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Available at: https://repository.law.umich.edu/mjlr/vol57/iss3/2

https://doi.org/10.36646/mjlr.57.3.complicit

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THE COMPLICIT CANON OF CRIMINAL LAW: A CRITICAL SURVEY OF SYLLABI, CASEBOOKS, AND SUPPLEMENTAL MATERIALS

Robin Peterson*

ABSTRACT

This Note analyzes the learning objectives, casebook readings, and supplemental sources that thirteen criminal law professors assigned over fifteen years and argues that the current approach to teaching criminal law is complicit in perpetuating the injustices of the American criminal legal system because it fails to adequately interrogate the carceral state and does not prepare students to become ethical practitioners or policymakers of criminal law. This paper calls for a fundamental rethinking of the purpose of teaching criminal law and recommends a reform orientation, which could be implemented through a variety of course structures.

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INTRODUCTION

The injustices and horrors of the American criminal legal system have been well-documented. The U.S. rate of incarceration remains one of the highest in the world\(^1\) despite recent declines,\(^2\) and the U.S. is an international outlier in long prison sentences.\(^3\) More people are serving life sentences in the U.S. than in any other country and the vast majority of people sentenced to life without the possibility of parole are in the U.S.\(^4\) Racial inequities are pervasive, with Black Americans incarcerated in state prisons at nearly five times the rate of white Americans.\(^5\) Suicide

\(^1\) The U.S. prison population rate is 505 per 100,000, a rate surpassed only by El Salvador (605), Rwanda (580), Turkmenistan (576), and Cuba (510). Nations with the lowest prison population rates include Gambia (22) and the Democratic Republic of Congo (24). The U.S. is an outlier even among the wealthiest nations with legal systems based on English common law: Australia (165), United Kingdom (139), Canada (85), and India (40). [Highest to Lowest Prison Population Total, WORLD PRISON BRIEF, https://www.prisonstudies.org/highest-to-lowest/prison-population-total](https://perma.cc/HJ88-7JLH) (last visited Mar. 16, 2023).


\(^4\) Id. at 4.

and homicide rates within prisons are on the rise in facilities already known to be rife with violence.7

Considering these enormous problems, the learning goals for courses on substantive criminal law are relatively insouciant. Rather than aiming to teach the flaws of the system and how to use the law to effect change, professors’ stated objectives are to teach the theoretical underpinnings of criminal law with varying degrees of attention to the actual outcomes of the system. In part because criminal procedure is taught in a separate course, students are exposed to abstract justifications and goals for criminal law in a manner that is disconnected from how the system truly functions.8 One criminal law professor with twenty-seven years of teaching experience reflected with contrition that teaching in this abstract way “misleads students into thinking that our system of criminal law is more thoughtful, more rational, and more just than it actually is.”9 This paper goes further to argue that the current approach to teaching criminal law is complicit in perpetuating the injustices of the criminal legal system because it fails to adequately interrogate the carceral state and does not prepare students to become ethical criminal law practitioners or policymakers.

The analysis of this paper is grounded in the materials that thirteen criminal law professors at seven law schools assigned to students over the past fifteen years.10 All of the participating professors concentrate on criminal law and have a range of three to thirty-four years of experience teaching law, with an average of fifteen years.11 They all primarily teach criminal law and have backgrounds in public defense, white collar criminal defense, federal prosecution, government investigations, and international criminal law. I sent an early draft of this piece to participants and received feedback from seven professors, ranging in depth from brief notes and corrections to extended conversations. I have attempted

7. See Nancy Wolff & Jing Shi, Contextualization of Physical and Sexual Assault in Male Prisons: Incidents and Their Aftermath, 15 J. CORRECTIONAL HEALTH CARE 58, 64–65 (2009) (finding, in a survey of 6,941 people, that nineteen percent of men in U.S. prisons were physically assaulted by other incarcerated people and twenty-one percent were assaulted by staff).
8. See generally Alice Ristroph, The Curriculum of the Carceral State, 120 COLUM. L. REV. 1631, 1651 (2020) (describing Criminal Law as a “deeply normative course premised on a specific model of what criminal law should be”),
10. Requests for syllabi were sent to ninety-five professors at twelve law schools. See infra Appendix A.
11. Information from public curriculum vitae, which were available for eleven of thirteen professors.
to incorporate many of their suggestions and occasionally reference their comments, anonymously, throughout the paper. The casebooks these professors assigned include Kadish’s Criminal Law and Its Processes and Dressler & Garvey’s Criminal Law, the two criminal law casebooks with the largest market share, four lesser-used texts, and two first-edition open-source texts.

This Note focuses on the curriculum of the introductory criminal law course and covers materials assigned to students, which were overwhelmingly judicial opinions (largely authored by white men), in alignment with the traditional case method of instruction. Professors occasionally assigned cases not included in their core casebook, but most supplemental materials were much more diverse in content, media type, and authorship. This Note does not explore how professors might “teach against” assigned materials—that is, teach the texts from a critical lens—through class discussion, guest speakers, court watching assignments, or other activities that cannot be neatly captured in syllabi. Certainly the same curricular materials can be taught in myriad ways. Themes of race, inequity, and injustice can be handled adeptly by one professor and abysmally by another. Additional scholarship on the praxis of criminal law based on class observations, structured interviews with professors, and student surveys or focus groups would be a valuable contribution to this field.

An analysis rooted in assigned materials is nevertheless a reasonable place to begin. The law profession values the written word and students should be exposed to writing that clearly identifies problems with substantive criminal law as it currently stands. Also, while important opportunities to reflect on problems within the current canon of criminal law have been identified, teaching against casebooks has not been shown to

15. See infra Appendix C for a full list of casebooks and editions included in this survey.
16. See infra Appendix D for a full list of supplemental materials for the instructional units discussed in this paper; see infra Appendix E for a list of assigned cases.
17. See, e.g., Cynthia Lee, Race and the Criminal Law Curriculum, in The Oxford Handbook of Race and Law in the United States (Devon Carbado et al. eds., 2022).
be an effective strategy. Finally, having students read racist or otherwise problematic texts without assigning advanced reading with sufficient counternarratives could create inequities in how students participate in and learn from lectures. Students who have not previously been exposed to critiques related to the assigned materials may need additional opportunities to reflect on those views to fully comprehend them. One professor who participated in this survey shared the pedagogical theory that an element of surprise might help students reflect on their own biases. If true, this would be a dubious justification for hiding the ball, since most courses on criminal law are not currently aimed at guiding students to realize their own biases and asking professors to do so would be a tall order for a large lecture-based course. Students should be given advanced reading and time for reflection on counternarratives to racist, misogynistic, or pro-carceral materials in order to honor the various processing time that students need to grapple with challenging material and to address any undue psychological burden that students with marginalized identities may face when engaging with problematic material during their preparation for class.

Part I of this Note examines the learning goals professors in this survey set, situates this paper in the broader scholarship on legal education reform, and establishes the unique aspects of the criminal law course that make it most appropriate for a reform orientation, relative to other first-year law courses. Parts II-IV analyze the materials that professors assigned to students for three instructional units. Part II explores the justifications of criminal law and the purposes of punishment, which all professors included in their introductory lectures. These materials are foundational to the course and are referred to repeatedly as professors teach subsequent doctrine and may be the most overt propaganda for the carceral state in all the materials that professors assign. Part III examines proportionality of punishment, including capital punishment, which nearly all professors taught to extremely varying degrees. This topic showcases the need to look beyond the U.S. when discussing criminal law since the country is such an outlier in sentencing. Part IV looks at self-defense, which all professors taught and which highlights the problem of relying heavily on cases for instructional

18. See Ristroph, supra note 8, at 1683–84 (discussing the challenges of teaching against casebooks generally and from a decarceration perspective in the criminal law course).

19. This argument is linked to a broader conversation about the psychological burdens that students of color face in law school. For a broader analysis of the psychological burdens that Black and Latinx law students experience, see Erin Cristina Dallinger-Lain, Experiences of Academically Dismissed Black and Latino Law Students: Stereotype Threat, Fight or Flight Coping Mechanisms, Isolation and Feelings of Systemic Betrayal, 45 J. L. & EDUC. 279 (2016).
materials when much of the decision-making that occurs in the criminal legal system does not result in published appellate decisions. Part V envisions what a reform-oriented substantive criminal law course could look like and discusses some administrative barriers to change. An appendix which details the methodology of this survey follows.

I. LEARNING GOALS

In this part, I review the objectives that professors included in their syllabi and provide a descriptive analysis of the types of goals they set with special attention paid to those aligned with a reform orientation. Next, I present pragmatic and moral arguments for why criminal law should be prioritized for restructuring relative to other first-year subjects.

A. Traditional Criminal Law Learning Objectives

Most professors in this survey included learning objectives in their syllabi, which can provide some insight into their instruction since they are documents of first impression used to set the tone for a course. Syllabi are uniquely tailored. The course objectives are not universal language provided by the university, and they are presumably not compliance-driven as law professors have wide latitude in how they discuss their goals.

Objectives fell into three categories: 1) lower-order goals specific to learning basic doctrine; 2) higher-order goals specific to evaluating and making arguments about criminal law; and 3) generalized content-neutral skills such as learning how to read a case, communicate effectively in class, and respectfully respond to different opinions. Every professor who included learning goals in their syllabi expected students to understand fundamental doctrine, including: the general elements of crimes; the specific elements of crimes like homicide and sexual assault; defenses; inchoate offenses; and liability for the actions of others.

20. Eleven of thirteen professors included explicit learning objectives in their most recent syllabi. While the ABA requires law schools to set learning objectives for their entire program, there is no similar requirement for individual courses. Standards and Rules of Procedure for Approval of Law Schools 2022-2023, AM. BAR ASS’N (2022) [hereinafter ABA Standards].


22. See id. at 191–93 (describing higher-order learning goals, including creating or critiquing material).
Professors also expected students to learn the theoretical justifications for criminal law. Their stated goals for interrogating the criminal law varied greatly. Only five of eleven professors who included learning goals included any related to reform, such as developing “an ability to critique the rules” of criminal law, considering “criminal justice reform initiatives,” and proposing reforms “where existing law fails.”

Of course, learning goals do not capture everything that professors cover. Only four professors explicitly included goals related to race, but race was undoubtedly covered in every course. Whether professors had clear objectives for how they would cover race and what students’ understandings would be is unknown. Syllabi also did not include objectives for individual instructional units, which is why I analyzed the specific content of units.

B. Prioritizing Criminal Law for a Reform Orientation

Teaching criminal law as a law reform course would unquestionably be a major departure from the status quo. The main critique of this Note sits within the larger criticism of legal education that students learn too much of what the law currently is and not enough of what it could be or how to change it. A reform orientation will require reading fewer or shorter cases. Even the professors who participated in this survey and were sympathetic to my call for change lamented that their time is already constrained and they do not have the bandwidth to add more supplemental materials or teach about reforms. Professors may be reluctant to cut cases to add other materials since learning to read cases is a vital skill that first-year law students develop. But there is ample duplication of the case method across the first-year curriculum. Students learn to read cases in Civil Procedure, Constitutional Law, Contracts, Property, and Torts. The skill is further refined in upper-level courses. Calls for reform to the teaching of other first-year courses have also been raised, but those reforms do not necessarily require pulling away from the case method.

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23. At minimum, race is mentioned somewhere in the materials of all syllabi reviewed, and racial inequities were presumably discussed in class since they permeate the criminal legal system.


Moreover, reliance on cases in the criminal law course provides a skewed view of the system because the government does not have a right to appeal acquittals and trials have nearly vanished in criminal cases, which leaves only a small and unrepresentative sample of cases to teach. Students almost exclusively read appellate opinions that stem from a finding of guilt, presumably because there is not much meat on the bones of many trial court opinions and because the most interesting issues in criminal law filter up through appeals. Of the syllabi analyzed in this survey, only three percent of opinions assigned to students were trial court opinions, all of which were sentencing decisions succeeding a finding of guilt. This narrow set of readings presents a warped view for students, who almost exclusively read cases where a defendant was found guilty. The opinions are also becoming more dated and niche due to the proliferation of plea negotiations. More than ninety-seven percent of federal criminal convictions and ninety-four percent of state court convictions are reached through plea deals. Plea bargaining has risen dramatically since the explosion of mandatory minimums and sentencing guidelines began in the 1980s, leading to a massive shift in discretion from judges to prosecutors. With fewer trials, there are fewer opportunities for appeals that would result in opinions fit for casebook publication. For students to learn how substantive criminal law is applied in contemporary cases, they must read a broader range of materials, examples of which could include pretrial motions, internal policy directives from prosecutors, and any number of extra-docket texts that explore the inner workings of the criminal legal system and its effects on people’s lives.

Fruehwald, Bringing Legal Education Reform into the First Year: A New Type of Torts Text, 50 J. MARSHALL L. REV. 713 (2017).

26. There were 226 case assignments in the three instructional units analyzed in this survey. If a professor used the same materials in multiple years, only one year was included in this count. Trial court opinions were only assigned seven times. A government sentencing memo was assigned once and was not included in this count.


30. Similar arguments could be made about civil cases and the rise in settlements. While there may be merit in having students read complaints, motions for summary judgment, consent decrees, etc., criminal law should be distinguished. Dockets in civil cases more adequately represent opposing parties’ views, whereas defendants’ true interests may not manifest in criminal cases; for
Beyond the pragmatic rationale for transitioning from cases, there is a broader moral justification for prioritizing the criminal law course as a venue for teaching law reform. In criminal law, the state has the enormous power to take lives, remove people from society until death, and strip people of the fundamental right to vote. Alongside these weighty powers should come critical interrogation and greater societal obligation to act when there are known flaws. The connection between law school instruction to reform of the legal system is also more direct in criminal law than in other areas of law. There are undoubtedly social-policy\textsuperscript{31} and statutory\textsuperscript{32} changes that need to be implemented to effect change in the criminal law, but that does not absolve law schools of the responsibility to interrogate how their pedagogical choices contribute to the perpetuation of the carceral state. Since so much discretion lies with prosecutors who act under the mantle of the state,\textsuperscript{33} and who are all trained in American law schools, those institutions should bear some obligation for producing ethical practitioners who can engender significant change within their roles.

Having explored the limitations of learning goals in criminal law courses and the broad challenges of heavy reliance on cases, this Note now turns to three instructional units that nearly all professors in this survey taught. The following sections explore in detail how the assigned cases and supplemental materials espouse pro-carceral views and inadequately challenge inequities in the criminal legal system.

II. THE PURPOSES OF PUNISHMENT

This section starts with a critique of introductory materials on the justification of criminal law and is followed by four sections that delve into areas that are insufficiently covered. The critiques are presented


\textsuperscript{33} See generally EMILY BAZELON, CHARGED: THE NEW MOVEMENT TO TRANSFORM AMERICAN PROSECUTION AND END MASS INCARCERATION (2019).
alongside positive outliers and references to materials that some professors assigned which provided more holistic and concrete content.

All casebooks included in this survey open with discussions of retributive and utilitarian functions of punishment, which every professor assigned some portion of for their introductory lectures. The readings discuss the four main goals of punishment—retribution, deterrence, incapacitation, and rehabilitation—and ask students to “consider why punishment is justified, not whether.” 34 Most casebooks frame this introductory content within the context of mass incarceration, but few offer explanations for this phenomenon that expose its deep injustices and inequities. The theories that students read are abstract justifications for the power of the state to punish as posited by white, male, and British or European philosophers from the eighteenth and nineteenth centuries, like Jeremy Bentham and Immanuel Kant. While it is perfectly appropriate for students to gain an understanding of historical justifications of punishment, a reform-oriented course would focus on contemporary and diverse writings that grapple with specific justifications for the system of punishment that currently exists.

Bentham and Kant had no way to predict issues that would make the American legal system a global outlier, such as the precipitous rise of incarceration during the War on Drugs, 35 the continuance of life without parole sentences for juveniles despite growing consensus that youth are more impulsive and less culpable offenders, 36 or the toxic surge in utilization of prolonged solitary confinement. 37 Notably, these authors do not address systemic racism, despite writing while the transatlantic slave trade was operative, and could not have predicted the retooling of the American criminal legal system as an instrument to perpetuate a racial caste system. 38

Even the writing of a twentieth century white male English author that is prototypical of readings on retributivism assigned to students is completely abstract. Consider this passage from the tenth edition of

34. Ristroph, supra note 8, at 1660.
Kadish’s Criminal Law and Its Processes, which was assigned by four of the five professors who used this casebook:

Even in the most well-mannered state, those criminals who deserve punishment should get it, according to retributivism. . . . Retributivism is a very straightforward theory of punishment: We are justified in punishing because and only because offenders deserve it. Moral culpability (“desert”) . . . gives society more than merely a right to punish culpable offenders. . . . For a retributivist, the moral culpability of an offender also gives society the duty to punish.39

While this casebook includes critiques of retributive theory, they are presented in similarly abstract form.40 Professors varied greatly in whether they assigned students supplemental materials that tackle defenses and critiques of concrete forms of punishment like incarceration or the myriad collateral consequences of convictions. These readings are discussed in more detail in the sections that follow.

As for the cases that were assigned, professors relied less on judicial opinions to discuss the purposes of punishment than in teaching other doctrine, such as specific crimes and defenses. They assigned anywhere from zero to six cases for this instructional unit, with an average of one and a half cases. When professors assigned at least one case, they included the classic English cannibalism-at-sea case Queen v. Dudley and Stephens41 eighty-four percent of the time.42 When that opinion was issued, cannibalism was not an uncommon issue for sailors who could be stranded at sea with no way to communicate with potential rescuers. While an unsavory practice, cannibalism in this situation was typically not criminalized.43 In Dudley, sailors eschewed the traditional form of

40. See, e.g., id. at 104 (citing to Jean Hampton, Correcting Harms Versus Righting Wrongs: The Goals of Retribution, 39 UCLA L. REV. 1659, 1660–61 (1992)) (critiquing retributive theory for operating on a “free rider” assumption which “makes sense only if raping, murdering, and stealing are viewed by us as desirable and attractive.”).
41. Queen v. Dudley and Stephens, 14 QBD 273 (1884).
42. For the analysis of the purposes of punishment, thirty-three unique syllabi were reviewed. Among those, twenty-five included case assignments. Within that subset, twenty-one assigned Dudley and Stephens.
43. This background is typically provided in the notes following the case. See, e.g., Kadish 10th, supra note 39, at 94 (citing to Neil Hanson, The Custom of the Sea (2000); A.W.B. Simpson, Cannibalism and the Common Law (1984)).
choosing a victim to cannibalize, drawing lots, and instead selected the weakest among their group. They were subsequently convicted. Even though the factual scenario of this case is dated and modern courts are unlikely to deal with a similar problem, the case can foster pedagogically relevant discussion among students about the justifiability of the state’s action. As one professor who participated in this survey pointed out, using fact patterns that are distant from current issues can enable more students to engage in the topic since it is depersonalized. Presumably no student is personally connected to cannibalism at sea, so everyone has an equitable opportunity to engage in conversation. This could be a valid starting point, but a course focused on reforming criminal law would necessarily go further to explore current issues that need solutions. As one example, students could discuss the power to criminalize driving with a suspended license and whether it is justified given the scant harm the offense causes to society and the immense harm that criminalization disproportionately imposes on Black men.44

A reform-oriented course would also engage in a root cause analysis to understand not only what is broken within the current system, but why. The following sections examine some of the problems of punishment and their justifications that should be more fully explored to prepare students to think critically about criminal law reform.

A. The Abstraction of Punishment

Most professors in this survey did not assign any materials that cover conditions of incarceration. Those that did typically assigned brief (one-to-two page) readings from their casebooks that discuss physical violence, sexual violence, and crowding in prisons. The only case assigned with regularity that discusses details of any type of punishment is U.S. v. Gementera,45 an outlier case with a shaming punishment requiring the defendant to stand in public wearing a sandwich board describing their offense. Only four of the thirteen professors in this survey assigned this case and its associated notes, which include other shaming-related sentences and philosophical questions about the justness of these punishments. Thus, most assigned materials discussing the purposes of punishment fail to address in any detail what we actually mean when we talk about punishment. This abstraction is concerning. In reality,

45. United States v. Gementera, 379 F.3d 596 (9th Cir. 2004).
punishment in America, which is inflicted on millions of people, nearly always includes some form of carceral control, including probation, incarceration, parole, life-long registration requirements, and monetary penalties. Without addressing how these punishments function, students are left to participate in thought experiments about substantive criminal law with potentially no regard for the implications in people’s lives.

To understand the retributive or utilitarian value of punishment, it is particularly important to discuss the rampant violence in U.S. prisons. It is one thing to defend retributivism if the punishment is social isolation and another if punishment includes violence or the threat of violence. One professor recently started assigning Danielle Sered’s writing on restorative justice, which argues that our prison system reinforces violent behaviors through widespread exposure to the core drivers of violent behavior at an individual level: shame, isolation, violence, and an inability to meet one’s economic needs. Utilitarian justifications for punishment should be interrogated through this critical lens since it undercuts the value that society purportedly gains through punishment. This perspective may be lost in a purely abstract conversation about utility. Perhaps professors assume that students already have some baseline understanding of the concrete nature of punishment in the carceral system. Even if true, students should still be asked to defend or critique justifications of carceral violence to promote more precise diagnosis of problems meriting concrete solutions.

Most materials professors assigned also fail to discuss the collateral consequences of conviction, such as ongoing court-monitoring, registration requirements, fees, migrant deportation, and life-long denial of rights and privileges, including certain social services and voting. This is addressed lightly in the overview to the criminal legal system in the tenth edition of Kadish—though not returned to in later cases or theories related to the justification of punishment—with the following line: “The vast expansion of the criminal justice system has created a large population whose access to public benefits, occupations, vocational licenses, and the franchise is limited by a criminal conviction.” Even this meager sentence was only assigned by one of the five professors who used this casebook, and none of those five assigned supplemental materials that

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47. See generally DANIELLE SERED, UNTIL WE RECKON: VIOLENCE, MASS INCARCERATION, AND A ROAD TO REPAIR (2019).
48. KADISH 10th, supra note 39, at 4 (quoting NAT’L RsCH. COUNCIL, THE GROWTH OF INCARCERATION IN THE UNITED STATES 6–7 (2014)).
address collateral consequences of punishment. Compare this with the more extensive overview provided in Podgor’s *Criminal Law*, which was assigned by one professor in this survey:

After a criminal conviction, individuals may face “a wide variety of sanctions and restrictions in addition to the sentence imposed by the court.” For example, persons convicted of a felony may be barred from voting, holding political office, serving on a jury, working in the government, living in public housing, receiving public assistance benefits, receiving federal student loans, possessing a firearm, ineligibility or dishonorable discharge from the military, or loss of business or professional licenses. White collar offenders also fear collateral consequences following convictions, such as the doctor who may be excluded from receiving government benefits such as medicare or medicaid, or the corporation who may be debarred from doing future business with the government. Parents who are convicted of crimes may lose preference in custody proceedings or have their parental rights terminated while incarcerated. A felony conviction may also result in collateral civil consequences involving the loss of certain rights, such as the opportunity to hold elected or appointed office or to serve on a jury, and, in some states, the right to vote or obtain certain licenses. Often, misdemeanor convictions do not trigger these disabilities.49

This note is followed by even more detailed information about sex offender registration requirements and the potential immigration consequences for non-citizens who are convicted of crimes, which is essential information all students should be exposed to.50

B. Racial Subjugation as a Purpose of Punishment

All professors assigned material that made at least passing mention of racial disparities in the criminal legal system, but there was little consistency in the quality and depth of assigned content. The most cursory overview is found in Hoffmann and Stuntz’s *Defining Crimes*. The entirety of this topic, at least in the introductory materials on purposes of punishment, is contained in this paragraph:


50. See id. at 48–49.
American punitiveness is not only extreme, it also disproportionately impacts the poor and people of color. For example, a comprehensive report published in 2016 revealed that whites in America are incarcerated at the rate of 275 per 100,000; Hispanics at the rate of 378 per 100,000; and blacks at the rate of 1,408 per 100,000. In 12 states—Alabama, Delaware, Georgia, Illinois, Louisiana, Maryland, Michigan, Mississippi, New Jersey, North Carolina, South Carolina, and Virginia—more than half of the state prison population is black. These disturbing statistics reflect in part the way that criminal laws get enforced by police, prosecutors, judges, and juries. But they also reflect the substance of the criminal law itself; as we shall see, the very way that crimes are defined can contribute substantially to such disparities.\(^{51}\)

The only professor who used this casebook did not assign any supplemental materials for this unit. While short, this section does close with a nod towards an antiracist analysis of disparities in the criminal legal system by indicating that enforcement and policy are contributing factors. This material is crucial to understanding how to reform the law and deserves to be covered in far more detail. Conversely, the tenth edition of Kadish provides a patently racist account of racial disparities couched in language sympathetic to conditions that may have led to increased criminality:

> Those who are incarcerated in U.S. prisons come largely from the most disadvantaged segments of the population. They comprise mainly minority men under age 40, poorly educated, and often carrying additional deficits of drug and alcohol addiction, mental and physical illness, and a lack of work preparation or experience. Their criminal responsibility is real, but it is embedded in a context of social and economic disadvantage.\(^{52}\)

This passage was only assigned by two of the five professors who used this casebook.

One casebook includes a unique note on the exorbitant caseloads that district attorneys’ offices and courts handle and how this exacerbates implicit bias, since prosecutors and judges must move quickly through their dockets, leading to overreliance on race-based heuristics:

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52. KADISH 10th, supra note 39, at 2 (quoting the National Research Council).
Legal experts and psychologists have identified reforms that can be utilized to address implicit bias in the criminal justice system. First, discretionary decision-makers should receive training on the psychology of implicit bias, how it affects the discretionary decisions they make, and how they can “auto correct” their unconscious behavior. Second, because research shows that implicit bias occurs more frequently when a decision-maker is forced to [make] rapid judgements without reflection, court systems should reduce the high premium placed on judicial efficiency in “clearing the court docket” or “moving cases along.”

This passage is both an important acknowledgement of how the procedural and substantive elements of criminal law are difficult to disentangle and valuable insight into how the machinations of the criminal legal system perpetuate inequities. It is another reminder of the important role that individuals trained by American law schools play in the criminal legal system and further underscores law schools’ responsibility to reform the teaching of criminal law.

Under the current learning objectives for the criminal law course, any of these approaches to incorporating race are appropriate. A reform-oriented course would necessarily dive much deeper to explore the proposition that racial disparities are part of the design of the system, rather than an unfortunate outcome or result of implicit bias. Students must consider this possibility to evaluate the effectiveness of possible reforms, and professors should be raising these critiques even if they do not agree with them because these criticisms are too substantial to be dismissed.

Three professors in this survey took unique and significant approaches to addressing racial subjugation as a purpose of punishment. One professor assigned two readings that show a common throughline from slavery to the current carceral state: Michelle Alexander’s *The New Jim Crow* and a piece from the 1619 Project authored by Bryan Stevenson. Another professor assigned an excerpt from Paul Butler’s *Chokehold*, which explicitly argues that a primary purpose of the criminal legal system is to subjugate Black people, as well as an excerpt from *Biased* which addresses implicit bias and police training. Finally,

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54. See ALEXANDER, supra note 35.
one professor assigned an excerpt from *The Wrongful Convictions Reader* which tackles several issues of racial bias in the criminal legal system and is unique in discussing drug crimes, which only two professors included a unit on. All these readings stand in contrast to the philosophical justifications for punishment included in casebooks, which are mere theoretical pontifications, whereas these supplemental texts are rooted in concrete examples, data, and the realities of the criminal legal system.

C. Other Insidious Motivations for Punishment

Professors in this survey rarely assigned materials that explore unjust purposes of punishment outside of racial bias or subjugation, such as for-profit motivations or personal career advancement. Lee & Harris’ *Criminal Law* does include a reading that addresses this, but only two professors used this casebook and neither assigned the relevant passage. Both have since switched to different casebooks. Starting in 2019, two professors assigned the introduction of *Just Mercy*, which includes for-profit motivations that have contributed to mass incarceration, but one professor stopped assigning this text in successive syllabi.

In a course that aims to cover a significant amount of doctrine primarily through the case method, it may be difficult to add readings that address these types of motivations for perpetuating mass incarceration, but this would be an important consideration in a law reform course. Students would need to consider the extent to which profit and career advancement are driving decisions in the criminal legal system in order to develop appropriate solutions. Given the rise of both private prisons and privatization of services within public prisons, it is important to discuss both the profit motivation this generates for incarceration as well as its effects on the meaning of punishment. The purported value of incarceration may be undermined in a liberal democracy when it is privatized and the proliferation of privatization creates an “escape valve”

61. See Alexes Harris, Tyler Smith, & Emmi Obara, *Justice Cost Points: Examination of Privatization within the Public Systems of Justice*, 18 CRIMINOLOGY & PUB. POL’Y 143 (2019).
62. See Mary Sigler, *Private Prisons, Public Functions, and the Meaning of Punishment*, 38 FLA. ST. U.L. REV. 149, 151 (2010) (“[T]he profit motive is thought to create perverse incentives to extend inmate sentences and promote criminal justice policies that yield more and longer prison sentences regardless of whether they are in the public interest.”).
which relieves pressure from the overburdened public system and reduces the need to reevaluate and radically alter carceral policies. Students, who may become lawmakers and practitioners of criminal law, should consider this reality.

D. Effects and Alternatives

Professors assigned limited materials that address the extent to which punishment achieves any just purpose, likely because disaggregating data to determine its effectiveness is so difficult. Some casebooks include studies from econometricians that attempt to tackle this feat, including the controversial study linking a drop in crime with a rise in abortion, but none offer a comprehensive assessment of whether the current carceral state is achieving its purported goals. It is conspicuous that all casebooks open with an abstract discussion of the utilitarian justification of punishment but offer no concrete evidence that would support the theory.

One of many motivations behind the prison abolition movement is this lack of evidence for positive outcomes from the current carceral system. Law professor Allegra McLeod juxtaposes the known data on prison violence with the unclear data on effects on crime and safety in her seminal abolitionist article. McLeod also explores outcomes, albeit on fairly small scales, of several alternatives to incarceration like restorative justice as well as nontraditional preventative justice measures like universal design. This text should be required reading in any reform-oriented criminal law course because it undermines the reasoning that serves as system justification for the carceral state and showcases the need to explore alternatives. It further demonstrates how students can learn the traditional language used to justify punishment, which they should be versed in since they will encounter it in their practice, from a critical lens.

In half the syllabi reviewed in this survey, professors exclusively used casebooks for readings on the purposes of punishment, which include limited if any mention of alternatives to incarceration. Newer

63. See id. at 178.
64. See, e.g., KADISH 10th, supra note 39, at 131 (citing to John J. Donohue III & Steven Levitt, The Impact of Legalized Abortion and Crime, 116 Q. J. ECON. 379 (2001)).
66. Id. at 1228–29.
67. Id. at 1229–31.
68. Of the thirty-three unique syllabi reviewed for the purposes of punishment unit, nineteen relied exclusively on casebooks.
editions of casebooks have expanded on the topic, including the eleventh edition of Kadish’s *Criminal Law and Its Processes*, which now includes a fourteen-page section on abolition and restorative justice. The two professors who used this casebook assigned five and eleven pages from this section. This is an important development, but the readings still do not address concrete outcomes of incarceration or alternatives.

The professors who supplemented their casebooks used a variety of materials that explore racial bias in the criminal legal system, for-profit motivation, restorative justice, and prison abolition. They typically took a frontloaded approach, assigning these materials in the first one or two lectures. Professors likely have varied skill in returning to the themes and issues raised in these introductory materials throughout the course. Some may engage in regular, effective callbacks, while others may leave them untouched the rest of the semester. Classroom observations focused on faculty facility in revisiting their introductory material would be valuable scholarship, although it is beyond the scope of this paper.

The cases that professors used during this unit rarely address alternatives to incarceration and when they do usually only discuss probation as a substitute for prison. The most troubling of these cases is *People v. Du*, which was used in eighteen percent of syllabi. Du was a Korean store owner whose ten-year prison sentence was suspended and replaced with probation after she was found guilty of involuntary manslaughter for the shooting of an unarmed Black teenage girl. The case raises difficult questions about individual racial bias and the larger racial tension in Los Angeles at the time. It has some pedagogical validity, but students should also be exposed to examples of alternatives to incarceration that are not so racially problematic and that demonstrate positive outcomes. Danielle’s Sered’s book *Until We Reckon* includes stories about the challenges and benefits of restorative justices, which would be valuable reading for students who may become prosecutors who will make the discretionary choice to offer such alternatives, or who will become policymakers who fund such programs.

Having explored the theoretical introduction that students receive on the justification of punishment, this Note now turns to a concrete doctrinal unit.

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71. Id. at 825–26.

72. See generally Sered, supra note 47.
III. THE PRINCIPLE OF PROPORTIONALITY

The criminal legal system purportedly upholds the value that some offenses are worthy of greater punishment than others and people who commit similar offenses ought to receive similar punishment. This is the doctrine of proportionality, an entirely inward-looking principle, in which courts only look to the U.S. to determine, for example, if receiving the death penalty or a life sentence is a proportionate sentence for the offense committed. The doctrine could be applied to any sentence, although the most prominent cases concern capital and life sentences.

Coverage of proportionality and capital punishment in this survey was highly inconsistent. In fifteen percent of syllabi reviewed, professors did not teach a distinct unit on proportionality, so students’ only written exposure to the concept came from a short paragraph or two buried in the dozens (sometimes hundreds) of pages of introductory materials they were assigned. One professor who made the decision to cut proportionality from their instruction shared that while this topic is of great moral significance, it is of marginal importance doctrinally and thus not worth allocation of concededly limited class time. This is a rational instructional decision for a course aimed at teaching the law as it is, but would be a lost opportunity in a reform-oriented course. There are substantial opportunities for change embedded within the doctrine of proportionality, including addressing disproportionality of sentencing on a global scale, racial inequities in sentencing, and interjurisdictional inconsistencies in sentencing.

Even among the professors who did include a unit on proportionality, there was considerable range in the quantity of readings and topics covered. Some professors assigned short passages from their casebooks which ran through the holdings in a litany of Supreme Court cases, mostly related to the death penalty, without further explanation. Some professors assigned cases on three-strikes laws and lengthy sentences, but either did not include capital punishment or only covered it if time permitted. Some had students read up to seven cases. Others assigned a mix of multiple cases and supplemental materials.

One significant missed opportunity in teaching proportionality is giving students a global comparison for the type, length, and frequency of punishment that is meted out in the U.S. Juvenile life without parole is a telling example. The topic was only covered in thirty percent of syllabi reviewed and the treatment it received varied greatly. The latest edition

73. Five of the thirty-three unique syllabi reviewed did not include a distinct unit on proportionality.
Peter Peterson, DOCX (DO NOT DELETE) 6/18/2024 2:10 PM

The Complicit Canon of Criminal Law

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of Kadish’s Criminal Law and Its Processes includes an important note following Graham v. Florida, which held that life without parole was not a proportionate sentence for juveniles convicted of non-homicide offenses. The note shows that the U.S. is out of step with international standards:

The European Court of Human Rights has gone further than the U.S. Supreme Court, ruling that LWOP sentences violate Article 3 of the European Convention on Human Rights, which prohibits torture and inhuman or degrading treatment or punishment. That court concluded that jurisdictions must provide for review of a life sentence no later than 25 years after it was imposed, with periodic reviews thereafter, to determine whether there have been significant changes and rehabilitative progress such that detention is no longer justified on legitimate penological grounds.

Neither of the two professors who used this casebook assigned this case or this note. A similar note is in the tenth edition of Kadish, which was assigned in four of the five syllabi which used that casebook. A reform-oriented course would provide students with a global understanding of proportionality so they would have a better baseline for what constitutes fair and just sentencing. The course would also provide students with an understanding of the current state of unique juvenile issues, which one professor did by assigning a podcast episode which discusses procedural requirements and racial disparities in juvenile life sentences.

Instead of gaining this global perspective, most students learn proportionality through Ewing v. California, which nearly all professors who assigned cases on proportionality included. Ewing upheld three-strikes laws even when a defendant’s third offense is minor, in Ewing’s case stealing golf clubs, and would never on its own warrant a life sentence. Of all the casebooks that include an excerpt from Ewing, only one includes a note with a Canadian comparison which highlights how proportionality is approached differently in a less punitive system.

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78. Cases were assigned in twenty-one of the thirty-three unique syllabi reviewed in this unit. Of those, only one did not include Ewing, which was a departure even for that professor, who had previously assigned Ewing several times.
Under the proportionality component of the Canadian Charter of Rights and Freedoms, the Supreme Court of Canada struck down a mandatory seven-year sentence for importing an illegal drug. Even though the defendant was an experienced cocaine smuggler, the court reasoned that since the mandatory sentence could be applied to a less culpable offender, such as a student returning from an American spring break trip with a single joint of marijuana, it was a cruel and unconstitutional punishment.  

This global comparator was only included in fifteen percent of the syllabi in this survey.

In addition to this global perspective, a reform-oriented course would also examine the aspect of proportionality that precludes interjurisdictional comparisons. Based on this principle, courts do not consider whether the sentences received in one jurisdiction are proportionate to sentences received in another jurisdiction. This is an important doctrinal barrier to achieving more lenity and consistency across jurisdictions in the U.S. that students should be introduced to. A case that addresses this issue was assigned in only two of the thirty-three syllabi reviewed.

Criminal law courses focus heavily on homicide since it is one of the “deepest injuries” to society. It also provides significant source material relative to misdemeanors, which have an astonishingly low rate of appellate review. Consequently, most students are not exposed to any content on misdemeanors, despite the facts that misdemeanors make up the overwhelming majority of the criminal docket and they can carry significant, long-term collateral consequences, some of which are wrongfully applied either because of problems with criminal records or because human legal errors are made when attempting to apply byzantine statutes for collateral consequences. The long-term penalties for misdemeanor convictions can include life-long sex offender registration, years-long employment and professional licensing restrictions, loss of housing

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80. See, e.g., United States v. Deegan, 605 F.3d 625 (8th Cir. 2010) (discussing the inappropriateness of comparing federal sentencing guidelines with significantly lower state sentencing for an offense that occurred on tribal land outside the state’s jurisdiction).
81. See Ristroph, supra note 8, for a historical analysis of casebooks shifting to a homicide focus which obscures systemic problems related to lesser offenses.
and government benefits, and changes to immigration status. Misdeemeanor convictions also significantly increase the likelihood of future arrest, relative to a misdemeanor case being dismissed. A misdemeanor conviction may create permanent social stigma, which could impede a misdemeanor defendant from seeking certain forms of employment, schooling, or public office. While all professors in this survey addressed homicide, only two covered misdemeanor-level drug and property offenses and only two assigned readings that address policy concerns related to the proliferation of misdemeanor convictions. This is a significant missed opportunity, since the long-term penalties for misdemeanors present a considerable proportionality concern and are as worthy as grappling with as proportionality issues related to capital offenses.

A reform-oriented course would also address the legal system’s current inability, or perhaps its unwillingness, to address disproportionate outcomes in sentencing by race. The Supreme Court was clear in McClesky v. Kemp that even in the face of abundant evidence of disparities in sentencing based on the race of the defendant and the race of the victim, the defendant only has a valid claim if there is evidence of an individualized racist action. McClesky is an equal protection case, but it raises an important proportionality question that the Supreme Court left unresolved. A reform-oriented course would consider first whether this is an issue to be addressed through the principle of proportionality and then what options exist within the law to effect change.

McClesky was only assigned in twenty-one percent of the syllabi in this survey and the professors who assigned it had mixed approaches to addressing its problematic holding with supplemental readings. Some relied solely on their casebook notes, which are fairly neutral. Others assigned articles that give more detail on racial disparities in sentencing. Some assigned jury instructions that attempt to mitigate for implicit bias, which is one factor that contributes to racial sentencing disparities. The McClesky problem puts the teaching of criminal law in an untenable predicament. It is critical that students learn about the actors involved in the process and how and when bias can be introduced if disparities in the criminal law exist at a systemic level but can only be addressed at an individual level. This is where substance ought to meet procedure. Students should learn how charging decisions and judicial rulings contribute to disparate racial outcomes. Bifurcating these subjects into Criminal Law and Criminal Procedure (the latter of which is not a

required course at all law schools) leaves students studying real world problems of proportionality that are unsolvable in the abstract.

IV. THE JUSTIFICATION OF SELF-DEFENSE

Professors rely more on cases to teach self-defense than to teach units on purposes of punishment or proportionality. They were also less likely to assign supplemental reading related to self-defense. Professors in this survey assigned one to six cases on self-defense, and in sixty-nine percent of syllabi reviewed, they did not assign any supplemental materials. Additional assigned readings included a mix of professor-created materials that summarize key points, topical articles discussing recent self-defense claims, and one piece on myths of Black criminality that was not specific to self-defense. The following sections explore some of the most used cases in self-defense, the limitations the traditional criminal law course structure places on examining them, and one professor’s novel use of supplemental materials that showcase how substantive law can be applied in pre-trial decision-making.

A. Goetz and the Reasonableness of Racism

*People v. Goetz* 88 was assigned in every syllabus but handled very differently across casebooks. Most casebooks note what the opinion itself does not, that race was an important factor looming in the subtext. Goetz was a white man who shot four Black adolescents on a subway. He claimed self-defense and was vindicated on that theory. The jury found him guilty of a weapons possession charge and acquitted him of attempted murder and assault. The case was a national sensation with some arguing Goetz was a vigilante hero and others proclaiming his act was racially motivatated, whether consciously or not. Hoffmann & Stuntz’ *Defining Crimes*, used by one professor in this survey, does not mention the race of Goetz or his victims. Kaplan’s *Criminal Law*, also used by one professor, implicitly affirms Goetz’s narrative by stating in the notes that he “relied on stereotypical generalities of the threats from the four young men.” 89

A number of casebooks that engage with race do so with some problematic texts. In the ninth edition of Kadish’s *Criminal Law and Its Processes*, used by one professor before they switched to another casebook,

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the notes following Goetz include violent crime statistics that are higher for Black people than white people, without an antiracist counterweight to explain the discrepancies.\(^90\) This excerpt was removed in later editions of this casebook. This casebook also includes Jody Armour’s argument that the subjective standard, as applied in Goetz, allows for implicit racial bias to be excused within the veil of reasonableness.\(^91\) Lee & Harris’ Criminal Law is particularly adept at detailing racialized dog whistles used by the defense, like referring to the victims as “predators” and “savages.”\(^92\) One professor used an open casebook which discusses the significance of talking explicitly about Goetz’s racially-influenced motivations by comparing his criminal trial with the civil trial one of his victims filed against him. While Goetz was acquitted on the most serious charges in his criminal trial, he lost his civil case, where the plaintiff explicitly argued that Goetz’s fears of his victims were unfounded and racially biased.\(^93\) Another open casebook, which includes Goetz as the only case in its self-defense section, asks students to consider whether Goetz was the initial aggressor and had a duty to retreat before resorting to the use of deadly force.\(^94\)

Some casebooks also include a 1990 Glamour article that details a Black woman’s fear that her husband may be killed because someone holds a mistaken, racially-influenced fear of him.\(^95\) While dated, this highlights the social impact of a legal system that permits the “reasonable racist” standard and how abstract concepts of law affect people’s lived experiences. Since most professors front-load their courses with material on the racialized social effects of the law, there is a danger that this point will be lost later in the course when examining concrete areas of law like self-defense. Professors did not consistently assign this piece even when it was included in their casebook.

Few casebooks delve into other social harms associated with self-defense claims, like who it fails to protect. When they did so, they included a brief synopsis of a recent case that involved a self-defense

91. Id. at 826–27 (for the argument itself, see Jody D. Armour, Race Ipsa Loquitur: Of Reasonable Racists, Intelligent Bayesians, and Involuntary Negrophobes, 46 STAN. L. REV. 781, 786 (1994)).
95. For the article, see Rosemary L. Bray, It’s Ten O’clock and I Worry About Where My Husband Is, 88 GLAMOUR, Apr. 1990, at 302.
claim. If the teaching of criminal law is to keep pace with contemporary issues, these materials must be assigned. The police killing of Tamir Rice, a 12-year-old Black boy playing with a toy gun in a park, is discussed in the latest edition of Dressler & Garvey’s Criminal Law.\textsuperscript{96} The officer was not charged, presumably because the prosecutor believed there was a valid self-defense claim.\textsuperscript{97} Lee & Harris’ Criminal Law discusses the self-defense claim George Zimmerman raised when he shot Trayvon Martin, an unarmed Black teenager, and how racial stereotypes affect outcomes in self-defense claims.\textsuperscript{98} One professor assigned a supplemental reading about CeCe McDonald, a Black transgender woman who pled guilty to manslaughter after stabbing someone in what she claims was self-defense.\textsuperscript{99} There is a concern that in the traditional structure of a criminal law course, students will not engage with these materials in the same thoughtful manner that they are expected to engage with the principal cases in a casebook. If it is unclear to students if or how they will be assessed on these materials, they may focus instead on dated, problematic cases like Goetz without a clear sense of what can be done through the law to achieve better outcomes.

The only content assigned to students that proposes any realistic mitigation for the legal problem of the reasonable racist is Cynthia Lee’s race-switching exercise. The esteemed criminal law professor posits that jurors ought to be asked to switch the race of the defendant and the victim and ask themselves if that changes how they feel about reasonableness. In a reform-oriented course, this could be a key reading assignment presented alongside others that offer alternative solutions, including statutory fixes, to address the challenges that arise when using a subjective standard to evaluate the reasonableness of self-defense claims.

A reform-oriented course would also examine social policy considerations and potential legal solutions, which are lacking in the current case-centric model of teaching criminal law. One professor in this survey assigned a supplemental reading from journalist Shaila Dewan which includes data highlighting that white defendants are more likely to be deemed justified in their actions if their victim is Black rather

\textsuperscript{96} Dressler 9th, supra note 79, at 547.
\textsuperscript{97} Id.
\textsuperscript{98} Lee 4th, supra note 92, at 614–16 (excerpting Cynthia Lee, Making Race Salient: Trayvon Martin and Implicit Bias in a Not Yet Post-Racial Society, 91 N.C. L. Rev. 1555 (2013)).
\textsuperscript{99} The specific reading was not cited in the syllabus. For more on CeCe McDonald and her self-defense claim, see Carrie L. Buist & Codie Stone, Transgender Victims and Offenders: Failures of the United States Criminal Justice System and the Necessity of Queer Criminology, 22 Critical Criminology 35, 43-44 (2014).
than white. The same reading explores how the proliferation of guns in America may make many claims of self-defense seem reasonable. Another reading that would expose students to the role race plays in self-defense claims is the criminal law section of Dorothy Brown’s Critical Race Theory. Brown explores how racial biases can affect how jurors view a victim and the reasonableness of the defendant’s claims. This book examines commonly-used cases across the standard first-year curriculum through the lens of critical race theory. Brown includes a lengthy excerpt from a Cynthia Lee article which discusses racial stereotypes of Black, Asian American, and Latinx people and social science studies that demonstrate how non-aggressive or ambiguously aggressive behavior by racial minorities is likely to be perceived as more violent than the same behavior by white people. Lee then discusses Goetz and makes several doctrinal points about why his self-defense claims should have been rejected. She also details several self-defense claims with problematic racial stereotyping of victims that either led to an acquittal or lack of charge. None of the professors in this survey assigned this article. These texts from Dewan, Brown, and Lee could be taught alongside core self-defense cases to provide necessary social context that is lacking in current casebooks. This additional sociological context is critical in helping students understand how the ostensibly neutral doctrine of self-defense can lead to inequitable outcomes and could serve as a springboard for learning about potential reforms.

B. Protecting (White) Women to Excuse the Reasonable Racist

State v. Norman is a staple of criminal law courses. It was assigned in sixty percent of syllabi in this survey and referenced in the cases or notes assigned in twelve percent of syllabi that did not include a longer excerpt. The defendant was a victim of extreme, decades-long abuse

102. Id. at 275–84 (citing Cynthia Kwei Yung Lee, Race and Self-Defense: Toward a Normative Conception of Reasonableness, 81 Minn. L. Rev. 367 (1996)).
103. Id. at 284–86.
104. Id. at 290–97.
106. Twenty-six unique syllabi were reviewed for self-defense. Norman was assigned in sixteen and referenced in an additional three.
by her husband, who she shot while he was sleeping.\textsuperscript{107} Norman sought to introduce evidence of the effects of intimate partner violence and how victims may act in ways contrary to what the public finds reasonable. Norman’s win in the Court of Appeals was overturned by the North Carolina Supreme Court because the harm that she feared from her husband was purportedly not imminent. This case highlights the problem with using an objective standard for self-defense and sets it in contrast to the problem of using a subjective standard as identified by Goetz. In Goetz, we see how the reasonable racist’s fears are legitimized to free them from charges of murder, whereas in Norman the criminal legal system continues to victimize people who have been abused by denying the reasonableness of their fears and actions.

Teaching Norman in juxtaposition with Goetz uses the victimization of a white woman to justify the racism of white men. Norman’s race is not stated in the case and no racially coded language is used, so readers are likely to assume, correctly, that she was white.\textsuperscript{108} To be clear, no casebook or professor’s stated intention was to use Norman to justify the reasonable racist and no casebook explicitly addressed race in Norman, but placing these cases side-by-side does pose this problem. Professors may want to use Norman because it is an “edge case” that explores an extreme example of imminency, but they can use a hypothetical to achieve the same goal and sidestep the gendered and racial issues that are presented when linking Norman with Goetz.

When Norman was not assigned, professors were evenly split between not assigning any cases involving intimate partner violence or choosing an alternative case of a woman killing an abusive man, either in an intimate partner violence scenario or a woman killing to protect her child. The three intimate partner violence cases\textsuperscript{109} have the same issues as Norman with regard to white normativity and the protection of white women’s interests. The exception is Wannow, in which an indigenous Sinixt woman successfully claimed self-defense. There, the court established the “reasonable woman standard,” holding that all facts that affect a defendant’s fears can be considered when assessing reasonableness, not

\begin{enumerate}
\item \textsuperscript{107} See Norman, 366 S.E.2d at 587.
\item \textsuperscript{109} State v. Stewart, 763 P.2d 572 (1988) (conviction upheld under similar reasoning regarding imminence as Norman); State v. Gartland, 694 A.2d 564 (1997) (applies reasonable abused woman standard and clarifies that the duty to retreat should not be conflated with a duty to leave an abusive relationship); State v. Kelly, 478 A.2d 364 (1984).
\end{enumerate}
just the events immediately preceding the offense.\textsuperscript{110} Only two professors assigned \textit{Wanrow} in lieu of \textit{Norman}. It is a better teaching case to present alongside \textit{Goetz} because students can contend with the advantages and disadvantages of the objective and subjective standards for self-defense claims without the problematic matchup of white female victimization and white male aggression. Instead, students would contend with a vindicated indigenous woman's self-defense claim. Professors may still want to discuss how evidence of intimate partner violence can be introduced to demonstrate the reasonableness of a self-defense claim, but they do not have to do so in a way that directly pits these cases against \textit{Goetz}. A reform-oriented class would draw students' attention to the challenge of needing a coherent doctrine of self-defense and social policy that does not let the reasonable racist escape punishment while simultaneously allowing victims of abuse to present viable claims of self-defense.

\textbf{C. The Killing of Ahmaud Arbery and the Power of Prosecutors}

The opacity of decision-making within prosecutors' offices is a significant obstacle to teaching criminal law in a manner that represents how the legal system is experienced by most people. The killing of Ahmaud Arbery presents a rare and instructive example of how prosecutors apply the justification of self-defense. Mr. Arbery, a Black man, was on a jog when he was pursued by three white men in a car and ultimately shot and killed by one of them. While Mr. Arbery's killers were eventually convicted of felony murder in federal court,\textsuperscript{111} a state district attorney initially declined to charge the men on the presumption that they were acting in self-defense.\textsuperscript{112} The prosecutor documented that decision in a letter to the local police investigation unit. Only one professor assigned this letter as supplemental reading, in which the prosecutor assumed criminal behavior on the part of the victim, factored that into his assessment of whether Arbery was the initial aggressor, and ultimately


declined to prosecute based on a limited investigation and a high degree of deference given to the three white defendants.\(^\text{113}\)

Since Mr. Arbery’s murder, two other professors have assigned or shared plans to assign supplemental material that look both at the self-defense claims his killers made as well as the self-defense claim made by Kyle Rittenhouse, who shot and killed three people when he was counterprotesting at a Black Lives Matter rally. One article notes that the law may have been applied accurately in the Rittenhouse case, but the outcome likely would have been different if he were not white.\(^\text{114}\) Prosecutorial discretion could also be explored in the Rittenhouse case by examining the decision-making process that went into charging first degree murder rather than second degree murder.\(^\text{115}\)

Another important procedural aspect of self-defense that ought to be explored is the effect of stand-your-ground laws on the charges that a prosecutor will pursue. Some states require prosecutors to show clear and convincing evidence that a defendant did not act in self-defense in a pre-trial hearing, which creates a substantial burden to pursuing murder charges. This issue was addressed in the notes to State v. Sandoval in Podgor’s Criminal Law, which only one professor assigned, and in the newest edition of Dressler & Garvey’s notes to United States v. Peterson, which only one professor assigned. This statutory problem, as well as challenges with implicit bias among prosecutors, should be explored in more detail.

V. POTENTIAL ALTERNATIVES

Having argued for a reform orientation to teaching criminal law and provided evidence of how the materials in three instructional units fail to adequately interrogate the carceral state, this Note now turns to potential alternatives. One option would be to simply change the materials that criminal law professors use. Professors could assign more readings on social policy, switch to casebooks that have a more critical approach to the traditional canon of cases,\(^\text{116}\) and incorporate materials

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113. See id.
116. Of the casebooks included in this survey, LEE 4th and PODGOR had the most comprehensive critiques. Another alternative, which was not reviewed in this survey, is BENNETT-CAPERS, ROGER A. FAIRFAX JR., & ERIC J. MILLER, CRIMINAL LAW: A CRITICAL APPROACH (6th ed. 2023) (the first criminal
that show earlier stages in criminal cases. This is the tactic that some of the professors in this survey have taken. A complete restructuring of the criminal law course may still be warranted since it would give professors who are most invested in reform more latitude to experiment and redesign their courses. Further, it will signal to students that they should be engaging with the material in a different way than they do in other introductory courses. Just as first-year law students need support in learning how to brief cases, they will need support in learning how to engage with law reform. One professor who participated in this survey shared that they were sympathetic to my arguments, but concerned about facing resistance from students if they were asked to read even more supplemental materials than the professor already assigned. If students know that the objectives of the course are substantially different than their other introductory courses and that the evaluation of their learning will align with those learning goals, they may embrace a more diverse set of materials. Finally, from a pragmatic standpoint, administrators who are interested in implementing this type of change may face resistance from tenured professors. While deans cannot tell professors to change their objectives and materials in an existing course, they can create change at their institution by offering a different course and assigning faculty who have the requisite background knowledge and who share their pedagogical goals.

One barrier that several professors who provided feedback on this paper offered is the bar exam. While the American Bar Association has no requirement that law schools teach criminal law in any set fashion, the goal of producing ethical criminal law practitioners and policymakers cannot be achieved if students cannot pass the bar exam. Further, an institution risks losing its ABA-accreditation if their graduates’ bar passage rates fall too low. Perhaps innovation is best tested in schools that already have high bar passage rates since they have less to lose and likely have alternative supports for bar passage in place. Once the

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117. In fact, there is no requirement that Criminal Law as a stand-alone course be taught at all. See ABA Standards, supra note 20, at 18–22.
118. Bar exam reform is a worthwhile endeavor beyond the scope of this paper. For more, see Marsha Griggs, Building a Better Bar Exam, 7 Tex. A&M L. Rev. 1 (2019).
120. See generally Aleatra P. Williams, The Role of Bar Preparation Programs in the Current Legal Education Crisis, 59 Wayne L. Rev. 383 (2013).
impact of criminal law course reform on bar passage is known, widespread implementation can be achieved. The impact may be negligible. Students would still learn core concepts of substantive criminal law in a reform-oriented course, but may not cover the same breadth of crimes, defenses, and liabilities that most professors currently include. Law schools already expect that students will spend significant time and energy on their own preparing for the bar exam and there are several areas of law that are bar-tested but not required courses at many institutions, including: criminal procedure, property, business associations, and evidence. Changing the criminal law course may have real consequences for the bar exam that should be examined, but there are other ways to address the issue and this should not be a complete roadblock to transforming the way criminal law is taught.

Gaining the skills necessary to reform the law will be beneficial to all students, whether they intend to practice criminal law or not. It will also help law schools deliver on the promises they make to students to prepare them to “become leaders across every sector of society” who will “ethically and effectively practice law.” It will also allow schools to live out their commitment to the “improved administration of justice” and offer a “cutting-edge curriculum.” Effective and successful legal professionals understand current problems in the law and can both critique and develop possible solutions. The following reform-oriented options for teaching criminal law are presented as an invitation to innovate and explore more alternatives to the status quo.

A. Problem-Solving Structure

Many law schools already offer problem-solving workshops which could be adapted to have students work through discrete challenges in reforming the criminal legal system. A case like Goetz could be excellent fodder. Students could start from the baseline that the outcome in Goetz is undesirable and identify what would need to be changed to lead to a

different result. This would include looking at the statutory language of self-defense and grappling with the language of reasonableness and retreat. Students would also need to examine implicit bias of juries and whether a race-switching exercise would have been sufficient to address this issue. They could also look at the racist dog-whistling from defense counsel and propose language and tactics the prosecution could have used to prevent this or court rules that would have allowed the judge to intervene. Similar exercises with other cases or hypotheticals could give students the opportunity to learn substantive criminal law, identify what problems can and cannot be addressed through changes to criminal statutes, and gain exposure to myriad policy solutions and discretionary actions they as individual practitioners could take. A problem-solving structure could take an interdisciplinary form and include students and faculty with social work, criminology, and public policy backgrounds, or it could be self-contained within the law school.

B. Experiential Learning

Students are required to complete some form of experiential learning before graduating from many law schools. This requirement could be modified to specify a minimum level of experience in a criminal setting, whether as a summer internship for a public defender or prosecutor, a semester-long externship, or criminal work through a clinic run by the law school. Seminar work that highlights the problems of criminal law would be necessary to ensure that students do not simply learn the system as it currently operates without critically examining its flaws and potential opportunities for change, and to ensure that students would have the requisite background knowledge to work in these settings. This option may be cost-prohibitive for institutions that cannot launch or expand in-house clinics to accommodate the number of students who would be enrolled and that do not have sufficient high-quality placement opportunities for students outside the law school.

C. Comparative Law

Rather than teaching a U.S.-centric course on criminal law, students could take a comparative criminal law course. This would solve for the baseline-setting issues that were discussed in the proportionality section of this paper and open future lawmakers, prosecutors, and judges to alternatives they may not otherwise have been exposed to. Students are already asked to read old English cases to gain an understanding of how U.S. criminal law has evolved from English common law and a
comparative criminal law course would provide an opportunity to modernize the materials that students read and illuminate which aspects of American criminal law are not on par with global standards. For example, the U.S. conception of mens rea is aligned with other legal systems that evolved from the English common law, but our use of felony murder is an aberration that abrogates the need to demonstrate a specific intent to commit homicide and has played a significant role in the growth of extended sentence lengths in the U.S.

Comparative criminal law is not a staple course among law schools, so developing curriculum and finding qualified professors are some logistical barriers to consider, but professors who provided feedback on an initial draft of this paper were most receptive to this proposal. There may be sufficient interest among current faculty to develop such a course.

D. Additional Seminar

Starting in the fall of 2020, all first-year students at the UNLV Law School were required to take a one-credit seminar on inequities in policing and the mass protests that have erupted across the country in response to law enforcement use of deadly force. Law schools could add a broader seminar focused on the social-policy aspects of criminal law to the first-year curriculum. Adding credits may be administratively difficult and this option would likely not solve for some of the problems raised in this paper, but this could be a way for law schools to test new material and innovate in the criminal law space before transitioning to a completely revised criminal law course.

CONCLUSION

The current state of criminal law pedagogy is deeply troubling. It obscures the dark, unjust realities of the American criminal legal system. Tinkering within the margins of the curriculum by adding supplemental

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126. For a detailed history of the evolution of the American felony murder rule, see Guyora Binder, Felony Murder (2012).
readings and engaging with issues of equity during lectures may not be sufficient to produce lawyers who are equipped to make significant change within the system. Restructuring the first-year criminal law course with a reform orientation could provide the opportunity law schools need to interrogate the current failures of the criminal legal system and develop lawyers who will do the same.

APPENDIX: METHODOLOGY AND TABLES

A. Universities and Professors Included

Thirteen professors at seven public universities responded to a request to participate in this survey and shared their syllabi and supplemental materials. Requests were sent via email to ninety-five professors at twelve law schools. Faculty who teach Criminal Law were identified from school websites. Twenty-five professor responses were received: thirteen participants; four refusals; three potential participants who did not send their materials; three out-of-office auto-replies; one had not taught Criminal Law within fifteen years; and one who had not yet taught Criminal Law.

Since some participants requested that their materials not be attributed to them by name and only a handful of professors teach Criminal Law at each university, the names of their law schools are not included in this paper. The schools have enrollments from 300-1300.¹²⁹ I contacted professors at one HBCU, none of whom responded. Professors at two of the three Hispanic-Serving Institutions I contacted participated. I contacted professors at three institutions in each of four regions of the country,¹³⁰ but only received responses from three regions:

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B. Number of Syllabi and Years Represented

Most participating professors provided materials for multiple terms, so this analysis spans from Spring 2007 to Fall 2022. Only the most recent syllabus was used to analyze learning goals, but multiple years were used for individual instructional units. If a professor submitted syllabi that were identical for more than one term, only one was included. In sum, thirty-three unique syllabi were reviewed. If a professor used the same material for an individual unit over multiple terms, repeated syllabi were removed from the analysis for that unit.

One of the original goals of this paper was to analyze changes in teaching materials over time in relation to the growth of the Black Lives Matter movement, but the sample size was not large enough to make relevant or reliable observations about changes in materials over time. Older syllabi were still included in this analysis to allow for examination of additional casebooks.

C. Casebooks Surveyed

Nine professors provided syllabi for multiple years. Of those, five changed casebook authors at least once. One professor developed their own materials using open-source texts and another professor shared their plan to use an open-source casebook in the future. In total, eight published titles were reviewed, including multiple editions of some casebooks, for a sum of fifteen casebooks. Newer editions of some titles have been published, but were not reviewed since they were not used in any syllabi in this survey.

Casebooks Surveyed

- ALICE RISTROPH, CRIMINAL LAW: AN INTEGRATED APPROACH, (2022)
- JOHN KAPLAN, ET AL., CRIMINAL LAW (5th ed. 2004)
- JOSHUA DRESSLER & STEPHEN P. GARVEY, CRIMINAL LAW (6th ed. 2012)

131. The professor-created casebook was reviewed, but is not listed to protect the anonymity of survey participants.
The supplemental materials professors assigned for the instructional units analyzed in this paper are listed below. Materials caveated with a directive to “skim” or “read lightly” are included, those referenced in syllabi as “optional” or “unassigned” are not. Professor-created materials, which were typically condensed explanations of legal doctrine, were reviewed but are not listed below. Readings relevant to both purposes of punishment and proportionality are only listed once, but were considered in both categories during analysis. Most materials were excerpted by professors.

**D. Materials Authors**

The supplemental materials professors assigned for the instructional units analyzed in this paper are listed below. Materials caveated with a directive to “skim” or “read lightly” are included, those referenced in syllabi as “optional” or “unassigned” are not. Professor-created materials, which were typically condensed explanations of legal doctrine, were reviewed but are not listed below. Readings relevant to both purposes of punishment and proportionality are only listed once, but were considered in both categories during analysis. Most materials were excerpted by professors.

**Purposes of Punishment**

- **Amna Akbar**, *An Abolitionist Horizon For (Police) Reform*, 108 CALIF. L. REV. 1781 (2020)
- **Angela Y. Davis**, *Are Prisons Obsolete?* (2003)
- **Brandon Vaidyanathan**, *Systemic Racial Bias in the Criminal Justice System Is Not a Myth*, THE PUBLIC DISCOURSE, June 29, 2020
- **Danielle Sered**, *Until We Reckon: Violence, Mass Incarceration, and a Road to Repair* (2019)
● Jeffrie G. Murphy, “In the Penal Colony” and Why I Am Now Reluctant to Teach Criminal Law, 33 Crim. Just. Ethics 72, 73 (2014)
● Jennifer Eberhardt, Biased: Uncovering the Hidden Prejudice That Shapes What We See, Think, and Do (2019)
● Khiara M. Bridges, Critical Race Theory: A Primer (2019)
● Radley Balko, There’s Overwhelming Evidence that the Criminal Justice System is Racist. Here’s the Proof., Washington Post, June 10, 2020
● Sahil Chinoy & Ash Ngu, Test Your Knowledge of American Incarceration, N.Y. Times, Dec. 21, 2018
● The National Registry of Exonerations, https://www.law.umich.edu/special/exoneration/Pages/about.aspx

Proportionality

● Adam Gopnik, The Caging of America, New Yorker, Jan. 23, 2012
Self-Defense

- Reading on CeCe McDonald (specific article not provided by professor)
- Ronald S. Sullivan, Jr., The Rittenhouse Trial: A Legal Scholar Responds, QUILLETTE, Nov. 23, 2021
- Shaila Dewan, Can Self-Defense Laws Stand Up to a Country Awash in Guns?, N.Y. TIMES, Nov. 13, 2021

E. Frequency of Case Use

The following tables show frequency of case use, ordered by highest usage. Syllabi are titled with anonymized letters.132 A bullet “●” indicates the case was assigned. Syllabi without cases are omitted.

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132. Letters differ for each instructional unit since professors did not consent to reproduction of their syllabi.
### Purposes of Punishment (1)

| Case Study                                                                 | A | B | C | D | E | F | G | H | I | J | K | L | M | N | O | P | Q | R | S | T | U | V | W | X | Y | Z | AA | BB |
| Queen v. Dudley and Stephens, 14 Q.B.D. 273 (1884)                        | • | • | • |   |   |   |   |   |   |   |   |   |   |   |   |   |   |   |   |   |   |   |   |   |   |   |   |   |   |
| United States v. Gementera, 379 F.3d 596 (9th Cir. 2004)                  |   |   |   | • | • |   |   |   |   |   |   |   |   |   |   |   |   |   |   |   |   |   |   |   |   |   |   |   |   |
| United States v. Jackson, 835 F.2d 1195 (7th Cir. 1987)                  |   |   |   |   |   |   |   |   |   |   |   |   |   |   |   |   |   |   |   |   |   |   |   |   |   |   |   |   |   |
| United States v. Madoff, No. 09 CR 213 DC (S.D.N.Y. June 29, 2009)       |   |   |   |   |   |   |   |   |   |   |   |   |   |   |   |   |   |   |   |   |   |   |   |   |   |   |   |   |   |
| **Total**                                                                 | 21| 10|  6|  5|  4|   |   |   |   |   |   |   |   |   |   |   |   |   |   |   |   |   |   |   |   |   |   |   |

This table lists various case studies and their associated letters from A to BB.
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