

ESSAY

CRIMINAL LEGAL EDUCATION

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ABSTRACT

The protests of 2020 have jumpstarted conversations about criminal justice reform in the public and professoriate. Although there have been longstanding demands for reformation and reimagining of the criminal justice system, recent calls have taken on a new urgency. Greater public awareness of racial bias, increasing visual evidence of state-sanctioned killings, and the televised policing of peaceful dissent have forced the public to reckon with a penal state whose brutality was comfortably tolerated. Scholars are publishing op-eds, policy proposals, and articles with rapidity, pointing to different factors and actors that produce the need for reform. However, one input has gone relatively unconsidered: legal education.

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Faculty who teach criminal law, criminal procedure, and evidence—what I describe as criminal legal education—are unassuming but integral players in the American system of punishment. They are responsible for the early legal training of prosecutors and public defenders. Surprisingly, the relationship between these lawyers’ education and criminal justice outcomes is underexplored. This Essay provokes a different kind of conversation by arguing that criminal legal education has some responsibility for our penal status quo. To fortify this argument, this Essay draws on scholarship on legal education and the legal profession. This

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literature illustrates how law schools socialize students into reproducing hierarchy and inequality. However, these insights are rarely applied to the criminal justice system and instead focus on the private sector. Longstanding and recent critiques of law school's inattention to race, poverty, and gender reinforce this Essay's argument about criminal legal education's inequality-producing character. Ultimately, this Essay contends that attention to the oversights in the criminal justice curriculum provides an immediate, potentially fruitful, but rarely considered criminal justice reform strategy.

INTRODUCTION

The American criminal justice system is in a season of public reckoning. A summer of protests—organized around anti-Black police violence—has shifted the views of a mainstream public that often ignored, disbelieved, or shrugged off advocates who argued that the criminal justice system is irredeemably biased.¹ Legal academics responded immediately. Law school deans, centers, and professors issued statements and penned op-eds decidedly denouncing white supremacy and police brutality.² These messages have important expressive functions and communicate values to the legal community and the broader population. Police are often the authors of state-sanctioned violence, so the focus on them was and continues to be appropriate. But legal academics' focus on police, along with a larger failure of introspection, obscures law schools' role in criminal justice inequality. This Essay provides a controversial corrective. I argue that law schools are key sites for the reproduction of our penal status quo, yet are relatively ignored in criminal justice scholarship. Legal education perpetuates some of the excesses of our criminal justice system.

Although the protests of summer 2020 generated new kinds of reflections on the criminal justice system, it is unclear that it will prompt changes in the criminal justice curriculum. This seems particularly true for first-year criminal law, as well as for bar courses such as criminal procedure and evidence—all three of which I describe as “criminal legal education.” Despite the very audible, social justice-inspired calls for criminal justice reform, the legal education of future prosecutors and public defenders is likely to remain constant. In fact, scholars have drawn attention to the race, class, and gender insensitivities of criminal justice teaching

1. Nate Cohn & Kevin Quealy, *How Public Opinion Has Moved on Black Lives Matter*, N.Y. TIMES (June 10, 2020), <https://www.nytimes.com/interactive/2020/06/10/upshot/black-lives-matter-attitudes.html>.

2. See, e.g., Press Release, Allard K. Lowenstein Int'l Hum. Rts. Clinic, Statement on the Extrajudicial Killings of Black People in the United States (June 9, 2020), <https://law.yale.edu/yils-today/news/allard-k-lowenstein-international-human-rights-clinic-statement-extrajudicial-killings-black-people>; Press Release, Univ. of Tex., Statement of the Deans of the Ten Texas Law Schools Condemning Racism and Remembering George Floyd (June 10, 2020), <https://law.utexas.edu/news/2020/06/10/statement-of-the-deans-of-the-ten-texas-law-schools/>.

for decades.³ Although the nature of the criticisms has changed, the core critiques are still relevant today.

Accordingly, this Essay contends that criminal legal education plays a role in our penal status quo by way of its poor treatment of issues tied to race, gender, and poverty.

This argument builds on longstanding as well as recent critiques of legal education. Almost four decades ago, Duncan Kennedy argued that law schools reproduce hierarchy and social inequality.⁴ Assuming this is right—and available empirical accounts of legal education seem to suggest so⁵—this would mean that the core criminal justice courses taught in law school are not immune from this critique. The reproduction critique has been generally applied to the private sector but has compelling relevance to the training of future lawyers. This Essay draws the connection. More recently, Alice Ristroph’s deep dives into the history of substantive criminal law—the only of their kind—put forth the closest and strongest message that this Essay builds upon: “American law schools, through the required course on substantive criminal law, have contributed affirmatively to the collection of phenomena commonly labeled mass incarceration.”⁶ Professor Ristroph’s assessment is correct and is just one part of a larger narrative about legal education’s reluctance to take full account of its role in our criminal justice crisis. This Essay picks up the baton and widens the discussion beyond substantive criminal

3. See, e.g., LANI GUINIER, MICHELLE FINE & JANE BALIN, *BECOMING GENTLEMEN: WOMEN, LAW SCHOOL, AND INSTITUTIONAL CHANGE* 56 (1997) (describing students’ concern about the trivialization of women as victims of rape in criminal law); PATRICIA J. WILLIAMS, *THE ALCHEMY OF RACE AND RIGHTS* 80–97 (1991) (discussing the inappropriate ways race, class, and gender are treated and ignored in criminal law classes and exams); Amna A. Akbar, *Law’s Exposure: The Movement and the Legal Academy*, 65 J. LEGAL EDUC. 352, 368–70 (2015) (describing the ahistorical treatment of issues such as slavery and Jim Crow in legal education and inviting these kinds of discussions in criminal law); M.K.B. Darmer, *Teaching Whren to White Kids*, 15 MICH. J. RACE & L. 109, 128–32 (2009) (critiquing pedagogical approaches to race in criminal procedure); Catharine A. MacKinnon, *Mainstreaming Feminism in Legal Education*, 53 J. LEGAL EDUC. 199, 206–08 (2003) (discussing the need for more robust discussions about gender in criminal law courses); Kimberlé Williams Crenshaw, *Foreword: Toward a Race-Conscious Pedagogy in Legal Education*, 11 NAT’L BLACK L.J. 1, 7–9 (1988) (describing law students’ objections to how one criminal law instructor engaged issues of race in a criminal law course and making suggestions about how conversations about race could be better handled in the provocation section of a criminal law class).

4. See Duncan Kennedy, *Legal Education and the Reproduction of Hierarchy*, 32 J. LEGAL EDUC. 591, 591–92 (1982).

5. See, e.g., ELIZABETH MERTZ, *THE LANGUAGE OF LAW SCHOOL: LEARNING TO “THINK LIKE A LAWYER”* 205–06 (2007); GUINIER ET AL., *supra* note 3, at 27; WENDY LEO MOORE, *REPRODUCING RACISM: WHITE SPACE, ELITE LAW SCHOOLS, AND RACIAL INEQUALITY* 9–12 (2008).

6. Alice Ristroph, *The Curriculum of the Carceral State*, 120 COLUM. L. REV. 1631, 1635 (2020) [hereinafter Ristroph, *Curriculum*]; Alice Ristroph, *An Intellectual History of Mass Incarceration*, 60 B.C. L. REV. 1949, 1950, 2008 (2019) [hereinafter Ristroph, *Intellectual History*]; see also #DefundthePolice Solidarity, *A Time for Solidarity: An Open Letter to Our Colleagues*, MEDIUM (Aug. 24, 2020), <https://medium.com/@solidarityinthemoment/a-time-for-solidarity-8a1ce0e52210> (calling law professors and scholars of punishment to account for their role in mass incarceration and address anti-Black racism and white supremacy in the legal system).

law to illustrate how the engagement with race, poverty, and gender in criminal legal education contributes to the reproduction of our penal status quo.

This Essay proceeds in two parts. Part I particularizes the long-standing critique that legal education is not designed to challenge the status quo.⁷ Part II draws on the literature about law school socialization to underline the reproduction critique. The Essay concludes by tying the importance of curricular reform to the current shape of the criminal justice bureaucracy.

I. CRIMINAL LEGAL EDUCATION AND THE REPRODUCTION OF HIERARCHY

Social scientists have spent decades writing about how schools and educational systems reproduce the social order.⁸ The nature of this reproduction is multi-dimensional and spans the educational gamut. Young boys and girls learn about gender divisions and sex identity through seemingly mundane activities such as restroom use, teasing, and play.⁹ Racial lessons are conveyed through curricular choices as well as practices of punishment.¹⁰ From elementary to high school, residential segregation produces a range of inequalities that ultimately shape who goes to college and where they choose to enroll.¹¹ From the Ivy Leagues to the politically-embattled for-profit colleges, higher education—the presumed bastion of social mobility—is freighted by a high-wire act of accommodating accumulated advantage and entrenched inequalities.¹² Schools of all levels supply their students with knowledge—some basic and some technical. But educational systems also

7. See Kennedy, *supra* note 4, at 598; see also Jedediah Britton-Purdy, David Singh Grewal, Amy Kapczynski & K. Sabeel Rahman, *Building a Law-and-Political-Economy Framework: Beyond the Twentieth-Century Synthesis*, 129 YALE L.J. 1784, 1789–90 (2020).

8. See, e.g., PIERRE BOURDIEU & JEAN-CLAUDE PASSERON, *REPRODUCTION IN EDUCATION, SOCIETY AND CULTURE* 177–78 (Richard Nice trans., 2d ed. 1990) (noting that the societal hierarchy exists in schools); PIERRE BOURDIEU, *DISTINCTION: A SOCIAL CRITIQUE OF THE JUDGEMENT OF TASTE* 1 (Richard Nice trans., 1984) (explaining the influence of social origin in the educational system); see generally MICHAEL W. APPLE, *IDEOLOGY AND CURRICULUM* (4th ed. 2019) (addressing the relationship between cultural and economic power in education); MICHAEL W. APPLE, *EDUCATION AND POWER* (2d ed. 1995) (discussing the reproduction of and resistance to unequal power relations in educational institutions).

9. See BARRIE THORNE, *GENDER PLAY: GIRLS AND BOYS IN SCHOOL* 49–53 (1993).

10. See AMANDA E. LEWIS, *RACE IN THE SCHOOLYARD: NEGOTIATING THE COLOR LINE IN CLASSROOMS AND COMMUNITIES* 18 (2003).

11. See, e.g., ANNETTE LAREAU, *UNEQUAL CHILDHOODS: CLASS, RACE, AND FAMILY LIFE* 1–13 (2d ed. 2011) (discussing the focus of middle-class parents on “concerted cultivation” in comparison to working-class parents’ focus on “the accomplishment of natural growth”); see generally MEGAN M. HOLLAND, *DIVERGENT PATHS TO COLLEGE: RACE, CLASS, AND INEQUALITY IN HIGH SCHOOLS* (2019) (explaining how race and class determine the pathways for high school students post-graduation); ANN L. MULLEN, *DEGREES OF INEQUALITY: CULTURE, CLASS, AND GENDER IN AMERICAN HIGHER EDUCATION* (2012) (addressing class disparities in the college experience).

12. See, e.g., JENNIFER MORTON, *MOVING UP WITHOUT LOSING YOUR WAY: THE ETHICAL COSTS OF UPWARD MOBILITY* 37–39 (2019) (discussing the hurdles disadvantaged college students face in seeking upward mobility); see generally ANTHONY ABRAHAM JACK, *THE PRIVILEGED POOR: HOW ELITE COLLEGES ARE FAILING DISADVANTAGED STUDENTS* (2019) (examining what happens to disadvantaged students when they attend elite colleges).

inculcate their students with middle-class value systems in preparation for an economically and socially-stratified society.

Legal education is not immunized from reproduction analyses. Duncan Kennedy lodged a scathing critique almost forty years ago that scholarship on the legal profession has had to contend with since.¹³ For the uninitiated, unfamiliar, or misremembered, the gist of Kennedy's argument is this: the seminal first-year courses of law schools are indoctrination factories that teach students the mystified skill of legal reasoning but do so in ways that are detached from actual lawyering as well as pressing policy problems.¹⁴ In doing so, law schools endow students with a set of political attitudes that naturalize inequality and prepare students to be foot soldiers in the legal order—primarily in private sector law firms, but also in the other spheres of the legal profession.¹⁵ Since Kennedy's critique, scholars have offered slightly more nuanced and less polemical takes on legal education.¹⁶ Still, the basic premise about law school's inequality-producing features remains.

Investigations into law schools' reproductive qualities have also brought more granular approaches to race and gender. Lani Guinier and her colleagues describe how the male-oriented nature of legal education denigrates women and can have career-defining effects by influencing their academic performance, ultimately determining things like who gets on law review, secures clerkships, and graduates at the top of the class.¹⁷ Wendy Leo Moore's ethnographic study of law schools, unambiguously titled *Reproducing Racism*, details how legal education reproduces ideas of white superiority by focusing on racially subtle messages that emerge from the plastering of white alumni across law school buildings, as well as the more obvious sites such as classroom discussions and pedagogy.¹⁸ Class bias also lurks in the background of legal education. A handful of scholars highlight how most law schools draw their faculty from the same small pool of elite law schools, which leads to a socio-economically homogenous professoriate that is insensitive to social stratification in its teaching.¹⁹ These texts, related scholarly literature, and

13. Kennedy, *supra* note 4, at 591–92.

14. *Id.* at 597–98.

15. *Id.*

16. For one particularly thoughtful take, see Lucille A. Jewel, *Bourdieu and American Legal Education: How Law Schools Reproduce Social Stratification and Class Hierarchy*, 56 *BUFF. L. REV.* 1155 (2008).

17. See GUINIER ET AL., *supra* note 3, at 28–29; see also Sari Bashi & Maryana Iskander, *Why Legal Education Is Failing Women*, 18 *YALE J.L. & FEMINISM* 389, 403 (2006) (discussing how men “dominate class discussions” and “use their classroom experiences as a springboard for building academically and professionally rewarding relationships with faculty members” while noting that “[d]iminished or less effective classroom participation by women feeds into diminished or less effective out-of-class interactions between faculty members and female students”).

18. MOORE, *supra* note 5, at 23–24.

19. See Jewel, *supra* note 16, at 1197 (“The American legal profession has long been viewed as occupying the cultural and social space of the aristocracy.”); Eric J. Segall & Adam Feldman, *The Elite Teaching the Elite: Who Gets Hired by the Top Law Schools?*, 68 *J. LEGAL EDUC.* 614, 618 (2019) (finding that eighty percent of the faculty in the top twenty-five law schools went to a top ten law school); Eli Wald, *Serfdom Without Overlords: Lawyers and the Fight Against Class Inequality*, 54 *U. LOUISVILLE L. REV.* 269, 297–98 (2016) (discussing how

a cottage industry of autobiographical takes on legal education lead to one conclusion: law schools have unclean hands when it comes to the production of social inequality.²⁰

Yet much of the relevant legal scholarship on the reproduction of hierarchy focuses on legal practice more generally or is specific to the private sector, but is rarely applied to criminal practice (i.e., prosecution and criminal defense). Since private sector law constitutes the lion's share of work into which graduates go, this particularized focus makes sense. But this raises the question: what does the reproduction of hierarchy look like in the world of criminal justice? Available literature allows us to make some reasonable inferences. Put simply, a wide range of scholarship suggests that legal education contributes to our penal status quo through its poor handling of race, poverty, and gender issues in the criminal justice curriculum. This poor handling occurs through omission, lack of attention, and in some instances, outright fumbling.

Evidence law is arguably the least scrutinized of the three core criminal justice courses when it comes to questions of pedagogy. Still, there have been longstanding critiques around its treatment of gender.²¹ The existence of rape shield laws

law schools “exclusively retain faculty from privileged backgrounds”); Michael J. Higdon, *A Place in the Academy: Law Faculty Hiring and Socioeconomic Bias*, 87 ST. JOHN'S L. REV. 171, 175 (2013) (noting that “students who attend top-tier law schools are overwhelmingly representative of the elite socioeconomic class” and arguing that “hiring faculty members from primarily those ranks undermines a law school’s ability to achieve socioeconomic diversity on its faculty and instead helps perpetuate a class-based monopoly within the legal academy to the detriment of all involved”); Jeffrey L. Harrison, *Confess'n the Blues: Some Thoughts on Class Bias in Law School Hiring*, 42 J. LEGAL EDUC. 119, 119–20 (1992) (suggesting that “people with working-class backgrounds” are not found in legal academia and describing the class bias in the legal professoriate); see also Milan Markovic, *The Law Professor Pipeline*, 92 TEMP. L. REV. 813, 817 (2020) (describing how new law professors largely received their undergraduate education from the most elite private colleges that serve the wealthiest segments of society).

20. See, e.g., ALFREDO MIRANDÉ, *THE STANFORD LAW CHRONICLES: DOIN' TIME ON THE FARM* 4 (2005) (describing the “values and ethos” of law school as those of “elite white male culture”); see generally KATHRYNE M. YOUNG, *HOW TO BE SORT OF HAPPY IN LAW SCHOOL* (2018) (noting that social inequality in law schools is systemic); ROBERT GRANFIELD, *MAKING ELITE LAWYERS: VISIONS OF LAW AT HARVARD AND BEYOND* (1992) (asking why law students identifying as liberal to leftist choose corporate law practice over public interest work); RICHARD D. KAHLBERG, *BROKEN CONTRACT: A MEMOIR OF HARVARD LAW SCHOOL* (1999) (same); ROBERT V. STOVER, *MAKING IT AND BREAKING IT: THE FATE OF PUBLIC INTEREST COMMITMENT DURING LAW SCHOOL* (1989) (same).

21. See Aviva Orenstein, *Apology Excepted: Incorporating a Feminist Analysis into Evidence Policy Where You Would Least Expect It*, 28 SW. U. L. REV. 221, 222 (1999); Aviva Orenstein, “MY GOD!”: *A Feminist Critique of the Excited Utterance Exception to the Hearsay Rule*, 85 CALIF. L. REV. 159, 162–63 (1997); Malinda L. Seymore, *Isn't It a Crime: Feminist Perspectives on Spousal Immunity and Spousal Violence*, 90 NW. U. L. REV. 1032, 1035–36 (1996); Rosemary C. Hunter, *Gender in Evidence: Masculine Norms vs. Feminist Reforms*, 19 HARV. WOMEN'S L.J. 127, 127 (1996); Ann Althouse, *The Lying Woman, the Devious Prostitute, and Other Stories from the Evidence Casebook*, 88 NW. U. L. REV. 914, 916–17 (1994); Susan Stefan, *The Protection Racket: Rape Trauma Syndrome, Psychiatric Labeling, and Law*, 88 NW. U. L. REV. 1271, 1277 (1994); Kim Lane Scheppelle, *Just the Facts, Ma'am: Sexualized Violence, Evidentiary Habits, and the Revision of Truth*, 37 N.Y. L. SCH. L. REV. 123, 125 (1992); Kit Kinports, *Evidence Engendered*, 1991 U. ILL. L. REV. 413, 413–14 (1991); Harriett R. Galvin, *Shielding Rape Victims in the State and Federal Courts: A Proposal for the Second Decade*, 70 MINN. L. REV. 763, 776–77 (1986).

and marital privilege, along with issues tied to domestic violence and rape trauma, has made it so that at a bare minimum, gender surfaces in evidence courses.²² But assumptions remain. Catharine MacKinnon's argument that gender should be mainstreamed and brought to the fore of evidence courses captures some of the elisions that evidence students and future criminal justice lawyers may miss. MacKinnon objects to the flattening of social categories like gender. How much does evidence law "ignore how inequality constructs reliability," she questions.²³ She also asks how much evidence law assumes "a uniformity of experience" that conditions of inequality actually refute.²⁴

Shining light on more omissions and conflation that likely filter into teaching, evidence scholars have picked up the baton and discussed the lack of attention to race. As Jasmine Gonzales Rose explains, "Most judges, lawyers, and scholars appear to assume that since evidence law is facially race-neutral, it applies equally to all persons irrespective of race."²⁵ Of particular concern here are the ways race filters through ideas about character evidence²⁶ and evidentiary credibility.²⁷ Also relevant are the intersectional oversights of an adoptive admission rule that ignores the role silence plays in non-white communities;²⁸ the uncritical use of prior convictions notwithstanding a demonstrably biased and flawed criminal justice system;²⁹ and the variety of ways race creeps into evidentiary considerations.³⁰ The inattention to race and gender in evidence law can lead to the reasonable

22. See Roger C. Park & Michael J. Saks, *Evidence Scholarship Reconsidered: Results of the Interdisciplinary Turn*, 47 B.C. L. REV. 949, 998 (2006).

23. MacKinnon, *supra* note 3, at 209–10.

24. *Id.*

25. Jasmine B. Gonzales Rose, *Racial Character Evidence in Police Killing Cases*, 2018 WIS. L. REV. 369, 375 (2018).

26. See *id.* at 389–91; see also Chris Chambers Goodman, *The Color of Our Character: Confronting the Racial Character of Rule 404(b) Evidence*, 25 LAW & INEQ. 1, 4 (2007) (discussing how racial references are either admitted or excluded as character evidence under Federal Rule of Evidence 402).

27. See Jasmine B. Gonzales Rose, *Toward A Critical Race Theory of Evidence*, 101 MINN. L. REV. 2243, 2259–60 (2017).

28. See Maria L. Ontiveros, *Adoptive Admissions and the Meaning of Silence: Continuing the Inquiry into Evidence Law and Issues of Race, Class, Gender, and Ethnicity*, 28 SW. U. L. REV. 337, 338–39 (1999) (arguing that the adoptive admission rule, which suggests that a listener will refute it, ignores how race, class, gender, and ethnicity influences silence and equivocation); see also Mikah K. Story Thompson, *Methinks the Lady Doth Protest Too Little: Reassessing the Probative Value of Silence*, 47 U. LOUISVILLE L. REV. 21, 21–22, 40 (2008) (suggesting that Black and Hispanic individuals, who are more likely to be distrustful of law enforcement, may choose to remain silent).

29. See Montré D. Carodine, *"The Mis-Characterization of the Negro": A Race Critique of the Prior Conviction Impeachment Rule*, 84 IND. L.J. 521, 521–22 (2009) (contending that the use of prior convictions in evidence law is inherently unreliable due to the massive evidence of racial bias in the criminal justice system, ultimately imposing a tax on Black defendants, and arguing that prior convictions fit into the category of hearsay).

30. See Bennett Capers, *Evidence Without Rules*, 94 NOTRE DAME L. REV. 867, 867–68 (2018) (describing how issues like dress, demeanor, and race go underregulated by the Rules of Evidence, are unchecked by evidentiary gatekeepers, and are ultimately used by fact-finders in their determinations of guilt).

conclusion that future criminal lawyers are leaving law school with incomplete understandings of how some fundamental evidentiary concepts can play out in practice.

The reproduction of inequality also occurs through the omission of important topics in classroom discussions and the casebooks that are the primary educational tools for students. Scholars have highlighted this problem in criminal law and procedure. Feminist scholars identified the issues of sex bias in criminal law teaching in the late 1980s and 1990s,³¹ and though gender operates differently in these courses, teaching sexual assault and rape still remains a challenge. Some instructors refuse to teach in this area out of fear, discomfort, or disinterest. While some of that reluctance is understandable, Jeannie Suk Gersen's observation is instructive: not teaching sexual assault remarginalizes a topic that was once considered unimportant.³² Such non-teaching may unwittingly (or purposely) reproduce a status quo where sexual violence is not taken seriously.³³

Other omissions abound. Frank Zimring similarly does not mince words and contends that academic criminal law is irrelevant because of its failure to meaningfully address "the important policy discourses of the modern age."³⁴ The primary policy issue he describes as "the sevenfold growth in the incarcerated population that happened after 1972 . . . and the massive 'war on drugs' that exploded in the United States between 1985 and 1995."³⁵ Alice Ristroph's recent deep dives into the history and development of criminal law casebooks are especially trenchant.³⁶ Lamenting the "pro-carceral" messages in substantive criminal law casebooks, Professor Ristroph catalogs the non-inclusion of gun and drug possession crimes that contributed to mass incarceration.³⁷ For Ristroph, the uncritical endorsement of pro-carceral messages, in what is typically the only required first-year criminal justice course, is responsible for producing a "law school to prison pipeline" that entails lawyers who are partially responsible for mass incarceration.³⁸

Criminal procedure—the field that has arguably been most shaped by concerns about race and class—is also beset with omissions. Reviewing several criminal procedure casebooks, Judge Stephanos Bibas has explained how there are "few materials on race, politics, or drugs, beyond the occasional doctrinal

31. See Nancy S. Erickson, *Final Report: "Sex Bias in the Teaching of Criminal Law"*, 42 RUTGERS L. REV. 309, 313 (1990); Nancy S. Erickson & Mary A. Lamanna, *Sex-Bias Topics in the Criminal Law Course: A Survey of Criminal Law Professors*, 24 U. MICH. J.L. REFORM 189, 193 (1990); Mary Irene Coombs, *Crime in the Stacks, or a Tale of a Text: A Feminist Response to a Criminal Law Textbook*, 38 J. LEGAL EDUC. 117, 118 (1988).

32. Jeannie Suk Gersen, *The Socratic Method in the Age of Trauma*, 130 HARV. L. REV. 2320, 2334–37 (2017).

33. *Id.*

34. Franklin E. Zimring, *Is There a Remedy for the Irrelevance of Academic Criminal Law?*, 64 J. LEGAL EDUC. 5, 5 (2014).

35. *Id.*

36. See Ristroph, *Curriculum*, *supra* note 6; see also Ristroph, *Intellectual History*, *supra* note 6.

37. Ristroph, *Curriculum*, *supra* note 6, at 1664–67.

38. *Id.* at 1685–90.

subsection.”³⁹ For Judge Bibas, omissions of race, politics, and drugs are crucial because they influence how legislators define what is a crime, how law enforcement policies regulate criminal behavior, and how prosecutors enforce criminal laws.⁴⁰ The “sophisticated interplay of politics, race, and doctrine,” he argues, “teaches students far more about the real world than a simple presentation of the selective-prosecution doctrine would.”⁴¹ Ronald Wright and Kay Levine likely agree. They have argued that the criminal law curriculum “tends to have fairly anemic offerings about the criminal justice system itself.”⁴² Professors Wright and Levine also rightfully point out that many law schools fail to offer courses that “expose students to structural concerns that plague justice systems around the world or invite students to take a hard look at empirical data about crime rates, incarceration rates, and the intersections of race, poverty, and crime.”⁴³ The inattention to questions about race, poverty, and politics is particularly striking since these are issues that criminal justice scholars have identified as being at the center of our penal status quo.⁴⁴ Ultimately, empirical, theoretical, and descriptive takes on legal education lead one to the reasonable inference that law schools are important sites for the consideration of criminal justice inequality.

II. LAW SCHOOL SOCIALIZATION

Whereas the reproduction thesis is premised on the idea that law schools reflect and replicate some of the larger problems in American society, law school socialization focuses on the ways legal education promotes certain kinds of attitudinal dispositions toward the law.⁴⁵ As a threshold matter, socialization is often examined through the lens of “public interest drift,” which posits that law students begin their legal education with public interest commitments but are socialized into valuing the economic incentives that come with working in the higher-paying private

39. Stephanos Bibas, *The Real-World Shift in Criminal Procedure*, 93 J. CRIM. L. & CRIMINOLOGY 789, 805 (2003) (book review).

40. *Id.* at 806.

41. *Id.* at 810.

42. Ronald F. Wright & Kay L. Levine, *The Cure for Young Prosecutors' Syndrome*, 56 ARIZ. L. REV. 1065, 1125 (2014).

43. *Id.*; see also Catherine M. Grosso & Barbara O'Brien, *Grounding Criminal Procedure*, 20 J. GENDER, RACE & JUST. 53, 55 (2017) (examining leading criminal procedure casebooks and finding that “discussions of race or racism [were] overwhelmingly absent from the cases”).

44. See generally ALEXANDRA NATAPOFF, PUNISHMENT WITHOUT CRIME: HOW OUR MASSIVE MISDEMEANOR SYSTEM TRAPS THE INNOCENT AND MAKES AMERICA MORE UNEQUAL (2018) (discussing how the misdemeanor system perpetuates error, injustice, and inequality); PETER EDELMAN, NOT A CRIME TO BE POOR: THE CRIMINALIZATION OF POVERTY IN AMERICA (2017) (examining the criminalization of poverty); PAUL BUTLER, CHOKEHOLD: POLICING BLACK MEN (2018) (addressing the criminalization of Black men when white men commit the majority of violent crime in the United States).

45. See generally Gregory J. Rathjen, *The Impact of Legal Education on the Beliefs, Attitudes and Values of Law Students*, 44 TENN. L. REV. 85 (1976) (discussing the impact of legal education on selected beliefs, attitudes, and values of law students).

sector.⁴⁶ As it relates to this Essay's discussion on the reproduction of criminal justice inequality, public interest drift is important to the extent that it is likely siphoning students away from indigent defense and prosecutorial work. But scholars have applied pressure to the idea of public interest drift.⁴⁷ Perhaps more crucially, the thesis tells us less about what happens to the students who enter the criminal justice bar.

More relevantly, law schools reproduce the penal status quo by socializing students into understanding law primarily as a science that is superordinate to social, political, and economic concerns—particularly as it relates to marginalized groups.⁴⁸ Such extra-legal concerns about marginalized groups are not absent from legal education *in toto*; law schools typically supply some combination of clinical offerings, elective courses, programming, and affinity groups for students interested in getting a deeper understanding of legal inequality. These are all powerful and necessary learning opportunities. But they are also educational adjuncts that are subject to self-selection and are in competition with other demands on time, and of course, availability. Further, these educational supplements are not part of the core first-year classes—unlike criminal law, which is typically offered in the first year, and is a site where one might argue that inequality is the appropriate course of study. Although these educational adjuncts are akin to evidence and criminal procedure in that they are often not required, they are also not bar courses that students often feel pressure to enroll in.⁴⁹

46. See *id.* at 92 (arguing that legal education socializes students toward an entrepreneurial model as opposed to a social welfare model); Susan Ann Kay, *Socializing the Future Elite: The Nonimpact of a Law School*, 59 SOC. SCI. Q. 347, 347 (1978) (same).

47. See John Bliss, *From Idealists to Hired Guns? An Empirical Analysis of "Public Interest Drift" in Law School*, 51 U.C. DAVIS L. REV. 1973, 2015–16 (2018) (arguing that students retain their political commitments even if they decide to go to a higher-paying job); Monroe H. Freedman, *The Loss of Idealism—By Whom? And When?*, 53 N.Y.U. L. REV. 658, 658 (1978) (rejecting the public interest drift thesis); Howard S. Erlanger & Douglas A. Klegon, *Socialization Effects of Professional School: The Law School Experience and Student Orientations to Public Interest Concerns*, 13 LAW & SOC'Y REV. 11, 21 (1978) (finding that changes in public interest attitudes are smaller than reported).

48. The idea of law as a science is hardly new and is a byproduct of the pedagogical design of law school, particularly the first year, but also for doctrinal courses. See Thomas C. Grey, *Langdell's Orthodoxy*, 45 U. PITT. L. REV. 1, 5 (1983).

49. See James E. Moliterno, *The Future of Legal Education Reform*, 40 PEPP. L. REV. 423, 433–34 (2013) ("Students, depending on their level of insecurity, feel a need to fill up their schedules with as many bar courses as possible. Law schools feel a corresponding obligation to offer as many bar courses as possible."); Andrea A. Curcio, *Society of American Law Teachers Statement on the Bar Exam: July 2002*, 52 J. LEGAL EDUC. 446, 449 (2002) ("From the moment they enter law school through graduation, students realize that unless they pass the bar examination, their substantial financial commitment and their years of hard work will be wasted. As a result, many students concentrate on learning primarily what they need to know in order to pass the bar exam, which often translates into high student attendance in courses that address the substantive law tested on the bar examination and reduced participation in . . . courses such as environmental law, poverty law, civil rights litigation, law and economics, and race and the law. As a result, the students fail to fully engage in a law school experience that will give them both the practical skills and the jurisprudential perspective that will make them better lawyers").

Looking inside the core courses, law school socialization often encourages students to think in ways that are unemotional and detached from pressing social problems.⁵⁰ Elizabeth Mertz has detailed this dynamic in her innovative empirical study of eight law schools that examined the frequency and duration of classroom speech.⁵¹ Professor Mertz found that legal education provides students with a distinctive legal worldview but that it also precludes important social and political discussions that ultimately disserve the public.⁵² Students learn how to “think like a lawyer,” which is generally understood as gaining an analytic ability that legal professionals uniquely possess (e.g., understanding doctrine, proof, reasonableness, intent, etc.).⁵³ But “thinking like a lawyer” is often *not* understood as a cultural form of thinking that can rest on unproven assumptions, has its own biases, and in some instances, disregards other forms of reasoning and information that might help resolve legal problems.⁵⁴

The “detached mastery” of legal education aggressively focuses on logical and analytical reasoning while denying the more dynamic and interpersonal dimensions of criminal justice matters.⁵⁵ This detachment communicates several messages that are relevant to this Essay’s inquiry: primarily, that interdisciplinarity, along with *legal* understandings of racism, sexism, and poverty “can be developed on their own, easily picked up in practice, or are simply not as demanding or significant in the development of foundational expertise for lawyers.”⁵⁶ Learning to think like a lawyer in these ways can lead students to be unaware of the legally specific ways various “-isms” crop up in different areas of criminal justice administration. To the extent that students have their own understandings of social justice, this form of thinking like a lawyer can lead them to overdetermine how race, poverty, and sexism operate in our system of punishment. In the same ways, students may miss these issues or over-assign value to inequality in places where it is not merited precisely because their ideas may not have been battle-tested by professors and student colleagues.

Law schools also socialize their students into understanding their learning experiences through a host of tiered binaries: law versus policy, substance versus process, and theory versus skills. These categories can be conceptually appropriate

50. RIAZ TEJANI, *LAW MART: JUSTICE, ACCESS, AND FOR-PROFIT LAW SCHOOLS* 209–10 (2017) (“Law school teaching in the United States has long separated justice and morality Though work prosecuting and defending criminal suspects, or litigating against negligent corporations, undeniably implicates questions of right and wrong or good and bad, the pedagogy producing these vocations submerges those binaries beneath rules and processes.”).

51. See MERTZ, *supra* note 5, at 34 (describing methodology).

52. *Id.* at 205–06.

53. *Id.* at 88–89, 98.

54. *Id.* at 221.

55. Susan Sturm & Lani Guinier, *The Law School Matrix: Reforming Legal Education in a Culture of Competition and Conformity*, 60 VAND. L. REV. 515, 531 (2007).

56. *Id.*; see also Deborah L. Rhode, *Legal Education: Professional Interests and Public Values*, 34 IND. L. REV. 23, 33 (2000) (observing how race, gender, ethnicity, and sexual orientation are often “tacked on as curricular afterthoughts—as brief digressions from the ‘real’ subject”).

and pedagogically convenient, but they have consequences for the professional development of future prosecutors and defense attorneys. First, in legal education, the “policy implications” of law are commonly ignored or understood as marginal.⁵⁷ Contrary to basic principles of bureaucracy theory, law students are socialized into understanding indigent defense and prosecution simply as the practice of law and not as significant sites of criminal justice policymaking.⁵⁸ Indeed, this is why progressive prosecution and indigent defense reform—which focus precisely on these issues—are attractive to current law students. Yet it is not clear that these conversations have permeated the walls of core criminal justice classes. Socializing students into understanding the legal system through a law/policy lens minimizes the roles prosecutors increasingly play in criminal justice governance and obscures how indigent defense organizations oftentimes resort to the electoral realm precisely because of a conservative jurisprudential landscape that has shaped their client communities.⁵⁹

Legal education also insists on a substance/process binary that further partitions how students understand the criminal justice system. The division between criminal law and criminal procedure best illustrates the substance/process distinction. This division is rooted in legitimate differences between the two fields in terms of objectives, the sources of law from which they emanate, and the sheer amount of content in both fields. But these differences need not be determinative. In fact, they are arguably impractical.⁶⁰ Still, this division shapes the legal education of future public defenders and prosecutors. To the extent that questions of race and poverty emerge in the criminal justice curriculum, they are understood as procedural matters—byproducts of the Warren Court’s due process revolution

57. See YOUNG, *supra* note 20, at 235 (noting that sometimes law professors discuss history and policy implications, but that “nine times out of ten” those insights won’t be helpful on the grade-determining final exam, and advising students preparing for finals that “[u]nless a stack of sample answers tells a different story, assume that come grading time, your policy-analyzing, theory-discussing, poetic-waxing professor will turn into a lean, mean, lawyerly grading machine”).

58. See Ristroph, *Curriculum*, *supra* note 6, at 1701 (arguing that the distinction “gravely distorts our understanding of criminal law”); Ristroph, *Intellectual History*, *supra* note 6, at 1978 (“At most American law schools, substantive criminal law is a required first-year course, and judging by the casebooks in use, students are still taught that the substance of criminal law resides in judicial opinions and statutes, not the decisions of enforcement officials such as police and prosecutors.”).

59. See JONATHAN SIMON, GOVERNING THROUGH CRIME: HOW THE WAR ON CRIME TRANSFORMED AMERICAN DEMOCRACY AND CREATED A CULTURE OF FEAR 116 (2007); Cara H. Drinan, *The Third Generation of Indigent Defense Litigation*, 33 N.Y.U. REV. L. & SOC. CHANGE 427, 444–48 (2009).

60. These distinctions do not match up neatly with criminal practice, which certainly emphasizes one more than the other, but requires an integrated understanding of both. Moreover, to the extent that producing “bar-ready” or “practice-ready” attorneys is a law school’s objective, the bifurcation of criminal law and procedure (and sometimes trifurcation, with criminal procedure being split into courses on investigation and adjudication) raises efficiency questions since the bar exam crams all these fields into one section of twenty-five questions—the same as evidence, civil procedure, torts, and other core courses. See *Preparing for the MBE*, NAT’L CONF. BAR EXAM’RS, <https://www.ncbex.org/exams/mbe/preparing/> (last visited Feb. 22, 2021). My purpose is not to advocate for the consolidation of these fields, but to denaturalize these distinctions and begin to gesture toward what they mean for students.

and its legacy.⁶¹ Some of these issues include police contact with citizens, the right to counsel, prosecutorial discretion, and sentencing. But it is important to pause and reiterate here that robust conversations about race and poverty, as observed by criminal procedure scholars and noted in Part I, *supra*, are sparse in corresponding casebooks. Assuming the criminal justice curriculum attends to race and poverty, criminal procedure is the main event. This focus underappreciates how substantive criminal law—what and how we punish—is not just influenced by abstract theories of punishment, but by a long and empirically-demonstrated history of racial subjugation and poverty management.⁶² Ultimately, criminal legal education socializes students into having uneven or incomplete understandings of the ways race and poverty animate the criminal justice system. To the extent that more sophisticated understandings are sought, they must come autodidactically, through elective education, or through public defender and prosecutor offices that *may* engage in relevant training.

The theory/skills binary varies by school but can have the effect of socializing students into privileging one over the other at the expense of a more integrated legal education.⁶³ Most crudely, elite law schools often emphasize theory in core courses.⁶⁴ But this focus on theory is relatively light and concerned with black letter law and legal doctrine, leaving less space for meaningful conversations about law's relationship to power, bias, poverty, and other inputs that determine criminal justice outcomes.⁶⁵ Tragically, by the end of their legal education, students are not

61. See Gary Peller, *Criminal Law, Race, and the Ideology of Bias: Transcending the Critical Tools of the Sixties*, 67 TUL. L. REV. 2231, 2232–33 (1993).

62. See, e.g., JULILLY KOHLER-HAUSMANN, GETTING TOUGH: WELFARE AND IMPRISONMENT IN 1970S AMERICA 20–21 (2019); ALEXES HARRIS, A POUND OF FLESH: MONETARY SANCTIONS AS PUNISHMENT FOR THE POOR 156 (2016); TALITHA L. LEFLOURIA, CHAINED IN SILENCE: BLACK WOMEN AND CONVICT LABOR IN THE NEW SOUTH 55 (2015); CHARLES R. EPP, STEVEN MAYNARD-MOODY & DONALD HAIDER-MARKEL, PULLED OVER: HOW POLICE STOPS DEFINE RACE AND CITIZENSHIP 10 (2014); see generally DOUGLAS A. BLACKMON, SLAVERY BY ANOTHER NAME: THE RE-ENSLAVEMENT OF BLACK AMERICANS FROM THE CIVIL WAR TO WORLD WAR II (2012) (discussing the mistreatment of Black Americans and historical legacy of racism); JONATHAN SIMON, POOR DISCIPLINE: PAROLE AND THE SOCIAL CONTROL OF THE UNDERCLASS, 1890–1990 (1993) (connecting punishment to political and economic transformations in society); David Arnold, Will Dobbie & Crystal S. Yang, *Racial Bias in Bail Decisions*, 133 Q. J. ECON. 1885 (2018) (showing how bail judges are racially biased against Black defendants); Bruce Western & Katherine Beckett, *How Unregulated Is the U.S. Labor Market? The Penal System as a Labor Market Institution*, 104 AM. J. SOCIO. 1030 (1999) (exploring the connection between incarceration and the labor market).

63. See Lucille A. Jewel, *Oil and Water: How Legal Education's Doctrine and Skills Divide Reproduces Toxic Hierarchies*, 31 COLUM. J. GENDER & L. 111, 111 (2015) (arguing that the theory/skills dichotomy “is responsible for reinforcing class, gender, and race segmentation in legal education, which limits the quality of instruction that law schools can provide and abets the reproduction of existing power relations in the legal profession and society at large”).

64. In different criticisms that are levied on elite law schools, Judges Harry Edwards and Richard Posner have both argued that legal education and scholarship are hopelessly detached from the problems of the legal profession. See generally RICHARD A. POSNER, *DIVERGENT PATHS: THE ACADEMY AND THE JUDICIARY* (2016) (discussing the widening gap within the legal profession); Harry T. Edwards, *The Growing Disjunction Between Legal Education and the Legal Profession*, 91 MICH. L. REV. 34 (1992) (same).

65. See Gerald P. López, *Training Future Lawyers to Work with the Politically and Socially Subordinated: Anti-Generic Legal Education*, 91 W. VA. L. REV. 305, 326 (1989).

fully equipped to “describe and critique the political and economic theories underlying various legal arrangements.”⁶⁶ Riaz Tejani’s study of for-profit legal education describes what happens on the other end of the elitism spectrum. Professor Tejani shows how economic pressures can lead some law schools to focus on skills development.⁶⁷ This focus on skills is premised on producing “practice-ready” attorneys, but often eclipses knowledge acquisition and the public policy deliberation.⁶⁸ At law schools across the spectrum, the theory/skills divide is prominent.⁶⁹ The criminal justice curriculum’s theoretical focus on litigation does not comport with the practical reality that ninety-five percent of criminal cases are resolved before trial, and fails to provide students with the skills necessary to be better problem-solvers and negotiators.⁷⁰

Law school socialization produces future public defenders and prosecutors who are poised to understand the core areas of criminal justice curriculum mechanistically and in ways that do not approximate the practical world. It is no wonder why one prosecutor complained, “Practically speaking, my law degree . . . was worth about as much as ballet lessons . . . when I started out.”⁷¹ It also makes sense that graduating law students sometimes “feel like they are left holding a Costco-receipt-cum-diploma for a mediocre learning experience.”⁷²

The technical focus in criminal legal education is not inherently bankrupt. The criminal justice curriculum is replete with rules, tests, exceptions, defenses, and doctrinal landmarks that students need to know to have a basic understanding of this area of law. But socializing students to understand criminal justice issues within narrow legal frameworks comes with costs that are borne when they become practitioners in the criminal justice system. To be sure, there is a dearth of direct empirical information on how decontextualized legal education shapes race, class, and gender outcomes in our criminal justice system. But the weight of scholarly complaints about identity-oblivious legal education, along with the reality of our savagely unequal criminal justice system, lead to the reasonable inference that law schools are worthwhile sites for reform.

66. *Id.*

67. TEJANI, *supra* note 50, at 67.

68. *Id.*

69. See Nancy B. Rapoport, *Changing the Modal Law School: Rethinking U.S. Legal Education in (Most) Schools*, 116 PA. ST. L. REV. 1119, 1119 (2012) (categorizing law schools into three groups: elite, modal (the “most frequently occurring”), and precarious, and noting the need for reform in understanding how “the theoretical underpinnings of law” translate into practice).

70. Wright & Levine, *supra* note 42, at 1124–25 (“Most of the current curriculum touching on criminal topics asks the students to picture themselves in litigation contexts such as trials, hearings on pretrial motions, and sentencing hearings. Competitions and simulation exercises usually arise in litigation contexts. But litigation skills courses and competitions do not adequately prepare a student for real practice in U.S. criminal courts A more relevant legal education would include workshops on negotiating strategies or judgment exercises, along with clinical experiences that allow students to observe and participate in the resolution of real cases.”).

71. *Id.* at 1125 (citation omitted).

72. SpearIt, *Priorities of Pedagogy: Classroom Justice in the Law School Setting*, 48 CAL. W. L. REV. 467, 467 (2012).

CONCLUSION

Legal education is an underexplored site for criminal justice reform. The few empirical studies on race and gender in prosecutorial offices indicate that both categories matter,⁷³ yet these issues, along with poverty, amongst other categories, occupy undersized space in criminalization. It is no secret that diversity in the legal profession is an issue, but there is a related and arguably deeper issue of how future criminal justice practitioners—irrespective of their race and gender—are socialized into understanding the relevance of those categories to their lawyering. The legal system tasks a relatively unrepresentative set of attorneys with prosecuting and representing criminal defendants in a world where race, gender, and poverty influence assumptions about crime as well its regulation. In the courses that are central to their legal education, they are socialized to believe that these categories are either irrelevant or additive in ways that may actually be the case in some instances, and not in others.⁷⁴

Calls for reform in legal education and the criminal justice system are not new. But there is a somewhat unique confluence of factors that make this third decade of the twenty-first century an opportune time to reimagine a system of legal education that shapes American punishment. There is an increasingly multi-generational, cross-ideological, and interracial recognition that the American criminal justice system is unjust. Law school leaders are making unprecedented statements about a racially biased, poverty-exacerbating criminal justice system. This is all occurring at a time when a global pandemic is making already squalid correctional facilities more dangerous.

Law professors are not the most obvious players in criminal justice reform, but they shape the educational landscape and policies of law schools.⁷⁵ Law professors

73. See Amy Farrell, Geoff Ward & Danielle Rousseau, *Race Effects of Representation Among Federal Court Workers: Does Black Workforce Representation Reduce Sentencing Disparities?*, 623 ANNALS AM. ACAD. POL. & SOC. SCI. 121, 131 (2009) (finding more equitable racial outcomes in districts with more Black prosecutors); Ryan D. King, Kecia R. Johnson & Kelly McGeever, *Demography of the Legal Profession and Racial Disparities in Sentencing*, 44 LAW & SOC'Y REV. 1, 25–26 (2010) (finding that racial disparities in sentencing attenuate as the number of Black and Latinx attorneys in a county increases); Lisa Frohmann, *Convictability and Discordant Locales: Reproducing Race, Class, and Gender Ideologies in Prosecutorial Decisionmaking*, 31 LAW & SOC'Y REV. 531, 534–37 (1997) (highlighting through an ethnographic study how prosecutors reproduce race, class, and gender ideologies in their decision-making); see generally Stephanie Holmes Didwania, *Gender-Based Favoritism Among Criminal Prosecutors* (Nov. 9, 2020) (unpublished manuscript) (on file with author) (finding that defendants are charged more leniently when they are the same gender as their prosecutor).

74. See Ristroph, *Curriculum*, *supra* note 6, at 1682 (“Discussions of discretion, mass incarceration, and racial disparities appear too much like accessories added as afterthoughts—which, for the most part, they have been. That allows the unattractive aspects of contemporary criminal law to be seen as bugs, not features, or as newly developed pathologies that may yet be excised with a still-better model penal code or the right constitutional decision from the Supreme Court.” (footnote omitted)).

75. ABA Standard 201(a) states, “The dean and the faculty shall have the primary responsibility and authority for planning, implementing, and administering the program of legal education of the law school, including curriculum, methods of instruction and evaluation, admissions policies and procedures, and academic standards.” See AM. BAR ASS'N, STANDARDS AND RULES OF PROCEDURE FOR APPROVAL OF LAW SCHOOLS 2020–2021, at 11 (2020).

have the potential to shape the future entrants of the legal profession. Despite a new COVID-19-inspired educational landscape, some will continue business as usual and train future penal bureaucrats who reproduce the status quo. Others may make meaningful changes to how they teach in the criminal justice curriculum and map core legal lessons to the practical realities that have come under public scrutiny. These changes may slowly alter prosecution and defense norms and coincide with reform efforts occurring in legal practice. Pedagogical changes and educational choices are not foolproof. Nevertheless, professors who teach in the criminal justice curriculum cannot plead collective innocence when it comes to the status quo that people are increasingly rejecting.