

TEACHING CRIMINAL LAW: CURING THE DISCONNECT

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Teaching Criminal Law¹ is like teaching religion: there are so many varieties of it, each strongly endorsed by at least one person to whom it makes at least some internal sense. The result is a lack of agreement about what the course is all about and few external standards to assess whether the course is accomplishing its goals. The problem is sorting out the core of the course. This involves answering the question, “What should be taught in the ordinary first-year Criminal Law course?” The issue is complex and subject to widely different answers. Of course the answer often depends on the personal values of the person answering the question. But it is often forgotten that the answer should also depend on the conceptual framework for legal education at the law school. Criminal Law should be seen as both a unique and important subject as well as part of a larger integrated curriculum with articulated goals and complementary components.

To some, Criminal Law should place far more emphasis on race,² gender,³ domestic violence,⁴ justice, legal history, poverty, philosophy, legal ethics,⁵

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1. I am referring to the substantive Criminal Law course that carries three or four hours of academic credit and is usually part of the first-year law curriculum.

2. See, e.g., Jodie-Marie Masley, *Testimony of Chrystal Blossom James*, 12 BERKELEY LA RAZA L.J. 433 (2001) (suggesting that a criminal law professor should have explored the race implications of a class hypothetical).

3. See, e.g., Kristin Bebelaar et al., *Domestic Violence in Legal Education and Legal Practice: A Dialogue Between Professors and Practitioners*, 11 J.L. & POL’Y 409 (2003). The article notes that an obvious place for this discussion is with the battered woman’s defense. Other illustrative areas for gender-based analysis include the concept of reasonableness, omissions where parents are charged with child neglect, and provocation. See also Catharine A. MacKinnon, *Mainstreaming Feminism in Legal Education*, 53 J. LEGAL EDUC. 199, 207-08 (2003) (recommending the coverage of feminist issues throughout the curriculum, even in the basic Criminal Law course, including issues exploring whether women should be subject to the death penalty when they have not been fully represented in the formulation of death penalty laws and procedures).

An interesting variation of this approach occurred in a seminar where upper-class law students enrolled in a course entitled “A Feminist Revisit to the First-Year Curriculum.” The course examined the feminist issues that were presented by subjects covered in the various first-year offerings. Anita Bernstein, *A Feminist Revisit to the First-Year Curriculum*, 46 J. LEGAL

and a host of other relevant considerations, sometimes broadly characterized as the social context of the law.⁶ Some even argue that there should be substantial coverage of a particular crime, such as prostitution,⁷ that reflects particular issues.

Others think that law classes should deal more with the skills that lawyers need to practice law. This could include such skills as mediation, negotiation, fact investigation, “thinking like a lawyer,” interviewing, and trial practice. It has also been suggested that law school classes should focus more on the client and the client’s perspective.⁸ Yet other faculty members believe that law school should be “above trade” and view the inadequacy of skills training as a virtue.⁹

Resolving these sometimes conflicting course objectives might be impossible in the time-crunched first-year Criminal Law course. Everyone would agree that not all of the above topics could be covered, even poorly, in a three hour Criminal Law offering that also deals with the more traditional facets of the subject. This means that the criminal law instructor must make some hard choices that could engender serious challenge by people with different values and priorities.

The matter is made more complex because the instructor’s choices are solidly protected by the important doctrine of academic freedom. Whatever path the professor takes—such as including or not including much attention to race, gender, poverty, sociology, history or philosophy, or any number of skills—will likely be respected by a faculty and administration uninterested in interfering with an instructor’s decisions about his or her course coverage and focus.

In addition, the query about the content of the Criminal Law course raises broad questions that a faculty does not address in any systematic way or even give its members much guidance in resolving. Courses are viewed as the province of the instructor rather than as a constituent element of a larger conceptual entity. For inexplicable reasons, legal education is viewed as a

EDUC. 217 (1996). In revisiting Criminal Law, the students discussed the gender issues raised by the sentencing of Leona Helmsley. *Id.* at 221-22.

4. See, e.g., Bebelaar, *supra* note 3, at 419 (“There has always been an obvious relationship between intimate and family violence and criminal law, so it should be inevitable that these topics pervade that course.”).

5. See, e.g., Deborah L. Rhode, *Missing Questions: Feminist Perspectives on Legal Education*, 45 STAN. L. REV. 1547, 1561 (1993) [hereinafter Rhode, *Missing Questions*]; Deborah L. Rhode, *Ethics by the Pervasive Method*, 42 J. LEGAL EDUC. 31 (1992).

6. See Rhode, *Missing Questions*, *supra* note 5, at 1558.

7. See, e.g., Beverly Balos, *Teaching Prostitution Seriously*, 4 BUFF. CRIM. L. REV. 709 (2001).

8. See Ann Shalleck, *Constructions of the Client Within Legal Education*, 45 STAN. L. REV. 1731, 1731-33 (1993).

9. See Rhode, *Missing Questions*, *supra* note 5, at 1555.

series of component parts that eventually comprise a whole. To some, the end result, irrespective of how it got that way, is a spectacular educational experience. To others, of course, the whole is less than the sum of the parts.

The result of these conflicting views of course content, the faculty's unwillingness to conceptualize legal education as an integrated whole, and the individual faculty member's independence engendered by the concept of academic freedom, is that each faculty member is rather free to structure the basic Criminal Law course with little direction from the administration or colleagues.

Many of us who teach Criminal Law resolve the issue by trying to cut the baby in half. In our first-year Criminal Law course, we deal with many of these issues, though none well or in any depth. Lip service replaces serious analysis. We might say we "cover" race and gender and skill issues, but in truth we give our students grossly inadequate background materials that almost trivialize very important matters affected by the criminal law. According to one observer:

Nor do conventional approaches adequately situate formal doctrine in social or historical context. The level of abstraction in most classrooms is both too theoretical and not theoretical enough; it neither probes the underlying foundations of legal doctrine nor offers practical assistance about how to use that doctrine in particular cases.¹⁰

I. A PERSONAL SHORT STORY

I have taught the first-year Criminal Law course for many years. I occasionally served as a criminal defense lawyer during that time. The Criminal Law course I taught dealt with the traditional subjects, including such esoterica as impossible attempts and criminalization—what should be made criminal. Because of time constraints, the course often omitted coverage of crimes that people who actually handle criminal cases must understand, such as theft, assault, robbery, and burglary. It also omitted any in-depth coverage of sometimes dispositive issues like burden of proof, fact and statutory interpretation, and the persuasive background of the guilty plea.

A few years ago, I was afforded the chance to leave teaching for a short period and become an assistant district attorney¹¹ prosecuting state cases in a

10. *Id.* at 1558.

11. The opportunity itself is worth noting and merits serious consideration by many academics. At the suggestion of a member of the local district attorney general's office, I arranged to swap jobs with an experienced district attorney general. For one semester, he moved into my law school office and taught full-time. I moved into his office and handled criminal cases. All administrative matters were unchanged. Each of us continued to be paid by our original employers. Thus, there was no problem with such matters as retirement and insurance.

medium-sized county. I did so full-time for five months and then part-time for several more years. The experience was phenomenal. I learned so much about the workings of the criminal justice system, including plea bargains, discovery, and the grand jury.

Both during and after this experience, I reflected a lot about the basic Criminal Law course that I had taught many times. During my relatively brief tenure as a prosecutor, I came to realize that many important issues routinely faced by lawyers in criminal law are simply ignored or given short shrift in the basic Criminal Law course and are not systematically taught in any other offering. For example, I did not encounter any impossible attempt cases, but I did see a significant number of assault-related incidents. And every single day I spent a significant amount of time reading statutes and case files, and trying to assess how, or whether, the facts I thought I could prove would enable me to establish the elements of a crime beyond a reasonable doubt.

II. CORE ISSUES IN CRIMINAL LAW COURSE

It seems to me that a basic Criminal Law course should encompass at least three general goals. Currently, American Criminal Law courses routinely cover some of these matters and virtually ignore others.

A. *Universal Constructs*

First, the basic American Criminal Law course should educate law students about a number of universal theoretical constructs that are the basis for criminal law. These include such concepts as responsibility (and defenses), intentionality, mens rea, actus reus, causation, punishment, harm, and inchoate offenses.

B. *Structure of the Criminal Law and the Criminal Justice System*

Second, and often overlapping with the first goal, it should teach the general structure of American substantive criminal law. This embraces such traditional topics as burden of proof, vagueness, accomplice liability, codification,¹² and the basic structure of a modern criminal code, such as the

The only administrative matter concerned, of course, parking. We exchanged parking spaces, but had to make a financial adjustment because one of our parking spaces cost more than the other.

12. The treatment of statutes in existing Criminal Law course materials is interesting in its variety. Every casebook discusses the rise of statutes in criminal law. The materials are presented ordinarily in the context of the principle of legality and vagueness. Professor Dressler, for example, has written a well-regarded criminal law course book that devotes a whole chapter to the "Modern Role of Criminal Statutes." JOSHUA DRESSLER, *CASES AND MATERIALS ON CRIMINAL LAW* 85-120 (3d ed. 2003). The chapter includes five substantial cases and some notes. The cases focus on the principle of legality, the values of statutory clarity, and statutory interpretation, but do not require students to read and interpret statutes without the judicial sifting that occurs in the given appellate decisions. The chapter also does not teach much about the

Model Penal Code. It also should encompass the general structure of the criminal justice system, including the roles of the various actors such as the police, courts, prosecutors, legislators, and defense lawyers. Additionally, there should be an introduction to fundamental societal issues, such as race and gender in the context of criminal law.

C. Skills

Third, the course should contribute to first-year law students' acquisition of important skills,¹³ especially ones that lawyers need in criminal cases and

interpretation of statutes other than through one case that does discuss a few approaches to statutory interpretation in criminal cases—especially strict construction. There are no problems that require students to read and parse statutes without the benefit of an appellate bench's coaching. If this is the only training students get in statutory interpretation, their education is lacking in a most important way. It should be noted, of course, that Professor Dressler does not deserve criticism because he has not chosen to address statutory interpretation in more than a perfunctory way. His choice of materials and approach simply reflects a value structure that assumes students get instruction about statutes in other courses.

Professor LaFave, on the other hand, deals more directly with statutory interpretation, including processes of both judicial and administrative bodies. He even devotes a few pages to some canons of statutory interpretation. *See* WAYNE R. LAFAVE, MODERN CRIMINAL LAW: CASES, COMMENTS AND QUESTIONS 53-54 (3d ed. 2001).

Many other criminal law course books do no more than hint at the role of statutes in modern criminal law. Often this occurs in the mandatory discussion of vagueness and the principle of legality. *See, e.g.*, RICHARD J. BONNIE ET AL., CRIMINAL LAW 35-57 (1997). This book contains an interesting potential statutory exercise when it discusses a statute defining obscenity. *Id.* at 59. *See also* LLOYD L. WEINREB, CRIMINAL LAW: CASES, COMMENT, QUESTIONS 740-42 (7th ed. 2003); PHILLIP E. JOHNSON & MORGAN CLOUD, CRIMINAL LAW: CASES, MATERIALS AND TEXT 69-73 (7th ed. 2002) (includes a brief discussion of the role of criminal statutes in the context of introducing the Model Penal Code).

Another approach is to deal rather heavily with statutes by intensively using the Model Penal Code's provisions to illustrate various issues. *See* RUSSELL L. WEAVER ET AL., CRIMINAL LAW: CASES, MATERIALS & PROBLEMS (2002) (presenting students with many provisions of the Model Penal Code, including some spanning several pages, which should provide first-year law students valuable exposure to criminal statutes and helpful experience reading and understanding them).

13. It is obvious that I find that much of the approach espoused by the MacCrate Report is worth very serious consideration by law schools. *See* LEGAL EDUCATION AND PROFESSIONAL DEVELOPMENT—AN EDUCATIONAL CONTINUUM: REPORT OF THE TASK FORCE ON LAW SCHOOLS AND THE PROFESSION: NARROWING THE GAP (1992). More particularly, I agree with MacCrate's observation:

I suggest that [the MacRate Report] challenges all law teachers, whatever their scholarly interests or pedagogical bent, to look beyond their own compartments of scholarship and teaching, to escape the confines separating doctrinal learning from skills and values instruction, and to identify the role they choose to play in the preparation of lawyers along the educational continuum of that profession of which all who work in the law are members.

that are well-suited for inclusion in the basic Criminal Law course. Obviously students must acquire solid legal-reasoning skills. Often this is taught through the case method where case after case is parsed in a Socratic style dialogue.¹⁴ Another skill the case method teaches is case analysis—the ability to read, understand, critique, and manipulate, mostly appellate, judicial decisions. The problem is that the same case analysis skills are surely covered in many other first-year courses, such as Contracts, Torts, and often Constitutional Law. Students learn how to read, analyze, and apply judicial decisions in these courses. It is reasonable to suggest that the other first-year courses might provide sufficient, if not too much, attention to this skill, releasing Criminal Law from the rather substantial burden of teaching case analysis and freeing it to focus on skills not necessarily covered elsewhere in the first-year curriculum.

Another skill—the ability to understand and apply statutes—however, frequently is given short shrift in the first-year Criminal Law course despite its paramount importance to modern law in general¹⁵ and criminal law in particular. Indeed, there may well be law students who finish their first year of law school without having been presented with many statutes. More tragically, many law students complete their legal education without much organized instruction in dealing with statutes, despite the predominant role of this form of law. This unfortunate lacuna is of significant concern for the student who will handle criminal cases. The modern truth is that criminal law today is statutory law. Anyone who practices criminal law must be able to read, understand, and apply statutes, some of which are complex and poorly written.¹⁶ This fact

Robert MacCrate, *Preparing Lawyers to Participate Effectively in the Legal Profession*, 44 J. LEGAL EDUC. 89, 89 (1994).

14. A former colleague, who was a strong critic of the so-called Socratic method of legal education, once observed that if Socrates actually saw the teaching technique that bears his name he would voluntarily take hemlock.

15. For an articulate argument about the role of statutes in modern law and the many advantages of teaching law students about statutes, see Jack Stark, *Teaching Statutory Law*, 44 J. LEGAL EDUC. 579 (1994). See also H. Miles Foy, III, *Legislation and Pedagogy in Contracts 101*, 44 ST. LOUIS U. L.J. 1273, 1274 (2000) (“[T]he established forms [of teaching contract law] do not deal adequately with legislation, the most important legal phenomenon of the modern era.”).

Teaching about statutes, whether or not in the Criminal Law class, should assist students in understanding both the process by which statutes are written by legislatures and interpreted by courts, as well as the structure of statutes—especially lengthy complicated ones. One useful instructional tool is to have students actually write or rewrite all or part of a statute, and then have the students’ efforts critiqued by other students, perhaps serving as advocates for opposite sides or as judges faced with applying the students’ work. This exercise provides students with terrific insight into statutes and the legislative process.

16. A similar argument has been made with regard to Contracts. See Foy, *supra* note 15, at 1274 (recommending that the first-year Contracts course devote more attention to statutes and their interpretation).

alone justifies using the Criminal Law course to teach statutory analysis to first-year students.¹⁷

Another important skill, often given short shrift in the first-year law curriculum, is the ability to assess, marshal, and “manipulate” facts. In the context of criminal cases, it includes understanding how critical facts are in criminal cases and how ambiguous they may well be. It also includes a basic understanding of the processes used in criminal cases to present facts and to resolve the facts to be applied to the law.

Finally, criminal law students need to understand how the facts and law interact in an adversary context in criminal cases. This requires students to understand the applicable law, including its many ambiguities, and how facts are used to support the position of the government or the defendant. They also should begin the process of learning how to marshal the facts as an adversary would.

III. A REPORT CARD

The basic Criminal Law course and the materials used to teach the course are somewhat well-equipped to satisfy the first goal, teaching students the fundamental theoretical constructs that shape American criminal law. The course is less successful in teaching the basic structure of the criminal law. Unfortunately, the criminal law is viewed piecemeal with little opportunity for students to reflect on the whole. Thus, each defense is studied, but too often the concept of defenses is given short shrift and virtually no effort is made to compare defenses. Moreover, the overall structure of a criminal code is ignored, as the focus is on individual components but not on the interrelationship of the various pieces.

One of the biggest weaknesses, however, is in the area of skills. Many of us do not see the Criminal Law class as the proper place to teach skills. Rather, we focus on theory, leaving to others, such as Criminal Procedure and trial practice courses, the daunting task of teaching skills. This decision, to some extent prompted by enormous time pressures in a three-hour course, might well shortchange the student’s legal education.

IV. A MODEST SUGGESTION

I suggest that law faculty who teach in the criminal law area reconsider what they teach in this basic course. More particularly, they should assess what skills they try to teach. Of course, any effort to increase the skills being taught in the Criminal Law course may well be hampered by the paucity of

17. Another approach is a freestanding course on legislation as an addition to an individual course’s attention to statutes when appropriate, such as tax or criminal law. *See generally* Stark, *supra* note 15.

available materials that facilitate skills teaching.¹⁸ What is needed is a new set of materials that specifically addresses statutes and facts in the adversarial context in which criminal law operates.

A wonderful vehicle would be the use of problems that require the students to understand criminal statutes and apply them as an adversary to a set of facts. This approach, already championed by others,¹⁹ would force students to deal directly with statutes as a primary source of law. To apply the statutes, the student would have to read them carefully and understand what is in the statute and what is omitted or possibly covered in an ambiguous manner. In applying the statute to a set of facts, the student would have to figure out what are the elements of the statute and how the facts might or might not assist in the proof of those elements. Unlike the case method, where an appellate court identifies the relevant portions of the statute, the student would have to make this determination without the benefit of the thoughts of an appellate judge.

It should be stressed that giving more attention to skills does not necessarily mean that other issues must be given short shrift. Skills training can be combined with other important issues. For example, assume that a criminal law professor wants to include statutory analysis, fact assessment and argumentation, and considerations of race and gender in a portion of a Criminal Law course. Perhaps the instructor would use a problem with a fact situation and a statute that contained a mental element using an objective reasonableness standard. The students could carefully parse the statute, then apply the facts to the statute, perhaps in an adversarial role-playing situation. During the process students could discuss how the concept of reasonableness might be based on assumptions that involve racial or gender stereotypes but give too little attention to differences in perceptions based on race or gender. This could lead to a discussion of the role of certain fundamental values in criminal law.

The bottom line is that those of us who teach the basic Criminal Law course should give some time to reconsidering two issues. First, how does what we do relate to the other parts of the law curriculum, especially the first-year offerings? Do we complement the other courses so that our students end the year or their three years with the skills and knowledge we want them to have? Second, how does our course relate to the skills needed by someone

18. See, e.g., Bebelaar, *supra* note 3, at 424 (noting that a survey of criminal law teachers concluded that certain subjects were not taught in the course because the teaching materials did not include the topic).

19. For a powerful argument in favor of the problem method, see Myron Moskowitz, *Beyond the Case Method: It's Time to Teach with Problems*, 42 J. LEGAL EDUC. 241 (1992). Professor Moskowitz has authored a criminal law course book that uses many creative problems (plus cases and commentary, of course) in the basic Criminal Law course. See MYRON MOSKOVITZ, *CASES AND PROBLEMS IN CRIMINAL LAW* (5th ed. 2003).

involved in criminal cases? The answers might suggest that perhaps new approaches merit serious consideration.