-C76T] (showing that 41% of Democrats and 54% of liberal Democrats believe people convicted of crimes spend too much time in prison, versus 14% of Republicans and 10% of conservative Republicans); Amina Dunn, *As the U.S. Copes with Multiple Crises, Partisans Disagree Sharply on Severity of Problems Facing the Nation*, PEW RSCH. CTR. (July 14, 2020), https://www.pewresearch.org/short-reads/2020/07/14/as-the-u-s-copes-with-multiple-crises-partisans-disagree-sharply-on-severity-of-problems-facing-the-nation [https://perma.cc/FEC6-WF4E] (showing that 76% of Democrats but only 20% of Republicans say that the way "racial and ethnic minorities are treated by the criminal justice system . . . is a very big problem"); *Most Americans Favor the Death Penalty Despite Concerns About Its Administration*, PEW RSCH. CTR. (June 2, 2021), https://www.pewresearch.org/politics/2021/06/02/most-americans-favor-the-death-penalty-despite-concerns-about-its-administration [https://perma.cc/6R2J-ZETN] (showing that 77% of Republicans but only 46% of Democrats "favor the death penalty for persons convicted of murder").

16 *See, e.g.*, POLICING THE BLACK MAN: ARREST, PROSECUTION, AND IMPRISONMENT (Angela J. Davis ed., 2017) (collecting critical essays by law professors); Dorothy E. Roberts, *Foreword: Abolition Constitutionalism*, 133 HARV. L. REV. 1 (2019).

17 Throughout the Article, when I refer to "retribution," I refer only to the use of retribution as a *justification* for punishment (sometimes called "positive retributivism"), not as an *upper limit* on punishment (sometimes called "negative retributivism"). *See* Zachary Hoskins & Antony Duff, *Legal Punishment*, STAN. ENCYC. PHIL. (Dec. 10, 2021), https://plato.stanford.edu/entries/legal-punishment [https://perma.cc/EZJ5-BJBW]. There may be better ways than negative retributivism of conceptualizing what the limits on criminal punishment should be, and negative retributivism may be relatively ineffective as a way of determining upper limits to punishment. *Cf.* Alice Ristroph, *Desert, Democracy, and Sentencing Reform*, 96 J. CRIM. L. & CRIMINOLOGY 1293, 1308–13, 1349–51 (2006) (describing the "elasticity" of the concept of "desert" in practice, and its weakness as a way of limiting punishment). But at the very least, positive retributivism provides resources for promoting mass incarceration that negative retributivism does not, if only because negative retributivism, standing alone, requires no punishment. My focus in this Article is on ideas conveyed through the traditional criminal law curriculum that have likely facilitated mass incarceration. Positive retributivism, to the extent that it promotes and defends the infliction of harm for its own sake, and presents such harm not as cruelty but as "justice," is certainly one of those ideas. In any

Law students who passed through the traditional criminal law curriculum and went on to participate in the development and maintenance of mass incarceration were acting consistently with their legal training. They were realizing a plausible expression of "justice" as they were trained to think of it.

The Argument begins in Part II by offering a brief sketch of the traditional criminal law curriculum. Part III argues that the curriculum described in Part II trains students to think of criminal justice in ways that facilitate mass incarceration. Specifically, Section III.A argues that by introducing the topic of criminal law through the frame of the standard "justifications for punishment," the traditional criminal law curriculum, among other things, invites students to think of clever and creative ways in which criminal punishments might be justified. Section III.B argues that the way case excerpts are used in the traditional criminal law curriculum promotes a view of crime as the result of decontextualized choices by bad people who generally deserve to be punished.

The looming arrival of the NextGen bar exam provides a rare and welcome occasion for rethinking how criminal law is taught in the United States. Part IV concludes by proposing curricular reforms.

It may be worthwhile to address a possible objection at the outset. Someone might respond to the problems detailed in Part III by proposing a seemingly simple solution. If the traditional criminal law curriculum invites students to discuss and develop their own ideas about justice while systematically depriving them of the materials needed to do so in a well-informed way, and if providing those materials would require thoroughly revising the criminal law curriculum, perhaps (it might be argued) the best path forward would be to exclude discussions of justice from the criminal law curriculum altogether. Perhaps students could simply learn to understand and predict the likely judicial interpretations of criminal statutes, without being asked to consider larger questions of justice. The professor could studiously avoid asking questions that might invite

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case, this Article largely attempts to avoid wading into the philosophical disputes surrounding the theories of punishment, in part based on a suspicion that the predictably interminable, hypertrophic reason-giving that characterizes such disputes may be doing less work than the unreasoned and often sharply differing moral intuitions with which the participants begin. As one defender of retributivism acknowledged, later in his career:

> [M]y enthusiasm for settling scores and restoring balance through retributive justice may in part have been extensions of what Nietzsche called "a soul that squints"—the soul of a shopkeeper or an accountant. If I had been a kinder person, a less angry person, a person of more generous spirit and greatness of soul, would robust retributivism have charmed me to the degree that it at one time did? I suspect not.

Alec Walen, *Retributive Justice*, STAN. ENCYC. PHIL. (June 18, 2014), https://plato.stanford.edu/entries/justice-retributive [https://perma.cc/GMA4-YHC6] (quoting Jeffrie G. Murphy, *Legal Moralism and Retribution Revisited*, 1 CRIM. L. & PHIL. 5, 18 (2007)).

students to reflect upon their own moral intuitions, including questions about whether a case was rightly decided.

One response to this objection might be to defend the importance of law students learning to think critically and for themselves. The response might invoke higher educational or professional ideals, such as the need for lawyers to display good judgment, or the value of lawyers serving as public-spirited leaders rather than mere technicians.[18]

But a more practical criticism could also be offered. A criminal law curriculum that never invited students to consider questions of justice would not prepare those students to work in the criminal legal system as it actually exists, especially as prosecutors. According to the American Bar Association, "[t]he primary duty of the prosecutor is to seek justice within the bounds of the law, not merely to convict."[19] Prosecutors will often be forced to make charging decisions or plea offers in contexts where "the law itself" provides no single, clear answer. Prosecutors cannot avoid making discretionary decisions informed by their understandings of justice. In fact, they have a professional obligation to do so. The ABA's standards state that "[t]he prosecutor is not merely a case-processor but also a problem-solver responsible for considering [the] broad goals of the criminal justice system. The prosecutor should seek to reform and improve the administration of criminal justice . . . ."[20] To remove considerations of justice from the criminal law curriculum would mean depriving students of deliberative tools that a considerable number of them will need to use in their careers.

Finally, to be clear, my aim in this Article is not to prove that the editors of criminal law casebooks, or teachers of criminal law more generally, were responsible for the rise of racially unequal mass incarceration in the United States. Obviously, outcomes in our criminal legal institutions are the product of a wide range of factors, many of them

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18 *See, e.g.*, ANTHONY T. KRONMAN, THE LOST LAWYER: FAILING IDEALS OF THE LEGAL PROFESSION (1993). In fact, "[o]ne of the most long-standing complaints about American law schools" is that they not only fail to teach justice, but that they undermine incoming students' "sense of moral right and wrong" and "produce amoralists." ROBIN L. WEST, TEACHING LAW: JUSTICE, POLITICS, AND THE DEMANDS OF PROFESSIONALISM 43 (2014).

On the teaching of criminal law, in particular, as a significant form of civic education, see Guyora Binder & Robert Weisberg, *What Is Criminal Law About?*, 114 MICH. L. REV. 1173, 1174 (2016) ("[T]he high stakes of criminal law and its contingency on democratic politics make criminal law teaching as much a matter of civic education as of technical education."). Binder and Weisberg also note that because "[l]awyers serve not merely as operators of the legal system but as stewards, charged with assessing and improving it," lawyers must be "independent critical thinkers, not passive recipients of content." *Id.* at 1198–99.

19 PROSECUTION FUNCTION § 3-1.2(b) *in* CRIM. JUST. STANDARDS (AM. BAR ASS'N 2017).

20 *Id.* § 3-1.2(f); *see also* Binder & Weisberg, *supra* note 18, at 1174 ("The discretion accorded many actors in the criminal justice system means that fundamental questions of justice are also highly practical questions.").

far outside the influence of any law professor. Perhaps one day a scholar will find a collection of data that makes possible a statistical analysis of a relationship between the content of criminal law curricula and subsequent prosecutorial behavior. Perhaps there is even a natural experiment somewhere, waiting to be found, in which criminal law curricula randomly changed in some settings but not in other, comparable settings, and the effects on subsequent prosecutorial behavior, or ideology, can be measured. This Article does not attempt such an analysis.[21] In any case, such an analysis would not show what effect the curricular reforms proposed below might have had, because the proposals have not yet been attempted.

But the absence of a proven causal relationship is not proof of an absent causal relationship. If it is plausible, as this Article argues, that the traditional criminal law curriculum encouraged ways of thinking that facilitated mass incarceration, we should at least factor this risk into our thinking about whether the teaching of criminal law should change.

II. THE TRADITIONAL CRIMINAL LAW CURRICULUM

When I refer to "the traditional criminal law curriculum," I have in mind something like the following. At a typical law school in the United States, all of the students are required to take a course called Criminal Law in their first year.[22] The course deals with the "substantive" law of crime and punishment, especially the definition of various crimes and defenses, rather than the "procedural" law of policing and criminal adjudication, which is covered in separate courses.[23]

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21 At the very least, it is not implausible that the contents of a criminal law course, including the information conveyed about criminal punishment, might have some effect on student attitudes and beliefs, and that these attitudes and beliefs might have some effect on later behavior. To cite an admittedly artificial example, some experiment-based public opinion research has suggested that exposure to additional information can reduce public enthusiasm for punishment. *See* GOTTSCHALK, *supra* note 14, at 186.

22 *See* Ristroph, *supra* note 2, at 1640–44, 1651 (describing how substantive criminal law became "a required course at most American law schools").

23 For a critique of strictly distinguishing between "substantive" and "procedural" criminal law, see Ristroph, *supra* note 2, at 1642, 1692–96, 1701–02 (resisting "a substance/procedure distinction that leaves enforcement out of an account of criminal law"). But as Ristroph acknowledges, even if criminal statutes are as unclear as other laws, and even if the application—the meaning, from a pragmatic perspective—of criminal statutes necessarily depends on discretionary decisions by actors in the system such as police, prosecutors, and judges, "there is value in studying the content of criminal statutes, or other forms of law that set forth conditions of criminal liability." *Id.* at 1701–02. Among other things, the study of criminal statutes teaches students about how most

The professor in this 1L Criminal Law course assigns a casebook that consists primarily of excerpts from judicial opinions, usually followed by a few notes and questions written by the casebook's author or authors. The readings are divided into chapters that cover various aspects of the substantive criminal law. There is often an early chapter describing various theoretical justifications for punishment, usually with a few gestures toward philosophers such as Kant and Bentham.[24] Retribution is

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judges today would likely understand "the outer scope" of a statute's reach. OHLIN, *supra* note 3, at 1170.

I note that this Article limits its focus to the teaching of the substantive criminal law course, without considering whether larger changes in the law school curriculum, such as the combination of the criminal law and criminal procedure courses, might be advisable. Changes in the teaching of criminal law can be brought about by any individual criminal law professor, while larger curricular changes would require a broader range of institutional actors and practical considerations.

Nevertheless, it may be worth noting that an argument could be made for collapsing criminal law and criminal procedure into a single introductory course, especially in light of the Supreme Court's decades-long attenuation of the practical significance of constitutional criminal procedure. Writing prior to most of the Warren Court's criminal procedure revolution, Kadish and Paulsen included both subjects in the first edition of their casebook. *See* MONRAD G. PAULSEN & SANFORD H. KADISH, CRIMINAL LAW AND ITS PROCESSES: CASES AND MATERIALS 715–993 (1962) (including within the fourth and final section of the casebook, under the title "The Administration of the Criminal Process," a variety of materials that today would be placed in a separate criminal procedure course, such as the treatment of "The Legal Control of Police Practices"). For a concise account of the Supreme Court's trajectory in constitutional criminal procedure cases over the last several decades, see ERWIN CHEMERINSKY, PRESUMED GUILTY: HOW THE SUPREME COURT EMPOWERED THE POLICE AND SUBVERTED CIVIL RIGHTS (2021).

24 *See, e.g.*, DRESSLER & GARVEY, *supra* note 3, at 29–92; SANFORD H. KADISH & STEPHEN J. SCHULHOFER, CRIMINAL LAW AND ITS PROCESSES: CASES AND MATERIALS 95–172 (7th ed. 2001); OHLIN, *supra* note 3, at 25–27. For simplicity, in my presentation of the traditional, tough-on-crime era criminal law curriculum in this Section of the Article, I will refer primarily to two works: the seventh edition of the Kadish and Schulhofer casebook, published in 2001, and the third and most recent edition of Ohlin's casebook, published in 2022. KADISH & SCHULHOFER, *supra* note 24; OHLIN, *supra* note 3. The former shows what the leading criminal law casebook in the United States offered to teachers in the period after violent crime had begun to decline nationally in the early 1990s but before the beginning of the decline in the incarceration rate in the late 2000s, and well before critiques of mass incarceration began to gain public prominence through activism and works such as MICHELLE ALEXANDER, THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS (The New Press rev. ed. 2012). It does not seem unreasonable to assume that the contents of the leading criminal law casebook in 2001 reflect a relatively conventional approach to teaching criminal law in the era of mass incarceration. I cite Ohlin's casebook to suggest that this traditional approach to teaching criminal law is not a thing of the past, even if many casebooks, including Ohlin's, have made some adjustments in response to the protests of 2020 and other developments in recent years. As noted below, the latest edition of Kadish continues to add supplementary materials that provide students (or at least those students who read the materials) with resources for critically examining mass incarceration, although without altering the basic structural features discussed in Sections III.A and III.B. *See infra* note 41.

Finally, it goes without saying that there are exceptions to the generalizations in this Section. Criminal law casebook authors have taken a variety of approaches to the subject. Even more importantly, the actual curriculum in any criminal law course will depend as much on the

presented as a standard justification for punishment.[25] Forward-looking justifications for punishment such as deterrence, incapacitation, and rehabilitation are also introduced.[26] The various justifications for punishment are presented as theories, often with little or no discussion of empirical evidence.[27] The primary goal seems to be to give students the ability to make arguments for and against punishment based on a toolbox of widely used argumentative moves.

A recent survey of the criminal law curriculum found that all of the professors who responded included "the justifications of criminal law and the purposes of punishment" in their introductory lectures.[28] The author of the survey notes that "[a]ll the casebooks included in this survey open with discussions of the retributive and utilitarian functions of punishment. Every professor who participated in this survey assigned portions of these readings in one of their introductory classes at the beginning of the semester."[29]

After this introductory theoretical discussion of punishment, the bulk of the casebook is dedicated to defining the elements of crimes in general (such as actus reus and mens rea), defining a selection of specific

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professor's use of the assigned casebook as on the casebook's contents, especially when one considers that most casebooks contain far more materials than could be plausibly assigned, much less read, in a three- or four-credit course. No matter how extensive a casebook's treatment of the scale of criminal punishment, racial disparities in incarceration, or alternatives to incarceration, the inclusion of such materials will matter little if they are not assigned, or assigned but never addressed in class.

25 *See* KADISH & SCHULHOFER, *supra* note 24, at 102–15; OHLIN, *supra* note 3, at 26–27.

26 *See* KADISH & SCHULHOFER, *supra* note 24, at 115–35; OHLIN, *supra* note 3, at 25–26.

27 *See* OHLIN, *supra* note 3, at 25–26. In its treatment of deterrence, the 2001 edition of Kadish and Schulhofer's book offers a variety of perspectives and qualifications, but generally gives the impression, at least to this reader, that Richard Posner's rational choice theory is the leading scholarly view of deterrence, that this view is supported by "[a] growing empirical literature on crime" (in Posner's words), and that harsh punishments are an effective deterrent, even if increasing the risk of conviction "appears to be" more effective than increasing the severity of punishment. KADISH & SCHULHOFER, *supra* note 24, at 117–19 (quoting RICHARD POSNER, ECONOMIC ANALYSIS OF LAW 242–43 (5th ed. 1998). In other words, the casebook invites students to conclude that armchair speculation about what "rational actors" might do is, subject to various caveats, a more or less reliable way of predicting the consequences of criminal justice policies, as shown by the method's successful predictions regarding the deterrent effect of incarceration. *See id.* at 118–19. The overall presentation is, if anything, less skeptical toward the general deterrent effect of incarceration than the language in the 1975 edition of the casebook, which noted that "[s]ome studies have gone so far as to question whether increased severity has any correlation at all with increased deterrence." SANFORD H. KADISH & MONRAD G. PAULSEN, CRIMINAL LAW AND ITS PROCESSES: CASES AND MATERIALS 31 (3d ed. 1975). For contemporary views of the empirical evidence regarding the deterrent effects of criminal punishment, see *infra* Section III.A.1.a.

28 *See* Peterson, *supra* note 2, at 569. The researcher, a student at the University of Michigan Law School, requested teaching materials from ninety-five professors at twelve law schools and received materials from thirteen professors at seven law schools. *Id.* at 567 & n.10.

29 *Id.* at 9.

crimes (typically including various forms of homicide), and defining a selection of defenses (such as self-defense and insanity).[30] Before each class, the student reads a handful of case excerpts. Very often, the cases include vivid, appalling factual descriptions of criminal conduct. In a typical criminal law casebook, a student will be exposed to a parade of horrors, such as a mother allowing her infant to starve to death, a father facilitating his son's rape of a neighbor, or a mob crushing in the skull of an African American man.[31] One of the most widely excerpted criminal law cases in the traditional curriculum involves starving men in a lifeboat killing, eating, and drinking the blood of a young man.[32] Another involves a woman who kills her husband while he is sleeping, after years of being prostituted and tortured by him.[33] The facts described in most of the excerpts in a standard criminal law casebook consist almost entirely of the allegedly criminal act and the events immediately preceding it.[34]

In class, the professor will often ask students to summarize the facts and holding of a case, typically through a so-called "Socratic method" in which the professor asks a series of questions that may or may not lead the student toward what the professor sees as the case's central significance.[35] The discussion may eventually turn toward whether the court reached the correct legal conclusion—that is, whether the court correctly applied the relevant legal materials to the facts of the case. Especially if the readings for the day involve a contested area of criminal law where different jurisdictions have adopted different rules, the professor may invite a discussion of the advantages and disadvantages of various possible rules.

In both the "legal" discussion of how the court applied the given law to the facts, and the "policy" discussion of whether the law should be different, students will almost inevitably draw on their moral intuitions

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30 *See* KADISH & SCHULHOFER, *supra* note 24, at xii–xiv, xvi–xvii, xxv–xxvi; OHLIN, *supra* note 3, at xv–xvi, xviii–xx, xxix–xxx.

31 *See, e.g.*, OHLIN, *supra* note 3, at 327 (excerpting State v. Stewart, 663 A.2d 912 (R.I. 1995)); *id.* at 138 (excerpting State v. Davis, 388 S.E.2d 508 (W. Va. 1989)); *id.* at 270 (excerpting State v. Castagna, 870 A.2d 653 (N.J. 2005)).

32 *See, e.g.*, *id.* at 773 (excerpting R v. Dudley & Stephens [1884] 14 QB 273). Peterson notes that she reviewed thirty-three syllabi containing a "purposes of punishment" unit. Peterson, *supra* note 2, at 575 n.42. "Among those, twenty-five included case assignments. Within that subset, twenty-one assigned *Dudley and Stephens*." *Id.*

33 *See, e.g.*, OHLIN, *supra* note 3, at 691 (excerpting State v. Norman, 378 S.E.2d 8 (N.C. 1989)). Peterson reviewed twenty-six syllabi that included a self-defense unit. Peterson, *supra* note 2, at 591 n.106. "*Norman* was assigned in sixteen and referenced in an additional three." *Id.*

34 *See supra* note 31.

35 *Cf.* Duncan Kennedy, *Legal Education and the Reproduction of Hierarchy*, 32 J. LEGAL EDUC. 591, 593 (1982) (criticizing the first-year law school classroom as a "Kafka-like riddle-state" consisting of "pseudo-participation in which one struggles desperately, in front of a large audience, to read a mind determined to elude you").

regarding what would or would not be just.[36] Although the debates between students in a criminal law classroom often seem to result from students having different intuitions about whether a criminal punishment would be fair, the case excerpts themselves often provide little or no detail regarding the nature and quantity of punishment that a convicted defendant will receive. The concrete stakes of different possible convictions are often left unclear in casebooks, perhaps because sentencing practices vary so dramatically by jurisdiction, while standard criminal law casebooks are written to be used in any state.[37]

Students may debate, for example, whether voluntary manslaughter should be broadly available to defendants charged with intentional murder, or should be limited to a narrowly defined list of provocations—often without considering in detail the concrete effect of this choice under the sentencing law of a specific jurisdiction. Instead, classroom discussions are often implicitly based on relative comparisons: would it be just to punish the defendant in this factual scenario *more* than the defendant in that factual scenario? Or does justice require that they be punished equally? Or that one or both not be punished at all?

Over the course of the semester, students typically have many opportunities to invoke the theoretical justifications for punishment introduced early in the course. In the discussion of the tortured spouse case, for example, one student may invoke retribution to argue that the tortured spouse does not deserve to be convicted of murder given all that she had suffered, while another student may invoke deterrence to argue that allowing the defendant a self-defense instruction could open the door to unjustified intentional killing in more marginal cases of spousal abuse. As students develop their facility in deploying these arguments, they may have the sense that they are gaining expertise in matters of great moral seriousness.

III. TWO STRUCTURAL PROBLEMS IN THE CURRICULUM

The sketch of the traditional criminal law curriculum offered above may seem anodyne. But when one considers that many law students will enter criminal practice with little or no further study of criminal punishment, what has been left out of the curriculum may seem far more

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36 *See* Gregory Brazeal, *Between Description and Prescription: Law, Wittgenstein, and Constitutional Faith*, 120 W. VA. L. REV. 363, 368 (2017) (describing legal discourse as a distinctive social practice in which speakers routinely "base a legal conclusion regarding what the law is in part on [their] view of what the law should be").

37 There are some exceptions. *See, e.g.*, STEVEN F. SHATZ, SCOTT W. HOWE & AMY FLYNN, CALIFORNIA CRIMINAL LAW: CASES AND PROBLEMS (5th ed. 2023).

troubling. My goal in Part III will be to defamiliarize the curriculum by making its exclusions and distortions more visible. Section III.A will address the framing of criminal law in terms of the standard justifications for punishment. Section III.B will address the exclusion of morally relevant context from the stories of crime included in most case excerpts.

A. *Framing Criminal Law in Terms of "Justifications for Punishment"*

Nearly every criminal law casebook contains an introductory chapter describing various traditional theoretical justifications for punishment, usually including deterrence, rehabilitation, incapacitation, and retribution.[38] By presenting the theories at the outset, the casebooks suggest that the theories provide a kind of normative foundation for what will be studied during the course. For example, the latest edition of the Kadish et al. casebook provides an introductory account of the scope of the criminal legal system in the United States, and then turns to the theoretical justifications under the heading: "Why Criminal Punishment?"[39]

Until very recently, most casebooks failed to include much, if any, empirical evidence that would allow students to evaluate for themselves the validity of the various theories of punishment. In most casebooks, as Alice Ristroph observed in 2020, "[n]one of the four theories (consider them the four horsemen of the carceral state) is presented in enough detail or with sufficient background evidence to allow students to assess meaningfully whether criminal punishment actually does serve the purported goal."[40] The next section, Section III.A.1, will briefly consider the potentially harmful effects of criminal law casebooks teaching students how to offer arguments in favor of incarceration while failing to expose them to empirical evidence that might undermine those arguments.

But it is worth noting that in recent years, as criminal justice reform and racial inequalities have received greater national attention, some casebooks have begun to include more empirical detail on the weaknesses and limitations of the traditional theoretical justifications for punishment. Characteristically, the Kadish et al. casebook, weighing in at nearly 1400 pages, has offered some of the most expansive updates. As the authors note in their preface to the eleventh edition, published in 2022:

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38 *See supra* notes 24–26.

39 KADISH, SCHULHOFER & BARKOW, *supra* note 3, at 8.

40 Ristroph, *supra* note 2, at 1660.

> [A]n acceptable 21st Century course of study in criminal law must give a prominent place to America's long-overdue reckoning with over-criminalization, mass incarceration, and discriminatory law enforcement. While the Tenth Edition covered those topics, the Eleventh Edition gives more in-depth treatment to those issues, both as standalone material at the outset of the book and where relevant in the discussion of other topics.[41]

The Kadish et al. casebook now touches on a number of the empirical points that I will briefly note below.[42] But it remains important to highlight the empirical points for at least two reasons. First, looking backward, the evidence-free presentation of the theoretical justifications for criminal punishment is one of the clearest illustrations of how the traditional criminal law curriculum may have facilitated, or at least failed to check, the rise of mass incarceration. Second, even today casebooks vary in the extent to which they address the limitations of the theoretical justifications, with some casebooks continuing to present little or no relevant empirical evidence.[43]

1. Empirical Omissions

A law student who becomes a prosecutor shortly after graduation may quickly find herself possessing significant discretionary power to determine, through plea offers, how much time another human being will spend in a cage, often under inhumane conditions.[44] How do prosecutors learn to deploy this awesome power?

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41 KADISH, SCHULHOFER & BARKOW, *supra* note 3, at xxxiii.

42 *Id.* at 18–32, 1163–70. Again, however, it is important to emphasize that no amount of added materials in a casebook can guarantee that a professor will make use of those materials, or that a student will consider them. To the extent that I direct critical attention toward casebooks in this Article, rather than focusing on the discretionary choices of teachers, I do so only because casebooks provide a convenient written source of materials for discussing the criminal law curriculum, not because I assume that the contents of casebooks entirely determine the contents of law school instruction.

43 *See infra* note 49.

44 On prosecutorial power, see PFAFF, *supra* note 9, at 127–59. As Rachel Barkow notes, "[t]he Framers . . . put in place numerous constitutional protections to prevent government overreaching in criminal matters," but a variety of legal and institutional shifts have resulted in prosecutors today possessing legislative, executive, and judicial powers "under one roof—the very definition of tyranny that the separation of powers was designed to guard against." RACHEL ELISE BARKOW, PRISONERS OF POLITICS: BREAKING THE CYCLE OF MASS INCARCERATION 126, 130 (2019). On the prevalence and pathologies of plea bargaining, see generally CARISSA BYRNE HESSICK, PUNISHMENT WITHOUT TRIAL: WHY PLEA BARGAINING IS A BAD DEAL (2021). On inhumane conditions in U.S. jails and prisons, see *infra* Section III.A.1.d.ii.

In practice, beginning prosecutors will often work on misdemeanor cases and will generally determine plea offers through consultation with their supervisors.[45] They will gradually develop a sense of what a "normal" plea offer looks like in various contexts. They may push above or below a normal offer in any given case based on their own intuitions of fairness.

But where did the norms governing plea offers come from? The norms in the prosecutor's office were typically not the result of any empirical study of the consequences of various charging decisions or sentencing options. The norms usually developed organically, through the decisions of previous prosecutors who presumably consulted their own interests and intuitions of fairness—intuitions that may have been influenced by the widespread and thoroughly documented institutional incentives for most elected prosecutors to be perceived as "tough on crime."[46] The existing norms of punishment in a prosecutor's office may also have been affected, consciously or unconsciously, by racial bias.[47]

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45 Paul Butler offers an anecdotal glimpse into the work of a beginning prosecutor. PAUL BUTLER, CHOKEHOLD: A RENEGADE PROSECUTOR'S RADICAL THOUGHTS ON HOW TO DISRUPT THE SYSTEM 64 (2017) ("My supervisor encouraged us rookies to try different styles of presenting evidence to judges and juries. . . . 'Don't worry if you win or lose the case,' my supervisor told us. 'It's only a misdemeanor—if the defendant is that bad, he'll be back.'"). Alexandra Natapoff notes that the least experienced junior prosecutors sometimes screen misdemeanor cases without review from more experienced attorneys. *See* ALEXANDRA NATAPOFF, PUNISHMENT WITHOUT CRIME 69 (2018). This phenomenon is especially troubling because as prosecutors gain more experience, they tend both to spend more time screening cases and to be more skeptical of the significance of misdemeanors. *See id.* at 69–70; David Alan Sklansky, *The Problems with Prosecutors*, 1 ANN. REV. CRIMINOLOGY 451, 458 (2018) ("[T]here is evidence that prosecutors become more balanced and less harshly punitive in their orientation as they gain seniority.").

46 On the institutional incentives of prosecutors, see, for example, PFAFF, *supra* note 9, at 161–83 (describing various "political defects that brought about mass incarceration"); Sklansky, *supra* note 45, at 453 ("[C]areer considerations have traditionally been thought to push prosecutors to more punitive behavior."); William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505 (2001); WILLIAM J. STUNTZ, THE COLLAPSE OF AMERICAN CRIMINAL JUSTICE 35–36, 38–39 (2011) (describing how demographic shifts including mid-century white flight from cities to suburbs gave "power over criminal punishment . . . to voters and officials outside the communities where crimes happen and punishments are imposed," with the result that decision-makers did not have to bear the cost of "incarcerat[ing] their sons and brothers, neighbors and friends"). Consistent with Stuntz's observations, the "progressive prosecutors" who have been elected in recent years have mostly been elected in counties with small or no suburbs within their borders. *See* John F. Pfaff, *The Poor Reform Prosecutor: So Far from the State Capital, So Close to the Suburbs*, 50 FORDHAM URB. L.J. 1013 (2023). The United States is the only country in the world that elects its local prosecutors. EMILY BAZELON, CHARGED: THE NEW MOVEMENT TO TRANSFORM AMERICAN PROSECUTION AND END MASS INCARCERATION 79 (2020).

47 Angela J. Davis, *The Prosecution of Black Men*, *in* POLICING THE BLACK MAN, *supra* note 16, at 178, 184 ("Like police officers, prosecutors exercise discretion in ways that produce unwarranted and unjustifiable racial disparities, especially when making charging and plea bargaining decisions."). Davis notes that the Prosecution and Racial Justice Program, a pilot program by the Vera Institute of Justice that lasted from 2005 to 2015, conducted statistical studies

Unless a beginning prosecutor enters her position with specific ideas about what would constitute an appropriate punishment, or not, for various crimes—no charge? diversion? a fine? a day in jail? three months in jail? three years in prison?—she is likely to assume that the status quo is more or less reasonable.[48]

The first-year criminal law course may be one of the few moments when a future prosecutor, legislator, or judge has the opportunity to be exposed in a deliberative setting to empirical evidence regarding criminal punishment, including evidence of the effectiveness or ineffectiveness of various punishments in relation to various possible objectives. Such evidence would seem to be essential to developing well-informed views regarding the justice of criminal punishments—however one defines justice, and regardless of how punitive one's moral intuitions tend to be.

But traditionally, criminal law casebooks have included little of such vitally relevant empirical evidence, and some casebooks include little even today.[49] Instead, casebooks have tended to present the various theories of punishment as though they were primarily rhetorical tools to be used by adversarial attorneys. In effect, students are offered a menu of options for justifying incarceration: if the first justification is not rhetorically persuasive or to a student's liking, she is invited to consider the second, third, or fourth justification, or perhaps to mix and match. As Ristroph notes, "the appropriateness of punishment is often presented as

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of three large prosecutors' offices and found "racial disparities at various points in the process in all three offices." *Id.* at 203; *see also* Jeffrey Toobin, *The Milwaukee Experiment*, NEW YORKER (May 4, 2015), (describing Milwaukee County District Attorney John Chisholm's reforms in response to the Vera Institute's findings). For other research finding evidence of racial bias in the use of prosecutorial discretion, see the studies listed in Radley Balko, *There's Overwhelming Evidence that the Criminal Justice System Is Racist. Here's the Proof.*, WASH. POST (June 10, 2020), [https://perma.cc/JU8D-5GQT].

48 *See* DANIEL KAHNEMAN, THINKING, FAST AND SLOW 119–28 (2011) (describing anchoring effects). Of course, different prosecutors' offices will display different cultures that affect the aggressiveness of prosecutions. *See, e.g.*, BAZELON, *supra* note 46, at 19 ("[A]n office culture that prizes aggression and trial victories can reinforce the drive to win at all costs."). In addition, the individual prosecutors in an office, like members of any group, will display varying degrees of punitiveness. *See generally* KAREN STENNER, THE AUTHORITARIAN DYNAMIC (2005) (providing empirical evidence of differing degrees of punitiveness among different individuals in various contexts); JONATHAN HAIDT, THE RIGHTEOUS MIND: WHY GOOD PEOPLE ARE DIVIDED BY POLITICS AND RELIGION (2012) (summarizing research regarding psychological foundations of various differences in moral and political orientation); ROBERT SAPOLSKY, BEHAVE: THE BIOLOGY OF HUMANS AT OUR BEST AND WORST 444–55 (2017) (same).

49 Ohlin's casebook introduces the theoretical justifications for punishment without any empirical evidence, perhaps reflecting a downside to the casebook's otherwise admirable concision. *See* OHLIN, *supra* note 3, at 25–27. Dressler offers limited empirical evidence, including a valuable reference to a review of deterrence research that found little evidence of various deterrent effects that might otherwise seem plausible to students. *See* DRESSLER & GARVEY, *supra* note 3, at 34–53 (introducing theoretical justifications for punishment); *id.* at 41 (summarizing conclusions from recent review of deterrence literature).

self-evident; students are asked to consider *why* punishment is justified, not whether."[50] In theory, a student might invoke one or another theory of punishment to argue that a punishment is *not* justified under that theory. But this would only be an invitation for another student to find a justification under a different theory, or to develop a clever, indirect justification under the theory rejected by the first student, perhaps by inventing a speculative story about the beneficial second-, third-, or fourth-order effects of punishment.[51]

Some of the difficulties of debating whether a criminal punishment is justified may be unavoidable. For example, classroom debates may tilt asymmetrically in favor of justifying punishment: someone who believes a punishment to be justified can effectively win the argument by offering one sufficient justification and then stopping, while someone who believes a punishment to be unjustified may feel obligated to address every theory of punishment in order to show that none of them provide a sufficient justification.

But the most significant flaw in the traditional criminal law curriculum's approach to teaching the theories of punishment is avoidable. It never made sense to teach students a series of theoretical arguments in favor of criminal punishment without providing them with

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50 Ristroph, *supra* note 2, at 1660.

51 On the role of empirically baseless, "rational choice theory"-inspired speculations in criminal law debates, see *infra* note 55. As an illustration, we might imagine a classroom debate regarding the "felony murder" rule, a controversial doctrine that states, subject to various limitations, that a defendant may be convicted of murder for having caused the death of another while committing a felony, even if the death was accidental. *See* OHLIN, *supra* note 3, at 319–46. If the professor invites the class to consider whether any principled justification can be offered for the felony murder rule, a clever student might defend the rule based on deterrence. Specifically, the student might suggest, if a prospective felon is considering how to commit a potentially dangerous felony, the rule offers the felon an incentive to carry out the felony in a manner that is relatively less likely to result in someone's death—because the felon knows that a death, even an unintentional one, could lead to a murder conviction. A first-year student who succeeds in articulating this argument would probably receive positive feedback for their ingenuity, and the discussion might continue without anyone noting that there is, in fact, no empirical evidence that the felony murder rule has this deterrent effect. *See* JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW 490 (8th ed. 2018) ("Advocates of the felony murder rule cannot provide empirical evidence to support the deterrence thesis."). It might also pass unremarked that, even if the felony murder rule did have this deterrent effect "at some margin," that is, in some possibly very small number of cases, the benefits of deterrence in these cases could be outweighed by (equally speculative) criminogenic effects, such as the possibility that the felony murder rule might encourage a felon to execute all the remaining witnesses as soon as anyone dies during a felony. *See, e.g.*, THOMAS MORE, UTOPIA 35–36 (Cassell & Co. 1895) (1516) (noting that if "a thief and a murderer should be equally punished," then a robber will "kill the person whom otherwise he would only have robbed; since, if the punishment is the same, there is more security, and less danger of discovery"); HEAT (Warner Bros. 1995) (depicting the calculated execution of the remaining witness to an armored car heist after the crew kills two guards—an execution that an LAPD investigator later recognizes as incentivized by the legal rules: "Once it escalated into a murder one beef . . . what difference does it make? Why leave a living witness?").

empirical evidence concerning the limitations of those arguments. The following sections offer a selection of the relevant empirical evidence that criminal law casebooks traditionally excluded and, in some cases, continue to exclude.[52]

a. Deterrence

Deterrence is one of the most commonly invoked justifications for criminal punishment.[53] It may seem intuitively obvious to many students that crimes can be deterred through harsh punishments, and that if we want to drive down the rate of some crime, we can do so by imposing harsher sentences. But the National Institute of Justice (NIJ), hardly a radical activist organization, has flatly stated: "Sending an individual convicted of a crime to prison isn't a very effective way to deter crime," and "[i]ncreasing the severity of punishment does little to deter crime."[54]

By introducing deterrence as a theoretical justification for punishment, including potentially very harsh punishments, without providing countervailing empirical evidence that harsh punishments do little to deter crime, the traditional criminal law curriculum effectively invites students to engage in empirically ungrounded speculations regarding the beneficial deterrent effects of punishment.[55] Of all the ways

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52 For convenience of expression, the following Sections refer to the traditional criminal law curriculum in the present tense.

53 *See, e.g.*, OHLIN, *supra* note 3, at 25–26.

54 NAT'L INST. JUST., FIVE THINGS ABOUT DETERRENCE 2 (2016); *see also id.* at 1 ("There is no proof that the death penalty deters criminals."). To be clear, making some type of previously legal conduct criminal can, under the right conditions, have deterrent effects. *See* Daniel S. Nagin, *Deterrence in the Twenty-First Century*, 42 CRIME & JUST. 199, 204 (2013) ("[F]or most people . . . decisions to refrain from crime are based on the mere knowledge that the behavior is legally prohibited or for other nonlegal considerations such as morality or fear of social censure."). This does not imply that increasing the severity of punishment for the conduct in question will predictably result in greater deterrence of the conduct.

55 Much more could be said about the use of armchair-empirical "rational choice theory" in criminal law debates, and in legal education and policy argument more generally. The indeterminacy of legal argument tends to receive much more attention in law school than the indeterminacy of policy arguments that have been set free from empirical constraint. *Cf.* Daryl Levinson, *The Inevitability and Indeterminacy of Game-Theoretic Accounts of Legal Order*, 42 L. & SOC. INQUIRY 28 (2017) (noting the indeterminacy of rational choice theory arguments in the context of accounts of legal order). For an example of a casebook presenting rational choice theory as a valid way of drawing conclusions about the likely effects of criminal justice policy, see *supra* note 27. For the sordid history of speculative, empirically unsupported deterrence arguments, see, for example, LYNN HUNT, INVENTING HUMAN RIGHTS: A HISTORY 92–94 (2007) (describing an eighteenth-century defense of public torture based on its deterrent effect); Edward M. Peters, *Prison Before the Prison: The Ancient and Medieval Worlds*, *in* THE OXFORD HISTORY OF THE PRISON: THE PRACTICE OF PUNISHMENT IN WESTERN SOCIETY, *supra* note 7, at 3, 35 (noting that late medieval criminal punishment in England, such as "the pillory, mutilation, branding, public stocks, and ducking stools," as well as "hanging, drowning, burning, burial alive, or decapitation," "was

in which the traditional criminal law curriculum has indoctrinated students in ways of thinking that facilitate mass incarceration, the uncritical, empirically uninformed introduction and promotion of deterrence arguments may be the most egregious.

How many law students over the last fifty years were trained to argue for punishment based on its deterrent effect, but never learned that harsher punishment, in fact, "does little to deter crime"?[56] How many law school graduates have gone on to demand or impose harsh sentences in part because their criminal law education failed to expose them to empirical evidence regarding the limitations of deterrent effects in the real world?[57]

b. Incapacitation

Another common justification for criminal punishment that appears in the traditional criminal law curriculum is the theory of incapacitation.[58] According to this theory, criminal punishment and especially incarceration can be justified as a way of preventing criminals from causing additional harm. The argument is seductive in its simplicity. A violent offender who is held safely behind bars cannot attack anyone on the outside.

As in the case of deterrence, however, incapacitation is routinely introduced to students without empirical evidence that might suggest the limits of the justification in practice. With regard to long-term confinement, two facts seem especially relevant. First, there is a great deal of evidence that human beings tend to "age out" of committing many types of offenses, with violent crime in particular becoming statistically

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intended to be quick and public to serve as a deterrent to other crime"); Spierenburg, *supra* note 7, at 54–55 (noting that France in the early modern era allowed "prolonged forms of execution" such as "burning alive," and that one writer in early modern England argued for importing such practices because "hanging did not effectively deter potential lawbreakers").

56 NAT'L INST. JUST., *supra* note 54, at 2.

57 In South Dakota, for example, calls for tougher sentencing laws are often accompanied by invocations of their presumed deterrent effect. *See, e.g.*, Bob Mercer, *Jackley Proposes Stiffer Sentences for Distributing Methamphetamine as Route to Reduce Prison Inmates*, WATERTOWN PUB. OP. (Jan. 2, 2018), [https://perma.cc/DTN4-NS3S] (describing the theory that "requiring longer prison times for distributing methamphetamine in South Dakota could lead to fewer men and women in state prisons" because "word would spread within the illegal-drug culture that distributing meth in South Dakota would mean longer stays behind bars for those convicted"); Annie Todd, *AG Marty Jackley Proposes Bill Meant to Curtail Violence Against Law Enforcement*, ARGUS LEADER (Jan. 19, 2023) [https://perma.cc/8QMM-553L] (quoting the South Dakota Attorney General's argument that increasing the maximum "penalty for the attempted murder of a law enforcement officer from 25 years in prison to 50 years in prison" would provide "an added deterrent").

58 *See, e.g.*, OHLIN, *supra* note 3, at 26.

less likely after the age of forty.[59] Thus, after a certain point, incarceration may have little or no incapacitating effect, because the offender may be unlikely to reoffend if released. Even if one assumed that incapacitation provided a sufficient justification for incarcerating some individual at the age of twenty-five, the justification may have diminished to such an extent by the time the individual is fifty, much less eighty, that incarceration can no longer be justified.

Another significant limit on the incapacitation argument is that even if incarceration reduces an individual's ability to cause criminal harms while incarcerated, this argument does not necessarily demonstrate that incarcerating the individual will reduce crime. More than 95% of all incarcerated people are eventually released.[60] A number of studies have found evidence that both pretrial incarceration and lengthy prison sentences can be criminogenic.[61] Any crime-reducing effects of temporary incapacitation should be weighed against the potentially crime-promoting effects of incarceration in the longer term.

Even more troublingly, the limitations of incapacitation-based arguments for incarceration may escape notice if students are not exposed to the limitations during their legal education. Crimes that take place because someone was not incarcerated before trial, or was paroled, or was released from prison after completing a sentence, often receive lavish media attention.[62] By contrast, proving that less incarceration sometimes results in less crime requires statistical analysis. It is impossible to point to specific crimes that would have taken place if an individual had been incarcerated for some period of time and then released, but did not take place because the individual was not incarcerated. Crimes that did not take place will never be in the news.

How many law school graduates have become prosecutors, judges, or legislators who responded to the latest news story about a released felon committing a crime by arguing that public safety requires more incarceration?[63] How many never considered that their decisions to seek

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59 *See* PFAFF, *supra* note 9, at 193, 231; BARKOW, *supra* note 44, at 44–45.

60 BARKOW, *supra* note 44, at 46.

61 *See* BARKOW, *supra* note 44, at 57–58; PFAFF, *supra* note 9, at 193 & n.20 (citing BRUCE WESTERN, PUNISHMENT AND INEQUALITY IN AMERICA (2007)). Of course, evidence that incarceration can sometimes be criminogenic does not imply that it always is. *See* PATRICK SHARKEY, UNEASY PEACE: THE GREAT CRIME DECLINE, THE RENEWAL OF CITY LIFE, AND THE NEXT WAR ON VIOLENCE 201 n.26 (2018) (discussing a 2005 report from a sentencing reform organization that "concluded that the rise of incarceration accounted for about a quarter of the decline in crime since the 1990s").

62 *Cf.* BARKOW, *supra* note 44, at 105–10.

63 *Cf.* Paul TenHaken, Opinion, *Sioux Falls Mayor Paul TenHaken Says Creating Safe Communities Requires Collaboration*, ARGUS LEADER (Sept. 4, 2022),

greater incarceration might, in fact, in the longer term, result in more victims being violently harmed?

c. Rehabilitation

Rehabilitation is another consequentialist justification for criminal punishment that students routinely learn about in their criminal law course.[64] According to the theory of rehabilitation, criminal punishment may be justified by its beneficial effects on the character of the offender. Through rehabilitation, a person who caused criminal harm may come to see the error of her ways and may no longer wish to offend or may be better equipped to avoid offending. Contemporary discussions of rehabilitation often involve an offender receiving treatment for a substance abuse disorder or mental illness.[65]

Again, the theory is simple and often intuitively appealing. Students who are familiar with the difficulty of confronting an addiction, for example, may find it plausible that, in some cases, only a period of forced abstinence through incarceration will create the possibility of recovery.[66] But there are, once again, empirical reasons to question rehabilitation as a justification for incarceration. As researchers for the Prison Policy Initiative have noted:

> [W]hile two-thirds of people in local jails have substance use disorders, only a tiny fraction of all jails provide medication-assisted treatment (MAT) for opioid use disorder—the gold standard for care. That means that rather than providing drug treatment, jails more often interrupt drug treatment by cutting patients off from their medications. . . . Jails are not safe detox facilities, nor are they capable of providing the therapeutic environment people require for long-term recovery and healing.[67]

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https://www.argusleader.com/story/opinion/2022/09/04/paul-tenhaken-sioux-falls-mayor-south-dakota-growth-public-safety/7971957001/ [https://perma.cc/5Q8C-XUE3] (arguing for tougher sentencing laws because "[m]any of the offenders committing violent crimes in our community have been previously in custody").

64 *See, e.g.*, OHLIN, *supra* note 3, at 25–26.

65 *See* Sawyer & Wagner, *supra* note 11 (describing and criticizing the "myth" that "[s]ome people need to go to jail to get treatment and services").

66 *See, e.g.*, Sam Quinones, *America's Approach to Addiction Has Gone Off the Rails*, ATLANTIC (June 1, 2023), [https://perma.cc/3P9Z-T956] ("In a time of fentanyl and meth, we need to use law enforcement differently—and more often.").

67 Sawyer & Wagner, *supra* note 11; *see also Criminal Justice DrugFacts*, NAT'L INST. DRUG ABUSE (June 2020), https://nida.nih.gov/publications/drugfacts/criminal-justice [https://perma.cc/8DAJ-52Z8] (noting that "only a small percentage of those who need treatment while behind bars actually receive it," and the treatment is often inadequate). Sometimes jail admission results in death rather than recovery. Sawyer & Wagner, *supra* note 11 ("Between 2000 and 2018, the number

With regard to longer sentences, as noted above, there is a large body of empirical research suggesting that incarceration often has a criminogenic rather than rehabilitative effect.[68] This result should not be surprising. As noted below, prisons in the United States, unlike prisons in some European countries, are primarily dedicated to retribution and incapacitation rather than rehabilitation and resocialization.[69] While substance abuse and mental health treatment programs often exist in U.S. prisons, and some prisons offer educational and job-training programs, the quality of such programs is generally very low.[70] Many prisons are also deeply unsafe, create new traumas for inmates, fail to prevent drug abuse and overdoses, and encourage the development of harmful behaviors that interfere with reintegration after release.[71]

Empirical research also suggests that one of the most powerful factors for reducing recidivism is a former prisoner's supportive social ties.[72] But prisoners in the United States tend to be located far from their families and social support networks, often in distant rural areas that make visitation difficult.[73] After release, people with criminal records often face a number of collateral consequences that make reintegration even more difficult, including burdensome fines and fees, and discrimination in housing and employment.[74] The abolition of parole in the federal system and in many states in the 1980s further reduced opportunities for prisoners to reintegrate into society by eliminating the transition between incarceration and release.[75]

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of people who died of intoxication while in jail increased by almost 400%; typically, these individuals died within just one day of admission."). In addition, people who have developed a tolerance for a drug, who lose the tolerance while incarcerated, and who are then released, face an increased risk of a fatal overdose. *See, e.g.*, Maddy Troilo, *We Know How to Prevent Opioid Overdose Deaths for People Leaving Prison. So Why Are Prisons Doing Nothing?*, PRISON POL'Y INITIATIVE (Dec. 7, 2018), https://www.prisonpolicy.org/blog/2018/12/07/opioids [https://perma.cc/ZX5V-HPJP].

68 *See supra* note 61.

69 *See* RAM SUBRAMANIAN & ALISON SHAMES, VERA INST. JUST., SENTENCING AND PRISON PRACTICES IN GERMANY AND THE NETHERLANDS: IMPLICATIONS FOR THE UNITED STATES 7 (2013). On the decline of the "rehabilitative ideal" in the United States, see GARLAND, *infra* note 144, at 8.

70 *See* BARKOW, *supra* note 44, at 61–67.

71 *See, e.g.*, DANIELLE SERED, UNTIL WE RECKON: VIOLENCE, MASS INCARCERATION, AND A ROAD TO REPAIR 64–79 (2019). On drug abuse in prisons and jails, see Beth Schwartzapfel & Jimmy Jenkins, *Inside the Nation's Overdose Crisis in Prisons and Jails*, MARSHALL PROJECT (July 15, 2021, 6:00 AM), https://www.themarshallproject.org/2021/07/15/inside-the-nation-s-overdose-crisis-in-prisons-and-jails [https://perma.cc/W58U-PVNL].

72 *See* BARKOW, *supra* note 44, at 69.

73 *See id.* at 69.

74 *See id.* at 88–102.

75 *See id.* at 73–87.

Criminal law students who are invited to consider the theoretically rehabilitative effects of incarceration may not consider that in many real-world contexts, incarceration renders individuals more rather than less likely to commit crime—and sometimes even leads to avoidable illnesses or death.[76] In our ongoing opioid epidemic, overdose deaths are particularly common after release, in part because the formerly incarcerated person may relapse and take the quantity of a drug they would have taken before their incarceration, not realizing the extent to which their body has lost its tolerance.[77]

d. Retribution

According to the theory of retribution, criminal punishment may be justified, whether or not it has any beneficial effects, simply because people who violate the criminal law deserve to be punished.[78] In the United States today, retribution plays an especially central role among the justifications for punishment, while Germany and the Netherlands, for example, place a greater emphasis on rehabilitation and resocialization.[79] Given the central role of retribution in U.S. criminal punishment theory and practice over the last several decades, it is no surprise that it also plays a central role in discussions of punishment in the traditional criminal law curriculum.

It might seem that the kind of empirical evidence discussed in the previous sections would have little relevance to a discussion of the theory of retribution because the theory is not concerned with the likely effects of punishment. In fact, however, empirical evidence about the nature of criminal punishment in the United States is highly relevant for arriving at well-informed conclusions about the retributive justice of criminal punishment—in specific cases, and more generally. In what follows, I briefly note three categories of relevant empirical evidence that have traditionally been excluded from the discussion of retribution in the criminal law curriculum and that continue to be excluded in many casebooks today: evidence regarding the absolute quantity of punishment that a convicted defendant is likely to receive; evidence regarding jail and prison conditions in the United States; and comparative evidence regarding the nature and quantity of criminal punishment in other countries.

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76 *See* Katie Rose Quandt, *America's Rural-Jail-Death Problem*, ATLANTIC (Mar. 29, 2021), [https://perma.cc/SX3S-CJ57].

77 *See* GOTTSCHALK, *supra* note 14, at 107 (describing the risk of death immediately after release from prison, especially as a result of overdose, as "astronomical").

78 *See, e.g.*, OHLIN, *supra* note 3, at 26.

79 *See* SUBRAMANIAN & SHAMES, *supra* note 69, at 7.

i. The Absolute Quantity of Punishment

The sketch of the traditional criminal law curriculum in Part II, above, already noted how casebooks and classroom discussions tend to focus on whether a defendant should be held criminally liable at all for some act, and if so, how the line should be drawn between more and less blameworthy crimes—for example, how intentional murder should be distinguished from voluntary manslaughter. Typically, the curriculum does not address in absolute, numerical terms how many days, months, or years a defendant will likely have to spend in confinement under the options for liability being discussed.[80]

The omission is understandable. Criminal law casebooks are generally designed to be used in any state in the United States, and statutory minimum and maximum sentences vary widely between the states. In addition, sentencing ranges are sometimes very broad, and the actual sentence that a defendant receives will often be the result of a discretionary decision by the prosecutor who makes a plea offer, as well as, potentially, the discretion of the judge who makes the final sentencing decision. Even if a casebook opted to simplify by focusing on sentences in the federal system rather than the many state systems, the federal sentencing guidelines are no longer mandatory,[81] and federal sentencing differs significantly from state sentencing.[82] As a result, a focus on federal sentencing would not provide an illuminating window into sentencing at the state level, where the vast majority of prosecution and incarceration takes place.[83]

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80 In the language of proportionality theory, the emphasis is on "ordinal" rather than "cardinal" measures of punishment. Paul H. Robinson, Shima Baradaran Baughman, and Michael T. Cahill's casebook represents an exception. The casebook includes many criminal scenarios ("case studies") written by the authors based on real cases. *See, e.g.*, PAUL H. ROBINSON, SHIMA BARADARAN BAUGHMAN & MICHAEL T. CAHILL, CRIMINAL LAW: CASE STUDIES AND CONTROVERSIES 37 (5th ed. 2021). At the end of the scenario, the student is often invited to consult her own intuitions of justice and decide "what liability and punishment" a defendant deserves based on the stated facts. *See id.* The options include sentences of various lengths. *Id.* A teacher's manual provides the sentence that was actually imposed, as well as results from past student surveys. *See* PAUL H. ROBINSON, SHIMA BARADARAN BAUGHMAN & MICHAEL T. CAHILL, CRIMINAL LAW: CASE STUDIES AND CONTROVERSIES FIFTH EDITION: TEACHER'S MANUAL (2020).

81 *See* United States v. Booker, 543 U.S. 220, 227 (2005).

82 *See, e.g.*, Leah Wang, *The U.S. Criminal Justice System Disproportionately Hurts Native People: The Data, Visualized*, PRISON POL'Y INITIATIVE (Oct. 8, 2021), https://www.prisonpolicy.org/blog/2021/10/08/indigenouspeoplesday [https://perma.cc/8XQR-G2BC] ("[A]t the federal level . . . sentences can be harsher than they would be at the state level."); Timothy J. Droske, *Correcting Native American Sentencing Disparity Post*-Booker, 91 MARQ. L. REV. 723 (2008) ("In South Dakota, a defendant convicted of assault in state court receives an average sentence of twenty-nine months," while a Native American defendant who committed the same offense "within one of the Indian reservations in South Dakota . . . would be prosecuted in federal court and receive an average sentence of forty-seven months.").

83 *See* Sawyer & Wagner, *supra* note 11.

As understandable as it might be, however, the general lack of attention to the absolute lengths of criminal sentences in the criminal law curriculum deprives students of an obviously relevant source of evidence for evaluating and applying the theory of retribution.[84] The traditional criminal law curriculum encourages students to consider, explicitly or implicitly, whether punishing a defendant would be just based on retributive principles—without specifying the nature and extent of that retribution.[85] One result is that students who go on to practice criminal law may never have thought about or discussed what a retributively appropriate absolute quantity of punishment might be for a given crime based on a given set of facts.

The enormous quantity of criminal punishment in the United States today is one of the most criticized aspects of our criminal legal system, along with the system's racial disparities. Yet the scale of punishment is obscured as a topic of critical analysis and debate when textbook and in-class discussions of retribution fail to refer to sentencing lengths. By failing to question or even address absolute sentencing lengths as a routine part of the discussion of retribution, the traditional criminal law curriculum, once again, invites students who enter criminal practice simply to imitate whatever punitive norms they happen to find upon arrival at their first position. In doing so, the curriculum facilitates the reproduction of practices that result in mass incarceration.

ii. Jail and Prison Conditions in the United States

A second category of empirical evidence about criminal punishment in the United States that has often been excluded from the criminal law curriculum, even though it is obviously relevant to the evaluation and application of the theory of retribution, is the nature of incarceration in the contemporary United States.[86] If the theory of retribution argues that

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84 The evidence is especially relevant in light of the sometimes wide disparities between the sentences that defendants actually receive and the sentences that jurors, judges, and others believe they should receive. Emily Bazelon describes how the former federal judge Paul Cassell resigned in part because of his moral discomfort with the sentences he was required to impose, including a mandatory minimum fifty-five-year sentence for a defendant named Weldon Angelos. BAZELON, *supra* note 46, at 141–42. In that case, Cassell polled the jurors and found that they would have imposed a sentence "in the range of five to fifteen years." *Id.* at 142. Bazelon notes that in Germany, Angelos probably would have received a maximum five-year sentence; in Britain, "two to four years"; in Sweden, "one year or less"; and in the Netherlands, "a fine of 350 euros." *Id.*

85 *See, e.g.*, OHLIN, *supra* note 3, at 26–27.

86 There are some exceptions. For example, the Kadish, Schulhofer, and Barkow casebook contains several pages on the harsh conditions and effects of imprisonment in the United States, and concludes by asking: "Should judges consider conditions of confinement as well as sentence length in determining someone's punishment?" KADISH, SCHULHOFER & BARKOW, *supra* note 3, at 1096–1102. In addition, Lee and Harris highlight brutal conditions of incarceration, and their

it may be justified to impose suffering on someone who has violated the criminal law, so long as the suffering is not disproportionate to the magnitude of the criminal wrong, then surely it is relevant to know what kind of suffering will likely be imposed. Someone might feel that a five-year sentence for some crime would not be enough punishment if it is served in a pleasant, resort-style facility with individual rooms and plentiful educational programming. The same person might feel that a five-year sentence in a sexually violent dungeon would exceed "just deserts" for the same crime.

Thus, the conditions of incarceration are relevant to thinking about retribution. But the traditional criminal law curriculum offers students little or no evidence about carceral conditions in the United States. The omission is all the more remarkable when one considers the nature of those conditions. Countless articles, reports, and judicial records could be cited in support of the conclusion that carceral conditions in the United States are often degrading and inhumane.[87] Many of these accounts highlight grotesquely unsanitary conditions, rampant sexual and other violence, and grossly inadequate medical treatment, as well as more specific offenses such as the torturing of mentally ill prisoners through long-term solitary confinement, and the often fatal failure to protect inmates from COVID-19 in 2020.[88] At the largest incarceration

relevance to theories of punishment, by including, very early in their casebook, excerpts from Robert Blecker, *Haven or Hell? Inside Lorton Central Prison: Experiences of Punishment Justified*, 42 STAN. L. REV. 1149 (1990). *See* CYNTHIA LEE & ANGELA P. HARRIS, CRIMINAL LAW: CASES AND MATERIALS 20–31 (4th ed. 2019).

87 *See, e.g.*, SERED, *supra* note 71, at 64 ("The brutalities of prison have been widely documented, from the psychological torture of solitary confinement to the prevalence of sexual and other violence."); GOTTSCHALK, *supra* note 14, at 137 ("In the United States there is a general acceptance of 'violence—and particularly brutal sexual violence—as an inevitable consequence of incarcerating criminals,' according to two leading experts on prison conditions." (quoting Silvia Casale, *The Importance of Dialogue and Cooperation in Prison Oversight*, 30 PACE L. REV. 1490 (2010))). For one lawyer's experiences, see KARAKATSANIS, *supra* note 2, at 6 ("[M]y clients in Ferguson told me about how they were sleeping on top of each other on the floor in jail cells covered in feces and mold with no access to natural light or fresh air because they could not pay old tickets to the city."); *id.* ("Another client told me that she had spent forty-eight days in the jail without a shower, toothbrush, or any way to clean her menstrual bleeding because she could not pay traffic tickets."); *id.* at 7 (describing a client who was strapped to a chair in a jail in Alabama and "shocked repeatedly," so that "[t]he prongs from the electric shock device burned open wounds all over her body"); *id.* at 8 ("Until the public defender's office [in Washington, DC] started objecting to indiscriminate child-shackling in 2011, I was told that no one had raised any problems with the practice in decades.").

88 *See, e.g.*, KARAKATSANIS, *supra* note 2, at 6–8; GOTTSCHALK, *supra* note 14, at 70–71 (cataloguing scandals involving violence at private prisons, including a "gladiator school" at the Idaho Correctional Center, and "rampant physical and sexual abuse" at a facility in Mississippi); Katie Benner & Shaila Dewan, *Alabama's Gruesome Prisons: Report Finds Rape and Murder at All Hours*, N.Y. TIMES (Apr. 3, 2019); Quandt, *supra* note 76; Jennifer Valentino-DeVries & Allie

facility in the United States, Louisiana's Angola prison, newly arrived, mostly Black prisoners are required to act out aspects of chattel slavery by picking cotton under the supervision of overseers on horseback.[89]

A particularly stark illustration of the atrocities that an inmate might face in the United States as part of their "just deserts" can be found in a 2019 *New York Times* article entitled, "Alabama's Gruesome Prisons: Report Finds Rape and Murder at All Hours."[90] The article begins: "One prisoner had been dead for so long that when he was discovered lying face down, his face was flattened. Another was tied up and tortured for two days while no one noticed. Bloody inmates screamed for help from cells whose doors did not lock."[91] According to the article, which is based on a Department of Justice investigation, the problems were not merely anecdotal: "Prisoners in the Alabama system endured some of the highest rates of homicide and rape in the country, the Justice Department found, and officials showed a 'flagrant disregard' for their right to be free from excessive and cruel punishment."[92]

The conditions in jails and prisons across the United States vary widely, and the horrors of Alabama's prisons are extreme. But inhumane conditions in jails and prisons are sufficiently widespread that it is misleading not to mention them in a course that purports to train students to understand and apply the concept of retribution. Criminal law is the law of punishment. Indeed, the connection between criminal law and punishment is so deeply rooted that in some languages, what we call "criminal law" is referred to as "penal law," the law of punishment: *Strafrecht* in German, *droit pénal* in French, *derecho penal* in Spanish.[93] Failing to expose criminal law students to empirical evidence regarding the nature of punishment in the United States deprives them of relevant information for thinking about criminal sentencing and "just deserts,"

Pitchon, *As the Pandemic Swept America, Deaths in Prisons Rose Nearly 50 Percent*, N.Y. TIMES (Feb. 19, 2023).

89 Gillian Brockell, *La. Voters Keep 'Slavery' at Angola Prison, Once and Still a Plantation*, WASH. POST (Nov. 10, 2022), [https://perma.cc/YGY6-2HRA] ("Cotton is still grown and picked by mostly Black hands . . . . Overseers, all White and referred to as 'freemen,' still keep watch on horseback. If the laborers refuse to work, they are punished. Well-behaved laborers work in the homes of the overseers, cooking and cleaning."); *see also* Bryan Stevenson, *Slavery Gave America a Fear of Black People and a Taste for Violent Punishment. Both Still Define Our Criminal Justice System*, N.Y. TIMES (Aug. 14, 2019), [https://perma.cc/Y8EK-YNNL] (noting that if prisoners at Angola "refused to pick cotton—or failed to pick it fast enough—they could be punished with time in 'the hole,' where food was restricted and inmates were sometimes tear-gassed").

90 Benner & Dewan, *supra* note 88.

91 *Id.*

92 *Id.*

93 *See* David Cohen, *Crime, Punishment, and the Rule of Law in Classical Athens*, *in* THE CAMBRIDGE COMPANION TO ANCIENT GREEK LAW 211, 214 (Michael Gagarin & David Cohen eds., 2005).

and may encourage future lawyers to support various punishments that they would reject as disproportionate if they were better informed about actual carceral conditions.

iii. International Comparisons of Criminal Punishment

A third sense in which the criminal law curriculum has omitted empirical evidence that would be relevant to the evaluation and application of the theory of retribution is the general absence of comparisons between criminal punishment in the United States and in other countries, especially other wealthy democracies. By failing to present comparative materials, the traditional criminal law curriculum risks normalizing practices in the United States that are in fact outliers among wealthy democracies.

As a result of the cognitive bias in favor of the status quo, noted above,[94] students may have a general tendency to assume that existing practices of criminal punishment in the United States are more or less just, or at least defensible, and they may be intuitively inclined to defend existing practices against proposed alternatives.[95] Evidence of international variations in criminal punishment practices can help students to make a more informed judgment about whether convicted criminals in the United States today generally receive "what they deserve," according to the students' own moral intuitions or conception of justice, whatever that conception is. Without exposure to such evidence, students may implicitly reason about retribution from false premises about what is normal or natural.[96]

It is notoriously difficult to compare criminal justice practices between countries.[97] But to the extent that comparisons are feasible, at least three areas of comparison would seem relevant to a class that claims to teach students about retribution and criminal justice. First, offenders in many European countries appear to receive shorter sentences in

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94 *See* KAHNEMAN, *supra* note 48, at 119–28.

95 Because many law students have already been exposed to critiques of racialized mass incarceration through social media campaigns, protests, and popular media, this generalization is no doubt far less true than it was in previous decades. But vocal opponents of the status quo may obscure the extent to which many students remain inclined to give existing practices the benefit of the doubt.

96 On the power of perceptions of what is "natural" to shape perceptions of what is right or good, see generally LORRAINE DASTON, AGAINST NATURE (2019). *See also* Gregory Brazeal, *Markets as Legal Constructions*, 91 U. CIN. L. REV. 595, 661 & n.260, 662 & n. 261 (2023) (collecting examples of the "anaesthetizing effect" of the assumption that a state of affairs is "natural" or "necessary").

97 *See, e.g.*, Meghan L. Rogers & William Alex Pridemore, *A Review and Analysis of the Impact of Homicide Measurement on Cross-National Research*, 6 ANN. REV. CRIMINOLOGY 447 (2023) (detailing difficulties of cross-national comparisons even in the context of homicide).

general than offenders in the United States.[98] Second, offenders in some European countries are much less likely than offenders in the United States to receive a sentence of incarceration in the first place.[99] For example, Germany and the Netherlands are far more likely than the United States to impose fines and community service as criminal punishment, "even for relatively serious crimes such as burglary, [or] aggravated assault."[100] Third, prisons in many European countries generally treat prisoners with far more dignity and humanity than prisons in the United States.[101]

To be clear, after being exposed to international comparisons, a student with punitive inclinations might conclude that, based on his own values, European states are committing an injustice by failing to impose adequate retribution on wrongdoers.[102] Exposure to facts about differing practices of punishment does not rationally compel agreement about how much punishment is just. Moral intuitions differ, and it is hard to see a plausible rational path to compel consensus on what constitutes "just deserts" in every disputed case.[103]

But by ignoring geographic and historical variations in punishment practices, the traditional criminal law curriculum implicitly conveys the message that current practices are normal or at least defensible. In doing so, the curriculum once again paves the way for the uncritical reproduction of those practices, including mass incarceration.

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98 *See* PFAFF, *supra* note 9, at 52–53 (noting that "by international standards US sentences are long, both nominally and in practice," and that "[i]n some European countries, the longest minimum sentence that a murderer can face is one year").

99 *See* SUBRAMANIAN & SHAMES, *supra* note 69, at 9 fig.2.

100 *See id.* To avoid unequal punishments resulting from variations in the ability to pay, some countries adjust fines based on income. *See* Joe Pinsker, *Finland, Home of the $103,000 Speeding Ticket*, ATLANTIC (Mar. 12, 2015), [https://perma.cc/PA3Y-NM56].

101 *See* SUBRAMANIAN & SHAMES, *supra* note 69, at 11–14; Jessica Benko, *The Radical Humaneness of Norway's Halden Prison*, N.Y. TIMES (Apr. 26, 2015). On the importance of the concept of dignity in European criminal justice thinking, see JAMES Q. WHITMAN, HARSH JUSTICE: CRIMINAL PUNISHMENT AND THE WIDENING DIVIDE BETWEEN AMERICA AND EUROPE 8 (2003).

102 For a recent illustration of this argument by an author of one of the leading criminal law casebooks, see Paul H. Robinson & Jeffrey Seaman, *"Mass Incarceration" Myths and Facts: Aiming Reform at the Real Problems*, 50 AM. J. CRIM. L. 1, 51–63 (2024).

103 On differing moral intuitions, see, for example, STENNER, *supra* note 48. On possible obstacles to a rationally compelled consensus, even under ideal conditions, see Gregory Brazeal, *Webs of Faith as a Source of Reasonable Disagreement*, 23 CRITICAL REV. 421, 421–23 (2011), and Brazeal, *supra* note 36, at 371 n.26 (noting the logical imperfection of natural languages).

2. Public Safety as an Alternative Frame

As already noted, the most recent editions of various criminal law casebooks have begun to address at least some of the empirical omissions noted above. Kadish et al.'s eleventh edition, in particular, includes cautionary words about the limited empirical support for the various consequentialist justifications for punishment.[104]

But once it is accepted that the standard theoretical justifications for punishment often rest on weak empirical foundations, why should criminal law be introduced through the frame of punishment theory at all? Even if it is appropriate to teach the standard theoretical justifications at some point in the course,[105] is it necessary to present them at the start of the course, as though they provide a conceptual foundation and justification for the entirety of criminal law?

There are many different ways in which a criminal law course could be introduced and framed. A professor could take an anthropological or historical approach, describing how law emerged alongside the state, with laws governing punishment often changing over time, serving different purposes, and taking different forms than they do today.[106] Or a professor could take a philosophical approach, analyzing the nature of law in general and criminal law in particular.[107] A professor could approach

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104 For example, Kadish, Schulhofer, and Barkow introduce deterrence in part by noting:

> [W]hile an increase in punishment might deter future crimes by setting a higher price for criminal behavior and by incapacitating people for a longer period of time, longer sentences could also tend to increase crime, because those who spend more time in prison may be more likely to re-offend when released because they will encounter greater difficulty readjusting to society. An Obama White House report noted that, for every additional year of incarceration, there is "an average increase in future offending of 4 to 7 percentage points."

KADISH ET AL., *supra* note 3, at 19 (quoting COUNCIL OF ECONOMIC ADVISERS, ECONOMIC PERSPECTIVES ON INCARCERATION AND THE JUSTICE SYSTEM 4 (2016)).

105 *See* Ristroph, *supra* note 2, at 1661 (noting arguments for including these justifications, especially that "the vocabulary of punishment purposes is important to the practice of criminal law because practitioners and judges use this vocabulary to make arguments about specific rules or for particular sentencing outcomes"); *id.* at 1661 n.137 (noting that the original Model Penal Code "reflected various consequentialist theories"). In addition, the various theories of punishment appear in the federal criminal code. *See* 18 U.S.C. § 3553(a) ("Factors to be considered in imposing a sentence.").

106 *See, e.g.*, JARED DIAMOND, GUNS, GERMS, AND STEEL: THE FATES OF HUMAN SOCIETIES 280 (1997); STEVEN PINKER, THE BETTER ANGELS OF OUR NATURE: WHY VIOLENCE HAS DECLINED 41–42, 56 (2011); JOSEPH HENRICH, THE WEIRDEST PEOPLE IN THE WORLD: HOW THE WEST BECAME PSYCHOLOGICALLY PECULIAR AND PARTICULARLY PROSPEROUS 116–20 (2020); TAMAR HERZOG, A SHORT HISTORY OF EUROPEAN LAW: THE LAST TWO AND A HALF MILLENNIA 25 (2018); Cohen, *supra* note 93, at 211–14.

107 *See, e.g.*, ALICE RISTROPH, CRIMINAL LAW: AN INTEGRATED APPROACH 1–5 (2022).

criminal law from a theoretical sociological perspective, locating the criminal legal system within the larger context of how societies have responded to perceived deviance.[108] Or a professor could take one or another critical approach to criminal law, perhaps framing the existing criminal legal system as primarily a facade used by the powers-that-be to legitimize oppressive, unequal state violence.[109]

For criminal law professors who do not wish to facilitate the reproduction of racialized mass incarceration, but who also believe that something like criminal law has a valuable role to play in our society, one possibility would be to frame the course in terms of "public safety." This does not mean presenting criminal law and criminal punishment as the natural or best response to the problem of public safety. To the contrary, the course could begin by introducing public safety as a social problem for which many possible responses exist. The course could survey various possible responses, presenting empirical evidence of the advantages and disadvantages of various options, including the policies that are often proposed as ways to improve public safety without criminal punishment: improved policies for housing, employment, health care, and education; ending residential segregation; removing lead from the environment; increasing the presence of police or community guardians in public spaces; and so on.[110] Criminal punishment could be presented as only one possible way of responding to the problem of public safety. The advantages and disadvantages of criminal punishment, as compared to other, less reactive and punitive responses, could be described in detail.

The introduction could also emphasize that large swaths of the criminal legal system address problems (if they are problems at all) that many of us would not describe as "public safety" problems.[111] As noted

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108 *See, e.g.*, HOWARD S. BECKER, OUTSIDERS: STUDIES IN THE SOCIOLOGY OF DEVIANCE 117–40 (1963).

109 For a critique of the police in something like this spirit, see generally ALEX S. VITALE, THE END OF POLICING (2017).

110 *See, e.g.*, Kevin Drum, *An Updated Lead-Crime Roundup for 2018*, MOTHER JONES (Feb. 1, 2018), [https://perma.cc/F48U-VY54] (summarizing the lead-crime hypothesis); Ben Grunwald, *Data-Driven Decarceration*, INQUEST (Jan. 12, 2023), https://inquest.org/data-driven-decarceration [https://perma.cc/3B57-JKKN] (collecting numerous citations to "promising empirical evidence that violence is reduced by investments in early childhood education, health care (including mental health), substance abuse treatment, cognitive behavioral training, violence-prevention programs, lead mitigation, emergency cash payments, greening of vacant lots, and even street lighting"); GOTTSCHALK, *supra* note 14, at 277–79 (listing social causes of violent crime); SERED, *supra* note 71, at 3 (same); SHARKEY, *supra* note 61, at 55–60 (summarizing theories offered to explain the decline in violent crime beginning in the 1990s, including increased presence of police and guardians).

111 *See* Ristroph, *supra* note 2, at 1635 ("Criminal law in America . . . has always reached non-injurious and often petty conduct . . . ."); VITALE, *supra* note 109, at 31 ("Crime control is a small

above, homicide and rape are not representative of what the criminal legal system deals with most of the time.[112] Most crimes are misdemeanors, and most misdemeanors have more to do with maintaining public order and enforcing social norms than with maintaining public safety.[113]

The traditional criminal law curriculum, by framing criminal law in terms of the justifications for punishment, encourages students to think according to the following logic: if crime is the problem, punishment must be the solution.[114] In the factual scenarios presented throughout most casebooks and discussed in most classes, the wrong or harm has already taken place. The primary question is whether criminal punishment should be imposed, and if so, how much in comparison to the punishment imposed for other crimes.[115] In other words, the focus in first-year criminal law is on the punishment of crime, not the prevention of crime. The curriculum pays little or no attention to how the likelihood of a wrong or harm might have been reduced before the fact, thereby potentially eliminating any cause for punishment.[116]

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part of policing, and it always has been."); *see also infra* note 118. As the Georgetown Law professor Rosa Brooks concludes in her account of becoming a volunteer reserve police officer in Washington, D.C.: "[M]ost of the people I arrested didn't need to be in jail. They were poor and sad; sometimes they were addicts, or mentally ill. And I didn't want to keep locking them up." ROSA BROOKS, TANGLED UP IN BLUE: POLICING THE AMERICAN CITY 330 (2021).

112 *See infra* note 118.

113 *See infra* note 118.

114 As one criminal law professor has noted,

> Criminal law casebooks . . . often ask how severely each defendant should be punished for causing harm or creating risk, or how blameworthy the conduct in question is, but those questions gloss over the threshold decision: Why is the problem at issue one that requires a criminal legal solution rather than some other sort of political, institutional, or regulatory response?

Benjamin Levin, *Criminal Law Exceptionalism*, 108 VA. L. REV. 1381, 1382–83 (2022). On "penal control" as "the standard American response" to a wide range of social problems, including "drug use, prostitution, teenage gangs, illegal economies, and violent crime," see David Garland, *The Current Crisis of American Criminal Justice: A Structural Analysis*, 6 ANN. REV. CRIMINOLOGY 43, 55 (2023); JONATHAN SIMON, GOVERNING THROUGH CRIME: HOW THE WAR ON CRIME TRANSFORMED AMERICAN DEMOCRACY AND CREATED A CULTURE OF FEAR (2007).

115 *See supra* Section III.A.1.d.i.

116 In this sense, the traditional criminal law curriculum resembles a required medical school course on lung cancer that only addresses how to respond to cancer after the fact through aggressive interventions such as surgery and chemotherapy—without ever mentioning public health measures such as discouraging smoking. Indeed, a broader analogy might be drawn between, on the one hand, the emphasis that U.S. criminal justice policy places on responding to criminal harms after the fact through (often very costly) criminal punishment in individual cases, rather than attempting to prevent criminal harms at a population level through public safety measures; and, on the other hand, the emphasis that U.S. health care policy places on responding to illness and injury after the fact through (often very costly) medical treatment in individual cases, rather than attempting to prevent illness and injury at a population level through public health measures. For a critique of the

It should be no surprise if students exposed to the relentless repetition of the assumption that criminal punishment (and, presumptively, incarceration) is the solution to the problem of crime often enter practice and find nothing unusual in the routine use of incarceration. By contrast, students who are trained to think of criminal law and criminal punishment as one among many possible ways of responding to the problem of public safety would be better equipped to think holistically about the most effective, efficient, and just ways to create a more peaceful and safe society. An introductory chapter or class locating criminal law within the frame of public safety could set the stage for discussing alternatives to criminal punishment throughout the course.

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latter tendency, see Atul Gawande, *Costa Ricans Live Longer than We Do. What's the Secret?*, NEW YORKER (Aug. 23, 2021).

The turn from thinking in terms of isolated, individual cases to thinking in terms of public safety or public health is an example of the more general phenomenon of "systems thinking." Calls for such thinking emerge often in legal scholarship, across a range of subject areas. *See, e.g.*, Evelyn Douek, *Content Moderation as Systems Thinking*, 136 HARV. L. REV. 526, 530 (2022) (calling for "a systems thinking approach to content moderation regulation that focuses on systems rather than individual cases"); *infra* note 180. In any turn from addressing individual problems in isolation to a systems perspective, it is important to recognize that there is no neutral or scientific way of defining the system. As Bernard Harcourt writes, "the very act of conceptualizing and defining a metaphorical system, and the accompanying choice-of-scope decisions, constitute inherently normative decisions that are value laden and political in nature." Bernard E. Harcourt, *The Systems Fallacy: A Genealogy and Critique of Public Policy and Cost-Benefit Analysis*, 47 J. LEGAL STUD. 419, 419 (2018). Harcourt describes the rise of "the criminal justice system" as a focus of policy discourse, and the consequences of categorizing various problems under this "system" rather than in other ways. *Id.* at 421–22, 428–31.

With Harcourt's observation in mind, it may be worth noting that from an abolitionist perspective, framing criminal law as part of a system for promoting public safety (or, even more broadly, public health, social welfare, or human flourishing) might be criticized as insufficiently radical. It implies that something like criminal law has a role to play in public safety, rather than criminal law simply being a tool for oppression that should be abolished. *Cf.* Tracey L. Meares, *Policing: A Public Good Gone Bad*, BOSTON REV. (Aug. 1, 2017), https://www.bostonreview.net/articles/tracey-l-meares-public-good-gone-bad (describing policing as a public good and noting that "most of us would think it extremely unwise—silly, even—to refuse national security or policing, just as it would seem ridiculous to forego street lights, clean water, or sidewalks"); Matthew Yglesias, *The End of Policing Left Me Convinced We Still Need Policing*, VOX (June 18, 2020, 3:50 PM), [https://perma.cc/329S-ZTLQ] (noting the risk that the defunding of public police under current conditions could result in the growth of private police forces who serve the affluent and ignore the needs of those who cannot afford to hire guards). In defense of using the public safety frame in the teaching of criminal law, I would note that if the criminal law is truly unrelated to public safety and solely serves to oppress, then it should probably not be part of the required curriculum at all. Again, the arguments of this Article are premised on the assumption that substantive criminal law continues to be taught as a discrete course. *See supra* note 23.

B. *Case Excerpts: Crime Without Context*

Up to now, this Article has primarily focused on how the traditional criminal law curriculum invites students to consider questions about justice while failing to provide them with empirical evidence that would be relevant to answering those questions. The Article has further suggested that the empirical omissions in the curriculum are not neutral with regard to contemporary debates about mass incarceration. Instead, the framing of criminal justice debates in the curriculum favors the use of incarceration.

It would be a mistake, however, to conclude from the preceding discussion of empirical omissions that the pro-carceral bias of the traditional curriculum could be addressed simply by adding a few more statistics to the course materials, or even by introducing the course through a public safety framework. The problems run deeper.

1. Standard Case Excerpts as Invitations to Individual Retribution

Virtually every first-year criminal law casebook consists mostly of excerpts from judicial opinions in criminal cases. Most of the time in class is dedicated to discussing these case excerpts. Often the criminal acts are vivid and horrendous, as in the cases briefly mentioned in Part II: parents killing children, rapes, and so on.[117] While roughly 80% of criminal cases in the United States are misdemeanors, the cases in a criminal law casebook are nearly all felonies, especially violent felonies, and most especially homicides.[118]

In local television news, as the saying goes, "if it bleeds, it leads." Casebooks seem to follow a similar principle, highlighting the salacious, violent, perverse, and unusual, rather than attempting to give anything remotely like a representative sense of criminal prosecutions in the United States.[119] Again, it is revealing that perhaps the most frequently excerpted case in the traditional criminal law curriculum is *Regina v.*

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117 *See supra* text accompanying note 31.

118 For the 80% figure, see NATAPOFF, *supra* note 45, at 2. For the emphasis of criminal law casebooks on homicide and rape, see Ristroph, *supra* note 2, at 1664–71.

119 *Cf.* Ristroph, *supra* note 2, at 1666 (considering Dressler's defense "of some of the graphic depictions of child abuse in his casebook").

Dudley and Stephens,[120] which describes how shipwrecked sailors killed a boy and then "fed upon the body and blood of the boy for four days."[121]

The use of case excerpts in the traditional criminal law curriculum distorts the teaching of criminal law in at least two ways. First, the focus on violent crime and especially homicide cases encourages students to think of such cases as paradigmatic of "what the criminal justice system does," and thus to think of the criminal legal system as more reasonable and justified than they might conclude if they were provided a more accurate picture of day-to-day criminal law enforcement activities. Some students already enter law school with an inaccurate sense of policing, prosecution, and incarceration shaped by TV procedurals such as the *Law & Order* franchise, which presents the police and prosecutors as primarily dedicated to addressing serious violent crimes, and above all homicide. Filling the first-year criminal law curriculum with homicide cases risks reinforcing the false sense that such cases are the everyday norm for the criminal legal system in general.

It is true that most people in state prisons in the United States are there for having committed "violent crimes"—although the definition of "violent crime" is more expansive and less clear than is often assumed.[122] But it is simply misleading to present acts of serious physical violence as what primarily occupies the time of most actors in the criminal legal system. In particular, most police officers are not detectives investigating homicides,[123] and most people in jails (as opposed to prisons) across the

120 *See supra* note 32 and accompanying text; *see, e.g.*, OHLIN, *supra* note 3, at 773; KADISH, SCHULHOFER & BARKOW, *supra* note 3, at 8–9 (introducing the basis for punishment through the "classic case" of *Dudley and Stephens*).

121 KADISH, SCHULHOFER & BARKOW, *supra* note 3, at 10.

122 *See* PFAFF, *supra* note 9, at 6 ("[M]ore than half of all people in state prisons have been convicted of a violent crime."); Sawyer & Wagner, *supra* note 11 ("[S]tate and federal laws apply the term 'violent' to a surprisingly wide range of criminal acts—including many that don't involve any physical harm."). On the ambiguity of the term "violent crime," see generally Alice Ristroph, *Criminal Law in the Shadow of Violence*, 62 ALA. L. REV. 571 (2011). *See also* Alice Ristroph, *Read Thyself*, 74 ALA. L. REV. 493, 494 n.8 (2022) (collecting additional sources).

123 *See* VITALE, *supra* note 109, at 31. Although Vitale offers his observations regarding the realities of policework in the context of an argument for police abolition, a case might also be made that police departments are not spending enough resources investigating homicides. *Cf.* BARKOW, *supra* note 44, at 161 (noting that "[n]ationwide, the police solve on average fewer than half of all crimes involving physical violence," and that in Chicago "the murder clearance rate . . . for the past three years has been less than 30%"); JILL LEOVY, GHETTOSIDE: A TRUE STORY OF MURDER IN AMERICA (2015) (describing and diagnosing the failure of police to respond effectively to murders of African Americans); Wesley Lowery, Kimbriell Kelly, Ted Mellnik & Steven Rich, *Murder with Impunity*, WASH. POST (Jan. 7, 2019) (finding that in fifty-five of the nation's largest cities, "Black victims, who accounted for the majority of homicides, were the least likely of any racial group to have their killings result in an arrest").

United States are being held pre-trial on non-violent offenses.[124] The overwhelming majority of criminal convictions in the United States are misdemeanors, and arrest rates suggest that the majority of misdemeanors are non-violent offenses such as DUIs and retail thefts, although simple assault is also very common.[125]

In other words, if you attend a random initial appearance hearing at a large county jail, you will probably not see any defendants who have been charged with murder.[126] You will very likely see a long assembly line of marginalized human beings, often disproportionately from minority groups, often being processed for public disorder offenses, many of them related to poverty, substance abuse, or mental illness.[127] This assembly line is a more accurate representation of what the criminal legal system paradigmatically, routinely does. It manages the disorderly behavior of struggling, often previously victimized human beings by arresting, incarcerating, and surveilling them.

Criminal law casebooks, by focusing on unrepresentative, obviously harmful crimes such as homicide, implicitly reinforce the legitimacy of current criminal law enforcement practices as a whole. It is generally not controversial to argue that murderers should be arrested, prosecuted, and incarcerated for some period of time. It is far more controversial to argue, for example, that someone who became addicted to heroin after being prescribed opioids for a back injury should be locked in a cage for drug

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124 *See* Sawyer & Wagner, *supra* note 11 (finding that over 80% of those in jails under local authority have not been convicted, and of those, 68% were not charged with a violent crime).

125 *See* NATAPOFF, *supra* note 45, at 2, 50 (noting that 80% of criminal cases are misdemeanors, and "theft, assault, and DUI are probably the most common misdemeanors"); Megan T. Stevenson & Sandra G. Mayson, *The Scale of Misdemeanor Justice*, 98 B.U. L. REV. 731, 758 fig.12 (2018) (presenting evidence that simple assaults made up less than one-fourth of misdemeanor arrests in 2014); ISSA KOHLER-HAUSMANN, MISDEMEANORLAND: CRIMINAL COURTS AND SOCIAL CONTROL IN AN AGE OF BROKEN WINDOWS POLICING 45 fig.1.5 (2018) (presenting evidence that simple assaults made up less than one-fourth of misdemeanor arrests in New York City in 2015).

The excerpts in criminal law casebooks are also unrepresentative in the sense that they mostly arise out of cases where a defendant went to trial, was convicted, and then appealed. But only around 2% of criminal cases in the United States are resolved through trials. *See* AM. BAR ASS'N, 2023 PLEA BARGAIN TASK FORCE REPORT 36 n.2 (2023). Roughly 90% of criminal convictions are obtained through guilty pleas. *See id.* The studies suggest that around 80% of criminal cases are dismissed. *See id.*

126 The observations in this paragraph are primarily based on my experiences in King County in Washington State and Minnehaha and Pennington Counties in South Dakota. For similar observations by a public defender in New York City, see DAVID FEIGE, INDEFENSIBLE: ONE LAWYER'S JOURNEY INTO THE INFERNO OF AMERICAN JUSTICE 8–9 (2006) (observing that many "of the 300,000 people criminally prosecuted in New York City every year . . . are just plain shuffled through the system so damn fast that no one has time to think about much beyond the docket number stamped on the case files at arraignment").

127 *See, e.g.*, STEPHEN B. BRIGHT & JAMES KWAK, THE FEAR OF TOO MUCH JUSTICE: RACE, POVERTY, AND THE PERSISTENCE OF INEQUALITY IN THE CRIMINAL COURTS 30 (2023).

possession, or that someone who has no home should be locked in a cage for urinating in public. The criminal law casebooks' focus on serious physical violence and especially homicide risks distracting students from difficult questions, such as whether the seemingly endless proliferation of criminal statutes, many including vague and expansive language, has gone too far,[128] or whether the vast resources allocated to prosecuting and incarcerating the poor for misdemeanors might be better spent in other ways—for example, on helping them.[129]

The emphasis on homicide in the traditional criminal law curriculum might plausibly be defended by arguing that it makes sense to focus on the most serious crimes, even if those crimes are unrepresentative of activity in the criminal legal system as a whole, because the harms from the most serious crimes are so significant. But surely it is a problem if the mandatory course on criminal law reinforces the legitimacy and justice of existence practices by conveying an inaccurate picture of what the criminal legal system does.[130]

Moreover, even if the focus of criminal law casebooks on homicide and rape cases can be justified, there is a second and more fundamental problem with the traditional criminal law curriculum's use of case excerpts. The typical criminal law case excerpt tells the story of a crime in a way that encourages students to think of criminal harms simply as the result of individual choices by bad people.[131] The factual portions of most

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128 Already in 2001, Stuntz noted that "criminal law's breadth is old news" and "has long been a source of academic complaint." Stuntz, *supra* note 46, at 507 (collecting sources back to the 1950s); *see also* Alice Ristroph, *An Intellectual History of Mass Incarceration*, 60 B.C. L. REV. 1949, 1952 (2019) ("Substantive criminal prohibitions have always sprawled broadly, reaching many forms of trivial misconduct.").

129 For social policies to reduce crime, see *supra* note 110 and accompanying text.

130 Outside of the classroom, it seems clear that focusing on the worst forms of crime can sometimes distort policymaking. *See* BARKOW, *supra* note 44, at 19–37 (describing how crimes are often defined "with the worst offenders in mind but end up covering conduct that is far less culpable"). Just as focusing on the worst examples of a type of crime may contribute to public support for policies that result in more punishment than the public would actually support in a specific case, focusing on homicide and rape in the criminal law classroom may contribute to students supporting criminal legal institutions and practices that are more punitive than students would support if invited to consider the less serious forms of crime that make up the bulk of activity in criminal legal systems.

131 As Austin Sarat wrote in the context of death penalty cases: "Typically [the story] has a simple structure, an evil person, so we are told, unjustifiably takes the life of an innocent citizen. Violence is a matter of monstrous deeds done by individuals who must be held responsible for those deeds." AUSTIN SARAT, WHEN THE STATE KILLS: CAPITAL PUNISHMENT AND THE AMERICAN CONDITION 26 (2001). As Sarat notes, "[t]his story deliberately ignores the social conditions that some say give rise to crime." *Id.* Against the rationalist assumption that moral discourse is defined by the use of abstract "moral predicates," the Wittgensteinian philosopher Cora Diamond suggests that stories can be, and often are, used for moral thinking. Cora Diamond, *Wittgenstein, Mathematics, and*

case excerpts focus overwhelmingly, and often exclusively, on a description of the defendant's criminal activity.[132] The reader often learns little or nothing about the defendant except that he or she committed the crime that is often graphically described in the opinion. Like a judge at a sentencing hearing where, inexplicably, only the prosecutor has been allowed to speak, the reader often learns nothing about the defendant's life leading up to the crime. The defendant is often nothing more than the person who did the bad deeds at issue in the case.

But as every public defender knows, each criminal defendant is also a human being, and every human being has a story.[133] Specifically, every defendant has both a life story, and a story of the events that led up to their arrest.[134] It is almost always possible, with enough patience, to learn details about a defendant's life that provide meaningful context for the defendant's criminal conduct, if such conduct occurred. It is a cliché that "hurt people hurt people," but the cliché is easily confirmed when one listens to the stories of the people who fill our jails and prisons.[135] It is not empty rhetoric to say that defendants are more than just the harms they

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Ethics: Resisting the Attractions of Realism, *in* THE CAMBRIDGE COMPANION TO WITTGENSTEIN 226, 242, 245, 248–49 (Hans Sluga & David G. Stern eds., 1996). Similarly, the use of narrative in legal thinking has been explored in many works associated with the "law and literature" tradition. *See, e.g.*, Robert M. Cover, *Foreword:* Nomos *and Narrative*, 97 HARV. L. REV. 4, 4–5 (1983) (arguing that legal "rules and principles" exist against a background of "narratives" that give them meaning).

132 There are, of course, exceptions. *See, e.g.*, OHLIN, *supra* note 3, at 691 (presenting State v. Norman, 378 S.E.2d 8 (N.C. 1989), a decision that contains an exceptional degree of detail regarding the defendant's life). Case excerpts also leave out the defendant's subsequent life, including the experience of punishment, and any changes that the defendant experiences. Although in the typical case excerpt, the immediate harm to the primary victim is usually contained in the description of the criminal act, longer-term effects on victims and their families and communities are also generally excluded.

133 *See, e.g.*, FEIGE, *supra* note 126, at 16–17 ("[A]lways, if you look hard enough, there is a story, a human drama that casts in a different light the horrific specter of criminality.").

134 As Mark Kelman noted over four decades ago, legal arguments in criminal law typically rest upon a prior, unstated, "arational choice" of which facts to include in the narrative of the crime. Mark Kelman, *Interpretive Construction in the Substantive Criminal Law*, 33 STAN. L. REV. 591, 594 (1981). The legal analyst might, for example, choose a narrow rather than a broad time frame, excluding "facts about the defendant's personal history" and "focus[ing] solely on the isolated criminal incident." *Id.* For more on broadening the time frame in a narrative of crime, see *infra* note 140.

135 "Nearly everyone who commits violence has also survived it, and few have gotten formal support to heal." SERED, *supra* note 71, at 4 & n.15 (collecting research); *see also id.* at 3 ("[L]ike so many conditions known all too well to public health professionals, violence itself drives violence." (citing Li-Yu Song, Mark Singer & Trina Anglin, *Violence Exposure and Emotional Trauma as Contributors to Adolescents' Violent Behavior*, 152 ARCHIVES PEDIATRIC & ADOLESCENT MED. 531 (1998))); W.H. AUDEN, *September 1, 1939*, *in* SELECTED POEMS OF W.H. AUDEN 95 (Edward Mendelson expanded 2d ed. 2007) ("I and the public know / What all schoolchildren learn, / Those to whom evil is done / Do evil in return.").

have caused. Among other things, they are often victims of earlier harms, and the defendants who have committed the most horrific wrongs have often, earlier, been victims of horrific wrongs.[136]

In addition, the earlier harms that shaped defendants' lives were often enabled by a long history of policy choices by the state that is now attempting to punish them.[137] The most obvious examples may be, first, the centuries-long history of racially discriminatory policies in the United States that resulted in the continuing existence of racially segregated areas of concentrated disadvantage; and, second, gun policies that have resulted in firearms being vastly more prevalent in the United States than in

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136 *See* SAPOLSKY, *supra* note 48, at 192–201 (summarizing the potentially criminogenic effects of childhood adversity, and noting that "about 33 percent of adults who were abused as children become abusers themselves"); *see, e.g.*, Bryanna Hahn Fox, Nicholas Perez, Elizabeth Cass, Michael T. Gablivio & Nathan Epps, *Trauma Changes Everything: Examining the Relationship Between Adverse Childhood Experiences and Serious, Violent, and Chronic Juvenile Offenders*, 46 CHILD ABUSE & NEGLECT 163, 163 (2015) ("[E]ach additional adverse experience a child experiences increases the risk of becoming a serious, violent, and chronic juvenile offender by 35 [percent], when controlling for other risk factors for criminal behavior."). To take a recent example of a defendant who committed an unconscionable crime and turned out to have herself been the victim of unconscionable crimes, see Ed Pilkington, *"A Lifetime of Torture": The Story of the Woman Trump Is Rushing to Execute*, GUARDIAN (Jan. 5, 2021, 4:00 PM), [https://perma.cc/826D-8S2Z] (describing the life of Lisa Montgomery). If we are unable to make sense of how a defendant came to commit a crime, this may not be because the crime was truly inexplicable, but rather because no one in the criminal process had the resources or opportunity to investigate deeply enough to find some explanation. *See* Patrick Radden Keefe, *The Worst of the Worst*, NEW YORKER (Sept. 7, 2015) (noting that the death-penalty attorney Judy Clarke, who is known for transforming her clients "from an unfathomable monster into 'one of us,'" "spends hundreds of hours getting to know" them); STEVENSON, *supra* note 2, at 104, 197 (noting that "spending time with clients is important," and describing a client whose "trial records made no reference to mental illness," but who had "been in nineteen different foster homes before he turned eight," whose mother overdosed before he was one year old, and who had "cognitive impairments that suggested some organic brain damage and behavioral problems that suggested schizophrenia"); Dorothy Otnow Lewis et al., *Neuropsychiatric, Psychoeducational, and Family Characteristics of 14 Juveniles Condemned to Death in the United States*, 145 AM. J. PSYCHIATRY 584 (1988) (finding based on examination of 14 of the 37 juveniles condemned to death in the United States that "[n]ine had major neurological impairments, seven suffered psychotic disorders antedating incarceration, seven evidenced significant organic dysfunction on neuropsychological testing, and only two had full-scale IQ scores above 90," while "[t]welve had been brutally physically abused, and five had been sodomized by relatives," but "the subjects' vulnerabilities were not recognized at the time of trial or sentencing"); *cf.* Thomas E. Simmons, *Inconceivability, Horror, and the Mercy Seat*, 67 S.D. L. REV. 212, 216 (2022) (concluding that even after a detailed review of the facts known about one woman's killing of her daughter, the crime remains "inconceivable," in part because "[w]e cannot imagine her crime, and she herself cannot recall it").

137 My focus here is punitive criminal justice policies. For a similar argument regarding punitive economic policies, see Brazeal, *supra* note 96, at 654–69.

countries with lower homicide rates.[138] State policies laid the foundation for criminal harms that the state later blames on an individual's choices.[139]

Neither the conditions in the defendant's life that ultimately led up to the crime, nor the role of the state in creating those conditions, appears in the typical criminal law excerpt. Instead, all that the student reader encounters is a bad person doing an often inexplicable bad thing. The defendant must be a bad person because they did the bad thing, and we know nothing else about them. Students read story after story about individuals who, apparently because they are evil, cause someone else to suffer, or even die. It should not be surprising if such stories often provoke righteous outrage and a visceral desire to punish those who cause such harms.[140]

If the stories of crime in the criminal law curriculum presented a defendant's wrongdoing as shaped by, for example, the defendant's history of victimization as a child, the defendant's brain damage, or the situation in which the crime took place, students might feel relatively less inclined to adopt or defend a harshly punitive retributivist stance toward the defendant. If the conditions of the criminal act were traced back to broader social and economic conditions resulting from a long history of unjust state policies, students might even question whether the state itself

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138 With regard to race and disadvantage, see generally RICHARD ROTHSTEIN, THE COLOR OF LAW: A FORGOTTEN HISTORY OF HOW OUR GOVERNMENT SEGREGATED AMERICA (2017); MEHRSA BARADARAN, THE COLOR OF MONEY: BLACK BANKS AND THE RACIAL WEALTH GAP (2019). For the effects of concentrated disadvantage on crime, a classic account is WILLIAM JULIUS WILSON, WHEN WORK DISAPPEARS: THE WORLD OF THE NEW URBAN POOR xiii (1996) ("Many of today's problems in the inner-city ghetto neighborhoods—crime . . . and so on—are fundamentally a consequence of the disappearance of work."). With regard to gun policies and homicide, see Nicole Narea, Li Zhou, & Ian Millhiser, *America's Unique, Enduring Gun Problem, Explained*, VOX (Feb. 14, 2024, 7:49PM), [https://perma.cc/RC7B-896N] (summarizing research on the relationship between gun ownership and gun violence); FRANKLIN E. ZIMRING & GORDON HAWKINS, CRIME IS NOT THE PROBLEM: LETHAL VIOLENCE IN AMERICA 1–8, 49–50, 122–23 (1997) ("The use of firearms in assault and robbery is the single environmental feature of American society that is most clearly linked to the extraordinary death rate from interpersonal violence in the United States.").

139 In the words of Thomas More, if the state does not try to cure the evils that lead to theft, "what else is to be concluded from this but that you first make thieves and then punish them?" MORE, *supra* note 51, at 33.

140 By contrast, "[i]ncluding forgiveness within law requires broadening the time frame to include future considerations as well as past actions and attending to patterns of effects with both generosity and commitments to fairness." MARTHA MINOW, WHEN SHOULD LAW FORGIVE? 156–57 (2019). By not "broadening the time frame" much beyond the criminal act, the typical criminal law case excerpt effectively excludes forgiveness. A student with a strong inclination against punitiveness may be inclined to assume that there must be a story that provides mitigating context for the crime. But the assigned readings will provide no material for telling such a story. In the absence of such materials, any attempt to argue against a punitive response in, for example, a class discussion, is unlikely to persuade anyone who does not already share the student's non-punitive inclination.

is in part to blame for the crime. Even students who wholeheartedly embrace the theory of retribution might question whether it is just for an unjust state to place no blame upon itself, to place all the blame on the individual defendant, and then to harshly punish the defendant for the crime that the state itself enabled.

But the case excerpts in the traditional criminal law curriculum rarely provide such context for a defendant's acts. Instead, the typical criminal law course is like a semester-long training in what social psychologists call the "fundamental attribution error": the tendency to explain the behavior of others as the result of their personality or character, while downplaying situational or environmental factors.[141] Criminal law students are relentlessly exposed to stories that suggest individual criminals are solely to blame for their harmful acts. During class, when the same students are challenged to draw on their moral intuitions while evaluating and applying legal rules, it should be no surprise if they often end up inclining toward punitive attitudes and seeing wisdom in harshly punitive approaches to criminal punishment.[142]

Retribution is based on individual responsibility. According to the retributivist view, punishment is the "just desert" for an individual precisely because the individual is to blame for his wrongdoing. By encouraging students to think of criminal acts as simply the decontextualized product of a wicked individual's free choice, the traditional criminal law curriculum implicitly encourages students to adopt a punitive ideology of individual blame and retribution that facilitates the acceptance of policies resulting in mass incarceration.[143]

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141 *See* Lee Ross, *The Intuitive Psychologist and His Shortcomings: Distortions in the Attribution Process*, 10 ADVANCES EMPIRICAL SOC. PSYCH. 173, 184 (1977); Guyora Binder & Ben Notterman, *Penal Incapacitation: A Situationist Critique*, 54 AM. CRIM. L. REV. 1 (2017). *But see* HENRICH, *supra* note 106, at 33 (noting that the fundamental attribution error is "clearly not that fundamental" in the sense that it primarily appears in developed Western societies).

142 In fact, exposing a student to a story of violence may by itself make the student more punitive. *Cf.* Michele J. Gelfand & Janetta Lun, *Ecological Priming: Convergent Evidence for the Link Between Ecology and Psychological Processes*, 36 BEHAV. & BRAIN SCIS. 489 (2013) (finding through randomized experiment "that individuals who were primed" through exposure to a fictitious news article describing a threat to their territory "showed more ethnocentric attitudes and a stronger desire to punish social norm violators"). On the psychology of punitive attitudes in general, see generally STENNER, *supra* note 48.

143 Ristroph offers additional critiques of the use of the case method in criminal law, including the fact that judicial opinions are generally written in order to justify criminal sanctions and tend to assume the legitimacy of those sanctions. *See* Ristroph, *supra* note 2, at 1662–63.

2. Holistic Responsibility: Alternatives to the Ideology of Individual Blame and Retribution

Even if it is conceded that the typical structure of a criminal law case excerpt encourages students to think of criminal justice through a punitive retributivist frame, perhaps such a framing can be defended. It might be argued that it is appropriate for the criminal law curriculum to focus on individual blame and retribution, because this focus reflects the dominant ideology of criminal justice in the United States. Although retribution has not always played the central role in U.S. criminal justice thinking that it does today,[144] a general focus on individual blame might be seen as reflecting the so-called "liberal" ideological tradition in American thought, with its Lockean emphasis on the free will of individuals as the organizing principle of society.[145] It might be argued that it is appropriate to teach criminal law on the basis of punitive retributivist assumptions in a society whose criminal law practices reflect punitive retributivist values.

But law schools should not be dedicated simply to indoctrinating students in the dominant values of the day, whatever they are. To the extent that criminal law education cannot avoid confronting questions involving values,[146] students should be encouraged to reflect on those values critically, including through exposure to arguments based on alternative values. The trouble with the criminal law stories in the traditional criminal law curriculum is not simply that they reinforce an

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144 On the decline of "penal-welfare" thinking and the "rehabilitative ideal" since the 1970s, see DAVID GARLAND, THE CULTURE OF CONTROL: CRIME AND SOCIAL ORDER IN CONTEMPORARY SOCIETY 8 (2001). For evidence of the public turn toward punitiveness during this period, see generally PETER K. ENNS, INCARCERATION NATION: HOW THE UNITED STATES BECAME THE MOST PUNITIVE DEMOCRACY IN THE WORLD (2016). On the centrality of retribution as a goal in contemporary American criminal justice, in contrast to the goals in some European countries, see SUBRAMANIAN & SHAMES, *supra* note 69, at 7.

145 On the meaning of "liberal" in the United States, see RICHARD WHITE, THE REPUBLIC FOR WHICH IT STANDS 172–212 (2017) (describing what it meant to be "liberal" in the Gilded Age); HELENA ROSENBLATT, THE LOST HISTORY OF LIBERALISM: FROM ANCIENT ROME TO THE TWENTY-FIRST CENTURY 4, 268–74 (2018) (describing the rise of the individual-rights conception of "liberalism" in the mid-twentieth century); WILLIAM M. WIECEK, THE LOST WORLD OF CLASSICAL LEGAL THOUGHT: LAW AND IDEOLOGY IN AMERICA, 1886–1937 9–11 (1998) (describing the centrality of the individual will and individual responsibility in American legal thought before the New Deal). On the pervasive if sometimes thin influence of Locke in Revolutionary America, see BERNARD BAILYN, THE IDEOLOGICAL ORIGINS OF THE AMERICAN REVOLUTION 27–28 (1967). As critical legal thinkers have long argued, there is at least a superficial tension at the heart of liberalism to the extent that it suggests a primary function of the state is to protect individuals from the state. *Cf.* Duncan Kennedy, *The Structure of Blackstone's Commentaries*, 28 BUFF. L. REV. 205, 211–13 (1979).

146 *See* AM. BAR ASS'N, *supra* note 19.

ideology of individual blame and retribution, but that they fail to expose students to alternative ways of thinking about crime and punishment.

The following subsections offer a very abbreviated list of such alternatives. All of the following perspectives on criminal law appear within the mainstream of contemporary criminal justice debates. All of the perspectives call into question the current focus of the U.S. criminal legal system on individual blame and retribution. Nearly all of the perspectives call, instead, for a more holistic approach to understanding the responsibility for criminal harms. I group the various perspectives, somewhat arbitrarily, into perspectives associated with the social sciences, religion, the humanities, legal thought, and activism. Of course, there are many overlaps and intersections between the groups, including writers who could be placed under multiple headings. The list also does not aim for comprehensiveness.

The point is not to argue that any of these specific alternative perspectives should explicitly be brought into the curriculum.[147] Rather, the point is to draw attention to the prominence of alternatives to punitive individual retributivism in contemporary thinking about criminal justice,[148] and thus to suggest how arbitrary and ideologically

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147 In fact, some of the most recent editions of the leading casebooks have added brief sections or notes on some of the perspectives described below. *See, e.g.*, DRESSLER & GARVEY, *supra* note 3, at 36, 52–53 (adding question on prison abolition and brief note on restorative justice); OHLIN, *supra* note 3, at 55–57 (adding a three-page discussion of mass incarceration and prison abolition in notes at the end of a thirty-seven-page introductory chapter); KADISH, SCHULHOFER & BARKOW, *supra* note 3, at 53–66 (adding ten pages of readings on prison abolition and three pages on restorative justice at the end of a seventy-six-page introductory chapter).

The value of unintegrated additions to the existing materials in a casebook is unclear. If a casebook insistently conveys a pro-carceral, individual-retributivist message through its fundamental structure—such as through the framing of criminal law in terms of justifications for punishment, and through the use of ideologically slanted case excerpts—it is unlikely that grafting on relatively brief references to alternative perspectives at the end of a chapter will by itself enable students to critically evaluate the carceral landscape and reach their own conclusions in light of their own values.

148 In the following sections, I focus for the most part on widely read but relatively theoretical contemporary writings, some of them not primarily focused on criminal justice, in order to suggest the mainstream prominence of alternatives to thinking about criminal wrongdoing primarily in terms of individual blame and retribution. Another approach might have been to document the enormous profusion in recent years of popular films, television series, podcasts, long-form journalism, and works in many other media that directly critique the punitive and racially unequal criminal justice practices that have resulted in contemporary mass incarceration. *See, e.g.*, Alissa Wilkinson, *9 Movies and Shows that Explain How America's Justice System Got This Way*, VOX (June 1, 2020, 3:40 PM), [https://perma.cc/A6QE-9TR7]; Serial Productions, *Serial: Season 3*, N.Y. TIMES (2018) (podcast describing cases at Cleveland-area Justice Center Complex). Taken together with writings such as the ones discussed below, the emergence of such works suggests that at least some parts of U.S. culture may be undergoing a shift in criminal justice thinking comparable to the one that took place after the 1960s, as described by Alexander, Garland, and others, but in an

skewed it is for the traditional criminal law curriculum to rely on case excerpts that encourage a punitive, individual-retributivist way of thinking about crime and punishment.[149]

a. The Social Sciences

One of the central concerns of the social sciences, from their origins onward, has been to explore the conditions that shape individual human behavior, including biological, environmental, cultural, and economic conditions.[150] The entire tradition in criminology and sociology that attempts to explain crime in part by focusing on economic and social "root causes" suggests that human behavior is not simply the product of an unconditioned individual will.[151]

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opposite direction. *See* ALEXANDER, *supra* note 24; Garland, *supra* note 114; *infra* note 151; *cf.* Sharon Dolovich & Alexandra Natapoff, *Introduction: Mapping the New Criminal Justice Thinking*, to THE NEW CRIMINAL JUSTICE THINKING 1, 3–4 (Sharon Dolovich & Alexandra Natapoff eds., 2017) (describing the emergence of more holistic attention to, among other things, "the entire, protracted . . . criminal process" and "the *public policies that generate the crime/poverty nexus*"). Only time will tell. But if a less punitive "era" in U.S. criminal justice culture arrives, and if that era involves a turn away from a retributive focus on individual blame and toward a renewed focus on the social causes of crime, that transformation could provide an additional argument for the curricular reforms described in this Article.

149 Of course, it would be possible to distinguish various theories of individual blame from various theories of retribution, and then to analyze how various writings in the following Sections conflict with, or are compatible with, various of these theories. The following sections do not aim for such conceptual precision. The point is simply to gesture toward a few of the mainstream alternatives to some of the dominant ideas about criminal punishment that are, as this Article has argued, reflected in the traditional criminal law curriculum.

150 To cite an early and representative example, August Comte, the nineteenth-century French theorist who coined the term "sociology," took the natural sciences as his model and attempted to produce "knowledge of the laws of the social world equivalent to our knowledge of the laws of nature." JOHN SCOTT, A DICTIONARY OF SOCIOLOGY 982–83 (4th ed. 2014). Comte "identified the specific objects of sociological inquiry as economic life, ruling ideas, forms of individuality, family structure, the division of labour, language, and religion." *Id.* at 214–15.

151 *See, e.g.*, GOTTSCHALK, *supra* note 14, at 277 (summarizing the "remarkably robust" "findings of decades of research on what explains variations in violent crime, especially homicide rates"). Already in the early twentieth century, the legal scholar Roscoe Pound stated that "modern psychology" had demonstrated "the extent to which what we have called free will is a product, not a cause, and the extent to which what we take to be reasons for actions are but rationalizings of what we desire to do and do on different grounds." ROSCOE POUND, CRIMINAL JUSTICE IN THE AMERICAN CITY 3 (1922). For other progressive-era accounts of crime as a product of external forces, including in Clarence Darrow's famous summation on behalf of Leopold and Loeb, see Albert Alschuler, *The Changing Purposes of Criminal Punishment: A Retrospective on the Last Century and Some Thoughts About the Next*, 70 U. CHI. L. REV. 1, 1–6 (2003). Progressive-era social scientists were often willing to explain crime as the result of harmful social conditions, at least when the criminal was white. *See* KHALIL GIBRAN MUHAMMAD, THE CONDEMNATION OF BLACKNESS: RACE, CRIME, AND THE MAKING OF MODERN URBAN AMERICA 5–7 (2010) (noting that criminal behavior by African Americans was more often attributed to factors such as "racial inheritance"). The "Social Gospel" movement, which came to dominate American Protestantism

Criminological and sociological scholarship on the conditions that make crime more likely does not necessarily conflict with a retributive focus on individual blame.[152] But even where such scholarship leaves room for individual blame, it often provides us with materials to do what the legal scholar Martha Minow suggests in her discussion of forgiveness in the law: to "shift[] from a focus on a specific violator and specific victim to use of a wider lens—not to negate the violation and its immediate harm but to understand the broader patterns and consider fair paths forward for all."[153]

It has become increasingly common for psychologists and psychiatrists who work with U.S. veterans of the post-9/11 wars to refer

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in the early twentieth century, similarly "repudiated an individuated conception of moral and social ills in favor of an interpretation of such phenomena as resulting from social, political, and economic realities over which the individual had little or no control." BILL BISHOP, THE BIG SORT: WHY THE CLUSTERING OF LIKE-MINDED AMERICA IS TEARING US APART 110–11 (2008) (quoting JAMES DAVISON HUNTER, AMERICAN EVANGELISM (1983)).

On the decline of "root cause" explanations for crime beginning in the 1960s and accelerating thereafter, see generally GARLAND, *supra* note 144; ELIZABETH HINTON, FROM THE WAR ON POVERTY TO THE WAR ON CRIME: THE MAKING OF MASS INCARCERATION IN AMERICA (2016). The Kerner Commission report on civil disorders, released in 1968, illustrates the root causes thinking that would soon fall out of favor. Based on a "synthesis of postwar social scientific theory," in Hinton's words, the report recommended "attacking the socioeconomic roots of urban unrest" in part through "the creation of 2 million jobs for low-income Americans . . . the immediate construction of 600,000 housing units in deprived 'ghetto neighborhoods,' and a guaranteed minimum income." HINTON, *supra* note 151, at 125.

152 For example, a retributivist might suggest that the tendency of street lighting to reduce crime does not imply that a city's failure to install streetlights provides a partial excuse for committing crime on a dark street. On the crime-reducing effects of street lighting, see Aaron Chalfin, Benjamin Hansen, Jason Lerner & Lucie Parker, *Reducing Crime Through Environmental Design: Evidence from a Randomized Experiment of Street Lighting in New York City*, 38 J. QUANTITATIVE CRIMINOLOGY 127 (2022) (presenting experimental evidence "that communities that were assigned more lighting experienced sizable reductions in nighttime outdoor index crimes"). *See also* SHARKEY, *supra* note 61, at 43–44, 198 nn.4–5 (summarizing research on "environmental factors that affect crime," including "approaches that focus on characteristics of the built environment").

153 MINOW, *supra* note 140, at 153. The aim of shifting to a wider lens is "not to excuse the person immediately responsible but to clarify the interconnections between people, forces, and structures that contributed to the wrong," and in some cases to "recogniz[e] that even victims might have contributed to a problem." *Id.* at 154. On the importance of overcoming the binary opposition of "perpetrator" and "victim" to recognize that both sides "are often from the same community, and at different moments in time can both experience harm and cause harm," see Alicia Virani, *Reaching Beyond the Binary To Find Humanity*, LPE PROJECT (Nov. 10, 2022), https://lpeproject.org/blog/reaching-beyond-the-binary-to-find-humanity [https://perma.cc/7LTH-XRH5]. *See also* Cynthia Godsoe, *The Victim/Offender Overlap and Criminal System Reform*, 87 BROOK. L. REV. 1319 (2022); DIANA TIETJENS MEYERS, VICTIMS' STORIES AND THE ADVANCEMENT OF HUMAN RIGHTS 18, 39 (2016) (criticizing the tendency to exclude "impure" victims from accounts of human rights violations); SERED, *supra* note 71, at 4 ("[M]any survivors of violence have complex lives, imperfect histories, and even criminal convictions.") (citing VERA INST. JUST., BEYOND INNOCENCE: TOWARD A FRAMEWORK FOR SERVING ALL SURVIVORS OF CRIME (2015)).

to "moral injury" as a way of describing "the lasting psychological, biological, spiritual, behavioral, and social impact of perpetrating, failing to prevent, or bearing witness to acts that transgress deeply held moral beliefs and expectations."[154] The term "moral injury" would seem equally applicable to many non-veterans who find themselves caught up in the criminal legal system in the United States as a result of harmful acts, including the many defendants who feel "overwhelmingly terrible about the harm they have caused," but have "no outlet via which to express this."[155]

Many social scientists have recognized and drawn attention to the inconsistency between, on the one hand, empirically grounded views of the conditions that shape human behavior, and, on the other hand, the punitive retributivism that has dominated criminal justice thinking for the last several decades in the United States. The biologist and neurologist Robert Sapolsky concludes his 2017 book *Behave*, a sweeping synthesis of contemporary empirical research on human behavior, with a critique of the belief in free will that underlies retributive criminal punishment.[156] He compares the retributivist assumptions of the criminal legal system in the United States with the belief in witches underlying the witch justice system of the sixteenth century.[157] Similarly, in his 2007 book *The Lucifer*

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154 Brett T. Litz, et al., *Moral Injury and Moral Repair in War Veterans: A Preliminary Model and Intervention Strategy*, 29 CLINICAL PSYCH. REV. 695, 697 (2009); *see* NANCY SHERMAN, AFTERWAR: HEALING THE MORAL WOUNDS OF OUR SOLDIERS 7–10 (2015) (illustrating the spread of moral injury discourse).

155 Virani, *supra* note 153. A civilian defendant's good and bad choices, just like a veteran's good and bad choices, can be described as the product of unchosen conditions and circumstances, some of them shaped by state policies. But the discourse of moral injury does not seem to play a significant role in contemporary criminal justice debates. For a rare exception, see Sarah C. Jobe, *Rethinking Responsibility: Moral Injury from War to Prison*, 23 POL. THEOLOGY 335 (2022). At the same time, "moral injury" discourse may not be the best way of arriving at a more holistic understanding of crime. *See* GREGORY BRAZEAL, THE HERO AND THE VICTIM: NARRATIVES OF CRIMINALITY IN IRAQ WAR FICTION (forthcoming 2024) (arguing that "moral injury" discourse, in practice, may sometimes pay inadequate attention to the harms caused by wrongdoers).

156 SAPOLSKY, *supra* note 48, at 583–85, 609–13.

157 *See id.* More recently, Sapolsky published a book-length expansion of his biological arguments against free will. *See* ROBERT M. SAPOLSKY, DETERMINED: A SCIENCE OF LIFE WITHOUT FREE WILL (2023). In a broad historical perspective, arguments like Sapolsky's can be seen as reflecting a cultural shift away from describing deviance in moralizing religious terms such as "evil" and "sin" and toward describing it in non-punitive medical terms. *See* CHARLES TAYLOR, A SECULAR AGE 618 (2007) ("What was formerly sin is often now seen as a sickness."). In an even broader historical perspective, social scientists' turn away from an account of crime focused on individuals and their culpable mental states, and toward an account that looks to the responsibility of the community, could be seen as returning, although with many differences, toward the more holistic, group-focused thinking that has characterized moral judgment in most societies outside of the modern industrialized West. *See* HENRICH, *supra* note 106, at 27–28, 33, 46–52, 216–22, 398–407; HOWARD ZEHR, CHANGING LENSES: RESTORATIVE JUSTICE FOR OUR TIMES 170–77, 234–35,

Effect, the social psychologist Philip Zimbardo draws an analogy to witch trials as part of his criticism of our tendency to attribute behavior to someone's "genetic makeup, personality traits, character, free will, or other dispositions."[158] Social psychologists like Zimbardo instead seek the causes of behavior in conditions and circumstances, asking: "To what extent can an individual's actions be traced to factors outside the actor, to situational variables and environmental processes unique to a given setting?"[159]

If the use of case excerpts in the traditional criminal law curriculum encourages students to think of crime based on individual retributivist assumptions, then the fact that two of the most widely known social scientists in the United States have compared these assumptions to the belief in witches might at the very least give criminal law professors pause.[160]

b. Religion

Like the social sciences, religious thought supplies countless examples of perspectives on wrongdoing that call into question individual retribution as a normative ideal. In the context of a discussion of criminal justice in the United States, it may be appropriate to start with the Christian tradition.

Historians such as Bart Ehrman would caution that Jesus was not offering general ethical advice for all people in all times, but rather was an apocalyptic Jewish preacher warning his fellow Jews, living under Roman occupation, about how to prepare for the imminent arrival of the

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324–25 (2015) (noting the "tremendous debt restorative justice owes to many [I]ndigenous traditions"). It might be argued that the ideology of individual blame and retribution that currently dominates criminal justice in the United States represents not only a regression from the socially oriented thinking of the first half of the twentieth century, as suggested above in note 151, but also a relatively recent and unusual (or, as Henrich suggests, "weird") outlier in the moral history of humanity.

158 PHILIP ZIMBARDO, THE LUCIFER EFFECT: UNDERSTANDING HOW GOOD PEOPLE TURN EVIL 7–9 (2007).

159 *Id.* at 8.

160 Already in the nineteenth century, the novelist Samuel Butler satirized the obvious injustice of a criminal justice system that blames individuals for conditions outside of their control. SAMUEL BUTLER, EREWHON (Peter Mudford ed., 1970) (1872). Butler's book imagines a land whose inhabitants are criminally punished for their illnesses, while wrongdoing is treated with sympathy. The narrator quotes an Erewhonian judge's harsh condemnation of a young recidivist who has "been imprisoned on no less than fourteen occasions for illnesses:" "It is all very well for you to say that you came of unhealthy parents, and had a severe accident in your childhood which permanently undermined your constitution; excuses such as these are the ordinary refuge of the criminal . . . ." *Id.* at 115. Similarly, in Edward Bellamy's enormously popular socialist utopian novel of 1888, there are no jails because crime is treated as a medical issue: "The idea of dealing punitively with those unfortunates was given up at least fifty years ago." EDWARD BELLAMY, LOOKING BACKWARD: 2000–1887 129 (Applewood Books 2000) (1888).

kingdom of God.[161] Nevertheless, taken out of context and at face value, Jesus' words often seem to express a radical rejection of retribution. Consider the following proclamations from the Sermon on the Mount: "Blessed are the merciful, for they will be shown mercy."[162] "Blessed are the peacemakers, for they will be called children of God."[163]

> [A]nyone who is angry with a brother or sister will be subject to judgment."[164] "You have heard that it was said, 'Eye for eye, and tooth for tooth.' But I tell you, do not resist an evil person. If anyone slaps you on the right cheek, turn to them the other cheek also. And if anyone wants to sue you and take your shirt, hand over your coat as well.[165]

"You have heard that it was said, 'Love your neighbor and hate your enemy.' But I tell you, love your enemies and pray for those who persecute you . . . ."[166] It is difficult to imagine a clearer or more extreme repudiation of retributivist attitudes than the call to turn the other cheek and "love your enemies."

Of course, in any religious tradition, it is possible to find support for conflicting perspectives, and Christianity is no exception.[167] A cultural historian might argue, in fact, that the focus on individual blame and retribution in the U.S. criminal legal system today can ultimately be traced back, in part, to the cultural and psychological transformations brought about by Protestant Christianity, or by earlier institutional transformations in the Catholic church.[168]

In any case, Christianity is only one of many mainstream, contemporary religious traditions in which critiques of individual blame and retribution can be found. Buddhism is another well-known example.

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161 *See* BART D. EHRMAN, JESUS: APOCALYPTIC PROPHET OF THE NEW MILLENNIUM 162 (1999) (noting that Jesus "did not propound his ethical views to show us how to create a just society and make the world a happier place for the long haul").

162 *Matthew* 5:7 (New International Version).

163 *Id.* at 5:9.

164 *Id.* at 5:22.

165 *Id.* at 5:38–:40.

166 *Id.* at 5:43–:44.

167 *See, e.g.*, *id.* at 10:34–:36 ("Do not suppose that I have come to bring peace to the earth. I did not come to bring peace, but a sword. For I have come to turn 'a man against his father, a daughter against her mother, a daughter-in-law against her mother-in-law'—a man's enemies will be members of his own household."). *See generally* KRISTIN KOBES DU MEZ, JESUS AND JOHN WAYNE: HOW WHITE EVANGELICALS CORRUPTED A FAITH AND FRACTURED A NATION (2020) (describing culture of militant masculinity in contemporary white evangelical Christianity); AARON GRIFFITH, GOD'S LAW AND ORDER: THE POLITICS OF PUNISHMENT IN EVANGELICAL AMERICA (2022) (describing evangelical Christian support for racialized "law and order" policies that resulted in mass incarceration, but also support for certain criminal justice reforms).

168 *See* HENRICH, *supra* note 106, at 15–17, 158–61, 415–27.

In a recent book, the philosopher Jay L. Garfield summarized the radical Buddhist rejection of free will, and thus of individual blame, as follows:

> The Buddhist approach to ethics rejects [the] entire image of an autonomous self independently giving rise through mysterious free agent causation to actions; instead, ethical thought proceeds on the assumption that our actions are just as much caused as anything else, and that we are just as much a part of the natural world as anything else.[169]

To the extent that the justification for retribution rests on individual blame, which in turn rests on free will, this characterization of Buddhist thought leaves no room for justified retribution.

If it is true, as these examples suggest, that some parts of the world's major religious traditions reject the ideology of individual retribution, then, once again, we might hesitate to conclude that the ideology is so widely accepted that it makes sense to encourage criminal law students to adopt the ideology uncritically.

c. The Humanities

Two largely unrelated traditions in the humanities are especially rich with critiques of individual blame and retribution: the philosophical debates surrounding free will and determinism; and writings by leftist critical theorists, in particular critiques of "liberalism."

Philosophical objections to retributivism can be found as early as the eighteenth century.[170] The ensuing philosophical literature is vast and, predictably, has given rise to an ever-growing, ever-more-finely-drawn technical apparatus of conceptual distinctions.[171] Many criminal law casebooks already note some of the philosophical critiques of

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169 JAY L. GARFIELD, BUDDHIST ETHICS: A PHILOSOPHICAL EXPLORATION 50 (2022).

170 *See, e.g.*, JEREMY BENTHAM, AN INTRODUCTION TO THE PRINCIPLES OF MORALS AND LEGISLATION 134 (Batoche Books ed. 2000) (arguing, regarding punishment, that "if it ought at all to be admitted, it ought only to be admitted in as far as it promises to exclude some greater evil").

171 For an introduction to the literature, see Hoskins, *supra* note 17. In the final decades of the twentieth century, retributivist theories dominated discussion. *See id.* For a particularly strong rejection of individual responsibility, and thus of the foundation for retribution, see Derk Pereboom, *Free Will Skepticism and Criminal Punishment*, *in* THE FUTURE OF PUNISHMENT 49 (Thomas A. Nadelhoffer ed., 2013). For an attempt to reject individual blame while recognizing individual responsibility, informed by clinical practice with addiction, see Hanna Pickard, *Responsibility Without Blame: Philosophical Reflections on Clinical Practice*, *in* THE OXFORD HANDBOOK OF PHILOSOPHY AND PSYCHIATRY 1134, 1135 (K.W.M. Fulford et al. eds., 2013). To be clear, despite my references to skeptics of free will such as Sapolsky and Pereboom, the attempt to arrive at a more holistic understanding of responsibility for criminal harms does not require a dogmatic rejection of free will. The practice of expanding the narrative frame around a criminal harm in order to arrive at a more holistic understanding of responsibility for the harm, with the ultimate aim of arriving at a more just response, is compatible with any number of theoretical positions regarding free will and determinism.

retributivism.[172] To reiterate, though, the point of the current survey of alternatives to the ideology of individual retribution is not to suggest that any of these specific alternatives should be discussed, or discussed more, in the criminal law curriculum. Instead, the point is to suggest how arbitrary and unjustified it would be to indoctrinate students in an ideology of individual retribution when so many relatively mainstream perspectives reject this ideology. The fact that many criminal law casebooks note the existence of philosophical critiques of retributivism, and then subtly proceed to train students to think in generally retributivist terms—for example, by provoking punitive moral intuitions and then encouraging students to draw conclusions about punishment based on those intuitions, rather than based on empirical evidence about the nature and consequences of punishment—highlights the problem rather than resolving it.

A second scholarly tradition in the humanities that contains critiques of individual blame and retribution is the diverse leftist tradition that might be called "critical theory," for lack of a better term. Within literature departments and in related fields, leftist theorists continue to produce works in various critical theoretical traditions, often drawing on Marx, Freud, and an ever-shifting pantheon of twentieth-century French intellectuals.[173] The alternatives to the ideology of individual blame and retribution offered, implicitly or explicitly, by critical theorists are just as numerous as, and perhaps even more varied than, the alternatives offered by mainstream academic philosophers. To take just one example, in her book *The Force of Nonviolence*, Judith Butler offers a critique of the liberal individualist tradition and its tendency to ignore human vulnerability and interdependence.[174] Butler's vision of nonviolence as "an ethical obligation by which we are bound precisely because we are bound to one another"[175] seems to challenge both the individualist assumptions and the violent practices that are embodied in the retributivism of the contemporary U.S. criminal legal system.

Despite the frequent difficulty of their thought for the uninitiated, many writers in critical-theoretical traditions, like Butler or the critical historian Saidiya Hartman, continue to break through and influence the

172 *See, e.g.*, KADISH, SCHULHOFER & BARKOW, *supra* note 3, at 34–37.

173 For an anthology of mostly critical-theoretical writings, although with an emphasis on literary theory, see THE NORTON ANTHOLOGY OF THEORY AND CRITICISM (Jeffrey J. Williams et al. eds., 3d ed. 2018).

174 *See* JUDITH BUTLER, THE FORCE OF NONVIOLENCE: AN ETHICO-POLITICAL BIND 27–65 (2020).

175 *Id.* at 148.

broader culture.[176] They are part of the intellectual mainstream in the United States at least as much as many social scientists, academic philosophers, and legal scholars. They provide further evidence that no consensus exists that would justify training law students to think of individual blame and retribution as the natural responses to criminal harms.

d. Legal Thought

Legal academics and practitioners have, of course, written works that criticize the excesses of retribution in the U.S. criminal legal system, as well as works that reject retribution altogether as a legitimate goal of criminal punishment.[177] Legal writers, including judges, have also offered many arguments against the assumption of unmitigated individual responsibility for crimes, especially with regard to certain groups such as juveniles and the mentally impaired.[178] But to the extent that these legal writings draw on the social scientific and humanities scholarship already noted above, I will not focus on them here.

One area where legal thought often breaks new ground is in writing about the design of legal institutions and rules, and the consequences of various design decisions.[179] It may be noteworthy, then, that legal scholars have repeatedly proposed the redesign of institutions in the context of criminal justice that would have the likely effect of sidelining retribution as a goal of criminal punishment. Scholars including Rachel Barkow and John Pfaff have argued in favor of insulating criminal punishment policies and procedures from the popular will by placing greater power

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176 Hartman also offers a critique of liberal individualism. *See, e.g.*, SAIDIYA HARTMAN, SCENES OF SUBJECTION: TERROR, SLAVERY, AND SELF-MAKING IN NINETEENTH-CENTURY AMERICA 234–35, 249 (W.W. Norton & Co. rev. ed. 2022) (1997). For illustrations of Butler's and Hartman's ideas reaching non-academic audiences, see, for example, Alexis Okeowo, *How Saidiya Hartman Retells the History of Black Life*, NEW YORKER (Oct. 19, 2020); Masha Gessen, *Judith Butler Wants Us to Reshape Our Rage*, NEW YORKER (Feb. 9, 2020), [https://perma.cc/Y7XV-K23X].

177 *See, e.g.*, MINOW, *supra* note 140; Richard Lowell Nygaard, *Crime, Pain, and Punishment: A Skeptic's View*, 102 DICK. L. REV. 355 (1998); *see also* Alice Ristroph, *Just Violence*, 56 ARIZ. L. REV. 1017, 1038 n.95, 1039 & n.99 (2014) (citing critics of retributivism and of punishment in general).

178 *See, e.g.*, Miller v. Alabama, 567 U.S. 460, 471–80 (2012) (holding unconstitutional mandatory life without parole for juveniles, in part based on studies showing differences between juvenile and adult brains in regions governing self-control); Roper v. Simmons, 543 U.S. 551, 569–72, 578 (2005) (holding unconstitutional the execution of offenders who were under the age of eighteen when committing their crime); Atkins v. Virginia, 536 U.S. 304, 318–21 (2002) (holding unconstitutional the execution of mentally disabled defendants).

179 *See, e.g.*, Brazeal, *supra* note 96, at 669–73 (collecting legal scholarship on the legal design of markets).

in the hands of technocratic experts, such as sentencing commissions.[180] Just as experts at the FDA make decisions about drug approval based on empirical evidence rather than popular fears or superstitions, experts in a criminal justice bureaucracy would make decisions related to sentencing based on the best available evidence, rather than being swayed by popular outrage in response to unrepresentative anecdotes publicized by the media.[181]

Whether or not we should have any democratic concerns about such proposals, for the purpose of this Article the most notable feature of taking an administrative approach to public safety, analogous to the FDA's administrative approach to public health, would be the almost inevitable shift in emphasis away from retribution as the primary goal of the criminal legal system. A standard criticism of the cost-benefit analysis form of decision-making typically used by experts in administrative agencies is that such analysis tends to ignore or give inadequate weight to difficult-to-quantify variables.[182] How much punishment an individual "deserves" is one such variable. It is easy to imagine analysts in an administrative agency offering a quantitative estimate of the likely effects of a criminal justice policy on future crime rates in general, or on

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180 *See* BARKOW, *supra* note 44, at 136–37, 169–75; PFAFF, *supra* note 9, at 182–83, 220–23. Similar proposals have often been made in the context of criminal procedure. *See, e.g.*, Daphna Renan, *The Fourth Amendment as Administrative Governance*, 68 STAN. L. REV. 1039, 1045–48 (2016) (summarizing prior scholarship). Others have argued that an administrative approach to policing could in fact be more democratically responsive than the status quo. *See* Barry Friedman & Maria Ponomarenko, *Democratic Policing*, 90 N.Y.U. L. REV. 1827, 1833–34 & n.28 (2015) (arguing for an administrative approach to policing, and noting earlier, related scholarship including Anthony G. Amsterdam, *Perspectives on the Fourth Amendment*, 58 MINN. L. REV. 349, 416–28 (1974)).

181 Another comparison might be to the National Transportation Safety Board (NTSB), which investigates plane and train crashes in order to figure out "what went wrong and why," without focusing "blame on individual actors." Radley Balko, *What If We Treated Wrongful Convictions and Bad Police Shootings the Way We Treat Plane Crashes?*, WATCH (June 8, 2023), https://radleybalko.substack.com/p/what-if-we-treated-wrongful-convictions [https://perma.cc/4SRZ-LQR9]. Imitating the NTSB's approach, pilot programs have carried out "sentinel event reviews" (SERs) in response to crime lab failures, police responses to protests, false arrests, and in-custody deaths. *Id.* But in theory the approach could be extended much further—for example, to homicides in general. In a world with many fewer homicides, more resources, or both, any homicide (or any emerging pattern of crime) might be treated as an occasion for an SER. *Cf.* ZIMBARDO, *supra* note 158, at 227 (adopting a systems-focused approach to understanding evil acts, and drawing inspiration from Richard Feynman's investigation of the systemic problems at NASA that resulted in the *Challenger* disaster); *see supra* note 116 (discussing "systems thinking"). Rather than focusing on individual blame, the SER could attempt to identify and address systemic public safety failures that made the homicide more likely. Perhaps such investigations and interventions could even be carried out by a federal agency. Perhaps the agency could be called "the Department of Justice."

182 *See, e.g.*, FRANK ACKERMAN & LISA HEINZERLING, PRICELESS: ON KNOWING THE PRICE OF EVERYTHING AND THE VALUE OF NOTHING 40 (2004).

deterrence, incapacitation, and rehabilitation in particular. It is harder to imagine how the analysts would reliably quantify the nature and length of incarceration that various defendants "deserve."[183] Moreover, if the latter calculation suggested a punishment that the former calculation suggested would be criminogenic, it is hard to imagine a bureaucratic expert having so much confidence in her quantification of "just deserts" that she would be willing to support creating new victims simply in the name of retribution for current victims.

Thus, an institutional design argument that has repeatedly been made by legal scholars rejects, at least implicitly, the central role given to retribution in contemporary criminal justice thought and practice in the United States. These scholars' designs effectively prioritize public safety rather than retribution. In order to promote public safety, the scholars argue for placing decision-making power in the hands of politically insulated experts. The scholars advocate for this approach precisely because they recognize the tendency of popular opinion, when inflamed by anecdotes of individuals doing horrible things, to seek punishments that cannot be justified by, and may in fact undermine, the goal of public safety.[184]

The traditional criminal law curriculum, by contrast, encourages students to reach conclusions about justice by reading decontextualized anecdotes about individuals doing horrible things. The excerpted judicial opinions, intentionally or not, often have the predictable effect of provoking punitive indignation. Rather than preparing students to take a dispassionate, empirically informed approach to public safety, as the experts in a criminal justice bureaucracy might, the curriculum trains students to embrace their inflamed moral intuitions and punish accordingly.

e. Activism

Finally, activists who focus on criminal justice reform frequently criticize, implicitly or explicitly, the excesses of retribution in the United States. There are, of course, many organizations that argue against harsh criminal punishments in general on a moral, economic, or practical basis, such as the Sentencing Project, the Prison Policy Initiative, the Vera Institute, Right on Crime, and various left-leaning NGOs that dedicate some of their attention to criminal justice reform, including the NAACP, the Center for Constitutional Rights, the ACLU, and Human Rights

183 *See, e.g.*, BARKOW, *supra* note 44, at 39 ("People have different conceptions of what a just punishment for a crime is, and retributive theory cannot settle what the exact amount of punishment should be.").

184 *See id.* at 136–37, 169–75; PFAFF, *supra* note 9, at 182–83, 220–22.

Watch.[185] The arguments of these organizations sometimes include criticisms of the ideology of retribution, but their criticisms generally overlap with and draw upon the arguments of reformist legal scholars and social scientists.[186]

Other activist perspectives draw upon more radical traditions. Two especially prominent examples are the prison abolition and restorative justice movements. Both movements encompass diverse perspectives, but at least some leading voices in both movements criticize the ideology of individual retribution. For example, when advocates for prison abolition like Ruth Wilson Gilmore and Angela Y. Davis are confronted with skeptical questions about how they would prevent violent harms from taking place,[187] their answers often emphasize social and economic problems, rather than isolated individual choices, as the ultimate causes of violence.[188] In addition, when abolitionists address individual blame for harmful acts, their statements frequently strike a radically anti-retributive note.[189]

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185 In addition, a number of universities have established policy institutes dedicated to criminal justice reform, from the Brennan Center for Justice and the Policing Project at N.Y.U. Law, to the Justice Collaboratory at Yale Law School, to the Crime Lab at the University of Chicago. *See, e.g.*, *About Us*, BRENNAN CTR. FOR JUST., https://www.brennancenter.org/about [https://perma.cc/D6N4-JMCD].

186 *See, e.g.*, Jeremy Travis & Bruce Western, *Beyond the Era of Punitive Excess*, BRENNAN CTR. FOR JUST. (Apr. 5, 2022), https://www.brennancenter.org/our-work/analysis-opinion/beyond-era-punitive-excess [https://perma.cc/U2C4-EKPS] (listing a "tangle of fictions that stand in the way of change," including that "harmed parties need retribution").

187 *See* Rachel Kushner, *Is Prison Necessary? Ruth Wilson Gilmore Might Change Your Mind*, N.Y. TIMES MAG. (Apr. 17, 2019) (describing Gilmore's response to a group of adolescents who were initially skeptical of prison abolition); ANGELA Y. DAVIS, ARE PRISONS OBSOLETE? 9–10 (2003) (addressing the incredulity that prison abolitionists often confront). For a response to prison abolitionism that emphasizes the problem of "the dangerous few," see Thomas Ward Frampton, *The Dangerous Few: Taking Seriously Prison Abolition and Its Skeptics*, 135 HARV. L. REV. 2013 (2022). In terms of clarifying the meaning of abolitionism, I note that even if many abolitionists do not call for the immediate elimination of all prisons and police, one way to distinguish most abolitionism from most reformist approaches is that abolitionists tend to emphasize reducing the number of prisons and the size of police forces, while reformists tend to emphasize bringing incarceration and policing practices under better political and legal control. If that is accurate, then abolitionism might be identified with attempts to "incapacitate the state," rather than legally regulating it. *See* Daryl J. Levinson, *Incapacitating the State*, 56 WM. & MARY L. REV. 181 (2014).

188 *See* DAVIS, *supra* note 187, at 14 (referencing Gilmore's description of prisons in California as "a geographical solution to socio-economic problems"); Kelly Hayes & Mariame Kaba, *The Sentencing of Larry Nassar Was Not 'Transformative Justice.' Here's Why.*, APPEAL (Feb. 5, 2018), [https://perma.cc/VZL3-3ERT] (arguing that "we simply do not know, and cannot know, what the occurrence, prevention, or resolution of harm could look like in our society under more just conditions").

189 For example, at the end of Kushner's profile of Gilmore, Gilmore describes talking with her aunt about the aunt's murdered son and saying, initially, "[f]orgive and forget." Kushner, *supra* note 187. Later, Kushner describes Gilmore's message as: "[Y]ou don't solve a problem with state

Restorative justice can take many forms, but it generally refers to survivor-focused processes that prioritize repairing harm and achieving meaningful accountability rather than seeking punishment as an end in itself.[190] In a restorative justice process, someone who has been harmed may play an active role, with the help of facilitators, in designing a form of accountability for a person who caused the harm.[191] In most approaches, the focus of the process is on healing, rehabilitation, and addressing the underlying causes of harm rather than on individual retribution for its own sake.[192] To the extent that restorative justice focuses on accountability, it does not deny individual responsibility for crime. But like many of the prison abolitionists and social scientists mentioned above, advocates for restorative justice often emphasize that harms always take place in a larger context.[193]

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To conclude, the dominant ideology of the contemporary U.S. criminal legal system focuses on individual blame and retribution. But a wide variety of prominent alternatives to that ideology can be found in the mainstream of the social sciences, religious thought, the humanities, legal thought, and social activism. The traditional criminal law curriculum is not neutral between the ideology of individual retribution and its alternatives. Through its use of case excerpts, the traditional criminal law curriculum has a structural tendency to function as indoctrination in the dominant ideology, rather than training students to think critically and for themselves regarding the ideological choices that cannot be avoided in criminal law.

3. Criminal Law Education as a Milgramesque Authorization for Cruelty?

In a famous series of experiments in the 1960s, the psychologist Stanley Milgram demonstrated the surprising extent to which people are willing to obey an authority figure even when the authority figure tells

violence or with personal violence. Instead, you change the conditions under which violence prevailed." *Id.*

190 *See, e.g.*, SERED, *supra* note 71, at 14, 133–41.

191 *See id.*

192 *See, e.g.*, ZEHR, *supra* note 157, 235–40 (comparing and contrasting restorative and retributive justice). "Some theorists . . . view restorative justice as incompatible with retributivism, while others . . . argue that true restoration requires the imposition of retributive punishment." Adriaan Lanni, *Taking Restorative Justice Seriously*, 69 BUFF. L. REV. 635, 679 n.165 (2021).

193 *See, e.g.*, SERED, *supra* note 71, at 3 (criticizing incarceration for "treat[ing] violence as a problem of 'dangerous' individuals and not as a problem of social context and history").

them to perform an act that conflicts with their values.[194] Although alternative interpretations have been proposed, the majority of the participants in Milgram's experiments appeared willing to administer fatal electrical shocks to another participant (actually an actor) when told to do so by the authority figure in charge of the experiment.[195] Apparently, being told by an authority figure that some behavior is acceptable can powerfully shape our willingness to participate in practices that we might otherwise view as profoundly wrong.

The teaching of first-year criminal law over the last several decades bears a disturbing resemblance to an unintentional, multigenerational Milgram-style experiment. Many, though of course not all, students entering law school might have been troubled, in the abstract, by the thought of placing millions of Americans in cages for years at a time. If given an opportunity to consider the choice, these students might have hesitated to participate in a system of mass incarceration, especially one that imprisoned "a larger percentage of [the] [B]lack population than South Africa did at the height of apartheid,"[196] with the result that by the mid-2000s, "in some cities more than half of all young adult black men [were] under correctional control—in prison or jail, on probation or parole."[197]

But then, in their first-year criminal law courses, the students received implicit but sustained messages from authoritative sources—their casebooks, their criminal law professors—suggesting that the use of incarceration as a default form of retribution against criminals is normal and morally unobjectionable: Criminal defendants are bad, often dangerous and violent people who deserve to be punished for their criminal acts. Retribution is a standard, widely accepted basis for punishment. The status quo is generally reasonable, aims toward justice, and responds to practical needs.

By the end of the semester, having read numerous stories of grisly killings and other violent crimes by apparently monstrous defendants, and having repeatedly considered and discussed the manifold ways that incarceration can be justified, students may have forgotten any earlier qualms. They may even feel that they have arrived at a tough, no-nonsense, "realistic" attitude toward crime and punishment, in contrast to others who have never squarely confronted the hard problems.

Eventually, some of these students may go out into the world and practice criminal law, empowered by their law degrees to do "justice" as

194 For summaries of the research, see ZIMBARDO, *supra* note 158, at 266–67; SAPOLSKY, *supra* note 48, at 461–62.

195 *See supra* note 194.

196 ALEXANDER, *supra* note 24, at 6–7.

197 *Id.* at 9.

they were trained to think of it. As prosecutors, in particular, they may enjoy not only the thrill of winning in adversarial litigation, but also the deeper satisfactions of knowing that they are on the side of righteousness. They are on the side of the "good guys" when they ensure that offenders, whom they may start to think of as "scumbags" or "thugs,"[198] pay for their crimes by doing time. Criminal law education, far from providing the young prosecutor with resources to reflect critically on such punitive attitudes, may have authorized and legitimated the idea of retributive incarceration as the natural response to crime.

CONCLUSION: TOWARD A NEXT GENERATION CRIMINAL LAW CURRICULUM

Over the next several years, a new version of the bar exam will be introduced. The "NextGen" bar will contain fewer questions testing the mechanical memorization of substantive criminal law rules, such as the elements of various crimes.[199] Instead, the exam will place a greater emphasis on interpreting criminal statutes, as criminal law practitioners routinely do in practice.[200]

Law schools vary with regard to the emphasis they place on bar preparation.[201] But to the extent that criminal law professors felt constrained in their teaching methods by the obligation to expose students to a large number of rules that would be covered on the bar exam, that constraint has now been relaxed. The approaching arrival of the new bar exam provides an excellent, once-in-a-generation opportunity to reconsider how criminal law is taught in the United States.

Although substantive criminal law only became a mandatory course at most law schools in the mid-twentieth century,[202] and although criminal law is rooted in statutes rather than in common law decisions,[203] the core of the dominant current approach to teaching criminal law, as sketched in Part II above, largely resembles the "case method" developed

198 The quotations come from my own conversations with prosecutors. *Cf.* BAZELON, *supra* note 48, at 157–58 (quoting Paul Butler on his experience as a prosecutor: "I didn't call the defendants 'cretins' on my first day, but it didn't take long"); Abbe Smith, *Can You Be a Good Person and a Good Prosecutor?*, 14 GEO. J. LEGAL ETHICS 355, 356 n.11 (2001) (quoting various references to criminal defendants as "scum").

199 *See* NAT'L CONFERENCE BAR EXAM'RS, NEXTGEN BAR EXAM OF THE FUTURE: BAR EXAM CONTENT SCOPE 21–24 (2023).

200 *See id.* at 21.

201 *See, e.g.*, Ristroph, *supra* note 2, at 1685 ("Whether law school courses do or should 'teach to the bar exam' is, of course, a matter of debate.").

202 *See id.* at 1641 & n.38, 1651.

203 *See id.* at 1641 & n.41.

by Harvard Law School Dean Christopher Columbus Langdell in the later nineteenth century for teaching private law courses.[204] As in a property law, torts, or contracts class, students in a substantive criminal law class read judicial opinions from a casebook; then, during class, the professor asks students questions that test their understanding of the rules or principles in the opinion, sometimes through the use of hypotheticals.[205]

I will not attempt to summarize here the many general criticisms that have been offered over the last century of the ways in which, as two critics noted in 2007, "Langdell's case method fails."[206] But it should not be surprising that a teaching method developed in the 1870s might reflect archaic understandings of the law or legal practice, might not suit the current needs of students or the legal profession, or might fail to incorporate ideas about effective teaching that researchers have developed in the last century and a half.

To clarify the weaknesses of the currently dominant case-focused approach to teaching criminal law, we might evaluate the approach using a leading contemporary guide for developing curricula in higher education, L. Dee Fink's *Creating Significant Learning Experiences*.[207] As the title suggests, Fink presents "significant learning experiences" as the goal of teaching, and distinguishes between several different types of significant learning.

The most common focus in college-level courses is "foundational knowledge," that is, "students' ability to understand and remember specific information and ideas."[208] To the extent that the traditional criminal law curriculum, behind the smoke and mirrors of the Socratic method, ultimately involves, at least in part, teaching students a list of

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204 *See id.* at 1640–41 (noting Langdell's focus on private law).

205 Anders Walker emphasizes the ways in which standard approaches to teaching criminal law depart from Langdell's precise method, especially by including fewer cases to illustrate the subtleties of a legal point. *See* Walker, *supra* note 8, at 218–20 (arguing that Herbert Wechsler and Jerome Michael's 1939 criminal law casebook, which influenced nearly all subsequent casebooks, "sought to revolutionize law teaching by making criminal law a vehicle for challenging the case method"). But in the more general sense noted in the text, the traditional criminal law curriculum continues to resemble the case method—certainly much more than it resembles the teaching methods ordinarily used in a philosophy, sociology, criminology, public policy, business school, or medical school course.

206 Todd D. Rakoff & Martha Minow, *A Case for Another Case Method*, 60 VAND. L. REV. 597, 600 (2007). For a collection of critiques of the Socratic case method, see A. Benjamin Spencer, *The Law School Critique in Historical Perspective*, 69 WASH. & LEE L. REV. 1949, 1958 n.30 (2012).

207 L. DEE FINK, CREATING SIGNIFICANT LEARNING EXPERIENCES: AN INTEGRATED APPROACH TO DESIGNING COLLEGE COURSES (rev. ed. 2013).

208 *Id.* at 34.

rules that they will be expected to know for the exam,[209] the curriculum conveys foundational knowledge.[210]

The traditional criminal law curriculum is less effective at delivering other forms of significant learning, such as "learning how to engage in various kinds of thinking" (what Fink calls "application").[211] Students in a traditional criminal law course often learn to some degree how to think like an appellate judge, or like an advocate arguing before a judge about the correct interpretation of a criminal statute. They learn these kinds of reasoning by critically engaging with the reasoning of case excerpts. But as Part III of this Article suggested, when criminal law practitioners think and argue about criminal law rules and how to apply them in the real world, they often have to make sense of a far broader, more complex, and less clear range of materials than usually appears in criminal law case excerpts. Above all, prosecutors making decisions about charging and plea offers have enormous discretion and cannot hope to find the "correct" answer simply by looking at the criminal code and the case law interpreting it.

By largely limiting students' criminal law education to the reasoning in appellate opinions,[212] without giving them an opportunity to grapple with contested or contestable empirical research, the traditional curriculum also limits students' "learning how to learn," another of Fink's categories of significant learning.[213] Many students enter law school without any exposure to social science or public policy research. Some of them may assume such research is outside of their competency to understand, much less critically evaluate. Or they may not know how little they know about empirical research and its difficulties and limitations. Encountering empirical social science scholarship in a criminal law course could be a first step toward learning how to seek out, understand, and make use of empirical research more generally. "Learning how to learn" from empirical research is obviously a valuable skill for any lawyer today, including criminal law practitioners.

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209 *See supra* note 3 (praising Ohlin's casebook for including doctrinal rules rather than engaging in what he calls "excessive hide-the-ballism").

210 Similarly, the coverage of criminal law on the existing bar exam almost exclusively tests foundational knowledge. The current BARBRI bar preparation outline for criminal law simply offers a long list of rules. *See* BARBRI, CRIMINAL LAW (2022). Unfortunately, the rules do not correspond to the rules of any existing jurisdiction. *See* Ristroph, *supra* note 2, at 1684 (observing that "the bar exam . . . tests pretend law").

211 FINK, *supra* note 207, at 35.

212 One survey of criminal law casebooks found that "only three percent of opinions assigned to students were trial court opinions, all of which were sentencing decisions succeeding a finding of guilt." Peterson, *supra* note 2, at 572 (footnote omitted).

213 FINK, *supra* note 207, at 36.

The traditional criminal law curriculum delivers even less with regard to Fink's other categories of significant learning. Fink describes "integration" as learning "to see and understand the connections between different things."[214] There are vast opportunities for integrative learning in the criminal law curriculum because crime and punishment have so many causal connections to other issues—from the politics and history of race and class, to the nature of the state, to gun policy, to the policies that shape housing, education, employment, poverty, mental health, and substance abuse. By depriving students of exposure to the empirical evidence and narrative materials noted in Part III, the traditional criminal curriculum deprives them of an excellent opportunity for integrative learning.

Finally, Fink refers to "caring" (developing "new feelings, interests, or values") and the "human dimension" ("learn[ing] something important about [oneself] or about others").[215] Some of the most enduring and meaningful experiences in a student's education can be located in these categories. Years after a student has forgotten all the elements of the various crimes she studied in criminal law, she may remember a discussion that made her understand the significance of criminal punishment in a new way, or that opened her eyes to some difference between her own perspective and the perspective of another student. Given the high stakes of crime and punishment, and the varying moral intuitions and assumptions that students bring to class, criminal law offers exceptional opportunities for these types of learning. But because the focus of the traditional criminal law curriculum is so narrow, and excludes so much, the experience of developing new concerns or learning about oneself or others may be more likely to happen in spite of the curriculum than because of it.

If the case method is not the best way to create significant learning experiences in criminal law, what could be an alternative?

I will conclude by proposing one possibility. Criminal law could be taught through hypothetical case studies that provide the kinds of materials traditionally excluded from criminal law case excerpts. That is, the criminal law curriculum could imitate the "case study" method sometimes used in business schools rather than the "case method" developed by Langdell.[216] Problem-solving exercises in criminal law could

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214 *Id.*

215 *Id.*

216 *See* Rakoff & Minow, *supra* note 206, at 603; Myron Moskovitz, *Beyond the Case Method: It's Time To Teach with Problems*, 42 J. LEGAL EDUC. 241, 241–42 (1992) (arguing for adopting the "problem method" used in other professional schools, such as medical and business school, because "[i]t is designed especially to train professionals"). There is already a widely used criminal law

take many forms. Students could, for example, be placed in the role of a prosecutor discussing a charging decision with a supervisor, a public defender negotiating a plea bargain, or a judge making a sentencing decision. To allow even more room for creative and critical thinking, students might imagine they are the members of a municipal committee tasked with addressing a public safety problem, members of a prosecutors' staff tasked with deciding whether to create a restorative justice program, or participants in a legislative negotiation over the proposed creation of a mandatory minimum sentence for some crime.

In a 2007 Article arguing for the use of the case study method in law schools, Martha Minow and Todd Rakoff described how students could be

> presented with relatively dense materials that lay out a situation, experienced as a problem for a person, or group of people, for legal treatment. Students should face a choice that challenges them to identify options and that permits multiple resolutions, sometimes within a relatively tight ambit . . . . Teaching should emphasize generating alternative solutions as well as appropriate grounds for choosing among them. And criteria for resolution should include legal, normative, and practical considerations.[217]

Harvard Law School, where Minow later served as Dean, later realized this proposal through a Problem Solving Workshop developed by Rakoff and Joseph Singer.[218] In 2019, the University of New Mexico

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casebook, Paul Robinson's *Criminal Law: Case Studies and Controversies*, that (as its title suggests) features the frequent use of case studies. *See* ROBINSON, BAUGHMAN & CAHILL, *supra* note 80; *see also supra* text accompanying note 80 (describing use of case studies in the Robinson et al. casebook). But the case studies are not of the kind I am proposing here. Robinson's case studies generally display the same limitations as the case excerpts criticized in Section III.B, above. *See* discussion *supra* Section III.B. They do not "shift[] from a focus on a specific violator and specific victim to use of a wider lens" to quote again Minow's phrase. MINOW, *supra* note 140, at 153. They are not the kind of "detailed fact-drenched case studies" that are used in business schools. Rakoff & Minow, *supra* note 206, at 604 n.17.

217 Rakoff & Minow, *supra* note 206, at 604.

218 *See* Joseph William Singer & Todd D. Rakoff, *Problem Solving for First-Year Law Students*, 7 ELON L. REV. 413, 414 (2015). For a collection of case study materials developed at the law school, see HARVARD LAW SCHOOL: THE CASE STUDIES, https://casestudies.law.harvard.edu [https://perma.cc/79QA-KTJ3]; *see also* Lisa Brem, *Why and How: Using the Case Study Method in the Law Classroom*, HARVARD LAW SCHOOL: CASE STUDIES BLOG (Mar. 16, 2017), https://archive.blogs.harvard.edu/hlscasestudies/2017/03/16/using-case-study-method-law [https://perma.cc/39WD-BHF2]. The websites of many business and management schools offer sample case studies that illustrate the depth of factual material that often appears in a case file. *See, e.g.*, *Sample Cases*, YALE SCH. MGMT., https://som.yale.edu/case-studies/approach/sample-cases [https://perma.cc/G4MF-Y8KA].

School of Law similarly added a three-credit experiential course to its required first-year curriculum.[219]

As Minow, Rakoff, Singer, and others have suggested, there are many good reasons to bring the problem-focused case study method into the law school curriculum, either as a supplement to or a replacement for the traditional Langdellian case method. In the context of the teaching of substantive criminal law, specifically, the case for simply replacing the case method with the case study method is especially strong.

First, the case study method could avoid the problems in the use of criminal law case excerpts described in Section III.B., above. It is unlikely that the narrative problems in existing case excerpts can be adequately addressed simply by finding better case excerpts, such as ones that provide more detail about a defendant's life. There are simply too few cases where the relevant details come up, and even in those cases, the details are often inadequate in various ways. A case file constructed for a problem-solving exercise could, by contrast, include far more relevant detail. The scope of the narrative could be more like *The Wire* and less like the first half of an episode of *Law & Order*. Depending on the nature of the exercise, the case file could in theory include a variety of materials, from a narrative description of conditions and circumstances that may have contributed to an individual defendant's criminal conduct (as well as, potentially, some of the history behind those conditions and circumstances, including state policies), to quantitative public safety data, to a discussion of jail or prison conditions and their relation to rehabilitation and rates of recidivism, to studies of proposed alternatives to incarceration. Among other things, such materials would enable students to think in a more holistic way about who or what bears responsibility for criminal harms, how best to address those harms, and what "justice" might mean once we move beyond the traditional criminal law curriculum's blindered focus on decontextualized individual choices.

There is a second powerful reason to consider replacing the traditional 1L criminal law course, in particular, with a more problem-focused course including one or more case studies. Unlike property, contracts, and torts, substantive criminal law is overwhelmingly a

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219 Steven K. Homer, *From Langdell to Lab: The Opportunities and Challenges of Experiential Learning in the First Semester*, 48 MITCHELL HAMLINE L. REV. 265, 266 (2022). In this Article, I leave aside the question of how teaching criminal law through the case study method might or might not relate to ABA Standard 304(b), which describes the teaching of "simulation courses" as one option for satisfying the ABA's experiential learning requirement. *See* AM. BAR ASS'N, STANDARDS & RULES OF PROCEDURE FOR APPROVAL OF LAW SCHOOLS: 2023–2024 20 (2023). Regardless of whether teaching criminal law through the case study method could satisfy the experiential learning requirement, the ABA standards certainly do not prohibit teaching criminal law through the case study method. *Id.*

statutory and not a common law subject.[220] In the real world, if a lawyer wants to know what the rules of substantive criminal law are in some jurisdiction, the lawyer will simply consult the criminal code of that jurisdiction, and will only turn to judicial opinions interpreting the criminal code as necessary. In light of the statutory basis of substantive criminal law, and the vast variation between the statutes of various jurisdictions, it is unclear that it ever made sense to teach criminal law through reading judicial decisions. Thus, if any mandatory 1L course were to substitute the case study method for the case method, criminal law would be a natural choice.

Ultimately, the shape of a redesigned criminal law curriculum should of course be approached through collaboration and experimentation, and should attend to the actual learning experiences of students.[221] With the arrival of the NextGen bar exam fast approaching, and with the nationwide protests after George Floyd's killing still fresh in many students' memories, a rare opportunity to reconsider the teaching of criminal law has arrived. In order to avoid another generation of law students being indoctrinated into ways of thinking about criminal justice that produce outcomes, in the aggregate, that the students themselves overwhelmingly perceive as unjust, the curriculum should be redesigned.

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220 *See* Ristroph, *supra* note 2, at 1640–41. Because this Article draws so frequently on Ristroph's work, it may be worth noting that Ristroph herself has produced a free criminal law casebook. *See* RISTROPH, *supra* note 107. The casebook takes a novel, philosophically oriented approach that addresses many of the criticisms of the traditional curriculum that Ristroph laid out in her 2020 Article. *See, e.g.*, *id.* at 10 (criticizing the division of criminal law into "substantive law" and "procedure"). Even more recently, three professors produced what may be the most forthrightly critical mainstream criminal law casebook, and also "the first authored solely by Black men." *Capers, Fairfax & Miller's Criminal Law, A Critical Approach*, WEST ACADEMIC (2023), https://www.westacademic.com/Capers-Fairfax-and-Millers-Criminal-Law-A-Critical-Approach-9781647086831 [https://perma.cc/H3PM-XT29] (describing BENNETT CAPERS, ROGER A. FAIRFAX, JR. & ERIC J. MILLER, CRIMINAL LAW: A CRITICAL APPROACH (2023)). Not surprisingly, these casebooks do not always take the precise approaches I propose in this Article, such as abandoning case excerpts in favor of case studies that draw attention to the broader contexts surrounding crime and punishment.

221 One possible objection, for example, might be: when will the students learn the substantive criminal law doctrine that they need to know? This objection could be answered in various ways. Based on my own experiences, I suspect that it would be feasible to teach the essential criminal law rules and definitions quite quickly by, for lack of a better word, teaching them—that is, stating them clearly and directly, and explaining them using simple examples, rather than by burying them inside case excerpts. A professor could provide such instruction early in the semester and before various case studies as needed. As for the more complex and esoteric doctrinal puzzles that are sometimes discussed in the traditional criminal law curriculum, these could be incorporated into the case studies, or simply ignored based on their limited relevance to the criminal law as it actually exists.