

ESSAY

THE CURRICULUM OF THE CARCERAL STATE

*Alice Ristroph**

This Essay scrutinizes the canons of substantive criminal law, with a particular focus on the curricular canon. By curricular canon, I mean the conceptual model used to teach the subject of criminal law, including the cases, narratives, and ideas that are presented to students. Since the middle of the twentieth century, American law schools have offered (and often required) a course in criminal law in which homicide is the paradigm crime and legality is a core organizing principle. The curricular canon depicts criminal law as a necessary and race-neutral response to grave injuries, and it also depicts criminal law as capable of self-restraint through various internal limiting principles. This model does not correspond closely to actual legal practices, and it never did; it was designed to model what criminal law could become. Though this curricular model was developed by men who wanted to improve and constrain the criminal law, instead it probably contributed to the vast expansion of criminal interventions in the second half of the twentieth century. The Essay reveals the pro-carceral implications of the prevailing canon, and it offers the outline of a different model that could alter American attitudes toward criminal law.

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* Professor of Law, Brooklyn Law School. For helpful feedback and productive disagreements, I am grateful to Rachel Barkow, Bennett Capers, Chad Flanders, Angela Harris, Eric Miller, Jamelia Morgan, Justin Murray, Melissa Murray, Anna Roberts, Steven Schulhofer, Jocelyn Simonson, Jim Whitman, and participants in faculty workshops at New York Law School and Brooklyn Law School. Thanks also to the students in my Criminal Law classes over the past fifteen years, including especially Amanda Chan and Anna Nathanson.

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INTRODUCTION

For decades, as the American criminal system grew and its racial disparities became impossible to ignore, many have resisted the suggestion that the scale or demographics of the prison population indicate something fundamentally rotten in criminal law itself. For example, former prosecutor and FBI Director James Comey told then-President Obama that the term “mass incarceration” was inaccurate and insulting.¹ To Comey, the term was inaccurate because each defendant was treated as an individual, “charged individually, represented individually by counsel, convicted by a court individually, sentenced individually, reviewed on appeal individually, and incarcerated. That added up to a lot of people in jail, but there was nothing ‘mass’ about it.” And the term was insulting, because it “cast as illegitimate the efforts by cops, agents, and prosecutors—joined by the black community—to rescue hard-hit neighborhoods.”²

As informed readers were quick to note, Comey’s argument obscured multiple well-documented realities: prosecutors’ broad power to select who will become a criminal,³ overburdened and underfunded indigent defense counsel who can do very little to alter their clients’ fates,⁴ the fact that almost all convictions are based on guilty pleas rather than a factual

1. James Comey, *A Higher Loyalty: Truth, Lies, and Leadership* 150 (2018).

2. See *id.*

3. See Darryl K. Brown, *Judicial Power to Regulate Plea Bargaining*, 57 *Wm. & Mary L. Rev.* 1225, 1233 (2016) (“Unrestrained charging discretion combined with broad criminal codes and power to define sentencing differentials are the sources of prosecutorial power and leverage in plea bargaining.”).

4. See Mary Sue Backus & Paul Marcus, *The Right to Counsel in Criminal Cases, a National Crisis*, 57 *Hastings L.J.* 1031, 1036 (2006) (noting that many defendants do not have access to adequate representation because of underfunding and other problems); Paul D. Butler, *Poor People Lose: Gideon and the Critique of Rights*, 122 *Yale L.J.* 2176, 2178 (2013) (arguing that while indigent defense is underfunded, even good lawyers cannot save poor people from a system that is designed to incarcerate them).

determination by a judge or jury,⁵ the circumstances that make these pleas less than “voluntary,”⁶ the prevalence of mandatory minimums and other mechanized determinations of sentences,⁷ and the limited efficacy of appellate review.⁸ Obama himself may have pointed out some of these realities to Comey, and Comey acknowledges that after the conversation, “I was smarter.”⁹

But in at least one respect, Comey’s original formulation captured something important about the vast expansion of criminal interventions now labeled mass incarceration. Individual law enforcers such as Comey himself—“cops, agents, and prosecutors”—had to decide to pursue each of the millions of criminal convictions necessary to imprison nearly one percent of adult Americans.¹⁰ Mass incarceration, or “a lot of people in jail,” *is* about individuals, in that it requires a great many individuals who are willing to put a still larger number of other individuals behind bars. The passage from Comey’s memoir suggests a reason that so many state officials were willing to pursue convictions and prison sentences: They saw their work as a worthy effort to “rescue hard-hit neighborhoods” and otherwise improve social well-being, and importantly, they saw this work as a *law-bound, legitimate* effort.¹¹ In the minds of the human agents of the

5. See Lucian E. Dervan & Vanessa A. Edkins, *The Innocent Defendant’s Dilemma: An Innovative Empirical Study of Plea Bargaining’s Innocence Problem*, 103 *J. Crim. L. & Criminology* 1, 7 (2013) (noting that almost ninety-seven percent of federal convictions are based on guilty pleas). In state courts, about ninety-four percent of felony convictions are based on guilty pleas. See Bureau of Just. Stats., *Felony Sentences in State Courts, 2006—Statistical Tables 25 tbl.4.1* (2009), <https://www.bjs.gov/content/pub/pdf/fssc06st.pdf> [<https://perma.cc/XER9-ZB2V>].

6. See Dervan & Edkins, *supra* note 5, at 36–37 (discussing an empirical study of circumstances in which innocent defendants plead guilty to obtain a sentencing benefit); see also John H. Blume & Rebecca K. Helm, *The Unexonerated: Factually Innocent Defendants Who Plead Guilty*, 100 *Cornell L. Rev.* 157, 161–62 (2014) (listing features of the American criminal legal system that create “hydraulic pressure” and increase the likelihood that innocent defendants will nonetheless plead guilty).

7. See Andrea Roth, *Trial by Machine*, 104 *Geo. L.J.* 1245, 1266–69 (2016).

8. See, e.g., Peter Maass, *James Comey Told Barack Obama that His Use of the Phrase “Mass Incarceration” Was Insulting to Law Enforcement Officers*, *Intercept* (Apr. 18, 2018), <https://theintercept.com/2018/04/18/james-comey-sees-himself-as-a-victim-of-trump-he-refuses-to-see-the-victims-of-the-justice-system> [<https://perma.cc/BSD3-J62P>] (“[O]nly the well-off or the fortunate who obtain lawyers with the resources and the time for aggressive litigation can pursue appeals that have a decent change of overturning a bad verdict.”).

9. Comey, *supra* note 1, at 151; see also Barack Obama, *The President’s Role in Advancing Criminal Justice Reform*, 130 *Harv. L. Rev.* 811, 824–29 (2017) (discussing federal charging practices and prosecutors’ leverage during plea negotiations, made possible by severe sentencing laws); *id.* at 855 (discussing the need for sentencing reform at the state level).

10. See Katherine Beckett, *Mass Incarceration and Its Discontents*, 47 *Contemp. Socio.* 11, 11 (2018) (noting that the U.S. incarceration rate reached almost one in one hundred in 2007, and also noting increases in the number of persons on probation or parole, booked in jail, or living with a criminal record).

11. See Comey, *supra* note 1, at 150.

carceral state, law—rather than raw power or discretion—defines what is criminal, and the due process of law ensures the fair treatment of each individual defendant. To get to mass incarceration, we needed a way of thinking about criminal law that would mean that in each individual case—for millions of individual cases—prosecution and punishment seemed like a good idea.

This Essay is about the relationship between individual actions and aggregate phenomena, and the relationship between ideas and practices. It explores a particular understanding of criminal law that gives meaning and legitimacy to the extensive work that mass incarceration requires. This model posits criminal law as a necessary response to deeply harmful and wrongful actions. The model recognizes the substantial burden of criminal interventions but holds that such interventions occur only within the bounds of carefully drawn legal constraints, such as a stringent burden of proof.¹² Importantly, the model envisions criminal law as neutral and egalitarian, imposing its burdens without reference to race, class, or gender. Many aspects of this model bear little relation to actual legal practices—hence the criticism from Comey’s most knowledgeable readers. But as a mindset and normative ideal, the model is nonetheless familiar. It is the canonical account that American legal education has delivered to students for several decades through a course in “substantive criminal law,” usually as part of the required first-year curriculum. Nearly every lawyer in the country, and thus nearly every prosecutor, defense attorney, and judge, has been taught these basic canons of criminal law: Defendants are initially presumed innocent; criminal charges must be based on a clear and preexisting statute; the state bears the burden of proving violation of said statute beyond a reasonable doubt. Moreover, future lawyers are taught that crime definitions follow a certain logical structure: *mens rea* (mental state) plus *actus reus* (action). And they are taught that the specific acts defined as criminal—the substance of criminal law—are those that inflict grave injuries upon individuals and society at large. In the American legal curriculum, homicide is the paradigm crime: a terrible act that demands punishment, but punishment by law, imposed only after careful investigation, application of the right legal definitions, presentation of adequate evidence concerning both act and mental state, and in most cases, appellate review.¹³

This set of claims is so familiar to American lawyers that one may forget, as Comey apparently did, that the model does not describe present practices. Even once the gaps between the curricular framework and

12. I have used the phrase “criminal law exceptionalism” to describe this model, since it combines the claim that criminal law imposes exceptional burdens with the claim that criminal law addresses exceptionally harmful or wrongful conduct and operates through exceptionally careful procedures. See Alice Ristroph, *An Intellectual History of Mass Incarceration*, 60 *B.C. L. Rev.* 1949, 1952–54 (2019) [hereinafter Ristroph, *Intellectual History*]; see also *infra* Part I.

13. See *infra* section II.C.

actual practice are pointed out, it may be tempting to conclude that the canonical model of criminal law was once roughly accurate, and then somehow, practices veered off-course and criminal law went “off the rails.”¹⁴ That suggestion works only so long as we don’t actually study history. If we do look closely at criminal law’s past, it becomes clear that the curricular model of criminal law never described actual practices. Criminal law in America has always been rife with discretion, has always reached non-injurious and often petty conduct, and has rarely demanded rigorous proof before a jury or offered extensive appellate review.¹⁵

The canonical model is not a portrait of a lost past, but rather a normative vision that was developed in the mid-twentieth century as part of an effort to win respect for criminal law within legal academia.¹⁶ The founders of the criminal law canon had broader goals as well: They worried about the irrationalities and overreach of criminal law, and they hoped to develop the model of an ideal criminal code. Indeed, Herbert Wechsler, one of the primary architects of the framework that still structures substantive criminal law courses, was also the primary architect of the Model Penal Code (MPC).¹⁷ A noted scholar of constitutional law as well as a criminal law expert, Wechsler was a champion of “neutral principles,” albeit with a specific conception of neutrality.¹⁸ The canons of substantive criminal law, as developed by Wechsler and his contemporaries and as tweaked by later scholars, are purportedly color-blind, depicting an egalitarian system that imposes obligations without reference to race. Of course, American criminal law is today rife with racial disparities, which brings us again to this Essay’s inquiry into the relationship between ideas and practices. What is the relationship between our curricular model and our present criminal law reality? Did scholars articulate a noble vision that policymakers and practitioners simply ignored? Or did the vision of substantive criminal law crafted at midcentury help enable the racialized expansion of American criminal law?

I suggest that American law schools, through the required course on substantive criminal law, have contributed affirmatively to the collection of phenomena commonly labeled mass incarceration.¹⁹ They do so by

14. William J. Stuntz, *The Collapse of American Criminal Justice* 5 (2011) [hereinafter Stuntz, *Collapse*].

15. See Ristroph, *Intellectual History*, supra note 12, at 1956–71 (providing an overview of the breadth of criminal law, scope of enforcement discretion, and rarity of jury trials throughout American history).

16. See infra Part I.

17. See infra Part I.

18. See Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 Harv. L. Rev. 1, 29–34 (1959) [hereinafter Wechsler, *Neutral Principles*] (expressing concern that some of the Supreme Court’s racial equality opinions, including *Shelley v. Kraemer* and *Brown v. Board of Education*, were not adequately supported by “neutral principles”).

19. Two questions have arisen about the term “mass incarceration,” one about prison and one about race. The term first became widely used among criminal law specialists to refer to the exponential growth in American *prisoners*—those actually held in custody in jail

telling a particular story about criminal law as limited in scope, careful in its operation, and uniquely morally necessary. The story has always been fiction, but it is presented as fact. Students educated in this model learn to trust and embrace criminal law, and thus law schools have helped to facilitate a carceral state by supplying it with willing agents, and more specifically, willing lawyers. Importantly, law schools have continued to tell basically the same story even as American prison populations exploded and racial disparities in that population became impossible to ignore.²⁰ Curricular attempts to address racialized mass incarceration have been additive rather than transformational, by which I mean academics have sought to supplement the traditional canon rather than reexamine it.²¹ At best, this approach has been ineffective, failing to counter the pro-carceral themes that are embedded in most of the traditional material. At worst, the additive approach could be affirmatively harmful: By mentioning racial disparities among those convicted and punished, while simultaneously emphasizing the legitimacy and neutrality of substantive criminal law, law schools may inadvertently reinforce conceptions of Black criminality.

My aim is not to provide an overarching account of mass incarceration. It is a complex social and political phenomenon, and its causes and necessary conditions are many and difficult to untangle. I want simply to highlight one piece of the puzzle that has so far received relatively little attention. Mass incarceration is also a legal phenomenon, and the role of the legal profession needs scrutiny. Unless we are to characterize the legal profession as

or prison—in the last three decades of the twentieth century. Increasingly, however, commentators have emphasized the expansion of criminal law in many forms, including tremendous growth in the number of persons with convictions who are not necessarily held in jail or prison but who are subject to other legal burdens. See Michelle Alexander, *The New Jim Crow* 15–16 (10th anniversary ed. 2020) (defining mass incarceration to include not only the entire criminal justice system but also “the larger web of laws, rules, policies, and customs that control those labeled criminals both in and out of prison”). Another question concerns how to distinguish between the overall expansion of criminal interventions, which has increased convictions across all racial groups—albeit at varying rates—and the specific impact on persons of color, especially Black Americans. Some have argued that the term “hyper-incarceration” better captures the racialized aspect of the increase in prisoners and convictions. See, e.g., Loïc Wacquant, Forum, *in* *Race, Incarceration, and American Values* 57, 59 (Glenn C. Loury ed., 2008). This Essay seeks to analyze, but also to keep distinct, all of these phenomena—the overall expansion of the prison population, the overall expansion of non-custodial interventions, and the significant racial disparities that have characterized both expansions.

20. The American prison population began to grow significantly in the 1970s, but widespread recognition of “mass incarceration” did not occur until the early 2000s. See Marie Gottschalk, *Caught: The Prison State and the Lockdown of American Politics* 1, 16 fig.1.3 (2015) [hereinafter Gottschalk, *The Prison State*] (showing incarceration rates over time and noting that fifteen years before the book’s publication, “mass imprisonment was largely an invisible issue”). Racial disparities in the prison population were present throughout the expansion but worsened over time. See Michael Tonry, *Malign Neglect—Race, Crime, and Punishment in America* 28–29 (1995) (providing statistics on racial disparities and noting that the disparities have increased over time).

21. See *infra* section II.D.

unthinking or malevolent, we need an account of why so many lawyers have chosen and still choose to pursue convictions and prison sentences on such a massive scale. This Essay explores that question and suggests that law schools bear more responsibility for mass incarceration than we have so far acknowledged. Recognizing this responsibility makes evident the likely costs of complacency: By continuing to rely on the same canonical model of criminal law, we are likely to preserve the carceral state.

To develop this argument, I scrutinize the canons of criminal law, with a particular focus on what I will call the curricular canon.²² I use this phrase to refer to the conceptual model used to teach criminal law, including the principal claims and narratives that are used to explain the field.²³ Elsewhere, I have begun to develop a broader intellectual history of mass incarceration, one that addresses legal education but extends beyond it.²⁴ But a more focused and detailed analysis of teaching materials seems especially urgent now. First, the May 2020 killing of George Floyd by police officers²⁵ has invigorated movements for both criminal law reform and racial justice more broadly, and these movements are rightfully challenging the presumption of legitimacy that criminal law and law enforcement have long enjoyed.²⁶ At this moment, more than ever, we need an honest account of criminal law and an accurate understanding of the sources of its racial disparities. Second, the disruptions to legal education caused by the COVID-19 pandemic create challenges for law faculty, but also opportunities. A shift to greater reliance on online resources or remote teaching means that many law schools are now developing the next generation of

22. See J.M. Balkin & Sanford Levinson, *The Canons of Constitutional Law*, 111 *Harv. L. Rev.* 963, 975 (1998) (“[W]e may find a wide divergence between what professors of law teach and what they write about.”); cf. *id.* at 975–76 (distinguishing between the “pedagogical canon,” the “cultural literacy canon,” and the “academic theory canon,” and noting that for constitutional law the content of each may be slightly different).

23. Jill Hasday’s definition, from her work on the family law canon, is helpful: “By ‘canon,’ I mean the dominant narratives, stories, examples, and ideas that judges, lawmakers, and (to a less crucial extent) commentators repeatedly invoke to describe and explain family law and its governing principles.” Jill Elaine Hasday, *Family Law Reimagined* 2 (2014).

24. See Ristroph, *Intellectual History*, *supra* note 12, at 1952 (“[T]o figure out where we might want criminal law to go, we need a better understanding of where we have been and where we are now.”).

25. See Jordan Culver, *What We Know About the Death of George Floyd: 4 Minneapolis Police Officers Fired After ‘Horrifying’ Video Hits Social Media*, *USA Today* (May 26, 2020), <https://www.usatoday.com/story/news/nation/2020/05/26/george-floyd-minneapolis-police-officers-fired-after-public-backlash/5263193002> [<https://perma.cc/E3XX-TXPA>] (last updated May 27, 2020).

26. See, e.g., Mariame Kaba, *Yes, We Mean Literally Abolish the Police*, *N.Y. Times* (June 12, 2020), <https://www.nytimes.com/2020/06/12/opinion/sunday/floyd-abolish-defund-police.html> (on file with the *Columbia Law Review*) (“[M]any cannot imagine anything other than prisons and the police as solutions to violence and harm. People like me who want to abolish prisons and police, however, have a vision of a different society, built on cooperation instead of individualism, on mutual aid instead of self-preservation.”).

teaching materials.²⁷ Overwhelmed by unavoidable changes in the form of the course, some educators are likely to be averse to rethinking substance. But to reproduce the same pro-carceral criminal law curriculum in a new medium would be to entrench the carceral state, and its inequalities, still further. The pandemic has highlighted and magnified inequalities;²⁸ it also creates an opportunity for legal academics to revisit and revise their own participation in the perpetuation of inequality.

My argument focuses on the content of the course and is fairly agnostic among teaching methods.²⁹ But with regard to both teaching method and curricular content, American legal education has been notoriously path-dependent and hard to change since the late nineteenth century.³⁰ It is also better designed to reproduce hierarchies, or ideologies, than to challenge them.³¹ Some teachers and scholars of criminal law will resist the suggestion that the academic depiction of substantive criminal law is deeply flawed. If I cannot persuade these thinkers to change their minds, I can at least issue them a clear challenge. Given the gaps between criminal law's actual operation and its curricular representation, those who defend or continue to use the existing curriculum need to justify their model.³² It is probably impossible for education to be neutral, but that is all the more reason to try to identify and scrutinize the particular ideologies that shape teachers' choices.

The structure of this Essay follows my dual aims to destabilize the current curricular model and to move toward something better. Part I

27. See Nina A. Kohn, *Teaching Law Online: A Guide for Faculty*, 69 *J. Legal Educ.* (forthcoming 2020) (manuscript at 19), <https://ssrn.com/abstract=3648536> (on file with the *Columbia Law Review*) (“[T]he educational crisis precipitated by the COVID-19 pandemic has presented an opportunity for academics to rethink how they teach and to experiment with new teaching techniques that may be better suited to achieving desired learning outcomes.”).

28. See, e.g., Richard A. Oppel Jr., Robert Gebeloff, K.K. Rebecca Lai, Will Wright & Mitch Smith, *The Fullest Look Yet at the Racial Inequity of Coronavirus*, *N.Y. Times* (July 5, 2020), <https://www.nytimes.com/interactive/2020/07/05/us/coronavirus-latinos-african-americans-cdc-data.html> (on file with the *Columbia Law Review*) (illustrating the effects of COVID-19 on different racial groups).

29. That said, some course content is driven by the “case method,” as section II.B discusses.

30. See, e.g., Elliott E. Cheatham, *Legal Education—Some Predictions*, 26 *Tex. L. Rev.* 174, 180 (1947) (“[L]egal education has made no comparable progress. We are, for the most part, adhering in 1947 to a method first developed over seventy years ago.”); see also Edward Rubin, *What’s Wrong with Langdell’s Method, and What to Do About It*, 60 *Vand. L. Rev.* 609, 613–15 (2007) (“Nearly one hundred years have passed since 1914, of course, and we still rely on Langdell’s substantive innovations.”).

31. See Duncan Kennedy, *Legal Education and the Reproduction of Hierarchy*, 32 *J. Legal Educ.* 591, 591 (1982) (claiming that law schools provide “ideological training for willing service in the hierarchies of the corporate welfare state”).

32. And in particular, teachers who are also scholars should ask whether they depict criminal law differently in their scholarship and in their classrooms, and, if so, why.

begins the work of destabilization with a short history of American criminal law teaching. Two claims are key here: First, the vision of “substantive criminal law” now promulgated to most first-year law students was developed about eighty years ago as part of an effort to win more respect for criminal law in the academy and in the profession. Second, this vision was a normative one that never corresponded very closely to actual legal practices. Part II examines the content of contemporary first-year criminal law courses in more detail to identify several subtly pro-carceral messages that inculcate a view of criminal law as morally and practically necessary, fair and color-blind, and disciplined by internal limiting principles. Part III asks whether curriculum matters and offers reasons to think that the way we teach criminal law does affect legal practice, though not necessarily in the ways that teachers intend. Part IV outlines a different explanatory model of the laws that define conduct, and people, as criminal. It is only an outline; developing a new paradigm requires more space than one Essay affords.³³ But the project must be launched. A different criminal law canon will enable professors to teach a more realistic course, one that better depicts the actual operation of criminal law and one that leaves students better equipped to reject carceral ideology if they so choose. And beyond the classroom, both in and beyond the legal profession, a better understanding of criminal law may enable real change in American penal practices. Toward that end, a Conclusion offers a few thoughts on the relationship between legal thought and legal practices.

33. A new curricular paradigm for criminal law is also likely to be a collective project rather than a solo endeavor. In the hope of contributing to a collective rethinking, I have developed various aspects of an alternative account in several earlier works. See Alice Ristroph, *Criminal Law as Public Ordering*, 70 *U. Toronto L.J.* 64, 64 (2020) (reconceptualizing order in the criminal law paradigm as an ongoing activity to provide leverage for critiques of criminal law practices); Alice Ristroph, *Criminal Law for Humans*, in *Hobbes and the Law* 97, 117 (David Dyzenhaus & Thomas Poole eds., 2012) [hereinafter Ristroph, *Criminal Law for Humans*] (emphasizing criminal law as a human practice); Alice Ristroph, *The Definitive Article*, 68 *U. Toronto L.J.* 140, 140 (2018) [hereinafter Ristroph, *Definitive Article*] (exploring the contingent, constructed character of criminal law, and critiquing efforts to draw a sharp line between substantive and procedural criminal law); Ristroph, *Intellectual History*, supra note 12, at 2009–10 (“The everyday work of criminal law is a series of enforcement decisions . . . and the outcomes of these decisions are often unpredictable.”); Alice Ristroph, *Responsibility for the Criminal Law*, in *Philosophical Foundations of Criminal Law* 107, 109 (R.A. Duff & Stuart P. Green eds., 2011) [hereinafter Ristroph, *Responsibility for the Criminal Law*] (“The claim is that the state designated this act as a crime and chose to prosecute and punish it. For these public acts, there is collective responsibility. That responsibility should be part and parcel of any theory of criminal responsibility.”); Alice Ristroph, *The Thin Blue Line from Crime to Punishment*, 108 *J. Crim. L. & Criminology* 305, 306 (2018) [hereinafter Ristroph, *Thin Blue Line*] (contending that a complete account of criminal law must address enforcement mechanisms); see also *infra* Part IV.

I. THE INVENTION OF THE “SUBSTANTIVE” CRIMINAL LAW (COURSE)

Criminal law has a history, though that history is often obscured or forgotten.³⁴ The course on “substantive criminal law” that is now required by almost every American law school also has a history, and a brief review of that history may help explain the content and ideological orientation of the contemporary curriculum.³⁵ Two points deserve emphasis: The substantive criminal law course now required in most American law schools follows a model developed in the mid-twentieth century as part of academics’ efforts to win more respect for their field, and this course was from its inception a normative model of criminal law rather than an accurate description of existing institutions.

A. *The Quest for Respect*

When law emerged as an academic and intellectual discipline in the nineteenth century in the United States, criminal law almost got left behind. Christopher Columbus Langdell and others championed a view of law as a science, worthy of scholarly inquiry, university training, and eventually, separate professional schools.³⁶ But Langdell and his contemporaries focused almost exclusively on the fields now classified as “private

34. See Alice Ristroph, *What Is Remembered*, 118 Mich. L. Rev. 1157, 1157 (2020) [hereinafter Ristroph, *What Is Remembered*] (reviewing Sarah A. Seo, *Policing the Open Road: How Cars Transformed American Freedom* (2019) [hereinafter Seo, *Policing the Open Road*]).

35. I am grateful to Anders Walker both for his article on the history of American criminal law teaching and for the illuminating responses that his article provoked. See Anders Walker, *The Anti-Case Method: Herbert Wechsler and the Political History of the Criminal Law Course*, 7 Ohio St. J. Crim. L. 217, 219–20 (2009) [hereinafter Walker, *The Anti-Case Method*]; see also Donald A. Dripps, *On Cases, Casebooks, and the Real World of Criminal Justice: A Brief Response to Anders Walker*, 7 Ohio St. J. Crim. L. 257, 259 (2009) [hereinafter Dripps, *Brief Response*]; Angela P. Harris & Cynthia Lee, *Teaching Criminal Law from a Critical Perspective*, 7 Ohio St. J. Crim. L. 261, 261 (2009) [hereinafter Harris & Lee, *Teaching Criminal Law*]; Yale Kamisar, *I Remember Professor Wechsler*, 7 Ohio St. J. Crim. L. 249, 249 (2009); Lloyd Weinreb, *Teaching Criminal Law*, 7 Ohio St. J. Crim. L. 279, 279 (2009) [hereinafter Weinreb, *Teaching Criminal Law*]. But as will become clear, my concerns with the course are quite different from Walker’s. He identifies and decries a departure from a Langdellian style of case-based teaching, suggesting that a return to Langdell’s model would better prepare students for practice. Preparing students for practice, while important, is not my central concern here. The problem is not the legal skills the course does or doesn’t teach, but the way the course teaches students to think about criminal law. It teaches them to think like carceralists, one might say.

36. See Thomas C. Grey, *Langdell’s Orthodoxy*, 45 U. Pitt. L. Rev. 1, 5–6 (1983) (noting that Langdell and his followers viewed law in a programmatic manner and considered it like a science); Steve Sheppard, *An Introductory History of Law in the Lecture Hall*, in *The History of Legal Education in the United States: Commentaries and Primary Sources* 6, 14–23, 25–31 (Steve Sheppard ed., 1999).

law.”³⁷ The first American law schools and professors offered courses on property and contracts, sales and torts, but for a time, nothing on criminal law.³⁸ Even as criminal law began to creep into the legal curriculum, it struggled for respect, remaining “the Cinderella of the law course” (think Cinderella as mistreated ash-maid rather than princess) until at least the 1930s.³⁹

Part of the problem was that Langdell’s model and the vision of law-as-science focused on common law.⁴⁰ In the field of criminal law, statutes increasingly supplemented or even displaced judicial definitions of crimes.⁴¹ Legislatures, with their different memberships at different time periods, do not adhere to precedent and do not even attempt the coherence and consistency that judge-made law purports to display. But even beyond the inelegance of actual criminal statutes, the whole field of criminal law was seen as a messy array of often irrational policies and erratic enforcement practices, and on the scholarly side, an intellectual

37. See Sheppard, *supra* note 36, at 27–29 (discussing Langdell as a teacher of contracts, sales, and equity, and his contemporaries’ classes on corporations, bailments, commercial law, torts, partnerships, and trusts).

38. See Proceedings of the Association of American Law Schools, 1931 AALS Proc. 132, 150 [hereinafter AALS Proceedings] (“We believe that the law schools should undertake the teaching of criminal law and procedure.”); Sheppard, *supra* note 36, at 13 (noting that the curriculum at the first American law school in Litchfield, Connecticut involved forty-eight lectures that “ran the gamut of American private law”). Langdell added criminal law to the Harvard Law School curriculum just a few years after he became the school’s first dean in 1870. Even then, the allocation of time and credits reflect a continued emphasis on private law: Students had one hour per week of “Criminal Law and Criminal Procedure” and one hour of Civil Procedure, along with two hours of Property and three hours each of Torts and Contracts. See, e.g., Bruce A. Kimball, Students’ Choices and Experience During the Transition to Competitive Academic Achievement at Harvard Law School, 1876–1882, 55 *J. Legal Educ.* 163, 172 tbl.2 (2005) (depicting two Harvard first-year students’ schedules for 1876–1877). Across all American law schools, the inclusion of criminal law apparently was still not widespread in the 1930s. See AALS Proceedings, *supra*, at 150.

39. See Sheldon Glueck, Book Reviews, 43 *Yale L.J.* 512, 516 (1934) [hereinafter Glueck, Book Reviews] (reviewing John Barker Waite, *Cases on Criminal Law and Procedure* (1931)); AALS Proceedings, *supra* note 38, at 150.

40. See Sheppard, *supra* note 36, at 25–31.

41. See, e.g., Sanford H. Kadish, Codifiers of the Criminal Law: Wechsler’s Predecessors, 78 *Colum. L. Rev.* 1098, 1138 (1978) (“By the time the idea of a Model Penal Code emerged, the codification controversy of the nineteenth century was over. The legislatures had long since asserted their dominance as lawmakers.”); Gerald Leonard, Towards a Legal History of American Criminal Law Theory: Culture and Doctrine from Blackstone to the Model Penal Code, 6 *Buff. Crim. L. Rev.* 691, 758–66 (2003) (discussing the nineteenth-century codification movement in America with specific emphasis on criminal law). To be sure, the proliferation of criminal statutes does not necessarily eliminate a role for judges in defining criminal law, and arguably it shouldn’t. See Carissa Byrne Hessick, The Myth of Common Law Crimes, 105 *Va. L. Rev.* 965, 968 (2019) (“Not only has codification failed to fully displace the criminal common law, but codification has also failed to vindicate rule-of-law values.”). My point is simply that in the early decades of American legal education, criminal law was difficult to characterize as a common law field—and as a science.

backwater in comparison to the rational, coherent fields of private law.⁴² This state of affairs eventually generated a long campaign by Roscoe Pound and other influential legal academics to develop, and motivate others to develop, a sophisticated intellectual paradigm for this neglected field.⁴³

The neglected field, to be clear, was something called “substantive” criminal law, which had only recently been severed from “adjective” law or what we now call procedure.⁴⁴ The general substance/procedure distinction is sometimes traced to William Blackstone, sometimes to Blackstone’s student and critic, Jeremy Bentham, but whoever gets credit for the idea, it is widely agreed that the conceptual distinction took hold in American legal thought in the latter decades of the nineteenth century.⁴⁵ Today, this distinction is both frequently assumed and frequently questioned, though in the specific field of criminal law it is more often assumed than questioned.⁴⁶ Among criminal law specialists, “substantive” law is used to refer to general principles of liability and definitions of specific crimes, while procedure refers to the rules governing legal officials as they implement the substantive law. That usage is consistent with a more general conception of substantive law as the law that describes the rights, duties, and obligations of private parties, while procedural law concerns mechanisms of enforcement.⁴⁷ One might say that substantive law is law with its human interpreters and enforcers erased from the picture—and that, I shall suggest, is the problem with the conception of “substantive criminal law” as independent of procedure.⁴⁸ But I get ahead of myself.

42. See Ristroph, *Intellectual History*, *supra* note 12, at 1973–75 (describing scholarly attitudes toward criminal law in the early twentieth century).

43. See *id.* at 1972–74.

44. On the development of the idea of substantive criminal law, see Lindsay Farmer, *Making the Modern Criminal Law* 63–77 (2016).

45. See Amalia D. Kessler, *Inventing American Exceptionalism* 11 (2017) (“[T]he category of procedure did not exist in any meaningful way before the mid-nineteenth century [P]rocedure as such came to be recognized as a distinct body of law only well into the nineteenth century.”); D. Michael Risinger, “Substance” and “Procedure” Revisited with Some Afterthoughts on the Constitutional Problems of “Irrebuttable Presumptions”, 30 *UCLA L. Rev.* 189, 191–92 (1982) (tracing the substance/procedure distinction to Bentham); Stephen N. Subrin, *How Equity Conquered Common Law: The Federal Rules of Civil Procedure in Historical Perspective*, 135 *U. Pa. L. Rev.* 909, 929–30 (1987) (tracing the substance/procedure distinction to Blackstone).

46. See Thomas O. Main, *The Procedural Foundation of Substantive Law*, 87 *Wash. U. L. Rev.* 801, 812–18 (2010) (noting that the substance/procedure dichotomy is “entrenched” even as it is not well-defined or understood); Gary Peller, *Criminal Law, Race, and the Ideology of Bias: Transcending the Critical Tools of the Sixties*, 67 *Tul. L. Rev.* 2231, 2234–44 (1993) (discussing origins and implications of a “process-substance filter” used to analyze criminal law).

47. See, e.g., *Substantive Law*, *Black’s Law Dictionary* (9th ed. 2009) (defining substantive law as that “part of the law that creates, defines, and regulates the rights, duties, and powers of parties”).

48. See *infra* Part IV.

The campaign to elevate and dignify substantive criminal law was eventually successful. It is not clear that any single thinker was able to “do for the substantive law of crimes what Wigmore did for the law of evidence or what Williston did for contracts,” as Roscoe Pound had apparently exhorted his contemporaries.⁴⁹ But by mid-twentieth century, several scholars and teachers had developed together an account of criminal law’s structure that has disciplined criminal law courses, and criminal law theory, ever since.⁵⁰ According to this now-canonical model, the purpose of the field is to identify conduct sufficiently injurious to individuals or to society generally to warrant distinctive penalties, and to impose said penalties on those who engaged in such conduct.⁵¹ Indeed, the model rests on a set of interrelated claims about the ways in which criminal law is exceptional: Sanctions are exceptionally burdensome; the conduct targeted by criminal law is exceptionally harmful or injurious; and the mechanisms by which the exceptional burdens of criminal sanctions are imposed are themselves exceptional in their guarantees of accuracy and predictability.⁵² In the exceptionalist paradigm, crimes are defined according to a basic structure that identifies precisely the actions and mental states (*actus reus* and *mens rea*) that will subject a person to liability.⁵³ Additional rules extend liability in specific circumstances, such as attempt or complicity.⁵⁴ Defenses identify special circumstances in which liability should not be imposed.⁵⁵ These general principles of liability or nonliability are applied and expressed through careful statutory definitions of specific offenses, and the state bears a heavy burden to prove the conditions of liability.⁵⁶ On this account, criminal law is disciplined by internal constraints, logically

49. Sheldon Glueck, *Roscoe Pound and Criminal Justice*, 10 *Crime & Delinquency* 299, 317 (1964). Glueck was paraphrasing Roscoe Pound, *What Can Law Schools Do for Criminal Justice?*, 12 *Iowa L. Rev.* 105, 106–07 (1927). Herbert Wechsler would later repeat this characterization of Pound’s exhortation, also invoking John Henry Wigmore and Samuel Williston as inspiration, when he volunteered himself as the intellectual architect of substantive criminal law. See Herbert Wechsler, *The Challenge of a Model Penal Code*, 65 *Harv. L. Rev.* 1097, 1098 (1952) [hereinafter Wechsler, *The Challenge*]. Pound himself wrote extensively about criminal law administration but called for someone else to reexamine the underlying conceptual structure of substantive prohibitions. See Ristroph, *Intellectual History*, *supra* note 12, at 1974 n.99.

50. See Wechsler, *The Challenge*, *supra* note 49, at 1099 (“Only in recent years and in recognition of a public duty have the schools and the profession evinced interest and concern commensurate with the importance of [criminal law].”).

51. The model emphasizes that crimes cause grave injury, but it does not commit to a specific account of *why* such injuries require criminal sanctions. Thus, the model can encompass various claims about the purpose of punishment, including retributive and consequentialist theories. See *infra* section I.B.

52. See Ristroph, *Intellectual History*, *supra* note 12, at 1953–54 (describing burdens exceptionalism, subject-matter exceptionalism, and operational exceptionalism).

53. See *id.* at 1984 n.140.

54. See Model Penal Code § 5.01 (Am. Law. Inst. Proposed Official Draft 1962).

55. See *id.* § 4.01.

56. See *id.* at Art. 2.

structured, and necessary to societal well-being—a field of law worthy of academic and professional respect.

This basic paradigm came to structure instructional materials and scholarly writing. It was, from its inception, a normative model presenting itself as a descriptive account. Fittingly, then, one prominent incarnation is a scholar's model code, of limited influence on actual legislatures but profoundly influential in the academy: the American Law Institute's Model Penal Code, first adopted in 1962.⁵⁷ In the law school classroom, the development of the now-canonical paradigm can be traced through a pair of influential textbooks. The first was coauthored in 1940 by Herbert Wechsler, who would later become the principal architect of the MPC;⁵⁸ the second—first authored by Sanford Kadish and Monrad Paulsen in 1963—was deeply influenced by the MPC and is still widely used today.⁵⁹ In the remainder of this Part, I want to highlight a few features of these books, and the MPC, that departed sharply from prior conceptions of criminal law—and from existing legal practices—to establish a new curricular approach.

B. *Teaching the Model, and Not the Reality*

Jerome Michael and Herbert Wechsler were colleagues at Columbia Law School—and had recently coauthored a very lengthy two-part article on homicide—when they published *Criminal Law and Its Administration* in 1940.⁶⁰ As Anders Walker has shown, one aim of this book was to replace

57. *Id.* The influence of the MPC in the academy is little disputed. See, e.g., Sanford H. Kadish, *Fifty Years of Criminal Law: An Opinionated Review*, 87 *Calif. L. Rev.* 943, 950–51 (1999) (arguing that the MPC, once drafted, “remained at the center of criminal law scholarship” at least until the 1980s); *id.* at 953 (describing the MPC mens rea framework as “old hat now, the standard stuff of the first-year criminal law class”); *id.* at 981 (crediting the MPC for the fact that “scholarship in the criminal law was finally raised to a level comparable to that in other basic areas of law”). But the influence of the MPC on actual law and legal practices is harder to assess, all the more so because scholars themselves influenced by the MPC may be prone to overestimate its influence beyond the academy. Much of Kadish's own fifty-year retrospective bemoans failures and disappointments, including the failure of the MPC to have greater impact on real legislation. See *id.* at 954, 957–58, 960 (“When the dust cleared, the sun of the Model Penal Code test had set.”); see also *infra* note 77 and accompanying text.

58. Jerome Michael & Herbert Wechsler, *Criminal Law and Its Administration* (1940) [hereinafter Michael & Wechsler, *Criminal Law*]; see also Walker, *The Anti-Case Method*, *supra* note 35, at 237 (discussing Wechsler's imprint on the MPC).

59. Monrad G. Paulsen & Sanford H. Kadish, *Criminal Law and Its Processes* (1st ed. 1962); see also Sanford H. Kadish, Stephen J. Schulhofer & Rachel E. Barkow, *Criminal Law and Its Processes* (10th ed. 2017) [hereinafter Kadish et al. 10th]; Jens David Ohlin, *The Changing Market for Criminal Law Casebooks*, 114 *Mich. L. Rev.* 1155, 1156 (2016) [hereinafter Ohlin, *Changing Market*] (describing the Kadish book as a “market leader” that “dominate[s] the field”).

60. The homicide article is “probably the longest article . . . ever written on the subject.” Kamisar, *supra* note 35, at 249; see also Herbert Wechsler & Jerome Michael, *A Rationale of the Law of Homicide* (pts. I & II), 37 *Colum. L. Rev.* 701, 1261 (1937).

Langdell's version of the case method with a more explicitly normative mode of instruction that brought philosophy and social science to bear on discussions of what law should be.⁶¹ The new book was not especially focused on preparing students to practice criminal law, for criminal law practice was a grimy endeavor understandably unattractive to "the bright young man with an eye to profit and social position."⁶² Instead, Michael and Wechsler aimed to ensure that those bright young men would be prepared, as "enlightened leaders," as legislators, administrators, or simply influential citizens, to make criminal law the best that it could be.⁶³ As the coauthors put it, "Our enterprise calls for a method which emphasizes general normative ideas rather than specific legal rules."⁶⁴

Without contesting Walker's analysis, I want to emphasize a few features of the book beyond its skepticism about the case method. First, Michael and Wechsler focused heavily on the law of homicide—unsurprisingly, perhaps, given their recent scholarship.⁶⁵ That was a novelty: Earlier casebooks had collected criminal law cases across a more representative range of offenses, including a great many offenses that we would now call petty or "regulatory."⁶⁶ To the extent earlier casebooks were weighted heavily toward one type of crime, it was property offenses—the intricate common law distinctions between larceny, embezzlement, false pretenses,

61. See Walker, *The Anti-Case Method*, supra note 35, at 219 ("Convinced that the so-called 'Langdellian method' had contributed to the Supreme Court's destruction of early New Deal programs by fostering a view of the law as a 'closed-system,' Michael and Wechsler hoped to disrupt Christopher Columbus Langdell's legacy and open students' eyes to law's interrelationship with society.").

62. George Wilfred Stumberg, *Book Review*, 89 U. Pa. L. Rev. 1123, 1123 (1941); see also Walker, *The Anti-Case Method*, supra note 35, at 227 (quoting Wechsler for the proposition that, in the 1930s, there was little interest in criminal law since it was "generally thought to have no money in it").

63. Walker, *The Anti-Case Method*, supra note 35, at 230.

64. Michael & Wechsler, *Criminal Law*, supra note 58, at 3.

65. See *id.* at pt. II, bk. I, ch. 1 (dedicating over 250 pages to homicide).

66. For example, consider the cases in the first chapter of H.W. Chaplin's 1891 casebook, possibly the first American criminal law casebook. The offenses charged in those cases include building a dam across a stream and thereby causing public injury by preventing fish from passing; selling "spirituous liquors" without a license; public corruption; poisoning a cow; and obtaining shoes by false pretenses. See H.W. Chaplin, *Cases on Criminal Law: A Collection of Reported Cases on Some of the Leading Heads of Criminal Law: Prepared for Use in the Law School of Harvard University* 1–14 (1891). Joseph Beale's casebook first appeared in 1894 and then "presid[ed] over the field in lonely majesty" for decades, E.W. Puttkammer, *Book Review*, 8 U. Chi. L. Rev. 386, 386 (1941), or possibly shared the throne with Francis Sayre, see Glueck, *Book Reviews*, supra note 39, at 514 (referencing "the two standard case books in the field, Beale's and Sayre's"). Beale's first chapter used the same dam-building and unlicensed liquor-sales cases that Chaplin had used, but also added a case involving charges of libel of the President and another involving a prosecution for disinterring a dead body. Joseph Henry Beale, Jr., *A Selection of Cases and Other Authorities upon Criminal Law* 1–9 (1894).

and so forth—that occupied substantial attention.⁶⁷ Second, as suggested by their book’s title, Michael and Wechsler viewed the “administration” of criminal law as something distinct from the law itself. Administration was a realm of discretion, they emphasized, whereas substantive criminal law was an independent field and the main focus of the book.⁶⁸ Finally, and perhaps most importantly, their turn toward normativity was not open-ended. That is, the book was not designed to promote or explore a wide range of competing views about criminal law.⁶⁹ Its aim was to encourage students to think as wise legislators, but Wechsler already had a specific vision of wise legislation in mind. That vision comes through in his textbook, as it would soon come through in the Model Penal Code.

Criminal Law and Its Administration innovated in several respects, but in one important regard it followed the path of earlier criminal law teaching materials. Namely, it did not discuss race or racial disparities among those prosecuted and punished. Racialized uses of criminal law have taken place since this country’s earliest days, but this dimension of criminal law was not widely acknowledged or well documented until much later in the twentieth century.⁷⁰ Michael and Wechsler did include a short

67. See, e.g., Frances Bowes Sayre, *A Selection of Cases on Criminal Law*, at ix–x (1927) (devoting fewer than fifty pages to homicide and almost 200 to theft offenses, not including robbery). Michael and Wechsler retained a fairly lengthy discussion of theft, albeit one much shorter than the chapter on homicide. See Michael & Wechsler, *Criminal Law*, supra note 58, at 401–582; *id.* at 3 (noting offenses other than homicide and theft “will be dealt with more summarily” in the book).

68. See, e.g., Michael & Wechsler, *Criminal Law*, supra note 58, at 2 (noting the criminal law’s “predominantly statutory character” and “the large areas of discretion in its administration”). Michael and Wechsler still found the “substance” of the law to reside primarily in cases, and a primary function of their non-judicial sources is to provide grounds to critique cases. See Walker, *The Anti-Case Method*, supra note 35, at 230 (“Though Michael and Wechsler incorporated cases into their text, at least half of their materials were designed not to drive home the basic principles of the common law, so much as to engender debate about what that law, ultimately, should be.”). But see Louis B. Schwartz, *The Wechslerian Revolution in Criminal Law and Administration*, 78 *Colum. L. Rev.* 1159, 1160 (1978). Schwartz argues that “[t]he interplay of procedure and substance is a persistent theme of the book,” but most of the examples he cites concern burdens of proof. See *id.* at 1162. For further discussion of burdens of proof and the separation of substance from procedure, see *infra* section II.A.

69. See Weinreb, *Teaching Criminal Law*, supra note 35, at 284–86 (2009) (discussing the rationalist, utilitarian view of criminal law underlying Michael and Wechsler’s book).

70. See Paul Finkelman, *Introduction, Race, Law, and American History 1700–1990*, at vii (1992) (“[S]ince the colonial period criminal prosecution, discrimination in trial practices, and police activities have been used as mechanisms for racial control and subordination.”). It remains unclear whether Michael and Wechsler were ignorant of racial disparities, or merely unwilling to mention them. For example, convict leasing, a practice by which vagrancy prosecutions were used to force Black persons into labor in southern states, was not quite eradicated when Michael and Wechsler published their book, but the practice is not mentioned in the book’s discussion of vagrancy. See Michael & Wechsler, *Criminal Law*, supra note 58, at 1008–54. Even by the 1930s, at least some in the legal academy, including the dean of Duke Law School, did recognize that criminal law was often used as an instrument of racial subordination. See, e.g., Justin Miller, *Criminal Law—An*

section on “The Personal Characteristics of Criminals” in their opening chapter, perhaps influenced by the waning eugenics movement, noting interest in the “heredity” of criminals.⁷¹ Michael and Wechsler hinted that social and economic deprivation rather than heredity could influence patterns of criminal offending, but they minimized these factors and ultimately found no way “to distinguish criminals from non-criminals in terms of their essential characteristics.”⁷² In this inquiry into “essential characteristics,” Michael and Wechsler did not ask whether state officials might target specific groups for prosecution. As Part II discusses further, the idea that public officials can influence who becomes a criminal is absent from the normative vision of criminal law launched at midcentury. Instead, the vision depicts substantive criminal law as color-blind, an approach consistent with Herbert Wechsler’s professed belief that law should be based on “neutral principles.”⁷³

After some initial skepticism,⁷⁴ the Michael and Wechsler book quickly established itself as the standard-bearer for teaching and, as some of its student-readers became a new generation of scholars, criminal law scholarship.⁷⁵ The book was updated with supplements, but the authors

Agency for Social Control, 43 *Yale L.J.* 691, 704–05 (1934) (discussing racialized enforcement from before the Civil War to the present). But detailed statistical data on racial disparities would not be collected and widely disseminated until later. The national system for crime and enforcement statistics, the Uniform Crime Reports, was introduced only in 1930 and did not initially include race-specific data. Agencies began reporting data on the race of arrestees in 1952. See FBI, *Uniform Crime Reporting Handbook 2* (2004), https://ucr.fbi.gov/additional-ucr-publications/ucr_handbook.pdf [<https://perma.cc/G5H3-P5P6>].

71. See Michael & Wechsler, *Criminal Law*, supra note 58, at 20–24; see also Russell D. Covey, *Criminal Madness: Cultural Iconography and Insanity*, 61 *Stan. L. Rev.* 1375, 1387 (2009) (discussing the “major impact” of eugenics on academics in the 1930s and citing Michael and Wechsler as examples).

72. Michael & Wechsler, *Criminal Law*, supra note 58, at 23–24.

73. Wechsler famously argued that courts should base their decisions on “analysis and reasons quite transcending the immediate result,” but he seemed to think neutrality a self-evident concept. Wechsler, *Neutral Principles*, supra note 18, at 15. Wechsler found the doctrine of separate-but-equal—so long as facilities were in fact comparable—to satisfy his vision of neutrality, and he worried that the Supreme Court had failed to articulate a race-neutral reason to strike down mandated segregation in public schools. *Id.* at 31–34. Wechsler suggested that when he and a Black co-counsel were not allowed to dine together at the Supreme Court, “[H]e did not suffer more than I in knowing that we had to go to Union Station to lunch together during the recess.” *Id.* at 34.

74. See Puttkammer, supra note 66, at 389 (criticizing the book for focusing too heavily on substantive law to the detriment of the administration of the law); John S. Strahorn, Jr., *Book Review*, 54 *Harv. L. Rev.* 1414, 1415 (1941) (expressing skepticism of the book’s “exotic” approach). Other reviewers were much more enthusiastic from the outset. See Stumberg, supra note 62, at 1124 (“The teaching materials compiled by Michael and Wechsler afford a welcome opportunity for experimentation to those who feel that a course in criminal law should go below the surface of positive law in action.”).

75. See Schwartz, supra note 68, at 1159 (crediting the book with effecting “the remarkable reorganization of an intellectual province”); Walker, *The Anti-Case Method*, supra note 35, at 236, 240 (discussing the popularity of the Michael and Wechsler book in

never produced a full second edition. Jerome Michael died in 1953, around the time that Wechsler was given principal responsibility for the drafting of the MPC.⁷⁶ Like Michael and Wechsler's textbook, the MPC was drafted with keen awareness of irrationality in existing law, but on the faith that criminal law could be rationalized.⁷⁷ Though the MPC had at best mixed results in its effort to change the content of American penal codes, it had an immediate and profound effect on criminal law teaching. Wechsler began to incorporate drafts of the MPC into his own teaching materials, including supplements to his casebook, even before the project was complete.⁷⁸ And nearly every criminal law casebook published since 1962 has featured the MPC prominently.⁷⁹ Since the 1960s, then, the course called "criminal law" in American law schools instructs students in a specific normative model.

Though commentators have recognized "the Wechslerian revolution,"⁸⁰ a few subtle but important adjustments to the curricular model described above have occurred through the many editions of Kadish's casebook. In 1962, the same year that the Model Penal Code was finalized, Sanford Kadish and Monrad Paulsen published *Criminal Law and Its Processes*—opening their new book with a quotation from Herbert Wechsler, of course.⁸¹ This book replaced Michael and Wechsler's text as "the classic in the field," and, now in its tenth edition, remains widely used and imitated.⁸² And like the casebook that inspired and preceded it, *Criminal*

the 1950s and noting that "Michael and Wechsler's text was still something of a benchmark by which other casebooks were judged even in the 1960s"); see also Herbert Packer, Book Review, 77 Harv. L. Rev. 790, 791 (1964) (reviewing Paulsen & Kadish, *supra* note 59) ("One might almost date the arrival of full intellectual respectability in the study of criminal law from the publication in 1940 of Michael and Wechsler's [book] from which many of those who are now in the forefront of criminal studies in this country had their first exposure.").

76. See Walker, *The Anti-Case Method*, *supra* note 35, at 236–37.

77. See Wechsler, *The Challenge*, *supra* note 49, at 1100–01 (outlining the substantive defects of penal codes that need to be reexamined by the MPC). As the next Part discusses at greater length, there was little attention to minor offenses or the parameters of criminal law in the MPC. At the same time, Wechsler's hostility toward rules of liability that focus on results, and his concomitant emphasis on risk creation, would help establish a powerful tool for the carceral state. See *infra* Part II.

78. Walker, *The Anti-Case Method*, *supra* note 35, at 237.

79. See *infra* Part II; see also *supra* note 50 and accompanying text.

80. Schwartz, *supra* note 68, at 1159.

81. Paulsen & Kadish, *supra* note 59, at vii (quoting Wechsler, *The Challenge*, *supra* note 49, at 1098).

82. The only contemporary casebook that may hold as much market share as Kadish et al. 10th, *supra* note 59, is Joshua Dressler's, now coauthored with Stephen Garvey. See Joshua Dressler & Stephen P. Garvey, *Cases and Materials on Criminal Law* (8th ed. 2019) [hereinafter Dressler 8th]. But Dressler has referred to his own book as "son of Kadish" and described Kadish as "the classic in the field." Joshua Dressler, *Criminal Law, Moral Theory, and Feminism: Some Reflections on the Subject and on the Fun (and Value) of Courting Controversy*, 48 St. Louis U. L.J. 1143, 1146–47, 1147 n.11 (2004) [hereinafter Dressler, *Criminal Law, Moral Theory*].

Law and Its Processes has shaped not just students' minds but also scholars'.⁸³ With a few slight adjustments discussed below, *Criminal Law and Its Processes* kept Michael and Wechsler's basic framework in which students were provided both cases and extrajudicial materials and invited to imagine the best design for the law. Like his predecessors, Kadish as casebook author was not neutral on the normative questions he raised: He organized the course around a particular justificatory account of criminal law—albeit one slightly more fixed on blame—and slightly less rationalist and utilitarian than Wechsler's model.⁸⁴

Over its many editions, *Criminal Law and Its Processes* made a few adjustments that have proven influential. First, the book initially tried to offer fairly comprehensive coverage of both substantive criminal law and criminal procedure, but eventually abandoned that goal.⁸⁵ Still, the reference to process in the book's title remains apt in one key respect: Even in recent editions, the book's normative model emphasizes certain procedures, such as a presumption of innocence and the requirement of proof beyond a reasonable doubt, that give legitimacy to substantive law.⁸⁶ Second, the first edition's materials on morals offenses, used to raise questions about principles of criminalization, were eventually moved from the first pages of the book and shortened.⁸⁷ The book still sometimes asks students to consider whether specific kinds of conduct should be subject to criminal penalties at all, but overall, theories of criminalization are given relatively little attention in comparison to theories of punishment.⁸⁸ Finally, as mentioned above, *Criminal Law and Its Processes* has relied

83. See Dressler, *Criminal Law, Moral Theory*, supra note 82, at 1146 (“Few casebooks influence the way lawyers or scholars think about a subject, but this book qualifies in that regard.”). Anders Walker is again a useful source on the evolution and importance of this book (and its debt to Wechsler), identifying as its main innovations a long section addressing (and critiquing) morals offenses such as adultery and fornication, and the integration of the MPC throughout the book. See Walker, *The Anti-Case Method*, supra note 35, at 238–44 (“Kadish and Paulsen continued down Wechsler's road in the 1960s, away from the case method and towards a more open-ended inquiry into why the law existed as it did.”).

84. See infra Part II (detailing the ideological orientation of the current edition of Kadish along with other contemporary criminal law casebooks, all or nearly all of which follow the Wechsler/Kadish model).

85. Walker, *The Anti-Case Method*, supra note 35, at 239 (noting that Paulsen and Kadish originally planned to emphasize procedure over substance, but “the tail wagged the dog” and most of the materials on procedure were eventually eliminated).

86. See, e.g., Kadish et al. 10th, supra note 59, at 18–52.

87. *Id.* at 150–56.

88. See *id.* at 5 n.20 (listing passages in the book that ask whether specific types of conduct should be criminalized at all). Compare *id.* at 81–150 (discussing the justification of punishment), with *id.* at 150–56 (introducing the harm principle as a constraint on criminalization but noting it has little practical bite and raising questions about “victimless” crime).

heavily on the MPC from its first edition, using it to illustrate a coherent codification of both offense definitions and general principles.⁸⁹

The embedding of substantive law within certain specified procedures, and the shrinking but still present question about the proper scope of criminal law, are important illustrations of a key aspect of Kadish's ideological orientation: He wanted to contain the scope of substantive criminal law, a goal that Wechsler shared but that Kadish made much more prominent and explicit.⁹⁰ Indeed, the same year that Kadish introduced his casebook, he coined the term "overcriminalization."⁹¹ He would pursue that theme across a half century of scholarship, persistently criticizing the scope of actual criminal law and doggedly trying to invigorate meaningful limitations on the penal power.⁹² Principles of criminalization were one source of limitation; procedural guarantees, such as the presumption of innocence, were another. Kadish went so far as to argue that the substantive criminal law course was "a course in civil liberties."⁹³ This unyielding effort to *limit* criminal law raises a question: On what basis could anyone see Kadish's casebook, or the broader curriculum he embraced and helped perpetuate, as contributing to further *expansions* of criminal law and the development of a carceral state? Is it not more likely that mass convictions are the product of a failure to heed the advice of Kadish, Wechsler, and other influential twentieth-century academics? The next Part considers ways in which educators' good intentions could, perversely, pave a road to hell.⁹⁴

89. See Paulsen & Kadish, *supra* note 59, at x–xi ("[W]e have included many of the proposals and some of the commentary of the Model Penal Code as an integral part of the material.").

90. See, e.g., Wechsler, *The Challenge*, *supra* note 49, at 1132 (noting that a model code should emphasize "serious injuries and threats to vital human interests rather than the vast, heterogeneous mass of special legislation declaring this or that conduct a crime").

91. Sanford H. Kadish, *Legal Norm and Discretion in the Police and Sentencing Process*, 75 *Harv. L. Rev.* 904, 909 (1962).

92. See, e.g., *id.* at 909–11 (arguing that broad criminal statutes, which encompass conduct not the target of legislative concern, promote abuse of power by the police).

93. Sanford H. Kadish, *Address, Why Substantive Criminal Law—A Dialogue*, 29 *Clev. St. L. Rev.* 1, 10 (1980) [hereinafter Kadish, *Why Substantive Criminal Law*].

94. Margo Schlanger has criticized perversity arguments as "quite fashionable in criminal justice," seductive and attention-grabbing but little supported by empirical evidence. Margo Schlanger, *No Reason to Blame Liberals (Or, The Unbearable Lightness of Perversity Arguments)*, *New Rambler*, https://newramblerreview.com/images/files/Margo-Schlanger_Review-of_Naomi-Murakawa.pdf [https://perma.cc/3XZG-47L9] (last visited Aug. 21, 2020) (reviewing Naomi Murakawa, *The First Civil Right: How Liberals Built Prison America* (2014)). If an argument is unsupported by empirical evidence, though, it's not clear what labeling it as a "perversity argument" adds to the critique. Perhaps Schlanger seeks to alert scholars to the boundaries of their own rationality so that they may be on guard for the seductive sirens of perversity. Of course, wanting attention or liking perversity are just two of many motivations that may distort human reasoning. Confirmation bias may also cloud our judgment, along with the related tendency to be defensive when one's own political views are criticized; either could produce resistance to perversity arguments even when there is evidence in support of the perversity claim. Ultimately, we should evaluate a

II. PRO-CARCERAL THEMES IN THE CLASSROOM

By the latter decades of the twentieth century, criminal law had won intellectual respectability, and substantive criminal law was a required course at most American law schools.⁹⁵ Notably, criminal *procedure* has never been required at most schools, though that subject lends itself to more focus on enforcement realities.⁹⁶ Thus, the only criminal law instruction many students will have is a deeply normative course premised on a specific model of what criminal law should be. To summarize again that normative paradigm, it holds that criminal law has a substance that is independent of enforcement choices. That substance is to be found in purportedly color-blind doctrines and statutes, articulated by judges and legislatures guided by rational principle.⁹⁷ Individual courts and legislatures may err, of course, but they have gotten criminal law right enough times that careful observers can discern criminal law's structure and principles and use that structure to critique the occasional misstep—such as a statute without a mens rea requirement.⁹⁸ The structure of criminal law includes various limiting principles that constrain what conduct can

scholarly claim about the factors contributing to mass incarceration by looking at the evidence offered in support of it, keeping in mind the many biases that may distort our assessments.

95. A survey published in 1984 found that 131 of the 146 law schools that belonged to the American Association of Law Schools included criminal law in the first-year curriculum, and seven more required criminal law as an upper-level course. Survey Shows Variety in Law Courses Required, Syllabus, June 1984, at 1, 5.

96. After World War II, Harvard added one credit hour to its required criminal law course in order to incorporate criminal procedure and administration, but it then eliminated the procedure component in 2008. Weinreb, Teaching Criminal Law, *supra* note 35, at 283 n.13; Lester B. Orfield, Book Review, 65 Harv. L. Rev. 716, 716 (1952). Most law schools do not require any courses in criminal procedure, as noted by Justice Ginsburg in dissent in *Connick v. Thompson*, 563 U.S. 51, 79–109 (2011). In *Connick*, the majority refused to grant a remedy for systemic procedural violations in the New Orleans district attorney's office and suggested that the district attorney should not be penalized because he reasonably relied on his employees' professional training to teach such obligations as the duty to disclose exculpatory evidence. See *id.* at 64–67; see also *id.* at 106 (Ginsburg, J., dissenting) (noting that criminal procedure is not required by most law schools).

97. Executive branch enforcement agents—most importantly, police and prosecutors—are largely absent from this vision of substantive criminal law. Criminal law's substance is thus both prior to and independent of enforcement decisions. Police and prosecutors may be faithful or unfaithful to their obligation to enforce substantive law, but the substantive law nevertheless exists and can be identified, whatever the degree of executive fidelity.

98. Reflecting on Sanford Kadish's work, Claire Finkelstein characterized “the criminal law's requirement of mens rea” as “the central distinguishing characteristic of the institution.” Claire Finkelstein, The Inefficiency of Mens Rea, 88 Calif. L. Rev. 895, 896 (2000). She acknowledged that her conception rendered “problematic” the presence of criminal liability based on negligence, *id.* at 914, and strict criminal liability is presumably all the more problematic. But Finkelstein's essay, like much criminal law scholarship, fails to distinguish clearly between aspiration and description. The aspects of existing law that contradict her idealized model are simply dismissed as “problematic” and in need of reform.

be criminalized—that which inflicts grave injuries on individuals or society—as well as the form that criminalization must take: clear offense definitions codified by legislatures.⁹⁹

The model has been aspirational since its inception, but it is consistently depicted to students as descriptive. In this Part, I want to examine several interrelated aspects of this model that I call pro-carceral, by which I mean they make it more likely that lawyers and policymakers will pursue, not avoid, the use of criminal law. Section II.A begins with the supposed constraints: the legality principle and other putative limits on substantive criminal law. Section II.B addresses casebooks' presentation of punishment theory, which focuses more on reasons to punish than reasons not to. Section II.C examines the curriculum's heavy emphasis on homicide as part of a refrain that criminal law addresses "all the deepest injuries"¹⁰⁰ that private persons might inflict on one another. Section II.D discusses the way the substantive criminal law curriculum obscures the human agents of criminal law and how, in doing so, it obscures ways that criminal law operates as a tool of racial oppression. Finally, in section II.E, I suggest that the casebook genre itself may impose constraints on efforts to depart from the existing canon or to transform it.

A preliminary word on terminology and methodology is in order. To identify the content and ideological underpinnings of "the course" or "the curriculum," I refer primarily to criminal law casebooks.¹⁰¹ As many of their authors acknowledge, criminal law casebooks haven't much departed from the model that Wechsler pioneered and Kadish refined.¹⁰² But some readers may question whether there is in fact a uniform curriculum and whether it makes sense to speak of "the course" rather than as many different courses as there are individual teachers. Throughout this Part, I seek to demonstrate that there is enough consistency across casebooks to identify a common curricular model and widely accepted curricular canons.

99. See *infra* section II.A.

100. The phrase is Herbert Wechsler's, but it opens Sanford Kadish's casebook. See Wechsler, *The Challenge*, *supra* note 49, at 1098; see also Paulsen & Kadish, *supra* note 59, at vii.

101. Following Douglas Husak, I assume for now that "[t]he tables of contents of leading casebooks can be used to identify what we tend to cover in our classes." Douglas Husak, *Is the Criminal Law Important?*, 1 *Ohio St. J. Crim. L.* 261, 261 (2003) [hereinafter Husak, *Is the Criminal Law Important*]. I discuss the possibility of "teaching against the casebook" *infra* section II.E.

102. See, e.g., Dressler 8th, *supra* note 82, at xi ("I can think of no higher accolade than if someone were to say of this book, 'Why, it is a son-of-Kadish . . .'"); Harris & Lee, *Teaching Criminal Law*, *supra* note 35, at 264 (2009) ("Our casebook . . . situates us squarely as granddaughters of Herbert Wechsler and Jerome Michael, as well as daughters of Sandy Kadish . . .").

A. *Legality and Other Imagined Constraints*

Criminal sanctions involve obvious restrictions of liberty. In a society that professes to value and protect liberty, those who would promote the use of criminal sanctions must first make them palatable. One standard path is to emphasize that criminal law is itself carefully constrained, subject to legal limitations that will protect against abuse. This section examines how casebooks develop that theme.

In fact, most criminal law casebooks begin with the claim that the awesome power to punish is subject to legal constraints: *nulla poena sine lege*, no punishment without law.¹⁰³ Most prominently, the books emphasize the principle of legality and the presumption of innocence.¹⁰⁴ Legality, as an academic and curricular term, is meant to express something more than the mere distinction between permitted and prohibited conduct. As a legal term of art and in criminal law casebooks, legality encompasses the idea that criminal liability must not be imposed unless the defendant's conduct was prohibited by a *preexisting statute*, the ex post designation of conduct as criminal by an executive official or a judge is prohibited.¹⁰⁵ Coupled with a presumption of innocence said to require the state to prove a violation of a statute beyond a reasonable doubt, legality is thus a constraint on

103. In a fairly typical depiction, Kadish characterizes *nulla poena* as “[o]ne of the most ancient and widely repeated doctrines of the criminal law.” Kadish et al. 10th, supra note 59, at 160. But there is some evidence that, like many a legal term, the Latin phrasing was simply selected to give an ancient patina to a novel idea. The particular phrase *nulla poena sine lege* was introduced by German legal theorist P.J.A. von Feuerbach in the nineteenth century. Tatjana Hörnle, P.J.A. von Feuerbach and His Textbook of the Common Penal Law, in *Foundational Texts in Modern Criminal Law* 119, 131 (Markus Dirk Dubber ed., 2014). To be sure, proponents of the principle argue that its roots are older than the particular phrasing. See, e.g., Jerome Hall, *Nulla Poena Sine Lege*, 47 *Yale L.J.* 165, 169–70 (1937).

104. For a recent and detailed survey of discussions of legality in American criminal law casebooks, see Hessick, supra note 41, at 973–75 & nn.21–29. One notable exception should be identified: The casebook initially coauthored by the late William Stuntz does not contain a section on legality at all. Joseph L. Hoffmann & William J. Stuntz, *Defining Crimes* (3d ed. 2017). Stuntz may be the single scholar most responsible for the academy's realization, in the last years of the twentieth century and the first years of the twenty-first, that substantive crime definitions do not determine criminal liability. See, e.g., William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 *Mich. L. Rev.* 505, 509 (2001) (warning that we are approaching a point at which “criminal codes . . . cover everything and decide nothing [and] serve only to delegate power to district attorneys' offices and police departments”). Consistent with Stuntz's scholarly views, the Hoffmann and Stuntz book seems more concerned with racially discriminatory enforcement than the mere fact of police discretion. For example, it does include a section on vagueness doctrine, but it suggests that discriminatory enforcement, rather than vagueness per se, is the problem. See Hoffmann & Stuntz, supra, at 34–52; id. at 51 (asking, of the Chicago anti-loitering statute, why notice is “so important when it comes to laws of this sort”).

105. See, e.g., Dressler 8th, supra note 82, at 91 (“[A] person may not be convicted and punished unless her conduct was defined as criminal (today . . . by statute rather than by judges). This prohibition . . . constitutes the essence of the principle of legality, a principle that has been characterized as *the* first principle of American criminal law.”).

the imposition of criminal liability, and it ostensibly prevents prosecutors or courts from choosing who will be made a criminal.¹⁰⁶

Closely related to this principle is the void-for-vagueness doctrine, which prohibits criminal statutes that are sufficiently vague to allow enforcers, or judges, to decide after the fact what is criminal.¹⁰⁷ Along with a section on vagueness doctrine, many casebooks also include some material on the Eighth Amendment prohibition of cruel and unusual punishments and other constitutional limits on penal power. Such doctrines are often presented as positive law with meaningful effects, not as philosophical aspirations.¹⁰⁸ Thus, students begin the course with the reassurance that the distinctive burdens of criminal sanctions are imposed only in limited circumstances. Punishment is a serious enterprise that imposes great pain on individuals, the casebooks solemnly acknowledge, but here in America we wield that weapon with the safety net of due process and legality.

In reality, there is no safety net—or, if there is, it is so riddled with holes that it offers little protection. Outside the classroom, in the academic journal or the faculty lounge, it is now standard for scholars to acknowledge that criminal codes simply do not determine what conduct

106. See *In re Winship*, 397 U.S. 358, 361 (1970) (“The requirement that guilt of a criminal charge be established by proof beyond a reasonable doubt dates at least from our early years as a Nation.”); *Sparf v. United States*, 156 U.S. 51, 87 (1895) (noting an earlier case that referred to a court in a criminal case as “a tribunal that obeys the law as made” and not one “which makes its own law” (internal quotation marks omitted) (quoting *Kane v. Commonwealth*, 1 Crim. L. Mag. 47, 57 (1879))). The term “proof” conjures mathematical or scientific certainty, but legal proof requires no such thing, and indeed, a fact may be “proved” legally even when it is contradicted by scientific evidence. See Andrea Roth, *Defying DNA: Rethinking the Role of the Jury in an Age of Scientific Proof of Innocence*, 93 B.U. L. Rev. 1643, 1664–65 (2013) (describing paternity suits in which juries found the defendant to be the father notwithstanding blood-type evidence that excluded the defendant as the father). Thus, even in the rare case that goes to a jury trial rather than ending in a plea, the determination of guilt is a matter of conviction (the jurors’ beliefs, or convictions) rather than “proof” in a scientific or mathematical sense. See *id.* at 1653–54 (“[S]o long as jurors . . . personally believe a confession or eyewitness, their guilty verdict would almost surely escape review, however irrational.”).

107. Some casebooks present void-for-vagueness as one component of legality. See, e.g., Markus Dirk Dubber & Mark G. Kelman, *American Criminal Law: Cases, Statutes, and Comments* 105–06 (2d ed. 2009).

108. See, e.g., George E. Dix, *Criminal Law: Cases and Materials* 65–66 (7th ed. 2015) (identifying proportionality, “precision in definition,” “need for a culpable mental state,” and “proof of guilt to the jury” as constitutional limitations on the imposition of criminal liability); Kadish et al. 10th, *supra* note 59, at 157 (“Three foundational principles limit the imposition of punishment: legality, culpability, and proportionality. Each of these principles has a long history of recognition in common-law precedents and in state penal codes based on them.”). But see *id.* at 158 (asking “to what extent the system of justice in the United States is in fact faithful to the three principles identified here”); Cynthia Lee & Angela P. Harris, *Criminal Law: Cases and Materials* 76 (4th ed. 2019) [hereinafter *Lee & Harris 4th*] (noting that the vagueness doctrine and other constitutional constraints aspire, without success, to eliminate discretion).

or which people will be subject to criminal sanctions.¹⁰⁹ To be sure, these scholars usually maintain that legality was alive and well until the late twentieth century, and that we could yet revive it by reforming and pruning criminal codes.¹¹⁰ That claim is inconsistent with historical and linguistic experience: The breadth and porousness of criminal statutes—and the inevitability of broad enforcement discretion—were well known even as Michael and Wechsler developed their pedagogical model.¹¹¹ The principle of legality was always more aspiration than reality. But a few generations of scholars have now been educated in a model that posits legality as a doctrine of positive law, and so when they observe that doctrine contradicted, they conclude that something has gone awry.¹¹² That is, even when casebooks acknowledge that statutes do not presently dictate the

109. See, e.g., Stuntz, *Collapse*, supra note 14, at 5 (“The system dispenses not justice according to law, but the ‘justice’ of official discretion.”); Dripps, *Brief Response*, supra note 35, at 257–59 (2009) (“[P]roof problems are less ubiquitous than purely discretionary choices about what charges of the many possible to select in a given case.”); Husak, *Is the Criminal Law Important*, supra note 101, at 262 (“The factors that govern whether or not persons will be punished are not much affected by the content of the statutes we teach and write about”);

110. See, e.g., Husak, *Is the Criminal Law Important*, supra note 101, at 270–71 (noting that the current criminal law is not one we ought to have and that there is “good reason to reform the criminal law to restore the rule of law”).

111. For example, many scholars writing at the time that Michael and Wechsler introduced their casebook were aware that legality was at best an aspiration, since those who administered criminal law (executive officials and judges) would inevitably have sufficient discretion to stretch old statutes to serve new purposes. See, e.g., Jerome Hall, *Theft, Law and Society* 262, 274–75 (2d ed. 1952) [hereinafter J. Hall, *Theft*] (“The judges . . . attempt today, as in the past, to apply the law justly. Their performance of this function is conditioned by professional techniques and traditions, and is sometimes disguised because of the necessity to make the decisions appear both plausible and consistent with precedent.”); Livingston Hall, *The Substantive Law of Crimes 1887–1936*, 50 *Harv. L. Rev.* 616, 637 (1937) [hereinafter L. Hall, *The Substantive Law of Crimes*] (noting that many states and judges have moved towards a “liberal construction” of penal statutes rather than the more traditional “strict construction”). American scholars’ interest in legality as a normative ideal seems to have increased sharply at midcentury, in part as a reaction to the rejection of that principle by Germany and Russia. See Livingston Hall, *Book Review*, 60 *Harv. L. Rev.* 846, 847 (1947) [hereinafter L. Hall, *Book Review*] (reviewing Jerome Hall, *General Principles of Criminal Law* (1947)); see also Lawrence Preuss, *Punishment by Analogy in National Socialist Penal Law*, 26 *Am. Inst. Crim. L. & Criminology* 847, 847 (1936) (quoting the newly enacted “punishment by analogy” section of National Socialist law and concluding that “the principle *nullum crimen, nulla poena sine lege* . . . has been abolished”). In 1952, Wechsler acknowledged the problem of “domination by administration,” or the fact that prosecuting agencies rather than written statutes dictated outcomes, but he held onto the belief that better-drafted statutes would restrain administrative and interpretive discretion to a tolerable degree. See Wechsler, *The Challenge*, supra note 49, at 1100–02.

112. See, e.g., Paul H. Robinson & Michael T. Cahill, *The Accelerating Degradation of American Criminal Codes*, 56 *Hastings L.J.* 633, 639 (2005) (characterizing broad criminalization as a “trend” that is destroying the rule of law, and noting that “[a]rrest, punishment, and the level of punishment are *now* determined as much by the ad hoc decision-making of individual law enforcement officials as they are by the legal rules” (emphasis added)).

scope of criminal liability, the suggestion is that this is a particular pathology of contemporary law rather than an enduring feature of criminal law.¹¹³ It's not difficult to see why: To be direct about the extent to which enforcement discretion has always controlled outcomes might lead students to wonder about the relevance of a substantive criminal law course.¹¹⁴

I have focused on legality because it is sometimes identified as “*the* first principle of American criminal law,”¹¹⁵ but, as noted, an array of other similar limiting principles are also frequently presented to students as meaningful constraints on the state's power to punish: a constitutional proportionality requirement;¹¹⁶ a presumption of innocence that requires the prosecution to prove the crime beyond a reasonable doubt;¹¹⁷ a

113. See, e.g., Kadish et al. 10th, *supra* note 59, at 158 (“Is a relaxation of the commitment to some or all of these principles responsible in some measure for the current record high rates of incarceration?”).

114. Indeed, students able to discover on their own the predominant role of enforcement discretion *have* long wondered about the relevance of the course. See Kadish, *Why Substantive Criminal Law*, *supra* note 93, at 5 (quoting a hypothetical student critic for the proposition that the “discretionary judgments of officials pretty well undercut the role of the substantive criminal law”). For further discussion of this Kadish essay, see *infra* section III.B.

115. Dressler 8th, *supra* note 82, at 91.

116. Most casebooks include at least one Eighth Amendment proportionality case while offering little or no information on the (in)frequency with which Eighth Amendment challenges have actually freed defendants or led to reversals of sentences. See, e.g., Dix, *supra* note 108, at 66–82 (presenting *Miller v. Alabama*, 567 U.S. 460 (2012), which declared unconstitutional mandatory life without parole sentences for those who committed crimes as juveniles); Kadish et al. 10th, *supra* note 59, at 205–16 (presenting *Ewing v. California*, 538 U.S. 11 (2003), and *Graham v. Florida*, 560 U.S. 48 (2010)). Ewing died in prison, and Miller and Graham are still incarcerated. See Sara Sun Beale, *The Story of Ewing: Three Strikes Laws and the Limits of the Eighth Amendment Proportionality View*, in *Criminal Law Stories* 427, 452 (Donna Coker & Robert Weisberg eds., 2013) (noting that Gary Albert Ewing “died still guarded 24 hours a day by correctional officers” at the California Medical Facility); Corrections Offender Network: Inmate Population Information Detail, Fla. Dep’t of Corr., <http://www.dc.state.fl.us/offenderSearch/detail.aspx?Page=Detail&DCNumber=J25706&TypeSearch=AI> [<https://perma.cc/4H2C-5W6X>] (last visited Sept. 29, 2020) (noting that Terrance J. Graham is still incarcerated at Charlotte Correctional Institution); Incarceration Network, Ala. Dep’t of Corr., <http://www.doc.state.al.us/InmateHistory> (on file with the *Columbia Law Review*) (last visited Sept. 29, 2020) (noting that Evan Miller is still incarcerated at St. Clair Correctional Facility). The Kadish casebook does include a note on “[p]roportionality review in practice,” which clarifies that “successful Eighth Amendment challenges continue to be rare.” Kadish et al. 10th, *supra* note 59, at 219.

117. See, e.g., Dressler 8th, *supra* note 82, at 9–18; John Kaplan, Robert Weisberg & Guyora Binder, *Criminal Law: Cases and Materials* 16–19 (8th ed. 2017) [hereinafter Kaplan et al. 8th]; Lee & Harris 4th, *supra* note 108, at 38–41. For criminal convictions based upon guilty pleas—that is, almost all convictions—the prosecution does not have to prove anything. See *supra* note 5 and accompanying text. Of course, in theory, burdens of proof could still be important in determining the parties’ relative bargaining power during plea negotiations. It is widely accepted among scholars, however, that an array of factors skews the bargaining process in favor of prosecutors and effectively relieves them of most of the weight of the burden of proof. See *supra* notes 5–6. Moreover, as noted above, even in the

culpability principle;¹¹⁸ and possibly, rules of lenity and strict construction for penal statutes.¹¹⁹ The idea of culpability, and in particular the claim that criminal conviction requires proof of a carefully specified mens rea, is prevalent throughout the entire criminal law course.¹²⁰ To see that these various principles are unfulfilled aspirations rather than actual constraints on the state's power to impose criminal sanctions, one need only close the casebooks and turn to legal scholarship, where the failure of the real world to correspond to the scholarly model is repeatedly bemoaned.¹²¹ Here

rare case that goes to a jury trial, prosecutors do not have to "prove" guilt in the scientific or mathematical sense of the word proof; they merely have to convince a jury to vote for guilt. See *supra* note 106.

118. Several casebooks and many scholars use the term culpability to describe a general requirement that criminal liability requires both a blameworthy act and a blameworthy mental state. See, e.g., Kadish et al. 10th, *supra* note 59, at 221 (presenting "[t]he [r]equirement of [v]oluntary [a]ction" as the first component of culpability); *id.* at 222 (referencing "the fundamental principle that criminal liability always requires an 'actus reus,' that is, the commission of some voluntary act that is prohibited by law"); *id.* at 258–59 (claiming that the criminal law limits punishment in the absence of fault through the requirement of mens rea). Consider also "the sentence that sums up the basic structure of criminal law," according to the newest entrant to the criminal law casebook market: "The Guilty Hand moved by the Guilty Mind, under the Required Circumstances, that sometimes causes a Result in the absence of a Justification or Excuse." Joseph E. Kennedy, *Criminal Law: Cases, Controversies and Problems 1* (2019) [hereinafter Kennedy, *Criminal Law*]. In reality, however, neither "a guilty mind" nor "a guilty hand" are actually required for criminal liability. See, e.g., Douglas Husak, *Does Criminal Liability Require an Act?*, in *The Philosophy of Criminal Law: Selected Essays* 17, 23–25 (2010) (arguing that the idea that "criminal liability requires an act" is not true "as a descriptive generalization, nor as an analytical truth, nor as a pure evaluation"); Richard A. Wasserstrom, *Strict Liability in the Criminal Law*, 12 *Stan. L. Rev.* 731, 731 (1960) (discussing the "proliferation" of impositions of criminal liability "in the absence of any requisite mental element").

119. See, e.g., Jens David Ohlin, *Criminal Law: Doctrine, Application, and Practice* 113 (2d ed. 2018) [hereinafter Ohlin 2d] ("Although courts rarely invoke the rule of lenity, it can sometimes provide a crucial factor that tips the scales in favor of the defendant."). But see Hoffmann & Stuntz, *supra* note 104, at 74–89 (identifying "the not-quite-rule of lenity" and explaining why it has little practical import). For an especially detailed chapter on constitutional limitations to substantive criminal law, including cases on vagueness, the First Amendment, substantive due process protections for abortion and same-sex intimacy, and the Eighth Amendment, along with a section on the Fourth Amendment exclusionary rule, see Gerald G. Ashdown, Ronald J. Bacigal & Adam M. Gershowitz, *Criminal Law: Cases and Comments* 271–443 (10th ed. 2017).

120. As Jody Armour has argued, American legal education both emphasizes mens rea as a "requirement" and obscures the ways in which mens rea determinations are likely to be shaped by racial bias. See Jody Armour, *Where Bias Lives in the Criminal Law and Its Processes: How Judges and Jurors Socially Construct Black Criminals*, 45 *Am. J. Crim. L.* 203, 205 (2018) ("Those trained in American law schools have learned to think about the mens rea requirement in ways that conceal its central role as a vehicle for factfinders to make frontal moral judgments of wrongdoers.").

121. See *supra* notes 3–7 and accompanying text. On mens rea specifically, which figures prominently throughout the curriculum, commentators outside the classroom have faulted the MPC and criminal law more broadly for "talking about a criminal's mental state as though such a mental state were a real, let alone discoverable, condition." Francis X. Shen, Morris B. Hoffman, Owen D. Jones, Joshua D. Greene & René Marois, *Sorting Guilty*

again, although many scholars would claim that the gap between model and reality is a pathology that developed in late twentieth-century America, a review of criminal law before the dawn of our current curricular model suggests otherwise.¹²²

There is one more way in which the criminal law curriculum creates a false impression of constraint in substantive criminal law, not so much by directly naming doctrines of purported constraint as by misrepresenting the structure and scope of existing law. I refer here to the heavy reliance on the MPC and the related technique in some casebooks of depicting American criminal law as structured around two alternatives: either the MPC or “the common law.”¹²³ Students are then instructed, and tested, on law in “MPC states” and “common law states.” Outside the casebooks, several commentators have pointed out that there is no such thing

Minds, 86 N.Y.U. L. Rev. 1306, 1317 n.37 (2011) (citing critics of the MPC). While empirical researchers are often straightforward about the uglier aspects of criminal law in practice, the collapse of normative or evaluative claims and positive description is a longstanding problem among criminal law theorists. At midcentury, aspects of Jerome Hall’s *Theft, Law, and Society* were criticized by his contemporaries in this regard, leading him to argue in later work that criminal law contained certain immanent “principles” that it only sometimes realized in practice. Hall argued that a scholar, even a scientific one, could reasonably identify those principles and state them as “is” rather than “ought.” See Jerome Hall, *Science and Reform in Criminal Law*, 100 U. Pa. L. Rev. 787, 790–92 (1952) [hereinafter J. Hall, *Science and Reform*]; see also J. Hall, *Theft*, supra note 111, at xvii–xviii (“It is also possible to generalize regarding selected recurrent phases of such situations and to correlate them with significant variables In this way valid empirical generalizations regarding past problem-solving processes can be discovered.”).

122. On legality as aspiration rather than reality even early in the twentieth century, see J. Hall, *Theft*, supra note 111, at xvii. On the presumption of innocence as aspiration in the same time period, Livingston Hall notes that “presumptions of guilt . . . were not unknown to the common law” and presumptions served as “prosecutor’s friend[s].” L. Hall, *The Substantive Law of Crimes*, supra note 111, at 648–51. He cited constitutional due process as a partial, but inadequate, constraint on the use of these devices. *Id.* at 649–50. On culpability requirements in that era, see *id.* at 641–46; see also Puttkammer, supra note 66, at 388 (noting that under existing law, criminal liability could be based on act or omission, and either could be “accompanied by any conceivable frame of mind . . . ranging from the most specific of intents to complete absence of thought”); L. Hall, *Book Review*, supra note 111, at 848 (describing Hall’s “new” theory of a mens rea requirement).

123. See Luis E. Chiesa, *Substantive Criminal Law: Cases, Comments and Comparative Materials*, at xxvii (2014) [hereinafter Chiesa, *Substantive Criminal Law*] (emphasizing that the book highlights contrasts between “the MPC approach” and “the common law approach”); Dressler 8th, supra note 82, at viii (“[T]he casebook emphasizes the Model Penal Code, in part so that students have ample opportunity to work with an integrated criminal code.”); Dubber & Kelman, supra note 107, at vii (“Paulsen/Kadish (and later Kadish/Schulhofer) was the first casebook based on the Model Penal Code and has set the standard for American criminal law teaching ever since.”); Kadish et al. 10th, supra note 59, at 157 (“But since 1962, more than half of the states have enacted modern criminal codes that draw heavily on the MPC, so many state codes look like the MPC.”); Lee & Harris 4th, supra note 108, at 5 (noting that definitions of crimes and principles of interpretation depend on “whether one is in a jurisdiction in which the code principally follows the common law or one in which the code has incorporated reforms taken from the Model Penal Code”).

as “an MPC state,” since even the states that have codified substantial parts of the MPC have also codified a huge range of other statutes and modified MPC concepts through either legislative or judicial adjustments.¹²⁴ Meanwhile, “common law state” seems to be an ill-defined umbrella term for any state that has not adopted sufficient portions of the MPC.¹²⁵ To the extent there ever was a “common law of crimes,” it was a sprawling collection of judicial decisions from different jurisdictions that did not yield one single set of rules.¹²⁶ Consequently, there was no single “common law” of crimes even before nineteenth-century codification movements. The MPC-versus-common-law paradigm has been adopted in classrooms, and on bar exams, not because it is an accurate representation of positive law but because it is simple and therefore testable.¹²⁷

But there are ideological effects to this choice of pedagogical convenience. The juxtaposition of the MPC and the (imagined) common law as America’s two alternatives suggests two closed and coherent “systems.”¹²⁸ This obscures from students one important reason that the legality principle does not operate as a constraint on criminal law: Actual criminal codes are sprawling arrays of disorganized, ambiguous, and overlapping statutes, layered on top of each other and potentially applicable to a wide range of ordinary conduct.¹²⁹ If we wanted to assess

124. Anders Walker, *The New Common Law: Courts, Culture, and the Localization of the Model Penal Code*, 62 *Hastings L.J.* 1633, 1646 (2013) [hereinafter Walker, *The New Common Law*] (highlighting that no state has adopted all of the MPC and that even the states that adopted portions still amended the MPC’s definitions with new legislation); see also James D. Gordon III, *How Not to Succeed in Law School*, 100 *Yale L.J.* 1679, 1696 (1991) (suggesting that an “honest” course description of criminal law would say: “Study common law crimes that haven’t been the law anywhere for more than 100 years. Then, to bring things up to date, study the Model Penal Code, which is not the law anywhere today.”).

125. Walker, *The New Common Law*, supra note 124, at 1636–37 (critiquing the term “common law state”).

126. See Guyora Binder, *The Origins of American Felony Murder Rules*, 57 *Stan. L. Rev.* 59, 63 (2004) (contesting the “myth” that the American colonies inherited a clear felony murder rule from England); *id.* at 65 (noting nineteenth-century distaste for “a general American common law of crimes” and development of state-specific homicide laws).

127. For a slightly different view that nonetheless recognizes the pervasive influence of the MPC, see Franklin E. Zimring, *Is There a Remedy for the Irrelevance of Academic Criminal Law?*, 64 *J. Legal Educ.* 5, 5 (2014) (“The beautifully articulated language and commentary of the model code provides introductory students with an almost statutory presentation of the doctrines. It is a rich and challenging curriculum for teachers and students.”). For more on the significance of the bar exam, see *infra* section II.E.

128. Cf. Sara Mayeux, *The Idea of “the Criminal Justice System”*, 45 *Am. Crim. L. Rev.* 55, 56–57 (2018) (“It is thus taken nearly universally for granted that in the United States there exists something called ‘the criminal justice system,’ a unitary, integrated set of component institutions, processes, and actors.”).

129. See Robinson & Cahill, supra note 112, at 635 (noting that “[t]he main form of degradation [of penal codes] is the proliferation of numerous new offenses that duplicate, but may be inconsistent with, prior existing offenses”); *id.* at 640 (suggesting that the “fundamental advance” achieved by the Model Penal Code “is often lost in what seems to be a willy-nilly rush to maintain a continuous stream of new offenses”).

realistically the MPC's effect on constraining discretion and vindicating the principle of legality, we would not ask how many states have codified *some* of the MPC but rather how many states have codified *only* the MPC. And the answer is zero.¹³⁰

B. *Punishment Theory as Carceral Ideology*

In addition to emphasizing the ways that criminal law is constrained, the curricular model launched by Michael and Wechsler makes an affirmative case for the good that criminal law can achieve. Michael and Wechsler embedded that argument into their introductory chapter, but since Paulsen and Kadish published the first edition of their casebook in 1962, most criminal law casebooks have included a substantial separate section on punishment theory, usually in the first or second chapter.¹³¹ This section examines the function of punishment theory in the criminal law curriculum.

In most casebooks, four broad justificatory theories—retribution, deterrence, incapacitation, and rehabilitation—are duly presented as possible rationales for all the doctrines that will follow. None 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.¹³² Indeed, the appropriateness of punishment is often presented as self-evident; students are asked to consider *why* punishment is justified, not whether.¹³³ And they are provided

130. See Walker, *The New Common Law*, supra note 124, at 1646 (noting that no state adopted the MPC in its entirety and those states that did adopt significant portions of the MPC have supplemented their codes with other legislation).

131. See Paulsen & Kadish, supra note 59, at 57–89; see also Dressler 8th, supra note 82, at 31–90 (Chapter Two: Principles of Punishment); Dubber & Kelman, supra note 107, at 1–85 (Chapter One: Punishment and Its Rationales); Kaplan et al. 8th, supra note 117, at 29–113 (Chapter One: The Purpose and Limits of Punishment); Lee & Harris 4th, supra note 108, at 6–38 (Justifications for Punishment); Ohlin 2d, supra note 119, at 21–49 (Chapter Two: Punishment).

132. Of course, claims that a punishment is deserved or serves retributive ends are not falsifiable, but the other purported aims of punishment could in theory be tested empirically.

133. See, e.g., Kadish et al. 10th, supra note 59, at 81 (“Punishing wrongdoers for their misconduct seems self-evidently appropriate. But this straightforward idea becomes complex and controversial when we seek to apply it to actual cases, because there are many distinct reasons *why* punishment of wrongdoers may be appropriate.”); see also id. at 96 (“Debate about . . . [philosophical] justifications sometimes seems purely academic, because both retributive and utilitarian purposes often appear self-evidently sound and mutually reinforcing.”). An important exception here is the Lee and Harris casebook, which includes a lengthy excerpt of Robert Blecker’s argument that penal philosophies do not justify the actual experience of American incarceration. See Lee & Harris 4th, supra note 108, at 20–31 (excerpting Robert Blecker, *Haven or Hell? Inside Lorton Central Prison: Experiences of Punishment Justified*, 42 *Stan. L. Rev.* 1149 (1990)); see also Dressler &

little recourse to answer this question other than some vocabulary to dignify any prior pro-punishment intuitions they may hold.¹³⁴

What is the goal in including in the course this smattering of punishment theories? Casebook authors sometimes emphasize 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.¹³⁵ More broadly, punishment theories are often presented as another source of limits on criminal law: No punishment is valid unless it is supported by at least one of the four horsemen.¹³⁶ Indeed, after Wechsler's MPC was embraced by the academy as answering all the big questions about the content of the substantive criminal law, criminal law theorists turned most of their attention to punishment theories, working out the best statement of retributivism (usually) and arguing that it could serve as a limiting principle to keep criminal law in check.¹³⁷ To keep things interesting, a

Garvey 8th, *supra* note 82, at 35 (suggesting that determinists who deny all human responsibility might argue for abolition of punishment).

134. The most extreme example of the intuition-priming pedagogical approach is Paul Robinson's casebook, now with coauthors. Paul H. Robinson, Shima Baradaran Baughman & Michael T. Cahill, *Criminal Law: Case Studies and Controversies* (4th ed. 2017). The book is built around case studies carefully designed to "tell[] the full story of the case leading up to the offense in a way that is likely to trigger people's intuitions of justice." *Id.* at xxxv.

135. See, e.g., Dubber & Kelman, *supra* note 107, at 2 ("Every day, judges—and sometimes juries—must decide whether a particular person before them deserves punishment, and if so, how much and in what form. To make these decisions, they turn to the various rationales for punishment for guidance."); Lee & Harris 4th, *supra* note 108, at 6 ("These moral justifications for punishment are not only discussed by theorists, but are frequently used by policymakers in public debate and by attorneys and judges in legal proceedings to evaluate the efficiency and fairness of the criminal justice system.").

136. This point is made more explicitly in academic journals than the casebooks themselves. But Kadish did emphasize blame as a limiting principle in an essay explaining his pedagogical approach to substantive criminal law. See Kadish, *Why Substantive Criminal Law*, *supra* note 93, at 10 ("It is deeply rooted in our moral sense of fitness that punishment entails blame and that, therefore, punishment may not justly be imposed where the person is not blameworthy."); see also Kaplan et al. 8th, *supra* note 117, at 32 ("[R]etributivism serves both as a limiting principle (there must be no undeserved punishment) and an affirmative justification for punishment (desert justifies punishment).").

137. For an overview of this theoretical turn, see Alice Ristroph, *Desert, Democracy, and Sentencing Reform*, 96 *J. Crim. L. & Criminology* 1293, 1298–306 (2006) [hereinafter Ristroph, *Desert, Democracy*]. Wechsler himself was a pluralist about punishment purposes, and the original MPC reflected various consequentialist theories without endorsing a single approach. See, e.g., Herbert Wechsler, *Sentencing, Correction, and the Model Penal Code*, 109 *U. Pa. L. Rev.* 465, 468–69 (1961) (describing the theories of punishment that are considered in the MPC). Three decades later, when mass incarceration was well underway, the American Law Institute would decide that the Code's failure to adopt retributive principles more explicitly was a shortcoming that required amendments to the MPC. See Kevin R. Reitz, *American Law Institute, Model Penal Code: Sentencing, Plan for Revision*, 6 *Buff. Crim. L. Rev.* 525, 528 (2002) ("The new ordering of sentencing purposes recommended for the revised Code is an adaptation of Norval Morris's theory of limited retributivism, under which considerations of desert establish upper and lower limits upon penalties in specific cases . . .").

few contrarians kept defending deterrence or other consequentialist accounts.¹³⁸ Theorists on each side would argue that their preferred theory constrains the penal law while other theories permit or even require too much punishment.

But if scholars, or teachers, hoped that attention to punishment theory would limit the scope of American criminal law, they have clearly been disappointed.¹³⁹ And the failure of justificatory theories to serve as constraints should not surprise us. Articulating the justification of a practice, especially in the deeply moral terms that retributive theory tends to use, is unlikely to foster restraint among those who engage in that practice.¹⁴⁰ Moreover, as some casebook authors do acknowledge, the intense scholarly preferences for one specific theory over others are rarely shared by policymakers and legal authorities.¹⁴¹ To the extent that punishment purposes do surface in policy discussions or judicial opinions, the usual approach is the kitchen sink, in which the proposed sentence or punitive policy is found to serve both retributive and consequentialist ends.¹⁴²

My focus so far in this section has been on the chapter, or subsection, in criminal law casebooks that is specifically devoted to punishment theories. But there is another, more subtle way in which the criminal law course nourishes a pro-carceral outlook rather than a perspective capable of deep critique of existing criminal institutions. Even after Michael and Wechsler's innovation to add non-judicial materials to the criminal law curriculum, cases are the primary source through which students learn positive law. Judicial opinions certainly are a source of positive law, but they are also a source of normative indoctrination. The persons who write appellate opinions tend to believe in the legitimacy of the system in which they work and wield power, and their opinions are built on "a rhetoric of justification."¹⁴³ Thus, teaching through cases ensures that most of what

138. For a brief literature review, see R.A. Duff, *Penal Communications: Recent Work in the Philosophy of Punishment*, 20 *Crime & Just.* 1, 4–9 (1996).

139. Cf. Jonathan Simon, *Teaching Criminal Law in an Era of Governing Through Crime*, 48 *St. Louis U. L.J.* 1313, 1316 (2004) [hereinafter Simon, *Teaching Criminal Law*] (noting that punishment theories do not determine the operation of criminal laws or the distribution of punishment). Recently, some criminal law scholars have urged professors to "teach abolition" alongside theories of punishment. See Amna Akbar, *Teaching Penal Abolition*, *Law & Pol. Econ. Blog* (July 15, 2019), <https://lpeproject.org/blog/teaching-abolition> [<https://perma.cc/9RN9-FLR4>]. For further discussion of teaching from a more critical perspective, see *infra* section II.E.

140. See Alice Ristroph, *Just Violence*, 56 *Ariz. L. Rev.* 1017, 1037 (2014) [hereinafter Ristroph, *Just Violence*] ("[The] focus on justifying punishment has served no better to limit punishment than the focus on justifying war served to limit war . . ."); see also Ristroph, *Desert, Democracy*, *supra* note 137, at 1308–13 (discussing the concept of desert as elastic and ill-equipped to limit punishment).

141. See, e.g., Hoffmann & Stuntz, *supra* note 104, at 12 (noting that judges asked to choose among theories of punishment will often choose "all of the above").

142. See *id.* at 11–12.

143. Again, unless we are to assume malevolence or bad faith, we should presume that the judges who have rejected defendants' resistance to charges or punishment in case after

students read will be written by individuals who are likely to hold a distinctively strong commitment to the legitimacy of criminal prosecutions and punishment. At the same time, judicial opinions assume what Robert Ferguson has called “the monologic voice,” so that the individual judge as a subjective being with possibly idiosyncratic preferences is made to disappear.¹⁴⁴ Of course, Michael and Wechsler were well aware that a diet of appellate cases could produce a strong bias in favor of existing law; that was part of their motivation to mix cases with extrajudicial materials.¹⁴⁵ But the materials they added, and most of the extrajudicial materials included in contemporary casebooks, also tend to assume the legitimacy and justice of standard criminal sanctions, including prison.¹⁴⁶

One final word on punishment theory and the case method: By asking students to apply their favorite justifications of punishment to particular cases, the criminal law course encourages the view—clearly evident in the James Comey passage that launches this Essay—that the justice of punishment is a question to be answered one person at a time.¹⁴⁷ The course may occasionally mention sentencing patterns or the broad social costs of punishment, but those glimpses at a systemic overview are far overshadowed by the relentless inquiry, in case after case, into the culpability of an individual defendant.¹⁴⁸ As Markus Dubber has observed, the “focus on the individual case has come at the expense of systematic justice” and has obscured issues of equality in criminal law.¹⁴⁹ And the distortion that comes by focusing on individual cases is all the more pronounced if the individual cases are carefully curated to highlight the most violent and serious offenses. The next section considers the pedagogical choice to depict criminal law primarily through homicide and rape cases.

case, millions of times, believe they are acting justly and fairly. In any case, judges certainly *write* as though they believe themselves to be acting justly. See Randy D. Gordon, *How Lawyers (Come to) See the World: A Narrative Theory of Legal Pedagogy*, 56 *Loy. L. Rev.* 619, 635 (2010) (“Lawyers become so accustomed to reading appellate opinions for rules that it is easy for them to forget how narrowly those opinions are cast—e.g., they have a limited purpose, are subject to powerful generic constraints, and are built on a rhetoric of justification, not description.”).

144. Robert A. Ferguson, *The Judicial Opinion as Literary Genre*, 2 *Yale J.L. & Humans* 201, 207 (1990).

145. See Michael & Wechsler, *Criminal Law*, *supra* note 58, at 1–2.

146. An important exception is the Blecker excerpt in Lee & Harris 4th, *supra* note 108, at 20–31.

147. Comey, *supra* note 1, at 150.

148. Moreover, the presentation of data on overall sentencing patterns, especially racial disparities, may be affirmatively harmful if students are not given tools to understand the sources of those disparities. See *infra* section II.D.

149. See Markus Dirk Dubber, *The Historical Analysis of Criminal Codes*, 18 *Law & Hist. Rev.* 433, 439 (2000).

C. “*All the Deepest Injuries*”

A substantive criminal law course supposedly focuses on the definitions of crimes. It purports to teach students something about what kinds of conduct are criminalized, as well as the form and structure of the prohibitions. But so many kinds of conduct are criminal that a teacher must choose which specific offenses to examine. This section examines the substantial focus on homicide in American criminal law courses—not to argue that the syllabus should strive to capture all types of crime, but rather to ask what ideological work is done by the choice to prioritize homicide. I suggest that the emphasis on homicide—with some supplemental attention to rape—reflects and seeks to propagate the view that criminal law’s primary function is to address deeply harmful acts, especially interpersonal violence. This claim about criminal law’s function is a normative one, not a description of actual practices, and the normative claim obscures the many ways in which criminal law operates to subordinate individuals who have not inflicted great harm upon others.

1. *Interpersonal Violence*. — For more than half a century, American law schools have shown students only a tiny slice of the vast range of conduct defined as criminal by state and federal penal codes. The slice is not a random sample, and it is certainly not representative. As discussed above, one of the major innovations of Michael and Wechsler’s 1940 casebook was its focus on homicide and deprioritization of other criminal offenses.¹⁵⁰ Though Kadish and other successors include some materials on other specific offenses, usually rape and theft, homicide remains the paradigm crime in American pedagogy.¹⁵¹ It is not just that casebooks’ discussions of specific offenses give greater weight to homicide than other offenses. Casebooks also frequently use homicide cases to teach an array

150. See *supra* Part I.

151. Two casebooks depart from the homicide/rape/and-maybe-theft model. The most recent edition of Ashdown et al. includes a full chapter on drug possession and distribution, and another chapter on drunk driving and texting while driving. See Ashdown et al., *supra* note 119, at 871–950. The most recent edition of Hoffmann and Stuntz contains chapters on drug crimes and gun crimes. See Hoffmann & Stuntz, *supra* note 104, at 399–486 (drug crimes); *id.* at 535–90 (gun crimes). Both of these casebooks also include lengthy discussions of federal criminal law. See Ashdown et al., *supra* note 119, at 191–205, 213–51; Hoffmann & Stuntz, *supra* note 104, at 233–97 (chapter on federal criminal law). Since relatively few federal prosecutions involve physically violent crime, the inclusion of federal law further shifts the focus from the homicide paradigm. It is also worth noting here one less widely used casebook with a roughly equivalent emphasis between property crimes and homicide. See Myron Moskovitz & J. Amy Dillard, *Cases and Problems in Criminal Law* (7th ed. 2018).

of other topics, including mental states,¹⁵² the purported act requirement,¹⁵³ omissions,¹⁵⁴ accomplice liability,¹⁵⁵ and inchoate offenses.¹⁵⁶ Causation—an issue that arises almost solely in homicide cases¹⁵⁷—is often given its own chapter, thus expanding further the emphasis on homicide.¹⁵⁸ Meanwhile, most casebooks include few if any materials on the nonviolent offenses that constitute the vast majority of criminal prosecutions.¹⁵⁹ For example, possession offenses generate far more convictions than charges of interpersonal violence, but possession stays mainly in the shadows of most casebooks.¹⁶⁰

152. See Lee & Harris 4th, *supra* note 108, at 211–12 (presenting *State v. Fugate*, 303 N.E.2d 313 (Ohio Ct. App. 1973), which noted that intent to kill may be presumed where death is the natural and probable consequence of defendant’s action, and affirmed a conviction for first-degree murder and armed robbery).

153. See Kadish et al. 10th, *supra* note 59, at 224–26 (presenting *People v. Newton*, 87 Cal. Rptr. 394 (Dist. Ct. App. 1970), which reversed a manslaughter conviction on grounds that the trial court refused to instruct the jury on unconsciousness as a defense). The Kadish casebook does not mention the racially charged context of this case: The defendant was Huey P. Newton, cofounder of the Black Panthers, charged with murdering a police officer after a conflict during a traffic stop. See Laurie Levenson, *Cases of the Century*, 33 *Loy. L.A. L. Rev.* 585, 594 n.25 (2000).

154. See Kaplan et al. 8th, *supra* note 117, at 124–26 (presenting *Jones v. United States*, 308 F.2d 307 (D.C. Cir. 1962), which reversed a conviction for involuntary manslaughter due to inadequate jury instructions).

155. See Dressler 8th, *supra* note 82, at 895–98 (presenting *State v. Linscott*, 520 A.2d 1067 (Me. 1987), which upheld a conviction for murder as an accomplice).

156. See *id.* at 831–34 (presenting *People v. Swain*, 909 P.2d 994 (Cal. 1996), which reversed a conviction for conspiracy to murder on grounds of inadequate jury instruction on the required mental state).

157. See Joshua Dressler, *Understanding Criminal Law* 180 (2001) (noting that most causation questions arise in homicide cases).

158. See, e.g., Dressler 8th, *supra* note 82, at 227–50 (presenting chapter on causation with homicide cases). Breaking this mold is Hoffmann and Stuntz’s casebook, which presents a wide array of offenses and gives relatively little emphasis to homicide. This book embeds the doctrinal material on causation within its single chapter on homicide. See Hoffmann & Stuntz, *supra* note 104, at 705–28. Chapters on affirmative defenses are also typically full of homicide cases, in part because self-defense and insanity claims seem to arise most often in homicide prosecutions. See, e.g., Dressler 8th, *supra* note 82, at 516–71 (presenting homicide and attempted homicide cases in which the defendant raised self-defense or defense of others); *id.* at 654–66 (presenting homicide cases in which the defendant raised insanity).

159. But see *supra* note 151 (discussing Ashdown et al. on drugs and driving offenses, and Hoffmann & Stuntz on drug and gun crimes). To be sure, homicide and other serious offenses are more likely to generate appeals and thus appellate opinions. But the case method can’t be blamed for the overwhelming focus on homicide in most casebooks. See *supra* note 66.

160. Some of the leading teaching cases are possession cases, but they are presented to teach other issues—often, nuances of mens rea analyses—rather than to examine the law of possession *per se*. See, e.g., Kadish et al. 10th, *supra* note 59, at 280–87 (using two drug possession cases, *United States v. Heredia*, 483 F.3d 913 (9th Cir. 2007), and *United States v. Jewell*, 532 F.2d 697 (9th Cir. 1976), to explore the concept of “willful blindness” in mens

Nor is it enough, for some casebook authors, simply to include lots of homicide cases. The particular murder and manslaughter cases selected are often particularly gruesome or disturbing—for example, victimized children are a recurring theme.¹⁶¹ Joshua Dressler, acknowledging criticism of some of the graphic depictions of child abuse in his casebook, has defended his choices as “pedagogically useful”: “The problem, of course, is that any class covering Criminal Law is replete with awful crimes, so there is no sensible way to protect readers from this reality, nor should we.”¹⁶² This reasoning, however, is circular. Classes in criminal law are “replete with awful crimes” if teachers and casebook authors choose to focus on awful crimes—if they choose homicides of children rather than drug possession, sexual assault rather than disorderly conduct, contract killings rather than shoplifting.

I do not think casebook authors pick the most violent cases (merely) to provoke or excite their students.¹⁶³ The selective presentation of offenses reflects and perpetuates a view of criminal law as a necessary social response to inflictions of grave harm or injury upon persons. That was Herbert Wechsler’s view of criminal law, reflected in his casebook and in his agenda for the MPC: “Whatever views one holds about the penal law, no one will question its importance in society. This is the law on which men place their ultimate reliance for protection against all the deepest injuries that human conduct can inflict on individuals and institutions.”¹⁶⁴

rea analysis); *id.* at 309–11 (presenting *Staples v. United States*, 511 U.S. 600 (1994), a gun possession case, in a section on strict liability and statutory analysis).

161. See, e.g., Dressler 8th, *supra* note 82, at 228–32 (presenting *Oxendine v. State*, 528 A.2d 870 (Del. 1987), which reversed a father’s manslaughter conviction for beating his son to death, but sustaining the conviction for the lesser included offense of assault); *id.* at 275–77 (presenting *Midgett v. State*, 729 S.W.2d 410 (Ark. 1987), which reversed a first-degree murder conviction for insufficiency of evidence but finding adequate evidence of a second-degree murder in the prosecution of a father who beat his eight-year-old son to death); *Kadish et al.* 10th, *supra* note 59, at 517–20 (presenting *Regina v. Serné*, 16 Cox. Crim. Cas. 311 (1887) (Eng.), which offered instructions on the felony murder doctrine in a prosecution of a father for setting a fire that killed his disabled son); *Ohlin* 2d, *supra* note 119, at 281 (presenting *People v. Kolzow*, 703 N.E.2d 424 (Ill. App. Ct. 1998), which upheld a manslaughter conviction of a woman who left her infant unattended in her car); *id.* at 263 (presenting *People v. Snyder*, 937 N.Y.S.2d 429 (App. Div. 2012), which upheld a mother’s conviction for depraved indifference murder of her toddler daughter). Almost every criminal law casebook includes *State v. Williams*, 484 P.2d 1167 (Wash. Ct. App. 1971), which affirmed manslaughter convictions for a couple who failed to seek medical attention for their seventeen-month-old baby. In my experience, many students are sympathetic to the defendants in *Williams*, as are, I suspect, many casebook authors. But the occasional presence of a sympathetic defendant does not undermine the observation that homicides and child victims are featured prominently in criminal law pedagogy.

162. Dressler, *Criminal Law, Moral Theory*, *supra* note 82, at 1149 n.18.

163. Dressler does, however, gesture at these goals. See *id.* at 1148–49 (“[M]any of my Criminal Law students do not come to the class expecting to be excited, even though (or is it because?) it involves the rawest material—for example, cannibalism, euthanasia, rape, tragic abuse of children, and the like.”).

164. Wechsler, *The Challenge*, *supra* note 49, at 1098.

This passage served as the epigraph to the first edition of Paulsen and Kadish's casebook and is still featured prominently in the Introduction of the latest edition.¹⁶⁵ Other casebooks, without necessarily quoting Wechsler, similarly suggest that criminal law is concerned primarily with the infliction of deeply injurious and wrongful behavior: "Criminal law forces us to wrestle with how we define and differentiate between different degrees of evil."¹⁶⁶ Casebooks thus reflect and present to students the view that criminal law is uniquely necessary and important because it is the only adequate response to a unique set of gravely injurious behaviors.¹⁶⁷ On this view, homicide is the paradigm crime. If there is a second offense that deserves substantial attention in a course about "all the deepest injuries" that humans inflict on one another, sexual assault fits the bill.¹⁶⁸

2. *The Rest of (Actual) Criminal Law.* — Speaking descriptively rather than normatively, is criminal law best understood as an effort to address violence or "the deepest injuries" that humans inflict on one another? Homicide offenses occupy a miniscule fraction of actual criminal codes, and actual homicides generate an even smaller percentage of actual criminal prosecutions.¹⁶⁹ Even if we move beyond homicide and think of all offenses that involve the infliction of physical injury, we still capture only a tiny fragment of criminal law's concerns.¹⁷⁰ And even if we think of injury in terms of property loss or nonphysical harm to a victim, we still do not capture the huge number of criminal laws that do not involve any individual victim at all.¹⁷¹ This interest in much more than "the deepest injuries" is not a new development or a pathology of late twentieth-century

165. See Kadish et al. 10th, *supra* note 59, at xxxii; Paulsen & Kadish, *supra* note 59, at vii.

166. Kennedy, *Criminal Law*, *supra* note 118, at 1; see also Ohlin, *Changing Market*, *supra* note 59, at 1155 ("Criminal law is a nasty business A book or article about criminal law often reads like a parade of horrors, an indictment of humanity's descent into moral weakness.").

167. Beyond the casebooks, scholars too often claim that without criminal law, humans simply wouldn't be able to develop and inculcate norms of fair treatment of one another. See, e.g., J. Hall, *Science and Reform*, *supra* note 121, at 787 (asserting "the paramount role" of criminal law and suggesting that criminal law shapes "basic attitudes which determine whether decency and respect for human beings are realities or mere pretensions").

168. Susan Estrich writes that "[w]e spent what seemed an eternity on homicide" when she was a law student in 1974, but her criminal law class did not address rape. Susan Estrich, *Teaching Rape Law*, 102 *Yale L.J.* 509, 509 (1992). Thanks in no small part to Estrich herself, more teachers began covering the subject and most casebooks now include a chapter on sexual assault. See *id.* at 514–16.

169. Cf. Alice Ristroph, *Criminal Law in the Shadow of Violence*, 62 *Ala. L. Rev.* 571, 573 & n.6 (2011) [hereinafter Ristroph, *Shadow of Violence*] (gathering empirical evidence on rates of violent offenses).

170. See *id.*

171. See *supra* note 160 (discussing possession offenses); *infra* notes 174–177 and accompanying text (discussing public order offenses).

overcriminalization.¹⁷² Indeed, by the numbers, criminal law is used much more often to manage petty disorder and low-level disruption than to respond to physical violence of any type.¹⁷³ Like invocations of a legality principle or a desert constraint on punishment, the claim that criminal law is focused on “all the deepest injuries” is best understood as an aspiration, a claim about the way that criminal law *should* be used. But to state this claim in descriptive terms, in the context of a course that focuses heavily on homicide cases, serves to buttress support for criminal legal interventions.

Again, the point is not that the syllabus of a criminal law course should precisely mirror patterns of actual criminal statutes or actual conduct, but that we should ask what ideological work is done by the choice to prioritize homicide and rape and exclude other offenses. Even as criminal law is depicted as a necessary response to grave physical violence, the relative inattention to low-level offenses prunes from students’ views much of the arbitrariness and discrimination that characterizes actual enforcement. A homicide prosecution *is* subject to some real constraints, starting with the need to identify an actual victim. There is no similar constraint on prosecutions for disorderly conduct, vagrancy, loitering, or an array of other public order offenses.¹⁷⁴ Note that vagrancy appears in most criminal law casebooks only as a bygone misstep, supposedly excised from American law by the Supreme Court.¹⁷⁵ Most casebooks do not mention vagrancy’s sordid history as the mechanism of convict leasing, through which southern states preserved “slavery by another name” for decades after the

172. In other words, the suggestion that criminal law is concerned primarily with homicide and like crimes was a misrepresentation from the moment it first entered American pedagogy. Published shortly before Michael and Wechsler’s casebook, Livingston Hall’s 1937 review of “the substantive law of crimes” over the prior fifty years begins by emphasizing the broad and growing scope of conduct prohibited. Areas of specific growth from 1887 to 1936 included crimes against government; regulation of business; banking and finance; food, drug, and liquor regulation; and automobile regulation. L. Hall, *The Substantive Law of Crimes*, *supra* note 111, at 619–36; see also *supra* note 66 and accompanying text (describing the wide range of offenses presented in casebooks published before 1940).

173. See, e.g., Jenny Roberts, *Why Misdemeanors Matter: Defining Effective Advocacy in the Lower Criminal Courts*, 45 *U.C. Davis L. Rev.* 277, 280–81 (2011) (“Contrary to popular belief, however, the vast majority of criminal cases in the United States are not felonies. They are misdemeanors: ‘minor’ dramas played out in much higher numbers every day in lower courts across the country.”). Of course, the point is not that humans don’t often mistreat each other, and gravely, but that grave mistreatment of another person is neither necessary nor sufficient for a criminal intervention.

174. Cf. Alexandra Natapoff, *The Penal Pyramid*, in *The New Criminal Justice Thinking* 71, 77–79 (Sharon Dolovich & Alexandra Natapoff eds., 2017) (arguing that, for the most severe offenses such as homicide, “the criminal justice system can assert with a straight face that it proceeds according to rule and is centrally motivated by the culpability of defendants,” but that no similar claim is plausible with regard to misdemeanors).

175. Several casebooks include *Papachristou v. City of Jacksonville*, 405 U.S. 156 (1972), as a main case or discuss it at length in notes. See, e.g., Dressler 8th, *supra* note 82, at 112–14.

Civil War,¹⁷⁶ nor do most books address in detail vagrancy laws' new manifestations.¹⁷⁷ Similarly, loitering appears in the course only to be struck down by the Supreme Court.¹⁷⁸ Here some casebooks do at least acknowledge that Chicago promptly reenacted its loitering statute and has so far avoided another successful constitutional challenge.¹⁷⁹ Even so, the relegation of this information to a few notes, especially in light of the casebooks' overall focus on homicide, suggests that there is a missed opportunity to study more fully the ongoing use of public order offenses as a mechanism of discriminatory enforcement.¹⁸⁰ Low-level offenses are the bread and butter of criminal law, but they all but disappear from a course that teaches criminal law as a response to "the deepest injuries" that humans can inflict.

The course's focus on homicide, with the occasional foray into sexual assault, also means that drug and gun crimes do not receive sustained attention.¹⁸¹ That omission helps a pro-carceral ideology in at least two

176. See generally Douglas A. Blackmon, *Slavery by Another Name: The Re-Enslavement of Black Americans from the Civil War to World War II* (2008). I have located only one direct reference to vagrancy's connection to convict leasing in a criminal law casebook. Hoffmann and Stuntz note that the history of vagrancy law is "scandalous" and quote a footnote from *City of Chicago v. Morales*, 527 U.S. 41, 53 n.20 (1999), that references the post-Civil War use of vagrancy. Hoffmann & Stuntz, *supra* note 104, at 41. The latest edition of Dressler's casebook adds a new note that vagrancy was used "to place limits on the actions of freed slaves," but then adds, "This should not obscure the fact, however, that lawmakers can have legitimate public safety or health concerns [that] might run afoul of legality principles." Dressler 8th, *supra* note 82, at 114. As an apparent illustration of these "legitimate public safety and health concerns," the next case addresses the prosecution of homeless persons for living in their automobiles. See *id.* at 114–20.

177. Demonstrating what we might call MPC blinders, one casebook asks whether it is still possible to draft a constitutionally valid vagrancy law, and then asks students to consider the MPC's proposed loitering statute. See Kaplan et al. 8th, *supra* note 117, at 189–90. But the question posed is not hypothetical, and it has not gone unanswered. As states quickly discovered, they could enact new vagrancy laws that would survive constitutional challenge by adding an additional element of criminal purpose or apparent threat. See Sarah A. Seo, *The New Public*, 125 *Yale L.J.* 1616, 1660 (2016) (describing the vagrancy statute that Florida enacted in the wake of *Papachristou*); T. Leigh Anenson, Comment, *Another Casualty of the War . . . Vagrancy Laws Target the Fourth Amendment*, 26 *Akron L. Rev.* 493, 499–506 (1993) (detailing the "surprising vitality" of vagrancy laws after *Papachristou*). In a world of plea bargaining, these additional elements rarely pose an obstacle for prosecutors. See Cynthia Alkon, *Hard Bargaining in Plea Bargaining: When Do Prosecutors Cross the Line?*, 17 *Nev. L.J.* 401, 416 (2017) (recognizing that "[t]here are few rules dictating how prosecutors should approach the plea bargaining process").

178. Several casebooks include or mention *Morales*, 527 U.S. 41. See, e.g., Dressler 8th, *supra* note 82, at 120; Kadish et al. 10th, *supra* note 59, at 185–93; Ohlin 2d, *supra* note 119, at 104–08.

179. See, e.g., Hoffmann & Stuntz, *supra* note 104, at 50–51; Kadish et al. 10th, *supra* note 59, at 195–97; Ohlin 2d, *supra* note 119, at 109. But see Dix, *supra* note 108, at 84–100 (presenting *Morales* without mentioning the reenactment of the gang loitering statute).

180. Lee and Harris do include a substantial discussion of the discriminatory enforcement of low-level offenses. See Lee & Harris 4th, *supra* note 108, at 76–100.

181. As noted above, there are two important exceptions. See Ashdown et al., *supra* note 119, at 871–904; Hoffmann & Stuntz, *supra* note 104, at 399–486, 535–90.

ways, each related to distinct but overlapping phenomena evoked by the term “mass incarceration.” First, and most importantly, drug and gun offenses are a crucial site of enforcement discretion and a source of profound racial disparities. This is because drug and gun offenses are often charged as possession offenses.¹⁸² Possession offenses are not quite as easily manipulated as public order offenses, since they do require evidence of contraband possessed. But the criminalization of objects and substances commonly held—such as marijuana—has meant that possession offenses also leave enforcers with wide discretion and opportunities to discriminate, so much so that one commentator has called possession “the new vagrancy.”¹⁸³ Excluding gun and drug crimes from the course is thus another mechanism to obscure the realities of arbitrary and discriminatory enforcement. It is a missed opportunity to explain, rather than simply gesture toward, the stark racial disparities in America’s prison population.

Second, the failure to include gun and drug offenses in the standard criminal law curriculum makes it more difficult for students to appreciate and understand the sheer scale of the carceral state. Recall that “mass incarceration” is sometimes used to describe the broad, cross-racial expansion of the American legal system rather than the specific racial disproportionalities in that system.¹⁸⁴ Across racial groups, though more for nonwhites than for whites, prosecutions for drug crimes (including not only some possession offenses but also manufacturing or distribution offenses) contributed substantially to America’s exponential prison growth over the twentieth century.¹⁸⁵ Gun crimes play a lesser but still important role, especially in the federal system, where gun offenses are second only

182. See Benjamin Levin, *Guns and Drugs*, 84 *Fordham L. Rev.* 2173, 2199–207 (2016) (discussing opportunities for enforcement discretion in gun and drug possession offenses).

183. Markus Dirk Dubber, *Policing Possession: The War on Crime and the End of Criminal Law*, 91 *J. Crim. L. & Criminology* 829, 908 (2001) [hereinafter Dubber, *Policing Possession*]; see also George Fletcher, *Rethinking Criminal Law* 202–03 (1978) (discussing the underlying philosophy of possession offenses as “an invitation to a class-oriented criminal law [that] could even support the introduction of racist criteria into the definition of offenses”).

184. See *supra* note 19.

185. See Hoffmann & Stuntz, *supra* note 104, at 399 (“[M]ore Americans are incarcerated for drug crimes today than were incarcerated for *all* crimes back in 1980.”). To be sure, drug prosecutions are not the sole explanation for the increase in prisoners. John Pfaff has argued that changes in prosecutorial charging practices are more important than the War on Drugs in explaining mass incarceration, but he does not deny the substantial effect of drug offenses. John F. Pfaff, *Locked In: The True Causes of Mass Incarceration and How to Achieve Real Reform* 14 (2017) [hereinafter Pfaff, *Locked In*]; see also John F. Pfaff, *Escaping from the Standard Story: Why the Conventional Wisdom on Prison Growth Is Wrong, and Where We Can Go from Here*, 26 *Fed. Sent’g Rep.* 265, 265 (2014) (“[T]he increase in drug incarcerations explains only 21 percent of the growth in state prison populations.”).

to drug offenses among the categories of crime that produce prison sentences.¹⁸⁶ Ultimately, then, the curricular focus on homicide and rape, and a corresponding neglect of drug and gun crimes, makes it possible to teach an entire course on American criminal law without a detailed discussion of mass incarceration. To the extent mass incarceration has finally made an appearance in criminal law casebooks, it is typically mentioned in a brief aside¹⁸⁷ or, worse, depicted as a perplexing development that must not unsettle the notion that criminal law is a necessary response to those who inflict “all the deepest injuries.”¹⁸⁸ Substantive criminal law casebooks offer relatively little insight into the causes of mass incarceration and racial disparities, for reasons explored in the next section.

D. *Erasing the State*

I have so far emphasized relatively easily identifiable ways in which the criminal law curriculum distorts or misrepresents criminal law to make it seem more rational, more necessary, and less arbitrary or discriminatory. This section identifies a more subtle, and more complicated, way in which the curriculum may contribute to pro-carceral policies and practices. The very conception of “substantive” law that underlies the course obscures from view the fact that law always requires human agents to operate, interpret, and enforce it. When we obscure law’s human agents, we may also obscure their flaws and limitations, or patterns of bias in their actual decisions. Racial bias is a property of humans—and an unmistakable property of the criminal law that humans have implemented and operated in the United States—but the curricular model of substantive criminal law is color-blind.

As Part I notes, substantive law is often characterized across legal fields as the law that describes the rights, duties, and obligations of private parties, while procedural law addresses the obligations and powers of public officials as they seek to enforce substantive law.¹⁸⁹ Applied to

186. See Levin, *supra* note 182, at 2213 (2016) (noting that in 2013, more federal prisoners were sentenced on weapons charges than any other category of crime save drug offenses).

187. See, e.g., Kaplan et al. 8th, *supra* note 117, at 21–27 (devoting a few pages to a discussion of incarceration rates and their relation to crime rates).

188. For example, the latest edition of Kadish’s casebook begins with a section on “the sweep of criminal law in America,” but the issues raised there are almost entirely absent from the rest of the book. See Kadish et al. 10th, *supra* note 59, at 1–7. Moreover, this section on mass incarceration is careful to emphasize the importance of criminal sanctions for some offenses: “Behavior like murder, rape, burglary, and theft remains all too common, and any well-ordered society will respond to such conduct with criminal sanctions.” *Id.* at 5. And the section ends with questions about *underenforcement* and the admonition that “[t]he challenge is to ensure that stronger enforcement tools—when needed—are deployed fairly, and not just in favor of individuals and groups that are already advantaged.” *Id.* at 7.

189. See *supra* notes 44–48 and accompanying text. Herbert Wechsler probably did not originate this account of the substance/procedure distinction, but he helped promulgate it in his celebrated federal courts casebook. See Henry M. Hart, Jr. & Herbert Wechsler, *The*

criminal law, this substance/procedure divide means that substantive criminal law includes general principles of liability as well as definitions of individual crimes.¹⁹⁰ Because statutes and formal statements of doctrine are typically facially race-neutral, so too is the substantive criminal law.¹⁹¹ The actions of state officials, such as police officers or prosecutors, are relegated to the separate realm of criminal procedure. Or, as Part I suggests, substantive law is law with its human interpreters and enforcers (and their biases, racial or otherwise) erased from the picture.¹⁹² This, I suggest, makes criminal law seem more trustworthy and more appealing as a response to social problems.

I offer a couple of examples to make the theoretical claim more concrete, but first, a point of clarification: Only some of the many humans who participate in criminal law are erased by the curricular model. Humans as *makers* of law are not entirely invisible to the usual conception of substantive law. Developed at a time of increasing codification in criminal law, the idea of substantive criminal law as a discrete and independent

Federal Courts and the Federal System 678 (1953) (defining “substantive” law as “those rules . . . which characteristically and reasonably affect people’s conduct at the stage of primary private activity”).

190. See, e.g., 1 Wayne R. LaFare & Austin W. Scott, Jr., *Substantive Criminal Law* § 1.2, at 8 (1986) (“The substantive criminal law . . . includes the definition of specific offenses and general principles of liability.”).

191. See, e.g., Paul Butler, *Affirmative Action and the Criminal Law*, 68 U. Colo. L. Rev. 841, 873 (1997) (“[A]lthough the substantive criminal law is color-blind, it favors some groups over others.”). Butler’s more recent work suggests that he would no longer characterize the substantive criminal law as color-blind. See, e.g., Paul Butler, *The System Is Working the Way It Is Supposed To: The Limits of Criminal Justice Reform*, 104 Geo. L.J. 1419, 1445–46 (2016) [hereinafter Butler, *The System Is Working*] (“[T]he law is suffused with racial hierarchy By avoiding the traps of false objectivity and colorblindness, reformers can use the law to achieve racial progress.”); see also, e.g., Justin Murray, *Reimagining Criminal Prosecution: Toward a Color-Conscious Professional Ethic for Prosecutors*, 49 Am. Crim. L. Rev. 1541, 1580–81 (2012) [hereinafter Murray, *Reimagining*] (“[C]olor-blind analyses of the criminal-justice system . . . assume that the substantive criminal law is race neutral, and that the only place where racism has room to maneuver is in . . . enforcement This assumption should be rejected because institutional racism excludes minorities from democratic political processes”).

192. See *supra* text accompanying note 48. I use the language of erasure deliberately, following critical race theorists who have used a play on words to critique purported colorblindness in the law as a mechanism for preserving racial inequality. See, e.g., Devon W. Carbado, *(E)rasing the Fourth Amendment*, 100 Mich. L. Rev. 946, 968–69 (2002) (“The Supreme Court’s investment in colorblindness . . . suggests that people of color are under-protected even as they are over-policed. In effect, from the perspective of many people of color, the Fourth Amendment has been erased.” (footnote omitted)). My claim is that the erasure of the state from conceptions of substantive criminal law has obscured, and thus protected from scrutiny, several different sources of profound racial inequalities. As Justin Murray has argued, racism in the criminal law is not limited to the enforcement decisions typically characterized as “procedure”; institutional racism affects the law we call “substantive” as well. See Murray, *Reimagining*, *supra* note 191, at 1563–64 (describing psychological research that has shown that people’s preferences for criminal law and punitive policies are affected by their subconscious racial biases).

field does not foreclose acknowledgment of the role of the legislature and its (human) members.¹⁹³ Indeed, as Part I discusses, Michael and Wechsler imagined their new criminal law course as a training ground for wise legislators or policymakers.¹⁹⁴ To the extent that a criminal law course asks students to critique existing statutes or doctrines, it must at least implicitly acknowledge law as a human construction that is thus subject to design errors.¹⁹⁵

But Wechsler—like many of his contemporaries and many of ours—believed that, with the right effort, humans could construct laws better than themselves.¹⁹⁶ This belief may be implicit in the phrase “the rule of law” at least so far as it is juxtaposed to the rule of man. The suggestion is that laws can be designed to operate without preference, bias, misperception, or other human failings. Wechsler believed that law could be rendered rational and neutral—that we could, ultimately, erase all or most human fingerprints from the law.¹⁹⁷ This vision shapes the Model Penal Code and his commentary on it, and it still shapes much of the contemporary course in substantive criminal law.¹⁹⁸ Legislators are humans, it is true, but the hope is that with reasoned deliberation humans can devise the right legislation, a substantive law free of human frailty.

Humans as makers of law are thus occasionally visible in the substantive criminal law curriculum; with much more regularity, humans as *breakers* of law are visible front and center. A criminal law course is all about human failings—of defendants. Much of the course is framed as an inquiry

193. See *supra* note 41.

194. See *supra* notes 60–69 and accompanying text.

195. Cf. Lee & Harris 4th, *supra* note 108, at 2 (describing criminal law as “a system of cultural meaning” that changes with time and identifying various specific actors who shape the law).

196. Wechsler’s commentary on the MPC illustrates his hope to inspire rational laws that avoided the occasional irrationalities of actual humans. See Wechsler, *The Challenge*, *supra* note 49, at 1097–100 (advocating for a model penal code to comprehensively reexamine penal law and fix its substantive defects because substantive criminal law must be “rational and just”); Herbert Wechsler, *The American Law Institute: Some Observations on Its Model Penal Code*, 42 A.B.A. J. 321, 321 (1956) [hereinafter Wechsler, *Some Observations*] (describing existing penal codes as “fragmentary, old, disorganized and often accidental in their coverage,” and expressing hope that a model penal code could address these difficulties).

197. See Herbert Wechsler, *Neutral Principles*, *supra* note 18, at 19 (arguing that judicial review does not render a court “a naked power organ” so long as its decision is “entirely principled,” or based on “reasons that in their generality and their neutrality transcend any immediate result that is involved”). Lloyd Weinreb has speculated that Wechsler might make a slightly different claim—that “we must proceed *as if* rationalization is possible”—whether or not it is. Weinreb, *Teaching Criminal Law*, *supra* note 35, at 289.

198. See Wechsler, *Some Observations*, *supra* note 196, at 321 (“We hope to provide a reasoned, integrated body of material that will be useful in [legislative reform].”); *id.* at 394 (“If we have erred in the details, we do submit at least that the philosophy is right.”); Wechsler, *The Challenge*, *supra* note 49, at 1098–101 (“[T]he differences [in criminal law across states] . . . call for exploration of the bases of competing views and some attempt to aid the rationality of judgment on the issues.”).

into human responsibility—of *defendants*, not public officials. The recurring question is how an objective, neutral law should assess the failings of the flawed beings who inflict deep injuries on other vulnerable beings. Students are presented with terrible events and asked how to allocate responsibility for those events among private parties, but they are not typically asked to think about *state actors*' responsibilities for either the terrible events or for the legal responses to it.¹⁹⁹ So my claim of erasure is specific. The human agents who operate the criminal law—as police, prosecutors, defense attorneys, judges, probation supervisors, and prison administrators—are mostly erased from the substantive criminal law curriculum. This erasure allows the law itself to be depicted as an objective institution free of human frailty. It allows us to pretend that “the rule of law” is distinguishable from the decisions of individual men (and women). Perhaps most importantly, the erasure of state actors allows the myth that “substantive” criminal law is color-blind.

Two concrete examples concern topics where state enforcement interests—and the possibility of racial bias—have loomed in the background without being fully addressed by the curricular canon. Affirmative defenses and inchoate offenses both involve doctrines driven by public concerns such as perceived enforcement needs or efforts to protect the legitimacy of public institutions. These doctrines are mechanisms of structural inequality: They are specific points at which racialized judgments of permissible and impermissible violence are made manifest.²⁰⁰ In several casebooks, the shadow of race already appears with respect to each of these subjects. It is the curricular handling of race that I wish to emphasize here: Rather than confronting the question of racial judgment within “substantive” criminal law itself, in teaching affirmative defenses and inchoate offenses the curriculum portrays racial bias as the property of an errant individual (preferably, the defendant). In these topics, the course keeps the primary emphasis on an analysis of the defendant's individual subjective responsibility and avoids any broader suggestion that legal institutions themselves are a source of racial inequality.

Take, first, affirmative defenses. These selective reprieves from criminal liability, such as self-defense and necessity, are mechanisms by which political institutions share—or refuse to share—their discretionary powers, including the power to use violence.²⁰¹ When Bernhard Goetz is ac-

199. See Ristroph, *Responsibility for the Criminal Law*, *supra* note 33, at 109 (“[A]n account of criminal responsibility must not rest with attributions of responsibility for individual criminal acts; it must address collective responsibility for the criminal law itself.”).

200. To be clear, I do not suggest that these doctrines are the only such points in criminal law. Rather, the point is that these doctrines are points at which racialized judgments are particularly difficult to conceal, and hence the shadow of race has already entered the curricular presentation of affirmative defenses and inchoate offenses.

201. See V.F. Nourse, *Reconceptualizing Criminal Law Defenses*, 151 *U. Pa. L. Rev.* 1691, 1702–15 (2003) (discussing self-defense and necessity doctrines in terms of “an . . . economy of relations between citizens and their state”); Malcolm Thorburn, *Justifications*,

quitted of attempted murder after shooting at Black teenagers, and after testifying that he wanted to “murder” them, the state has retroactively granted Goetz a license to use violence against those he finds sufficiently threatening—a license that echoes the state’s own discretionary powers.²⁰² This political and institutional account of justification defenses yields important insights into other old casebook favorites such as *State v. Norman*,²⁰³ and also the newer (to casebooks) topic of law enforcement justifications as a rationale for not prosecuting police officers who kill unarmed suspects.²⁰⁴

The fact that race shapes judgments about danger and threat is impossible to ignore with regard to both *Goetz* and police killings, and for these topics, casebooks do often ask students to think directly about racial bias in legal decisionmaking.²⁰⁵ Particularly noteworthy is the casebook coauthored by Cynthia Lee and Angela Harris, which draws on Lee’s scholarship to highlight the legal concept of “reasonableness” as inevitably racialized.²⁰⁶ Other casebooks are more circumspect. But having glimpsed this possibility of racial bias within the law itself, most casebooks then seek to reassert the color-blind paradigm by returning the focus to doctrinal analysis of a defendant’s subjective culpability. Thus the overall depiction of justification defenses suggests that they do (or should) involve close legal inquiries into the minds of defendants, not that these legal inquiries will themselves be shaped by race, nor that justification defenses are a mechanism by which society chooses, sometimes along racial lines, to allow one defendant and not another to avoid conviction.

The second example addresses attempt and other inchoate offenses. Attempt can be a frustrating topic for students and teachers alike, because the cases resist logical, principled explanations, and both statutory and doctrinal efforts to define an attempt are maddeningly imprecise.²⁰⁷ The

Powers, and Authority, 117 Yale L.J. 1070, 1110 (2008) (arguing that justification defenses are a kind of political authorization that permit an individual to “exercise . . . a legal power . . . [to decide] whether or not otherwise prohibited conduct is justified under the circumstances”).

202. *People v. Goetz*, 497 N.E.2d 41, 44 (N.Y. 1986).

203. 378 S.E.2d 8 (N.C. 1989).

204. See, e.g., Kadish et al. 10th, supra note 59, at 937–45; Kaplan et al. 8th, supra note 117, at 594–601.

205. See, e.g., Kadish et al. 10th, supra note 59, at 878–81 (“Notes on Self-Defense and Race”); *id.* at 936–45 (emphasizing racial disparities in uses of force by police).

206. Lee & Harris 4th, supra note 108; see also Cynthia Lee, *Murder and the Reasonable Man: Passion and Fear in the Criminal Courtroom 4–6* (2007) [hereinafter *Lee, Reasonable Man*] (examining how unconscious racism influences perceptions of criminality).

207. See, e.g., Kadish et al. 10th, supra note 59, at 641 (“Statutory definitions of the crime of attempt are usually minimal.”). Scholars’ frustration with attempt doctrine seems to have been considerably greater before the promulgation of the MPC; now it seems that many criminal law specialists believe (wrongly, in my view) that the MPC has offered a clear and rational definition of a crime of attempt. For an example of the pre-MPC view, see John S. Strahorn, Jr., *Preparation for Crime as a Criminal Attempt*, 1 Wash. & Lee L. Rev. 1, 1 (1939) (“Both as fascinating and as fruitless as the alchemists’ quest for the philosopher’s

frustration may arise from trying to put the square peg of public enforcement interests into the round hole of private moral responsibility. Attempt is not best understood as an independent crime with its own mens rea and actus reus—notwithstanding the depiction of it in just those terms in many a casebook—which then leads students to write confused exams that struggle with the impossible question whether a defendant is guilty of *attempt* in the abstract, without reference to the specific offense that was attempted.²⁰⁸ Instead, attempt doctrine is a way to expand the scope of criminal liability previously established by independently defined offenses. This expansion of liability is not driven primarily by a determination that preparation for a crime is sometimes (but exactly when?) blameworthy, but rather by a determination that sometimes it is appropriate for enforcers to intervene even though they cannot establish a violation of some preexisting statute.²⁰⁹ What it takes to expand liability depends upon the courts' assessments of law enforcement interests in a particular case. Attempt doctrine is thus a departure from the principle of legality, and before Wechsler and Kadish imposed their vision of substantive criminal law, the doctrine was sometimes explicitly praised for just that reason.²¹⁰

Cases about inchoate crimes can reveal the shadows of the enforcement officials otherwise banished from a course on “substantive” law, as evident in the discussions of *McQuirter v. State*²¹¹ found in several

stone has been the search, by judges and writers, for a valid, single statement of doctrine to express when . . . preparations to commit a crime becomes a criminal attempt threat.”).

208. See, e.g., Dressler 8th, *supra* note 82, at 759–70 (identifying the mens rea and conduct elements of attempt); Hoffmann & Stuntz, *supra* note 104, at 490 (same).

209. See Michael T. Cahill, Inchoate Crimes, in *The Oxford Handbook of Criminal Law* 512, 515 (Markus Dirk Dubber & Tatjana Hörnle eds., 2014) (developing an “intervention-based” account of attempt and showing that it better explains existing doctrine than other theories).

210. See Thurman Arnold, Criminal Attempts—The Rise and Fall of an Abstraction, 40 *Yale L.J.* 53, 76 (1930) [hereinafter Arnold, Criminal Attempts] (characterizing attempt doctrine as a power “to extend the policy or limits of any particular criminal prohibition” when the courts feel it is appropriate to do so (footnote omitted)); *id.* at 79 (claiming that the “very vagueness [of attempt law] has been its salvation, for it makes it possible to arrive at good results in many cases”). Of course, Arnold wrote not only before Wechsler, but also before authoritarian regimes in Germany and Russia notoriously rejected legality in favor of the power to impose “punishment by analogy,” or convictions for conduct analogous but not quite identical to conduct proscribed by existing law. See, e.g., Preuss, *supra* note 111, at 847 (1936) (quoting the newly enacted “punishment by analogy” section of National Socialist law and concluding that “the principle *nullum crimen, nulla poena sine lege* . . . has been abolished”). A desire to distinguish U.S. law from such provisions was surely part of American scholars' motivation to emphasize legality during and immediately after World War II. Occasionally one still finds an acknowledgment that attempt doctrine operates largely through principles of analogy. See, e.g., Arnold N. Enker, Impossibility in Criminal Attempts—Legality and the Legal Process, 53 *Minn. L. Rev.* 665, 674 (1969) (“Because attempt is a relational crime—it is defined in relation to the statutorily defined substantive crime allegedly attempted—there is available a judicial technique for deciding individual cases, namely the technique of analogy.”).

211. 63 So. 2d 388 (Ala. Ct. App. 1953).

casebooks.²¹² In *McQuirter* a state court affirms the conviction of “a Negro man” for the crime of “an attempt to commit an assault with intent to rape.”²¹³ The charge and conviction were based upon the facts that Mr. McQuirter had walked near a white woman on a public street, in a manner that she found threatening, and on police testimony (denied by the defendant) that the defendant had confessed to an intent to commit rape.²¹⁴ In upholding the conviction, the Alabama court held that criminal intent could be established by consideration of “social conditions and customs founded upon racial differences, such as that the prosecutrix was a white woman and defendant was a Negro man.”²¹⁵

Police officers had to arrest McQuirter and report his supposed confession; a prosecutor had to pursue charges. But the Kadish casebook directs our attention not to the legal professionals, but to the lay jury, implying that juror bias led to an improper outcome.²¹⁶ Moreover, although this case illustrates starkly the possibility that human enforcers or adjudicators will act upon all-too-human biases, the Kadish casebook suggests that the problem can be solved with better substantive law, such as an “equivocality” test for attempts.²¹⁷ No doubt different legal definitions of attempt may create more or less discretion, but it seems highly unlikely that an inquiry into (un)equivocality will be immune from racial bias. Rather, for some enforcers, bias is exactly what will make a Black man’s guilt seem unequivocal.

To the extent that different substantive definitions of attempt and other inchoate crimes give enforcers and adjudicators varying degrees of discretion, the MPC moves toward more discretion, not less.²¹⁸ In a turn

212. See Dressler 8th, *supra* note 82, at 751; Kadish et al. 10th, *supra* note 59, at 657–58.

213. *McQuirter*, 63 So. 2d at 388.

214. *Id.* at 389.

215. *Id.* at 390.

216. Kadish et al. 10th, *supra* note 59, at 658–59. The Kadish casebook’s use of Bennett Capers’s work is notable here and illustrative of the curricular effort to defend a color-blind account of substantive criminal law. Capers uses *McQuirter* and other cases to identify what he calls “the white letter law of rape”—rules and principles that disappear from official view, like white text on a white page, but nonetheless enshrine racial bias into substantive law. Bennett Capers, *The Unintentional Rapist*, 87 Wash. U. L. Rev. 1345 (2010). According to Capers, *McQuirter* is useful as a rare case where this white letter law becomes black letter, and therefore visible. See *id.* at 1385. The Kadish casebook quotes Capers’s article, but only for the proposition that the evidence supported an acquittal. See Kadish et al. 10th, *supra* note 59, at 658–59 (quoting Capers to highlight the troublesome “context of racial bigotry” in the case). Neither this section on *McQuirter*, nor the separate chapter on rape law in Kadish, mentions or addresses “the white letter law of rape” or Capers’s broader challenge to the image of law as color-blind.

217. Kadish et al. 10th, *supra* note 59, at 659 (stating that an equivocality test—or an inquiry into “how clearly [the defendant’s] acts bespeak his intent”—“would foreclose conviction in a case like *McQuirter*”).

218. See Luis Chiesa, *The Model Penal Code, Mass Incarceration, and the Racialization of American Criminal Law*, 25 Geo. Mason L. Rev. 605, 650 (2018) [hereinafter Chiesa,

that many scholars and casebook authors depict as progressive, the MPC made the defendant's actions less important, and the defendant's mental state more important, to the definition of attempt.²¹⁹ But since mental states are typically attributed rather than "proved" in any scientific sense, doctrines heavily focused on mental states are more prone to manipulation by legal decisionmakers.²²⁰ The expansive discretion afforded by inchoate offenses has played a significant role in the construction of the carceral state, as evidenced by the frequency with which drug and gun crime prosecutions are based on attempt, solicitation, or conspiracy charges arising from undercover or "sting" operations.²²¹ But these dimensions of inchoate offenses are underemphasized in or sometimes entirely absent from criminal law casebooks. Again, that omission appears to be a result of the conception of substantive criminal law as rules for private individuals, with state officials excised from the picture.²²²

Racialization of American Criminal Law] ("[T]he ideas that led to the enactment of the Model Penal Code make it easier for racially prejudiced judges and juries to justify reaching outcomes that discriminate against black defendants.").

219. See *id.* at 608–09 (noting that the MPC's focus on culpability was originally considered progressive); Arnold H. Loewy, *Culpability, Dangerousness, and Harm: Balancing the Factors on Which Our Criminal Law Is Predicated*, 66 N.C. L. Rev. 283, 306–07 (1988) (detailing the increased focus on the defendant's mental state in the MPC's definition of attempt).

220. See Fletcher, *supra* note 183, at 119, 233 (contrasting "manifest criminality" and "subjective criminality," and noting that the latter, because it relies more heavily on claims about mental states, "generates concern about the dangers of convicting the innocent"); see also *supra* notes 106, 117 (discussing ways in which legal "proof" differs from mathematical or scientific proof); *supra* note 121 (noting that mental states are not actually concrete, discoverable facts).

221. See Elizabeth E. Joh, *Breaking the Law to Enforce It: Undercover Police Participation in Crime*, 62 Stan. L. Rev. 155, 175–76 (2009) (discussing the MPC approach to inchoate offenses as part of a trend toward "removing barriers to conviction in the undercover context"); Eda Katharine Tinto, *Undercover Policing, Overstated Culpability*, 34 Cardozo L. Rev. 1401, 1441–51 (2013) (explaining several undercover policing techniques in which officers encourage defendants to commit particular criminal conduct in order to expose them to longer, and often mandatory, prison sentences); cf. Chiesa, *Racialization of American Criminal Law*, *supra* note 218, at 649 (arguing that "the Code's approach to inchoate crimes and possession offenses facilitated the casting of a 'vast net of mass incapacitation' by providing lawmakers and courts with an expansive array of 'mechanisms' for intervention by enforcement officials (quoting Dubber, *Policing Possession*, *supra* note 183, at 992)).

222. An example will also reveal the ways in which criminal law scholars depict law one way in the journals and another in the casebooks. Luis Chiesa has published a powerful critique of the MPC's approach to inchoate offenses and the effects of that approach on enforcement officials and adjudicators. See generally Chiesa, *Racialization of American Criminal Law*, *supra* note 218. But Chiesa's own criminal law casebook offers a fairly traditional presentation of attempt that focuses on "the conduct element" and "the subjective offense element (*mens rea*)," and includes only one brief note on enforcement implications. Chiesa, *Substantive Criminal Law*, *supra* note 123, at 331–70; see also *id.* at 349 ("The fact that the Model Penal Code's substantial step test generates attempt liability earlier than the common law proximity tests has important consequences for the police.").

Thus, human enforcers and adjudicators—and the ways these humans may be influenced by bias, irrationality, or political and social concerns unrelated to the particular defendant—are mostly invisible in a course in substantive criminal law. This erasure of the state and its human agents generates a more sanguine depiction of criminal law. It trains new lawyers to indulge the fantasy of a self-executing law that vindicates individual freedom, a law that follows its own objective and neutral principles and never functions, in Wechsler's term, as a "naked power organ."²²³ All of this makes criminal law much more palatable. It makes the choice of a criminal sanction seem a much safer option.

One more observation deserves emphasis. As the previous section notes, many casebooks in recent years have added some acknowledgment, often in their opening pages, of mass incarceration and the profound racial disparities in American criminal law.²²⁴ But most of the content between the book covers presents a legal framework in which mass incarceration and racial disparities should never have arisen—most of the curriculum suggests that criminal law is color-blind and subject to constraints. Thus, casebooks acknowledge the fact of racialized mass incarceration but do not offer an explanation of the phenomenon. The lack of an adequate explanation, I suggest, stems from the separation of substance and procedure, and the corresponding exclusion of state officials from most discussions of substantive law.²²⁵ Teachers and scholars should consider the impact of mentioning, but failing to explain, grave racial disparities among incarcerated persons in a course that repeatedly emphasizes the careful operation of criminal law. By failing to look closely at the human agents of criminal law who have directed criminal sanctions along racial lines, the curriculum runs the risk of reinforcing perceptions of Black criminality.²²⁶

E. *Casebooks: The Medium and the Message*

In the preceding discussion, I have identified several pro-carceral messages that are fairly consistent across criminal law casebooks, though I have tried also to note the occasional departures from the norm. Here I want to shift focus from the message to the medium and offer reflections

223. Wechsler, *Neutral Principles*, supra note 18, at 19.

224. See supra notes 187–188 and accompanying text.

225. Cf. Peller, supra note 46, at 2234 (arguing that "the process-substance filter for analyzing criminal law," along with an "integrationist" ideology of color-blindness, have "severely limit[ed] the range of critical discourse about the interplay of race and criminal law").

226. In the decades after the Civil War, white Americans across the nation, including political leaders, social scientists, and other elites, constructed an association of Black Americans with criminal behavior that has shaped American law and society ever since. See Khalil Gibran Muhammad, *The Condemnation of Blackness: Race, Crime, and the Making of Modern Urban America I* (2010) ("[T]he statistical language of black criminality . . . is the glue that binds race to crime today as in the past.").

on ways in which the medium through which criminal law is taught—the casebook—makes it more difficult to change the messages in the course.²²⁷

The law school casebook is “truly a unique American creation,”²²⁸ and predictions of its demise in an age of electronic media have so far fallen short.²²⁹ Legal educators in other countries have traditionally preferred treatises or independently curated teaching materials.²³⁰ Unlike teaching materials assembled by an individual instructor for one’s own course, casebooks are a commodity. They are fairly expensive to produce, and while there is a captive market for them, there is sufficient competition in the casebook market to create some constraints on casebook authors.²³¹ Fields of law develop their own canons, and once established, a canon exerts a strong gravitational pull.²³² An unorthodox approach is risky, for unless it gains converts quickly and changes the canon (as did Michael and

227. Cf. Marshall McLuhan, *Understanding Media: The Extensions of Man* 7–8 (1964) (introducing the claim that “the medium is the message”).

228. Douglas W. Lind, *An Economic Analysis of Early Casebook Publishing*, 96 *Law Libr. J.* 95, 95 (2004).

229. See Joseph Scott Miller & Lydia Pallas Loren, *The Idea of the Casebook: Pedagogy, Prestige, and Trusty Platforms*, 11 *Wash. J.L. Tech. & Arts* 31, 32 (2015) (noting that conventional casebooks have not become “toast” as thought possible more than a decade ago (internal quotation marks omitted) (quoting Robert Laurence, *Casebooks Are Toast*, 26 *Seattle U. L. Rev.* 1, 1 (2002))).

230. In the 1990s, however, some European educators—inspired by the American example—sought to develop a series of casebooks on “the common law of Europe.” See Mauro Bussani, *Current Trends in European Comparative Law: The Common Core Approach*, 21 *Hastings Int’l & Compar. L. Rev.* 785, 787–88 (1998).

231. See Mitu Gulati & Veronica Sanchez, *Giants in a World of Pygmies? Testing the Superstar Hypothesis with Judicial Opinions in Casebooks*, 87 *Iowa L. Rev.* 1141, 1145–46 (2002) (noting that law professors assign casebooks to “captive audiences” and the market for casebooks is “highly competitive”). Authors need to appeal to law professors (and not directly to law students, though of course professors may take student interests or preferences into account). While a professor could in theory choose a casebook in order to “teach against” it, as discussed below, it is much more likely that they will choose one that presents the subject in line with her own views. See *infra* notes 240–244 and accompanying text.

232. Cf. Introduction, *in* *Legal Canons* 1, 6 (J.M. Balkin & Sanford Levinson eds., 2000) [hereinafter Balkin & Levinson, *Legal Canons*] (“Law professors also rely on anthologies, though we call them ‘casebooks.’ Indeed, it is safe to say that no part of the academy relies more on anthologies than do American law schools.”). Interestingly, even the arrival of platforms that allow professors to self-publish e-casebooks has led to relatively few changes in the content of casebooks. See Miller & Loren, *supra* note 229, at 39. Moreover, new professors are especially likely to pick an already established casebook, and then there is strong path dependence. *Id.* at 44–45. Finally, as I have noted, scholarly canons and pedagogical ones can diverge. Robert Weisberg’s essay for the *Legal Canon*’s volume begins with the suggestion that Blackstone asked “all the key questions” about substantive criminal law and answered them about as well as we are able to answer them now. Robert Weisberg, *Criminal Law*, *in* Balkin & Levinson, *Legal Canons*, *supra*, at 130, 130–31. But the remainder of Weisberg’s essay discusses scholarship that considers the constructed nature of crime, unanswered (and unanswerable) questions about agency and free will, the use of the criminal law to further racial or class subordination, and the limits of human and legal rationality. *Id.* at 132–52. The *pedagogical* canon has not tackled most of these issues.

Wechsler's book, which was certainly unorthodox when first introduced), it will not survive in the market.²³³ Casebooks are thus likely to generate uniformity of thought. They make it less likely that scholars and teachers will depart from the canon or disagree about what constitutes the canon.

I do not want to suggest that evolution is impossible. As mass incarceration and racial disparities have gained more public attention, some casebooks have made important adjustments to the pedagogic model that Wechsler developed and Kadish refined. Kadish's own casebook now has a full chapter on discretion, though it is tucked at the end of the book.²³⁴ The importance of enforcement discretion is referenced by some other authors as well, most prominently Joseph Hoffmann and William Stuntz, and Cynthia Lee and Angela Harris.²³⁵ Indeed, the explicit aim of Hoffmann and Stuntz is to reorient the study of criminal law away from moral philosophy and toward "the political economy of criminal justice—the complex relationships between the key institutional players (legislatures, prosecutors, police, judges, and juries) that share responsibility for defining, interpreting, and applying criminal law."²³⁶ As noted above, some books now include some empirical information on incarceration rates and patterns of racial disparity, and two books now feature drug crimes prominently.²³⁷

233. Here it is worth noting a couple of ghosts of casebooks past—books that rejected many of the premises of the Michael and Wechsler model and have now gone out of print. Richard C. Donnelly, Joseph Goldstein & Richard D. Schwartz, *Criminal Law: Problems for Decision in the Promulgation, Invocation, and Administration of a Law of Crimes* (1962) (emphasizing criminal law as a social construct and an instrument of social control, and presenting extensive psychiatric and clinical resources to suggest alternatives to criminal law); Lloyd L. Weinreb, *Criminal Law: Cases, Comments, Questions* (7th ed. 2003). Both of these books begin with a "case file"—a varied array of legal documents, transcripts, news reports, and other materials related to a single criminal prosecution. As it happens, both books use cases with child victims for these files, in keeping with the interest in child victims noted above. See *supra* notes 161–162 and accompanying text. But overall, the legal theory underlying each of these books is quite different from that underlying Michael and Wechsler, Kadish et al., and most other criminal law casebooks. Weinreb described the differences between his approach and Wechsler's as "jurisprudential rather than pedagogical" and explained that he rejected Wechsler's assumption "that the criminal law is—or should be and could be—a product of reason." Weinreb, *Teaching Criminal Law*, *supra* note 35, at 283–84.

234. Kadish et al. 10th, *supra* note 59, at 1179–262.

235. See Hoffmann & Stuntz, *supra* note 104, at 2–3 (discussing enforcement discretion and the resulting racial disparities in criminal law); Lee & Harris 4th, *supra* note 108, at 81–100 (same).

236. Hoffmann & Stuntz, *supra* note 104, at xxi.

237. See *supra* notes 151, 187–188 and accompanying text; cf. Sharon Dolovich, *Teaching Prison Law*, 62 *J. Legal Educ.* 218, 218–19 (2012) (urging law schools to incorporate "the administration of punishment" into their curriculum). See generally Tajania Y. Henderson, *Teaching the Carceral Crisis: An Ethical and Pedagogical Imperative*, 13 *U. Md. L.J. Race, Religion, Gender & Class* 104 (2013) (assessing the state of casebooks on criminal law, criminal procedure, and sentencing, and suggesting ways to incorporate the topic of mass incarceration into the standard law school curriculum).

But I do not think these developments do much to undercut the pro-carceral messages outlined in the previous four sections. To be clear, this Essay identifies a sin of commission, not merely one of omission. Discussions of discretion, mass incarceration, and racial disparities appear too much like accessories added as afterthoughts—which, for the most part, they have been.²³⁸ That allows the unattractive aspects of contemporary criminal law to be seen as bugs, not features, or as newly developed pathologies that may yet be excised with a still-better model penal code or the right constitutional decision from the Supreme Court. But the use of criminal law to police a wide range of ordinary conduct, the broad discretion of enforcers, and patterns of bias in enforcement are not twentieth or twenty-first century novelties.²³⁹ What changed in the second half of the twentieth century was the scope and frequency of criminal interventions, not the fact of discretion or the failure of criminal law to live up to its promise of legality. Meanwhile, the criminal law curriculum has taken some small steps to acknowledge the existence of discretion and discrimination, but it retains the same underlying conceptual model that has failed to contain discretion and discrimination for more than half a century.

Finally, I want to revisit an assumption made at the outset of this Part: The content of casebooks serves as a roughly accurate guide to what is actually taught in criminal law classrooms. It is possible, after all, to “teach against” a casebook.²⁴⁰ Or at least, it is possible to try. A teacher can use lectures and class discussion to question aspects of the written assignment. Sometimes the order of assignments or the pairing of cases in an unexpected way can generate insights; sometimes one can use a case to illustrate a point other than the one the authors intended.²⁴¹ Michael and

238. Moreover, even if one or two casebooks are less pro-carceral than most, this has little impact overall if those casebooks are not widely adopted.

239. See Ristroph, *Intellectual History*, supra note 12, at 1952 (“[O]ther key phenomena associated with a contemporary crisis have in fact been attributes of American criminal law since the early days of the republic.”); Ristroph, *What Is Remembered*, supra note 34, at 1163–70 (noting that policing and criminal law as a tool of racial control have been present in American society long before the twentieth century).

240. See, e.g., Ariela J. Gross, *Teaching Humanities Softly: Bringing a Critical Approach to the First-Year Contracts Class Through Trial and Error*, 3 *Calif. L. Rev. Cir.* 19, 20 (2012) (recounting advice from senior colleagues “to assign a ‘plain vanilla’ casebook, and then teach against the casebook”).

241. For example, *Regina v. Dudley & Stephens*, 14 Q.B.D. 273 (1884) (Eng.), appears in nearly every casebook to generate discussions about the purposes of punishment and the necessity defense, but it is also a stark example (albeit a dated one) of nonadherence to the principle of legality. Dudley and Stephens were prosecuted for murder after cannibalizing a fellow sailor while stranded at sea without other food or water. *Id.* Their act, while tragic, was also consistent with the “custom of the sea” at that time, except that they chose the weakest and sickest sailor to kill rather than drawing lots. See A.W. Brian Simpson, *Cannibalism and the Common Law: The Story of the Tragic Lost Voyage of the Mignonette and the Strange Legal Proceedings to Which It Gave Rise* 60–66 (1984). The public and even the dead sailor’s family were largely sympathetic to Dudley and Stephens, but the English court condemned them to death. Although the court mentioned the failure to draw lots, that fact did not appear to be dispositive; rather, the court wanted to change the

Wechsler designed a casebook to enable students to read judicial opinions critically, and a teacher can similarly encourage students to read the casebook itself critically. A teacher can highlight and scrutinize ideological claims or presuppositions; they can ask what is left out or what is going unsaid.²⁴² They may choose to omit particular topics, such as punishment theory, in order “to avoid . . . inoculating lawyers, some of who will be legislators, prosecutors, and judges, with the conviction that American punishment is under the control of law and thus more or less both democratic and rational.”²⁴³ Unsurprisingly, teaching against a casebook is a method that may be more common among faculty inclined to critical perspectives.²⁴⁴

A related option is to use a casebook but decline to rely upon it to frame the structure or even much of the content of the course. In a thoughtful “Guerilla Guide” to teaching criminal law, Amna Akbar and Jocelyn Simonson discuss several “ways to broaden and deepen the discourse in the classroom when teaching first-year Criminal Law.”²⁴⁵ Their suggestions include expanding the discussion of punishment theory to include more information that could enable skepticism about the wisdom and justice of criminal sanctions; giving greater attention to race, gender, and class; and “shortening or eliminat[ing] them with criminal law subjects that affect the lives of more people,” such as misdemeanors and drug laws.²⁴⁶ For over a year, these suggestions and others have been actively discussed among a nationwide group of professors loosely organized as “decarcerationlawprofs.”²⁴⁷ Casebook tables of contents notwithstanding, at least some professors are engaged in a campaign of collective subversion, telling students after each

applicable law. See *id.* at 240; see also Nourse, *supra* note 201, at 1715 (“[T]he court was worried that the ‘custom of the sea’ was . . . too easily subject to abuse . . . [H]istory tells us that the case was constructed for the precise purpose of announcing a new rule that would change the ‘custom of the sea.’”).

242. See Melissa Murray, *Teaching Gender as a Core Value: The Softer Side of Criminal Law*, 36 *Okla. City U. L. Rev.* 525, 526–29 (2011) (noting that “men predominate in most criminal law casebooks . . . [while] women are notable in their victimhood,” and suggesting ways to introduce discussions of gender (and race) into the course).

243. Simon, *Teaching Criminal Law*, *supra* note 139, at 1316.

244. And perhaps also more common among women faculty. See Deborah Waire Post, *Outsider Jurisprudence and the “Unthinkable” Tale: Spousal Abuse and the Doctrine of Duress*, 26 *U. Haw. L. Rev.* 469, 471 n.11 (2004) (noting, in a discussion of teaching from a critical perspective, that the author had “heard colleagues, mostly women, talk about the fact that they teach against the casebook”).

245. No. 2: Criminal Law, *Guerrilla Guides to L. Teaching* (Aug. 29, 2016), <https://guerrillaguides.wordpress.com/2016/08/29/crimlaw> [<https://perma.cc/5GZV-ACHT>] [hereinafter *Criminal Law, Guerrilla Guides*]; see also Jocelyn Simonson & Amna Akbar, *Rethinking Criminal Law, LPE Project* (Oct. 24, 2018), <https://lpeproject.org/blog/rethinking-criminal-law> [<https://perma.cc/KM7H-X6Z9>].

246. See *Criminal Law, Guerrilla Guides*, *supra* note 245.

247. Email from Valena Beety, Professor of L. & Deputy Dir. of the Acad. for Just., Ariz. State Univ., to author (Dec. 19, 2019, 12:46 PM EST) (on file with the *Columbia Law Review*).

casebook assignment: *But be aware, it isn't really like that at all, and it never has been.*

As much as I endorse this decarceral pedagogy, I believe that it will have little long-term effect without an overhaul of the underlying curricular material. First, the casebooks themselves will continue to shape the way many professors teach and think, as suggested by the remarkable continuity in content as new criminal law casebooks and new editions of old casebooks come to market.²⁴⁸ Note that today's faculty were educated in the same canon that they now teach. Criminal law scholarship suggests that most faculty members still embrace the canonical account of criminal law as a worthy ideal, even if they recognize that current conditions do not correspond to that ideal (and thus should be seen as a "crisis").²⁴⁹ But even as some faculty have recognized and tried to counter the pro-carceral messages in the very materials that they have asked students to read, teaching against a casebook is not usually effective.²⁵⁰ Law is a field where written texts matter a great deal, even if they do not determine everything. A casebook sets "the tone of the course" in a way that is difficult to disrupt.²⁵¹ In addition, it is difficult to explain to students why they are being asked to read several hundred pages of a seemingly authoritative text (perhaps after having spent a couple hundred dollars on said text) when it is not, in fact, trustworthy.

There is one more important factor that may contribute to uniformity among casebooks and in the law school curriculum: the Multistate Bar Exam (MBE), which did not exist when Michael and Wechsler launched the modern criminal law course, but which now incorporates some aspects of their model.²⁵² To be sure, the correlation between current casebooks and the bar exam is often overstated; the bar exam also tests pretend law,

248. For the anecdotal evidence, I am relying on discussions of criminal law pedagogy at large academic conferences over the past three years.

249. See, e.g., Ristoph, *Intellectual History*, supra note 12, at 2004–07 (explaining how the legal academy came to see criminal law as "in crisis"). For more on the potential divergence between the scholarly canon and the pedagogical canon, see supra note 232; infra Part IV.

250. See Jane B. Baron & Richard K. Greenstein, *Constructing the Field of Professional Responsibility*, 15 *Notre Dame J.L. Ethics & Pub. Pol'y* 37, 39 (2001) (noting that efforts to teach against the prevailing construction of professional responsibility have "marginal effect"); Ellen Dannin, *Teaching Labor Law Within a Socioeconomic Framework*, 41 *San Diego L. Rev.* 93, 96 (2004) ("Any teacher who has had the misfortune of having to teach against the casebook knows just how powerful a hold the text has on the tone of a course."); Post, supra note 244, at 471 n.11 (noting that teaching against a casebook is not an effective pedagogical method).

251. Dannin, supra note 250, at 96; see also Gulati & Sanchez, supra note 231, at 1149 (noting that when a professor tries to cast a judicial opinion as "the viewpoint of a lunatic fringe," students are likely to see the case as more authoritative and "the professor begins to look like the one on the lunatic fringe").

252. See Philip C. Kissam, *Law School Examinations*, 42 *Vand. L. Rev.* 433, 464 n.98 (1989) (noting that the MBE was introduced in 1973).

but it's not exactly the same pretend law that casebooks emphasize.²⁵³ All the same, the overlap between the conception of criminal law in today's curriculum and the conception on the MBE is substantial. Whether law school courses do or should "teach to the bar exam" is, of course, a matter of debate. But any faculty who do feel a responsibility to prepare their students for the bar exam may feel constrained in how much they can depart from Wechsler's model.

Criminal law scholars who do not want to deliver pro-carceral messages need more than a tweaked casebook or a clever lecture plan. Ultimately, as Deborah Waire Post observed: "[C]ritical perspectives require more than reflection on the content of the canon. Critical perspectives require us to reconceive and reconstruct the canon."²⁵⁴ That is certainly a project too big to complete in this Essay, but I sketch an initial framework in Part IV. Before I take up that effort, though, Part III specifies a bit more carefully the pathways by which the criminal law curriculum is likely to affect criminal legal practices.

III. A LAW SCHOOL TO PRISON PIPELINE?

Among the many causes of mass incarceration identified by scholars, legal education has not so far taken a turn on the stage. This Part offers a few reasons to think that the curricular model Part II describes did have some effect on the many small steps and choices that have added up to mass incarceration.²⁵⁵ To recap, that model begins with the premise that substantive criminal law is separate and distinct from enforcement practices.²⁵⁶ The model further teaches that substantive criminal law is bound by a principle of legality and other constitutional constraints, including a presumption of innocence and a due process requirement that guilt be proved beyond a reasonable doubt; crimes are defined according to a logical structure that includes necessary components such as mens rea and actus reus; and criminal law is a necessary mechanism to address "the deepest injuries" that individuals inflict on one another, especially and notably acts of extreme physical violence such as homicide and rape.²⁵⁷ These claims are the canons of substantive criminal law.

At the outset, a few caveats about claims of cause and effect seem important. First, mass incarceration, whether understood more narrowly

253. See Daniel J. Solove, *The Multistate Bar Exam as a Theory of Law*, 104 Mich. L. Rev. 1403, 1406 n.10 (2006) ("[I]f one practiced the criminal law on the Bar Exam, one might be disbarred.").

254. Post, *supra* note 244, at 471.

255. See James Forman, Jr., *Locking Up Our Own: Crime and Punishment in Black America* 45 (2017) ("Mass incarceration is the result of small, distinct steps, each of whose significance becomes more apparent over time, and only when considered in light of later events.").

256. See *supra* Part I.

257. See *supra* Part II.

as the increase in incarcerated Americans or more broadly as a vast expansion of both custodial and noncustodial criminal law interventions, is a historical transformation unlikely to be easily explained with a simple model.²⁵⁸ Note also that the most likely explanations for the growth in the prisoner population may not also be the best explanations for the overall expansion of all criminal interventions, both custodial and noncustodial.²⁵⁹ And finally, I take some heed of the disagreement among intellectual historians about whether scholars can or should make causal claims about the relationship between ideas and practices.²⁶⁰ With all these caveats in mind, I nonetheless speculate (not prove) that what goes on in the classroom has some effect on the operation of law beyond the classroom. This Part suggests that legal education indoctrinates new lawyers with a set of ideas that make these lawyers more likely to embrace criminal sanctions. The curricular model discussed in the previous two Parts gives lawyers confidence in criminal law—and importantly, it forestalls and discourages important critiques.

A. *How Mass Incarceration Thinks*

A central inquiry of this Essay is the relationship between ideas and practices. How does a given way of thinking shape the choices we make and the actions we take? The anthropologist Mary Douglas tackled this issue in her short but influential book *How Institutions Think*.²⁶¹ Douglas argued that for an institution to survive, it must structure the thinking of the individual humans who will participate in and perpetuate that institution.²⁶² People must come to view the institution as necessary and natural.²⁶³ At the same time, to change or eliminate an institution, humans must find a way to identify and then escape the conceptual categories that the institution has imposed: “[T]he hope of intellectual independence is

258. See *supra* note 19; see also Marie Gottschalk, *The Prison and the Gallows: The Politics of Mass Incarceration in America* 10 (2006) (discussing the complex interaction of different factors contributing to mass incarceration).

259. For example, since many convictions for drug offenses do not result in custodial sentences, the War on Drugs probably played a more prominent role in driving up all criminal convictions than it did in driving up the prisoner population specifically. See Alice Ristroph, *Farewell to the Felony*, 53 *Harv. C.R.-C.L. L. Rev.* 563, 600 n.178 (2018) [hereinafter Ristroph, *Farewell to the Felony*].

260. See, e.g., William W. Fisher III, *Texts and Contexts: The Application to American Legal History of the Methodologies of Intellectual History*, 49 *Stan. L. Rev.* 1065, 1088–92 (1997) (contrasting different approaches to the question whether historians can develop causal explanations).

261. Mary Douglas, *How Institutions Think* 3 (1986).

262. *Id.* at 46 (noting that an institution needs “a parallel cognitive convention” to succeed).

263. See *id.* at 46–47 (“[M]ost established institutions, if challenged, are able to rest their claims to legitimacy on their fit with the nature of the universe.”).

to resist, and the necessary first step of resistance is to discover how the institutional grip is laid upon our mind.”²⁶⁴

Consider the most widely accepted accounts of the growth of prison populations. Researchers have tested and rejected the hypothesis that higher rates of criminal offending drove the prison expansion.²⁶⁵ Instead, the increase in convictions and incarcerated people has been traced to changes in policy and changes in legal practice.²⁶⁶ With regard to policy, changes in sentencing law such as mandatory minimums, three-strikes laws, and reductions or abolishment of parole have been identified as significant contributors to the increase in people who are incarcerated.²⁶⁷ With regard to legal practice, prosecutors’ decisions to pursue more severe sentences are widely recognized, even as scholars disagree about the relative importance of prosecutorial choices in relation to sentencing policy.²⁶⁸ Notice that whatever the relative importance of these factors, mass incarceration happened through law: through formal legal changes with regard to sentencing, and through choices made in the legal process. The carceral state was built in accordance with *nulla poena sine lege*, though not quite in the sense that casebooks embrace that phrase.²⁶⁹ But we might ask, why did people make these choices? Why did policymakers choose more severe sentencing laws, and why did prosecutors seek more severe sentences? As the carceral state grew, why was the legal profession so slow to critique it?

It is difficult if not impossible to “prove” what any given human was thinking, or to prove a link between an idea and an action. Intellectual historians are right to raise caution about thinking we can read people’s minds and know why they acted as they did.²⁷⁰ But as criminal law scholars

264. *Id.* at 92. For a thoughtful deployment of Douglas’s approach to the carceral state, albeit without specific focus on legal education, see generally Sharon Dolovich, *Exclusion and Control in the Carceral State*, 16 *Berkeley J. Crim. L.* 259 (2011).

265. See, e.g., Nat’l Res. Council, *The Growth of Incarceration in the United States 3* (Jeremy Travis, Bruce Western & Steve Redburn eds., 2014) (“The best single proximate explanation of the rise in incarceration is not rising crime rates, but the policy choices made by legislators to greatly increase the use of imprisonment as a response to crime.”).

266. Beckett, *supra* note 10, at 11 (“[S]hifts in policy and practice (rather than rising crime rates) were the primary driver of penal expansion.”).

267. See, e.g., Stephen Raphael & Michael A. Stoll, *Why Are So Many Americans in Prison?* 34 (2013) (identifying sentence length as a central factor).

268. See Pfaff, *Locked In*, *supra* note 185, at 11–15 (“The primary driver of incarceration is increased prosecutorial toughness when it comes to charging people, not longer sentences.”). But see Beckett, *supra* note 10, at 16–20 (noting that “Pfaff is undoubtedly correct to emphasize the role of prosecutors in the prison build-up,” but offering evidence to refute Pfaff’s arguments that sentencing policy did not matter much).

269. That is, “no punishment without law” describes the means by which American penal expansion took place—through legal forms that accommodated or even required the expansion. Legality operated as the means to expand punishment, not as a constraint upon it as promised by casebooks. See *supra* notes 103–106 and accompanying text.

270. See Fisher, *supra* note 260, at 1088–92 (considering capacity of dominant legal-historical methodologies to address questions of causality).

know, attributing thoughts to others and drawing conclusions about why they acted as they did are the very coins of this legal realm. In the classroom, we speculate freewheelingly about defendants' mens rea, sometimes speaking as though mental states can be proved. When pushed, though, criminal law scholars will acknowledge that in the rare case that actually features a trial on mens rea issues, lawyers and factfinders usually must rely on circumstantial evidence.²⁷¹ So too must I.

Here, then, is the circumstantial evidence. A new framework for criminal law pedagogy was developed at midcentury in the United States, one that encouraged students-as-potential-policymakers to engage in critical reflection on the law; it also offered an idealized model of what the law could and should be.²⁷² This new model recognized that criminal law was a powerful and painful measure, but it also legitimized criminal law by placing it in a framework of supposed constraints and identifying the law's rational principles.²⁷³ And though the architects of this framework were certainly concerned about the scope of existing substantive criminal prohibitions, they did not choose to portray the wide range of those prohibitions in their pedagogical model.²⁷⁴ Instead, they focused on violent offenses and emphasized the importance of criminal law to address gravely injurious behavior.²⁷⁵ The curricular model invited close scrutiny of the minds and acts of criminal defendants, but it did not look closely at the minds or acts of enforcement officials.²⁷⁶ Focused on the content of criminal prohibitions and leaving all enforcement realities aside, the model presented criminal law not only as a thing to be perfected but also a thing to be trusted.

Soon thereafter, policymakers (who are disproportionately lawyers²⁷⁷) began to allocate more money to law enforcement and add large numbers of new law enforcement officials.²⁷⁸ And soon after that, policymakers and prosecutors began a turn toward severity that has lasted several decades.²⁷⁹ To be sure, that turn was not directly encouraged by many members of the

271. See, e.g., Deborah W. Denno, *Concocting Criminal Intent*, 105 *Geo. L.J.* 323, 377–78 (2017) (“[P]rosecutors attempt to prove *mens rea* through the use of circumstantial evidence and frequently must ‘concoct’ the defendant’s level of intent to some degree.”).

272. See *supra* Part I.

273. See *supra* sections II.A–B.

274. See *supra* section II.C.

275. See *supra* section II.C.

276. See *supra* section II.D.

277. See Maimon Schwarzschild, *The Ethics and Economics of American Legal Education Today*, 17 *J. Contemp. Leg. Issues* 3, 9 (2008) (noting that legislators are disproportionately lawyers).

278. Elizabeth Hinton, *From the War on Poverty to the War on Crime: The Making of Mass Incarceration in America* 1–4 (2016) (describing large increases in funding for law enforcement beginning in the 1960s).

279. See Beckett, *supra* note 10, at 1 (“The U.S. incarceration rate began an unprecedented ascent in the 1970s.”).

legal academy, though nor was it much resisted for a long time. The policymakers, prosecutors, and judges who pursued or upheld more severe sentences spoke the language of the criminal law canon, the same language that pervaded the substantive law course that had been introduced at midcentury.²⁸⁰ They emphasized the grave injuries inflicted by criminals, and the ways that punishment would serve important ends of desert, deterrence, and incapacitation.²⁸¹ They put everything in a framework of legality, where no one would be convicted without a prior law, where each individual defendant would be duly charged and convicted and sentenced, one at a time.²⁸² And thus was built the carceral state, one defendant at a time.

I have characterized the model of criminal law in the American curriculum as “criminal law exceptionalism” to highlight the model’s claims about the distinctive burdens, distinctive subject matter, and distinctive mechanics of criminal law.²⁸³ Of course, every field of law might claim to be different from others in various respects. But with the term “exceptionalism,” I mean to emphasize that teachers and scholars have depicted criminal law as an exception to a general norm; they have suggested that criminal law avoids or solves challenges that exist across all of the rest of law. Exceptionalism is important to the story of how mass incarceration thinks, first because it inoculates criminal institutions from certain lines of critique, and second because it limits the scope of reform proposals.²⁸⁴ For example, over the twentieth century, legal thinkers increasingly recognized the inevitability of discretion in legal decisionmaking, but in the specific field of criminal law, scholars continue to depict discretion as a foreign, extralegal phenomenon.²⁸⁵ And to date,

280. See *supra* notes 1–10 and accompanying text. Even the language of internal limits to criminal law was alive and well as Americans built the carceral state, though usually used in narrow contexts such as critiques of strict liability for regulatory offenses or burden-shifting in affirmative defenses. See, e.g., Henry M. Hart, Jr., *The Aims of the Criminal Law*, 23 *L. & Contemp. Probs.* 401, 411 (1958) [hereinafter *Hart, Aims*] (calling for substantive constitutional limits on conduct that can be criminalized). Notwithstanding the limiting principles featured prominently in criminal law casebooks, neither courts nor commentators were able to articulate concrete rules to restrict the definition of conduct as criminal. Cf. Bernard E. Harcourt, *The Collapse of the Harm Principle*, 90 *J. Crim. L. & Criminology* 109, 113 (1999) (“Claims of harm have become so pervasive that the harm principle has become meaningless.”).

281. See *supra* section II.B.

282. See *supra* section II.A.

283. See *supra* note 12.

284. See Ristroph, *Intellectual History*, *supra* note 12, at 2005–07 (explaining the effects of exceptionalism on discourse surrounding mass incarceration).

285. See *id.* at 1989 (“Criminal law, the exceptional field, managed to resist these insights and retain a paradigm in which a properly drafted statutory code will supposedly . . . eliminate discretion.”).

most reform efforts consist of doubling down on the traditional model, writing better statutes or reinvigorating supposed proof standards.²⁸⁶

None of this *proves* that the curriculum caused the penal expansion, or that a different curriculum would have led to different results. Again, mass incarceration is a complex phenomenon that defies a single-factor explanation. It is possible that societal fear of crime, or racial mistrust and prejudice, or economic inequality and the interests of the wealthier in managing the poor, would have driven a similar expansion of American criminal law no matter what the law professors were saying. But it is also plausible that among all the various factors that made Americans with the power to punish choose to do so more often and more severely, a confidence in criminal law as a rational, necessary, and legitimate response to grave injuries helped move things along. And it seems plausible that the substantive criminal law course introduced at midcentury, designed to bring dignity and respectability to the field, has fostered and encouraged that confidence in the criminal law.

B. *Student Resistance and Professorial Authority*

Curricular indoctrination didn't work with everyone, to be sure. Some students were probably paying only enough attention to survive the exam; some probably slept through the course. And at least some who were listening were sharply critical of the pedagogy. We have some record of students' objections to the substantive criminal law course in a 1980 essay by Sanford Kadish, structured as a dialogue between a Student and a Professor.²⁸⁷ At the outset of his essay, Kadish explained that he wanted to address criticisms of "substantive criminal law, as a course and as a subject matter," that had been raised by students over the years.²⁸⁸ He noted that he believed "these criticisms are widespread and . . . my responses speak to what is generally done in criminal law courses in this country."²⁸⁹

Though this essay is now forty years old, the Student's criticisms will sound painfully familiar to anyone who knows much about criminal law in 2020. Citing their experiences doing clinical work at a public defender's office, the Student noted that the work of criminal defense attorneys involves many efforts to exclude evidence on grounds of police misconduct but no questions involving substantive criminal law.²⁹⁰ The Student noted also that "[t]he discretionary judgments of officials pretty well undercut the role of the substantive criminal law you are speaking about."²⁹¹ Instead

286. See *supra* notes 109–114 and accompanying text (noting scholars' assurances that better-drafted criminal codes would restore the ideal of legality in criminal law); see also *supra* notes 106, 117 and accompanying text (discussing standards of proof).

287. Kadish, *Why Substantive Criminal Law*, *supra* note 93.

288. *Id.* at 1.

289. *Id.*

290. *Id.* at 1–2.

291. *Id.* at 5.

of “exquisite line drawings”²⁹² on questions of supposed moral fault, the Student wanted to discuss “the great issues of criminal law today—urban crime and its relation to ghetto life; race and crime; the injustices in our society that produce crime; the degradation of our prisons and jails; corruption in government; the arrogance and brutality of police.”²⁹³ The Student, it turns out, is an abolitionist: “Underlying all this talk is the premise that punishing people is an acceptable and justifiable thing for our society to do. I do not accept that premise.”²⁹⁴

In response, the Professor repeated Herbert Wechsler’s claim that men rely on criminal law for protection against “all the deepest injuries that human conduct can inflict.”²⁹⁵ He reassured the Student that in a few rare cases, knowing “tricky mens rea issues” would be helpful.²⁹⁶ At the same time, he said to focus only on “immediate practical training” would be “a great waste and would make it doubtful whether we could justify being part of a university.”²⁹⁷ A substantive criminal law course could provide general training in legal methods as well as an opportunity to explore “the ramifications of a person’s moral fault and responsibility.”²⁹⁸ Even as defendants’ moral faults needed to be explored, the Professor explained, to discuss issues of race, corruption, and police brutality would risk becoming “an exercise in ideological polemics.”²⁹⁹ And to the Student’s charge that criminal law benefited “the well-to-do and the powerful” while victimizing “the poor, the powerless, the outsider, [and] racial and ethnic minorities,” the Professor responded, “[Y]ou are overreacting.”³⁰⁰ Though the Professor acknowledged and regretted race and class disparities among defendants and prisoners, he emphasized that “the cause of this is not in any meaningful sense the substantive criminal law.”³⁰¹

At the end of the essay, the Professor and the Student agree to disagree.³⁰² I suspect that Kadish’s Student did not speak for all law students of the 1980s, given what American lawyers did (and still do) to keep criminal legal institutions operating. But I suspect also that criminal law faculty may be substantially more sympathetic to the Student’s arguments

292. *Id.* at 14.

293. *Id.* at 4.

294. *Id.* at 8.

295. *Id.* at 4 (internal quotation marks omitted) (quoting Wechsler, *The Challenge*, *supra* note 49, at 1097–98).

296. *Id.* at 2.

297. *Id.* at 3.

298. *Id.*

299. *Id.* at 4.

300. *Id.* at 9. The Professor also conceded that problems of “imperfections in administration” and excessive discretion exist but argued that the Student’s distress over these issues only showed the moral importance of substantive rules. See *id.* at 6, 8.

301. *Id.* at 15.

302. See *id.*

now than they were forty years ago.³⁰³ Reflecting on the half century of mass incarceration, substantive criminal law teachers are left with two unpleasant positions: What I teach doesn't matter, or what I teach does matter—and look what it hath wrought. Either way, we need to do something differently.

IV. PROLEGOMENA TO ANY FUTURE CRIMINAL LAW CANON

A. *To Keep or Abandon the Criminal Law (Course)*

In 1977, the law school that had launched the modern substantive criminal law course installed a giant bronze sculpture by Jacques Lipchitz called *Bellerophon Taming Pegasus*.³⁰⁴ In Greek myth, Bellerophon was a mortal ordered by the gods to complete various near-impossible tasks, including the capture of the winged horse.³⁰⁵ Lipchitz reportedly wanted to depict Bellerophon's struggle as representative of "the control of laws over the forces of disorder in society."³⁰⁶ But at the installation ceremony at Columbia Law School, one professor looked at the great, swirling twenty-three tons of wings and arms and hooves and told the *New York Times*, "That looks like me trying to teach criminal law."³⁰⁷

Like a wearied Bellerophon, some law schools (including Columbia) have since considered eliminating a course in substantive criminal law from their required curriculum, and a few have actually done so.³⁰⁸ And if the course is as flawed as this Essay suggests (or as meaningless as some students have claimed), that option may seem appealing. Criminal law could be left off the required curriculum altogether, as it was at many law schools early in the twentieth century.³⁰⁹ Alternatively, schools could require a course in constitutional criminal procedure but no other criminal law-related course.³¹⁰

303. Kadish's casebook coauthor praised the *Why Substantive Criminal Law* essay as a response to "undercurrents of cynicism and nihilism among our students." Stephen J. Schulhofer, *Kadish Returns*, 70 *Calif. L. Rev.* 518, 519 (1982). Another leading casebook author, Joshua Dressler, found Kadish's essay "resonated powerfully" and reported that he recommended it to students who expressed concerns about his own criminal law course. See Joshua Dressler, *Where We Have Been, and Where We Might Be Going: Some Cautionary Reflections on Rape Law Reform*, 46 *Clev. St. L. Rev.* 409, 409 n.1 (1998).

304. *Columbia Gets Lipchitz Sculpture*, *N.Y. Times* (Apr. 20, 1977), <https://www.nytimes.com/1977/04/20/archives/columbia-gets-lipchitz-sculpture.html> (on file with the *Columbia Law Review*).

305. See *id.*

306. *Id.*

307. *Id.* The professor asked to remain anonymous.

308. See Balkin & Levinson, *Legal Canons*, *supra* note 232, at ix (noting that some law schools have taken criminal law out of the required first-year curriculum and made it an elective).

309. See *supra* note 38 and accompanying text.

310. This is Georgetown's approach, where "Criminal Justice" is a required first-year course that covers the Fourth and Fifth Amendments. Full-Time J.D. Program, *Geo. L.*,

Neither of these options seems wise. Now that we have built a carceral state, one where criminal interventions are a central mode of governance that structure the lives of many citizens, it would be rather ostrichlike for law schools to simply stop talking about criminal law. And while constitutional criminal procedure is an important topic, it is not one that can be adequately understood without an account of the laws that give police power in the first place.³¹¹ And that is what “substantive” criminal laws are: authorizations to enforcement authorities to make various interventions in the lives of citizens. They are not orders from the gods to refrain from various types of conduct but human constructions that empower some humans to impose burdens, stigma, or violence upon other humans.

So long as our society relies so heavily on criminal law, we need a course in it. But to teach this area of law, we need first an accurate account of it. The problem with the existing course is not that there is nothing there to teach, but that the conceptual model around which the course was built was deeply flawed. It was a model designed to bring dignity to the field, to secure criminal law’s place in the law school curriculum (and the law school’s place within the university), and to inspire legislative reform. With those aims, the course was based on a vision of what criminal law could and should be, in the eyes of Wechsler and Michael, and somewhat later Kadish.³¹² But these men skipped a step, it seems: They apparently did not consider whether they had an adequate understanding of what criminal law *was*, or is. They seem to have taken for granted the Blackstonian (or Benthamite) distinction between substance and procedure. They conceived of substantive criminal law as freestanding

<https://www.law.georgetown.edu/academics/jd-program/full-time-program> [<https://perma.cc/GHQ4-FV2U>] (last visited Aug. 21, 2020). At most law schools, the same constitutional material is covered in an upper-level elective called “Criminal Procedure.” See, e.g., Criminal Procedure: Investigations, Brook. L. Sch., <https://www.brooklaw.edu/Courses/Criminal-Procedure-Investigations> [<https://perma.cc/LBL6-GY8Z>] (last visited Sept. 29, 2020).

311. The interaction of substance and procedure was a central theme of William Stuntz’s work, which has earned a place of pride in the scholarly canon, though it has not sufficiently influenced the pedagogical canon. See, e.g., William J. Stuntz, Substance, Process, and the Civil–Criminal Line, 7 J. Contemp. Legal Issues 1, 1 (1996) (“[W]ithout substantive limits, important parts of the law of criminal procedure seem likely to fall apart.”); William J. Stuntz, The Substantive Origins of Criminal Procedure, 105 Yale L.J. 393, 415 (1995) (noting that in early America, “[P]rocedure and substance were inseparable”). As I have argued elsewhere, Stuntz’s important insights into the interactions of procedure and substance did not ultimately lead him to question that conceptual dichotomy. See Alice Ristroph, Regulation or Resistance? A Counter-Narrative of Constitutional Criminal Procedure, 95 B.U. L. Rev. 1555, 1587–90 (2015) [hereinafter Ristroph, Regulation or Resistance]. Accordingly, the casebook that Stuntz coauthored does not go far enough in resisting the Wechslerian model, though Stuntz’s casebook is probably the best option now on the market.

312. See *supra* Part I.

prohibitions of conduct, and the course became a study in the best formulation of those prohibitions.

It is time to develop a more honest criminal law theory, one that begins with a more accurate description of criminal law as a human practice. Since I have gestured toward Kant, and he toward metaphysics as science, I should make clear that my approach is not Kantian, metaphysical, or particularly scientific.³¹³ I do, however, seek to develop a positive description of criminal law rather than an ideal theory. I am certainly not hostile to normativity; indeed, I think it inescapable. We cannot avoid making choices as we decide how to describe the world around us, and whether we realize we are doing it or not, we inevitably rely on normative judgments or intuitions in making those choices. All the same, as philosophers have long realized, theory begins with observation, not with imagination.³¹⁴ We should first say what we see, remembering always to consider the possibility that we are not seeing clearly. Moreover, insofar as conceptual models involve generalizations that may not seem apt in every particular case, we should aim for a theory that does fit most of the observed phenomena that humans label criminal law.³¹⁵ A theory that describes a practice that has never existed is not a good basis for an introductory course in criminal law.

B. *Criminal Law as Human Practice*

What *is* criminal law? The reader still with me at this point may not have the patience for a full account, and in any event a full account would exceed the conventional length of a law review essay. But I can sketch here an overview in the form of six propositions, each of which I have elaborated more fully elsewhere. Again, I mean this to be a description of criminal law, not an aspiration for what it might become. And I mean it to be a conceptual account that is roughly accurate across most jurisdictions

313. See generally Immanuel Kant, *Prolegomena to Any Future Metaphysics That Will Be Able to Come Forward as Science* (Paul Carus trans., 1977) (1783). Science, of course, was the paradigm for many nineteenth and early twentieth century legal scholars. See Sheldon Glueck, *Principles of a Rational Penal Code*, 41 *Harv. L. Rev.* 453, 453 (1928) (noting the need for a “prolegomena to a criminal procedure more scientific than that under which society now is so ineffectively waging the struggle against crime”).

314. See Michael Oakeshott, *What Is Political Theory?*, in *What Is History? And Other Essays* 391, 393 (Luke O’Sullivan ed., 2004) (suggesting an etymological link between theory and theater, with both words related to the Greek *thea* for an observed spectacle or occurrence); Stephen K. White, *Pluralism, Platitudes, and Paradoxes: Fifty Years of Western Political Thought*, 30 *Pol. Theory* 472, 477 (2002) (linking theory to seeing and describing “the activity of the theorist [as] the solitary act of grasping an object within a field of vision”).

315. This conception of “fit” is fairly standard in legal theory and beyond. See, e.g., Richard H. Fallon, Jr., *How to Choose a Constitutional Theory*, 87 *Calif. L. Rev.* 535, 537–38 (1999) (distinguishing between text-based constitutional theories that focus solely on the written text and “practice-based theories [that] assert their superiority because they better fit or explain” actual constitutional practices, including instances when judges do not follow the constitutional text).

and, with one exception noted below, historical periods. It is not meant to model only American criminal law in the twenty-first century, though I do think the account will help us better understand criminal law here and now. It is useful to try to identify aspects of criminal law that span place and time, for that will help us assess whether present conditions are normal, and what we could reasonably hope to change. In the remainder of this Part, I first state the propositions, then offer a brief account of each.

- Criminal law is human law.
- Criminal law empowers state officials to use a particular enforcement mechanism: a criminal sanction.
- Criminal sanctions involve a state-imposed inequality: They alter the convicted person's formal status within the political community.
- Although the criminal sanction is an important distinguishing characteristic, criminal law cannot be reduced to punishment. (Here I do focus on contemporary law specifically. Modern states have developed a distinctive and elaborate enforcement apparatus that generates not-necessarily-punitive powers, such as powers of surveillance and investigation.)
- Criminal law has no fixed substance; criminal sanctions can be (and are) used in nearly every area in which law regulates at all.
- Nor does criminal law have a fixed purpose. No single statement of purpose captures all or most of the circumstances in which states do in fact choose to use criminal sanctions.

1. *Criminal law is human law.* — I begin with the proposition that criminal law is law, so we need some underlying jurisprudential understanding to make sense of criminal law. And without wading too far into the what-is-law swamp, I posit that law is a human practice distinguishable from, say, morality, religion, language, game-playing, or other human endeavors that may bear some similarity to law or overlap with it.³¹⁶ One distinguishing feature of law—at least, the kind of law of interest here—is that it operates through states. Unlike, say, divine law or the laws of physics, human laws are constructed by states and used by them. Moreover, states themselves are human institutions. Whatever the state does, it does through human agents. Criminal law is neither self-evident nor self-executing: It needs human agents to articulate and enact it, and it needs human agents to interpret and enforce it.³¹⁷ Unlike Bellerophon, who received a golden bridle from Athena to help him tame Pegasus,³¹⁸ we mortals must make criminal laws on our own.

316. For a more extensive treatment of the what-is-law question, see Alice Ristroph, *Sovereignty and Subversion*, 101 Va. L. Rev. 1029, 1049–53 (2015).

317. For a more detailed account of criminal law as law by and for humans, see generally Ristroph, *Criminal Law for Humans*, *supra* note 33.

318. N.J. Spyropoulos, *Bellerophon* 20 (Clarence A. Manning trans. 1955).

As a human practice, law relies heavily upon human language. We use language to articulate the powers of state officials and the conditions under which their powers will be exercised. But if human language does not always allow us to fix meaning clearly, if language is subject to interpretation or manipulation, or if it evolves with time, then law will be subject to the same limitations.³¹⁹

And finally, we should expect all the faculties and frailties that humans possess to show up in legal practice. If humans are only boundedly rational, so too will be their law. If humans engage in motivated reasoning or make decisions subject to various cognitive biases—including but not limited to implicit racial bias—the law will reflect such limitations.³²⁰ To be sure, an enduring aim of the humans who construct law is to build institutions better than themselves, to design institutions that will correct for or guard against human failings. But the effort to overcome our own human limitations is itself a human effort, and we should never assume it to have succeeded.

2. *Criminal law empowers state officials to use a particular enforcement mechanism: the criminal sanction.* — This proposition actually encompasses two important claims, but they are sufficiently closely linked that I have stated them as one proposition. The first claim is that criminal law empowers state officials. That is, criminal law is power-conferring law, not a set of freestanding directives to private individuals.³²¹ Contrary to the canonical

319. Here it is difficult to improve upon James Madison:

All new laws, though penned with the greatest technical skill, and passed on the fullest and most mature deliberation, are . . . more or less obscure and equivocal, until their meaning be liquidated and ascertained by a series of particular discussions and adjudications . . . [N]o language is so copious as to supply words and phrases for every complex idea, or so correct as not to include many equivocally denoting different ideas . . . When the Almighty himself condescends to address mankind in their own language, his meaning, luminous as it must be, is rendered dim and doubtful by the cloudy medium through which it is communicated.

The Federalist No. 37, at 182–83 (James Madison) (Ian Shapiro ed., 2009).

320. This point is a recurring theme in critical race theorists' critiques of substantive criminal law. See, e.g., Lee, *Reasonable Man*, supra note 206, at 4 (arguing that social norms involving race affect legal decisionmakers in the criminal law context); Armour, supra note 120, at 205 (“[U]nder current law biased moral judgments of a wrongdoer can directly and indirectly determine whether factfinders ‘find’ the necessary *mens rea* for criminal conviction.”); Capers, supra note 216, at 1363–64 (concluding that “implicit biases about race” can affect the “prosecution and resolution of rape cases”); Dorothy E. Roberts, *Motherhood and Crime*, 79 Iowa L. Rev. 95, 97 (1993) (“The law compels and legitimates prevailing relationships of power.”).

321. Legal theorists have emphasized the fact that law does not operate merely by imposing constraints but also by conferring new powers in some instances, as when law enables individuals to contract, bequeath property, or marry. Law may confer powers on either private individuals or public officials. See H.L.A. Hart, *The Concept of Law* 27–33 (2d ed. 1994). Law’s power-conferring function has not been sufficiently explored with regard to criminal law, which is typically portrayed (including by Hart himself) only in terms of constraints. See *id.* at 27. But see Peter Arenella, *Rethinking the Functions of Criminal*

account developed midcentury, criminal law does not consist of statements such as “do not murder, rape, or rob.”³²² Instead, criminal laws empower state officials to act in particular ways, which leads to the second part of this proposition: Criminal laws empower officials to impose a distinctive sanction. I say more about criminal sanctions below, but let me first illustrate this important aspect of the structure of criminal law. “Thou shalt not kill” is a divine commandment, a prohibition addressed to the individual; it does not contemplate any enforcement mechanism (perhaps because the giver of the commandment can take care of enforcement Himself or Herself). “Whoever shall intentionally cause the death of another person is guilty of murder and shall be subject to life in prison” is a criminal law.³²³ It takes a different form than the divine commandment; it needs a human enforcer and thus it empowers and directs that enforcer.

In emphasizing the conferral of enforcement powers, I do not mean to obscure the norm-articulation function of criminal law.³²⁴ But it is important to remember that many kinds of law, and also many nonlegal human practices, involve the articulation of norms for human conduct. Criminal law involves a distinctive kind of norm-articulation in which violations of the norm are subject to a state-imposed sanction.

3. *Criminal sanctions involve state-imposed inequality.* — It is difficult to associate criminal law with one specific penalty, since at different times a variety of unpleasant burdens have been used as criminal sanctions. Prison and death may come to mind most readily, but noncustodial sanctions such as fines or probation are actually more common today.³²⁵ Earlier eras saw banishment or public shaming (such as the stocks) as common criminal sanctions.³²⁶ But there is some continuity across different types of

Procedure: The Warren and Burger Courts’ Competing Ideologies, 72 *Geo L.J.* 185, 199–200 (1983) (discussing rules of criminal procedure as allocations of power). For an account of criminal statutes as power-conferring law, see Ristroph, *Intellectual History*, supra note 12, at 1983–84. Elsewhere, I have argued that the principle of legality itself confers power more than it constrains: In practice, “[D]o not impose criminal sanctions unless there is a valid statute” has become “to impose criminal sanctions, simply enact a statute or adapt an existing one.” See Ristroph, *Definitive Article*, supra note 33, at 148–49.

322. See Hart, *Aims*, supra note 280, at 403 (“Mostly, the commands of the criminal law are ‘must-nots,’ or prohibitions, which can be satisfied by inaction. ‘Do not murder, rape, or rob.’ But some of them are ‘musts,’ or affirmative requirements . . . ‘File your income tax return.’”).

323. This is a simplification of a fairly standard formulation. See, e.g., *Ariz. Rev. Stat.* § 13-1105 (2020).

324. See, e.g., Farmer, supra note 44, at 26 (“[T]he aims of the criminal law . . . are broader in scope than simply the justification of punishment Criminal law . . . may be expressive, or even constitutive, of the prevailing social morality adopted by the state . . .”).

325. See Sally T. Hillsman, Joyce L. Sichel & Barry Mahoney, DOJ, *Fines in Sentencing: A Study of the Use of the Fine as a Criminal Sanction* 7–9 (1984); Joan Petersilia, *Probation in the United States*, 22 *Crime & Just.* 149, 149 (1997).

326. On banishment, see J.M. Beattie, *Crime and the Courts in England 1660–1800*, at 500–06 (1986). On forms of public shaming such as stocks, see Erin E. Braatz, *The Eighth*

criminal penalties. As many scholars have observed, a distinctive stigma attaches to a criminal conviction and accompanies all forms of criminal sanction—or perhaps stigma itself is part of the sanction.³²⁷ The combination of the stigma and the specific form of penalty is a state-imposed inequality: The convicted person is subject to burdens that other citizens are not, and these burdens are associated with a loss of political standing. Some penalties, like a death sentence or banishment, make the loss of standing quite explicit. But even seemingly milder penalties such as a fine or community supervision involve an alteration in the convicted person's status.³²⁸ In American criminal law today, the so-called “collateral” consequences of a criminal conviction are good indicators of this loss of status.³²⁹ In short, criminal law is a particular way in which the state imposes inequality: It designates some persons as “criminals” and thereby deprives them of some of the goods that members of a polity not so designated enjoy—physical liberty, money, equal dignity and social standing, various civil and political rights, eligibility for various government benefits, and so forth.³³⁰

The description of criminal sanctions as state-imposed inequality may meet resistance from normative theorists who have offered justifications of punishment as a supposedly egalitarian measure. On one such account, a crime disrupts an equilibrium among citizens and puts the offender at an advantage over everyone else; punishment then restores equality and ensures “fair play.”³³¹ I have critiqued these theories at length in other work, but even those who endorse the fair-play view should, upon reflection, be able to recognize punishment as state-imposed inequality.³³² Punishment does treat the offender differently from those who are not punished by imposing “harsh treatment”; it is precisely that worse treatment that the theorist is trying to explain and justify by construing the crime as disruptive to a baseline of equality. We can leave aside for now the question of

Amendment's Milieu: Penal Reform in the Late Eighteenth Century, 106 *J. Crim. L. & Criminology* 405, 438–39 (2016).

327. Hart, *Aims*, *supra* note 280, at 404–05.

328. The alteration in status is usually permanent, but my theory does not require such permanence. An effective expungement and total erasure of a criminal record could in theory restore someone to full political membership and equal status. In practice, criminal records are nearly impossible to escape. See generally James B. Jacobs, *The Eternal Criminal Record* (2015) (discussing the difficulties encountered by individuals with criminal records in their personal and professional lives).

329. For a more detailed exposition of this account discussing the detrimental impacts that the “felon” label has on one's standing in the community, see generally Ristoph, *Farewell to the Felony*, *supra* note 259.

330. See *id.* at 605.

331. See Herbert Morris, *Persons and Punishment*, 52 *Monist* 475, 477–80 (1968), reprinted in Herbert Morris, *On Guilt and Innocence: Essays in Legal Philosophy and Moral Psychology* 31, 33–36 (1976).

332. See Ristoph, *Just Violence*, *supra* note 140, at 1045–46 (noting that the normative, fair-play view of punishment fails to consider that many criminals enjoy little economic or social equality to begin with).

whether punishment is *justified* inequality, and simply recognize that it is an imposition of inequality. (Indeed, the fact that criminal law combines impositions of inequality with claims of moral justification may make it a distinctively dangerous human practice, one that Donald Dripps has called “a recipe for irresponsibility—a political martini of four parts violence and one part of self-righteousness.”³³³)

Although the imposition of inequality is a feature of criminal law across jurisdictions, nowhere is this aspect of criminal law starker than in the United States. In this country, criminal law has been used to enforce racial inequality throughout our history, and that history should shape any American criminal law course. Critical race theorists have made this point about the entire legal curriculum: Race is not peripheral to American law, and it is not an issue that can be relegated to electives or addressed only optionally.³³⁴ But this argument has particular force with regard to criminal law, a field intrinsically about impositions of inequality.

4. *Criminal law cannot be reduced to punishment.* — Criminal law empowers state officials to do more than impose whatever formal sanction is authorized. At least since the nineteenth century, states have assigned particular public officials the tasks of identifying, investigating, and prosecuting crime.³³⁵ This means that any new designation of conduct as criminal will give state officials, including police officers, new authorities

333. Donald Dripps, *The Exclusivity of the Criminal Law: Toward a “Regulatory Model” of, or “Pathological Perspective” on, the Civil–Criminal Distinction*, 7 *J. Contemp. Legal Issues* 199, 204 (1996).

334. See, e.g., Dorothy A. Brown, *Taking Grutter Seriously: Getting Beyond the Numbers*, 43 *Hous. L. Rev.* 1, 3–5 (2006) (“Law schools at the very least must ensure that race-based discussions are incorporated into their classrooms.”); Kimberlé Williams Crenshaw, *Foreword: Toward a Race-Conscious Pedagogy in Legal Education*, 11 *Nat’l Black L.J.* 1, 2–3, 9–10 (1988) (“Although it is clear that many discussions do not involve race, it is also true that race is often implicated in a range of ways even when it is not directly at issue and when racial perspectives are not explicitly identified.”).

335. Before that time, private enforcement was much more important, at least in Anglo-American legal systems. See Roger A. Fairfax, Jr., *Delegation of the Criminal Prosecution Function to Private Actors*, 43 *U.C. Davis L. Rev.* 411, 421 (2009) (“[T]he English tradition of private prosecution dominated the early American experience before the Revolution.”); James E. Pfander, *Standing to Sue: Lessons from Scotland’s Actio Popularis*, 66 *Duke L.J.* 1493, 1527 (2017) (noting that, in Scotland, “private enforcement of criminal law had largely ended by the nineteenth century”).

to try to discover and prevent that conduct.³³⁶ Criminal law also contemplates a distinctive adjudicative process that empowers state officials to take persons into custody even before conviction.³³⁷

To say that criminal law cannot be reduced to punishment allows us to recognize police authority as part of criminal law, but it also invites us to consider ways in which public officials use the powers bestowed by criminal law for purposes other than prosecution and conviction. For example, in various periods, vagrancy laws were understood to authorize police to move people along—to order them out of specific areas.³³⁸ Even when a person was actually charged with vagrancy and brought to court, in many cases the disposition was not a conviction but an agreement that the defendant would leave the area and not return.³³⁹ Used in this way, a criminal prohibition of vagrancy was not primarily aimed at formal punishment, but at managing populations and people in physical space.³⁴⁰ Several scholars have examined similar “managerial” functions of criminal

336. Some investigative powers are distinct to criminal enforcement. For example, the power to stop *and frisk* an individual is—in principle—contingent on suspicion of criminal activity. *Terry v. Ohio*, 392 U.S. 1, 30 (1968) (holding that when an officer suspects criminal activity “and that the persons with whom he is dealing may be armed and presently dangerous . . . he is entitled . . . to conduct a carefully limited search of the outer clothing of such persons in an attempt to discover weapons which might be used”). But other investigative powers cross the civil/criminal line, and indeed, in some cases, police officers are the designated agents of civil enforcement. As is now widely acknowledged, police authority to enforce civil traffic and automobile regulations—including through automobile stops—dramatically expands the opportunities for criminal investigation. See Sarah A. Seo, *Policing the Open Road*, *supra* note 34, at 109–10 (detailing the ways in which police officers’ roles in traffic enforcement and criminal investigations overlap).

337. See *Atwater v. City of Lago Vista*, 532 U.S. 318, 343–45, 353–54 (2001) (discussing history and current practice of police authority to arrest and concluding that a custodial arrest—even for an offense punishable only by fine—does not violate the Fourth Amendment).

338. See, e.g., Caleb Foote, *Vagrancy-Type Law and Its Administration*, 104 U. Pa. L. Rev. 603, 605 (1956) (“A number of defendants [arrested for vagrancy] were discharged with orders to get out of Philadelphia or to get out of the particular section of Philadelphia where they were arrested.”).

339. See Allen Steinberg, *The Transformation of Criminal Justice: Philadelphia, 1800–1880*, at 29–31 (1989). To be sure, elsewhere in the nineteenth and early twentieth century, vagrancy laws were used for the precise purpose of securing convictions; many states relied heavily on vagrancy to generate convicts for the convict-leasing system that replaced slavery in the American South. See generally Blackmon, *supra* note 176 (discussing convict leasing after the Civil War).

340. Anti-loitering laws now sometimes give police specific authority to issue similar dispersal orders. For this reason, such laws do not really present the lack-of-notice complaint that has sometimes been lodged against them. Such laws may be objectionable for other reasons, but they do not impose criminal sanctions without a very specific and indeed personalized notice. See Kiel Brennan-Marquez, *Extremely Broad Laws*, 61 *Ariz. L. Rev.* 641, 646–47 (2019) (arguing the problem with anti-loitering statutes is one of breadth rather than uncertainty).

investigation and adjudication, both on the streets and in the courts.³⁴¹ A theory of criminal law needs to be able to capture these functions as well as the more familiar imposition of penalties for specified conduct.

5. *Criminal law has no fixed substance.* — Much of what I have said above will be seen, from the perspective of the existing canon, as observations about “procedure” rather than “substance.” But as should be clear by now, I think that conceptual separation gravely distorts our understanding of criminal law.³⁴² Since criminal law is defined in part by its enforcement mechanisms, we must attend to enforcement to understand this area of law. The substance of what is actually prosecuted and punished will always depend on what enforcers do. If they decline to enforce, a statute will not enforce itself. If state agents interpret written statutes in unexpected ways, the “substance” of the criminal law is thus altered. And as I have suggested above, as we watch substance take shape through actual enforcement procedures, we must keep in mind that criminal law’s enforcers are, like all law enforcement, humans. Human judgment, human error, and human bias are inevitably part of enforcement practices.³⁴³

All the same, even as I resist a substance/procedure distinction that leaves enforcement out of an account of criminal law, I think there is value in studying the content of criminal statutes, or other forms of law that set

341. See Issa Kohler-Hausmann, *Managerial Justice and Mass Misdemeanors*, 66 *Stan. L. Rev.* 611, 614 (2014) (introducing a “managerial model” that is more concerned with “managing people over time through engagement with the criminal justice system” than with “adjudicating guilt and punishment in specific cases”); see also Bernard E. Harcourt, *Illusion of Order: The False Promise of Broken Windows Policing* 129–34 (2001) (discussing “order-maintenance policing” as itself a way of constructing the meaning of “order”).

342. For more detailed discussions of this point, see Ristroph, *Intellectual History*, *supra* note 12, at 2008–09; Ristroph, *Regulation or Resistance*, *supra* note 311, at 1587–90; Ristroph, *Thin Blue Line*, *supra* note 33, at 308–14. Consider also Herbert Packer’s review of the first edition of Sanford Kadish’s casebook:

[T]hey might have chosen another path. They might have attempted the task that no one else has so far been either wise enough or foolish enough to undertake: to fuse, somehow, substance and process into a meaningful whole; to expose for examination the interplay of rules and institutions that characterizes and limits the criminal sanction, both as it is and as we might wish it to be. Only through such a synthesis are we likely to provide the resources required for resolution of the paradoxes of the criminal law.

Packer, *supra* note 75, at 794.

343. The role of bias in police decisions is increasingly widely acknowledged. See, e.g., Butler, *The System Is Working*, *supra* note 191, at 1447–48 (“[T]he Supreme Court ha[s] established a set of police practices that, in theory, apply to everyone, but are principally directed against black men.”); Carbado, *supra* note 192, at 964–67 (describing the severe burden that racialization of Fourth Amendment doctrine places on people of color in interactions with people). But legislators, prosecutors, judges, jurors, and other legal actors are no less vulnerable to cognitive bias or other sources of error. See, e.g., Armour, *supra* note 120, at 204 (“[I]f black wrongdoers systematically suffer harsher moral evaluations than similarly situated whites, they will more often satisfy the *mens rea* requirement for criminal conviction, which means that black criminals are ‘constructed’ and not merely ‘found’ in the bias-laden fact ‘finding’ process of a criminal trial . . .”).

forth conditions of criminal liability. It is useful to try to catalogue the kinds of conduct that are designated as subject to criminal sanctions, if only to discover the difficulty of capturing everything.³⁴⁴ It is true that most societies have criminalized acts of physical violence and incursion on property interests, but what counts as violence, or property, changes over place and time.³⁴⁵ Moreover, criminal laws have long been used to reach conduct far beyond physical violence; they have often been used to punish a wide range of activities (and people) found annoying, dangerous, or threatening. Socrates was convicted for corrupting the youth of Athens, Sarah Good and other colonial women for witchcraft, Homer Plessy for riding in the wrong railway car, and Estelle Griswold for distributing contraceptives.³⁴⁶ That many commentators would today view each of those convictions as a misuse of criminal law shows only that judgments about what should be criminalized have changed, not that there is a true core of criminal law's substance.

To say that criminal law has no fixed substance is not to deny that it has, at least in the United States, a typical *structure*. The categories of mens rea and actus reus, the defining of crimes in terms of elements, and the concept of legal proof are important to the contemporary analysis of criminal liability. But in teaching students how these concepts operate in the practice of criminal law, honesty is key. For example, elements of crimes are less important when trial is too costly for many defendants and the pressure to plead is overwhelming.³⁴⁷ Even when cases do go to a trial, mental states are attributed to defendants by ex post decisionmakers; they are not facts that prosecutors could or do prove with scientific certainty.³⁴⁸

6. *Criminal law has no fixed purpose.* — States use criminal sanctions, and other interventions such as policing, for a wide range of purposes. Surely the four horsemen of criminal law casebooks—retribution, deterrence, incapacitation, and rehabilitation—do motivate some legislators, judges, and other decisionmakers, but no one of these purposes appears to eclipse the others. At different times one rationale or another may dominate public discourse. Moreover, in some instances criminal interventions appear motivated by purposes unrelated to any of the four punishment

344. Blackstone's Commentaries may give us the first effort to classify all criminal offenses into rational categories. As Lindsay Farmer notes, Blackstone identified broad categories such as "public wrong," "crimes against the person," "crimes against property," and "crimes against religion." Farmer, *supra* note 44, at 72. But there were still a great many offenses that didn't fit into Blackstone's scheme, so he used "public police" as a residual category for such matters as "bigamy, Egyptians, common nuisances, idle and incorrigible rogues, sumptuary laws, gaming, and poaching." *Id.* at 73.

345. See *id.* at 32–33, 65, 231–32. I discuss shifts in the conception of violent crime in Ristroph, *Shadow of Violence*, *supra* note 169, at 574 ("As the scope of the criminal law and the scale of imprisonment has expanded, so too has the concept of violence.").

346. For further discussion of these examples, see generally Ristroph, *Intellectual History*, *supra* note 12, at 1964–65.

347. See *supra* notes 5–6.

348. See *supra* notes 106, 117.

theories typically recited in casebooks, as two very different uses of vagrancy law illustrate. As discussed above, in some contexts, vagrancy laws were used simply to move undesirable people out of town; in others, they were used to supply southern industrial interests with captive labor after chattel slavery was no longer legally authorized.³⁴⁹

My claim is that criminal law itself does not have a single overriding purpose, not that individual humans do not act with purpose. As should be clear, the various humans who authorize and implement criminal sanctions will typically be able to give reasons for their actions, though they may not all give the same reasons. But I suspect it is not possible to give a non-tautological statement of purpose that captures all or most instances of criminal law. I have written, for example, that “[t]he criminal law aims to make criminals.”³⁵⁰ My emphasis there was the fact that criminal law operates on people, not acts, and it transforms the status of a convicted person in rendering them a criminal. But could the making of criminals be taken as criminal law’s general purpose in most instances? I am not sure. I would guess that at least sometimes, those who enact a criminal statute may hope or even expect that the mere enactment of the law will produce perfect compliance. In such a case, the legislator does not aim to make criminals but simply to change behavior. Moreover, for any single given criminal statute, the purposes of a legislator may not align with those of the prosecutor nor yet again the sentencing judge. The bottom line is that associating criminal law with one overarching purpose is likely to cloud, rather than clarify, our understanding of actual human practices.

C. *Education and the Capacity to Resist*

With those six propositions, we could revise the canons of criminal law. Some efforts to revise the scholarly canon have begun, though much remains to be done.³⁵¹ The curricular canon, however, remains mired in criminal law exceptionalism, a deeply flawed account of what criminal law is. In trying to define criminal law as a distinctive field, scholars and teachers have focused on its substance, its purposes, and its enforcement mechanism. As should be clear, neither “substance”—understood as the types of conduct that are subjected to liability—nor purposes are in fact consistent across all criminal laws nor characteristically distinguishable

349. See *supra* notes 176, 339 and accompanying text.

350. Ristroph, *Definitive Article*, *supra* note 33, at 162.

351. As evidenced by footnotes above, various individual scholars have articulated arguments in line with some of the specific propositions I outline above. Overall, though, the most prevalent scholarly critiques of American criminal law still rely on roughly the same model of criminal law as depicted in American casebooks, and thus they see problems such as racial disparities and severity as “pathologies” or “excess” rather than fundamental attributes of criminal law. For a critique along these lines, see Amna Akbar, *Radical Reimagination of Law*, 93 *N.Y.U. L. Rev.* 405, 442–43 (2018) (noting that scholarly critiques of existing criminal legal institutions depict the problem as one of “contemporary excess,” neglecting criminal law’s history and treating criminal law itself as a neutral institution).

from civil laws. But criminal law does impose unique burdens and a distinctive enforcement mechanism. The subject belongs in the law school curriculum and is an important object of scholarly inquiry.

Would a course built around this alternative account of criminal law have made mass incarceration less likely? Would it help us unwind mass incarceration now? My alternative account is likely to produce a more chastened approach to the choice to use criminal sanctions, but it does not guarantee such restraint. Various portions of my account are consistent with some academic conceptions of criminal law held in the early twentieth century, before Michael and Wechsler developed their vision. The thinkers who held that pre-Wechslerian view were no abolitionists, nor even penal minimalists. Most notably, Thurman Arnold, a Yale law professor of the 1930s who would later serve in the Roosevelt Administration, criticized the substance/procedure dichotomy in ways consonant with my arguments here, and he emphasized the inability of “substantive” law to contain enforcement discretion.³⁵² He repeatedly emphasized the role of state agents and resisted a conception of substantive law as depersonalized and self-executing.³⁵³ But Arnold did not appear particularly troubled by any of these features of criminal law; he saw enforcement discretion as an efficient way to achieve the public good.³⁵⁴

If we revise our criminal law canons to understand criminal law as a human practice, then our willingness to use criminal sanctions is likely to turn on how much we trust the enforcers. Arnold was sanguine, but almost a century later, we have good reason to be less confident. Among other things, we have better understandings of cognitive bias, and the ways that bias is likely to affect the exercise of discretion are simply too prevalent now to ignore. And in an age of both great inequality and heightened awareness of inequality, empowering the state to impose still more inequality may seem more troubling than it did early in the twentieth century.

A different curriculum would better serve the general aim to prepare students for democratic citizenship and empower students with a more

352. Thurman W. Arnold, *The Role of Substantive Law and Procedure in the Legal Process*, 45 *Harv. L. Rev.* 617, 645 (1932) (“Substantive law is canonized procedure. Procedure is unfrocked substantive law.”); see also Thurman W. Arnold, *Law Enforcement—An Attempt at Social Dissection*, 42 *Yale L.J.* 1, 6 (1932) [hereinafter *Arnold, Law Enforcement*] (rejecting as false the idea that “criminal justice is both impartial and impersonal—that principles instead of personal discretion control the actions of judges and prosecutors”).

353. See *Arnold, Law Enforcement*, *supra* note 352, at 6–7; see also *Arnold, Criminal Attempts*, *supra* note 210, at 76–79 (“An examination of the cases indicates not only that courts are free to throw all this machinery overboard, but that they are actually doing it in most cases.”).

354. See *Arnold, Criminal Attempts*, *supra* note 210, at 79 (claiming that attempt law’s “very vagueness has been its salvation, for it makes it possible to arrive at good results in many cases”).

critical perspective to assess the merits of criminal sanctions.³⁵⁵ To be clear, though, the aim should be to equip students with the capacity to critique and resist existing legal institutions; it should not be to replace one line of indoctrination with another. There will be those who, like modern-day Thurman Arnolds, see the realities of criminal law and embrace it anyway. A democratic society needs disagreement and can benefit from it, so long as those who disagree share some understanding of the underlying facts. The problem with criminal law teaching is that it has produced consensus through a distorted depiction of criminal legal practices.

Ultimately, though, we need a different curriculum, whether or not it yields different criminal legal practices or leads to more democratic modes of interaction.³⁵⁶ Obviously, one aim of education is knowledge and understanding. The existing criminal law curriculum was designed around other goals: It sought to secure esteem for the field and implement a particular policy vision.³⁵⁷ If for no other reason than the pursuit of truth for its own sake, teachers should abandon Wechsler's model in favor of a more accurate description of criminal law as a human practice.

355. Cf. Jeannie Suk Gersen, *The Socratic Method in the Age of Trauma*, 130 *Harv. L. Rev.* 2320, 2341 (2017) (“[T]eaching is meant to form citizens of a democracy. A classroom can model how citizens speak to each other and discover their rational and meaningful disagreements.”).

356. Cf. Simon, *Teaching Criminal Law*, *supra* note 139, at 1335. As Simon puts it:

I view my course as a practical exercise in creating a mentality for the next generation of lawyers. By helping students become aware of the role that historically specific narratives and discourses play in making it possible to legally reason about crime, I hope my course teaches them to work with the multiple sources of meaning and authority that compete in our present age. Naturally this makes it more difficult to engage in the project of reforming the criminal law by identifying its principles and seeking to work out implications for various boundary-drawing problems. But we are not in an age when academic legal scholars have much influence on the making of criminal law. Instead we must make our contribution, if any, in the preparation of new criminal law mentalities.

Id.

357. If the prevailing account of criminal law was shaped by concerns about the field in relation to the rest of law, and by efforts to identify a distinctive subject worthy of independent attention, this is hardly a new story. Similar stories have been told of torts and evidence. See Thomas C. Grey, *Accidental Torts*, 54 *Vand. L. Rev.* 1225, 1226–27 (2001); William Twining, *Hot Air in the Redwoods, A Sequel to the Wind in the Willows*, 86 *Mich. L. Rev.* 1523, 1533–36 (1988). Indeed, scholarly accounts of law itself are often implicitly, and sometimes explicitly, driven by the theorist's own felt need to maintain “the dignity of our profession.” See, e.g., Anthony Kronman, *Jurisprudential Responses to Legal Realism*, 73 *Cornell L. Rev.* 335, 335–39 (1988) (describing a view he calls “conventionalist,” and explaining that he adheres to that view because he finds the alternatives to imperil “the dignity of our profession”). As I note, law doesn't execute itself; it needs humans to do that. Nor does law theorize itself; it needs humans to do that too. See *supra* section IV.B.1. It should be no surprise that human fingerprints can be found on law's theorization as on its execution.

CONCLUSION

The phrase “the carceral state” appears to have originated with a political scientist, which is not surprising: The term reflects a shift in the use of criminal law so profound that the very character of the political regime is altered.³⁵⁸ For many Americans, criminal legal institutions are the “only government I know.”³⁵⁹ For a still-larger number, the burdens of a criminal record define their place in the polity.³⁶⁰ Meanwhile, for many Americans whose lives have not been burdened by a criminal conviction, the operation of criminal law is seen as one of the state’s most fundamental tasks, more important than the pursuit of economic well-being, education, technological advancement, or even liberty itself.³⁶¹

Historical transformations as significant as America’s twentieth century turn toward carcerality do not happen thoughtlessly. Humans may not always be fully rational, but they are nonetheless thinking creatures who give accounts of why they are acting as they do. And, in general, humans do not openly embrace malevolence toward one another. Rather, large-scale violence by some against others is usually accompanied by a theory or rationale, often held in good faith, about why the violence is

358. See Gottschalk, *The Prison State*, *supra* note 20, at 1–2 (describing how the carceral state “includes not only the country’s vast archipelago of jails and prisons, but also the far-reaching and growing range of penal punishments and controls that lies in the never-never land between the prison gate and full citizenship”); see also Marie Gottschalk, *Hiding in Plain Sight: American Politics and the Carceral State*, 11 *Ann. Rev. Pol. Sci.* 235, 235 (2008) (“The carceral state has grown so huge that it has begun to transform fundamental democratic institutions . . .”). The phrase evokes Michel Foucault’s concept of “the carceral archipelago,” or a society that disciplines through both the prison itself and other institutions (such as schools, factories, and the military) organized on similar principles. See Michel Foucault, *Discipline and Punish: The Birth of the Prison* 297 (Alan Sheridan trans., Vintage Books ed. 1979) (1977) (describing “a whole series of institutions which, well beyond the frontiers of criminal law, constituted what one might call the carceral archipelago”).

359. Vesla M. Weaver, *The Only Government I Know: How the Criminal Justice System Degrades Democratic Citizenship*, *Bos. Rev.* (June 10, 2014), <http://bostonreview.net/us/vesla-m-weaver-citizenship-custodial-state-incarceration> [<https://perma.cc/7LEH-AEAY>].

360. See Jacobs, *supra* note 328, at 247 (“Th[e] conception of the convicted felon as a noncitizen carried over into U.S. law, particularly with respect to prisoners, who were treated as ‘beyond the ken of the courts.’ Even persons who had completed their sentences were denied certain citizenship rights.” (quoting *Beyond the Ken of the Courts: A Critique of Judicial Refusal to Review the Complaints of Convicts*, 72 *Yale L.J.* 506, 506 (1963))).

361. See, e.g., Hart, *Aims*, *supra* note 280, at 410 (“[T]he criminal law has an obviously significant and, indeed, a fundamental role to play in the effort to create the good society.”). As a few scholars have suggested, the crime victim has become the cultural model of the representative citizen. See David Garland, *The Culture of Control: Crime and Social Order in Contemporary Society* 144 (2001) (viewing a victim as a “representative character”); Jonathan Simon, *Governing Through Crime: How the War on Crime Transformed American Democracy and Created a Culture of Fear* 136 (2007) (“The crime victim can be celebrated in American governance as an ideal citizen subject in part because his or her demands are limited to what the state already knows how to produce relatively effectively, i.e., punishment.”).

appropriate. The conquest of indigenous tribes in the United States had a theory, as did the institution of slavery, and as did and do any number of uses of military force.³⁶² Mass incarceration was not a thoughtless mistake. It was not consciously theorized in terms of scale, to be sure; I see no evidence that leaders or policymakers set out to become the world leader in prison population. As James Comey reminds us, mass incarceration happened one defendant at a time.³⁶³ But there is a particular vision of criminal law that made millions of criminal prosecutions seem, when each was considered individually, like a good idea. That is the vision of a noble, impartial, and constrained criminal law, and it is a mirage. The hope now must be to try to see—and help the next generation of lawyers see—more clearly.

362. See, e.g., Seth Davis, *American Colonialism and Constitutional Redemption*, 105 *Calif. L. Rev.* 1751, 1775–77 (2017) (discussing the relationship between Spanish theologian Francisco de Vitoria’s theories of just conquest and the Supreme Court’s endorsement of forcible conquest of native tribes); Ristroph, *Just Violence*, *supra* note 140, at 1028 & n.40 (discussing just war theory); Louis Michael Seidman, *The Secret History of American Constitutional Skepticism: A Recovery and Preliminary Evaluation*, 17 *U. Pa. J. Const. L.* 1, 41–44 (2014) (discussing the political thought of John C. Calhoun and its influence in slave-holding states).

363. See *supra* notes 1–2 and accompanying text.

