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(Law) School to Prison Pipeline

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"Mass incarceration is also a legal phenomenon, and the role of the legal profession needs scrutiny. Unless we are to characterize the legal profession as unthinking or malevolent, we need an account of why so many lawyers have chosen and still choose to pursue convictions and prison sentences on such a massive scale."
– Alice Ristroph[1]

Introduction

If students come to law school to learn the tools of a trade they plan to use to achieve justice, as John O. Calmore puts it, they're "learning the wrong lessons."[2] Students that arrive for their first year of law school following high-minded ideals, guided by an ethical northern star of sorts, regularly find that light obfuscated by the rational, the logical, and the precedential. While casebooks and lectures are often explicit in their rejection of wooly concepts like morality or justice, the lesson is subtly reinforced by the school's engineered cultural landscape that emphasizes "legal professionalism" and "legal ethics" above all. These value-laden students are liable to experience a painful reconfiguration of their views on the role of law in society, their philosophies and ideologies, even the *way* that they think. Some of these changes are a necessary part of understanding the field and practice of law, but a student is not often well positioned to determine which lessons to take onboard and which to politely decline. As withdrawal from a J.D. program is heavily disincentivized by the high cost of attendance, and

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1. Alice Ristroph, *The Curriculum of the Carceral State*, 120 COLUM. L. REV. 1631, 1636–37 (2020) [hereinafter Ristroph, *Curriculum of the Carceral State*].

2. John O. Calmore, *"Chasing the Wind": Pursuing Social Justice, Overcoming Legal Mis-Education, and Engaging in Professional Re-Socialization*, 37 LOY. L.A. L. REV. 1167, 1168 (2004).

achieving academic success requires conformity to certain policies, rules, codes, and beliefs, the disillusioned law student may be left with the impression that they're receiving an education at gunpoint.

As an unabashed critique of contemporary legal education through a progressive lens, this Note is fairly unoriginal—to the discredit of contemporary legal education. The recitation of critiques established decades prior is necessary only because many of the same issues with legal pedagogy and the administration of legal education persist. This Note differs from former critiques, however, as serious consequences stemming from those issues left unresolved have now flowered: hyper-incarceration, unfettered state surveillance, and the proliferation of carceral institutions. While these phenomena may seem disconnected from the ins and outs of legal education and administration of law schools, this Note argues that the dominant pedagogical and ideological approach to institutional legal education has performed a necessary role in the development and maintenance of the American carceral state.

Contemporary American legal education has failed time and time again to meet the challenges presented by our criminal legal system, a condition made dire by the construction and rapid expansion of the carceral state. The dominant, near hegemonic educational approach of the modern law school both miseducates students on the realities of criminal legal practice and attempts to socialize students into a monolithic identity under the banner of the legal professional. The consequences of this dual approach to lawyer-making are the mass production of lawyers with a propensity to blindly preserve and expand mechanisms of the carceral state and a diminished capacity for progressive reimagining of the approach to crime, punishment, and order in the United States.

I. Early American Law Schools, Prisons, and Criminality

The history of crime and punishment in the United States, as described by Lawrence Meir Friedman, is "a story of social changes, character changes, personality changes; changes in culture; changes in the structure of society; and ultimately, changes in the economic, technological, and social orders."[3] The law and its derivatives, such as legal education, are an integral part of this story of change. As elucidated by Professor Stephen R. Alton,

3. LAWRENCE MEIR FRIEDMAN, CRIME AND PUNISHMENT IN AMERICAN HISTORY 11 (1993).

> Legal education has never taken place in a vacuum. It is no more possible to divorce eighteenth-, nineteenth-, or twentieth-century American legal education from its social, intellectual, political, and professional settings than it is to divorce contemporary American legal education from such settings. Legal education is inextricably bound up with the social, intellectual, political, and professional currents of the contemporaneous American scene. Those currents have always moved and shaped legal education in this country, and they continue to do so.[4]

This relationship, this Note argues, is a reciprocal one. By examining the development of American law and legal education in the context of historical shifts in American social, political, and economic responses to crime and punishment, Part I establishes a backdrop for the succeeding analyses contained in Part II and III that examine the role of contemporary legal education in reifying the current incarceration crisis and expansion of carceral institutions in the United States.

A. Colonial Era

The early American legal landscape was heavily influenced by English common law tradition,[5] a mode of lawmaking wherein the collective principles rendered from numerous individual disputes by judicial decisions accrue and evolve around a "distinctive set of habits and practices" that inform a "shared legal culture."[6] For common law nations, the criminal legal system includes the

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4. Stephen R. Alton, *Roll over Langdell, Tell Llewellyn the News: A Brief History of American Legal Education*, 35 OKLA. CITY U. L. REV. 339, 341 (2010) [hereinafter Alton, *History of American Legal Ed.*].

5. Mark L. Jones, *Fundamental Dimensions of Law and Legal Education: An Historical Framework – A History of U.S. Legal Education Phase I: From the Founding of the Republic Until the 1860s*, 39 J. MARSHALL L. REV. 1041, 1056 (2006). The proliferation of the English common law was supported by a growing number of trained lawyers living in the Colonies and the increasing availability of legal texts, such as William Blackstone's *Commentaries on the Laws of England*. Blackstone's *Commentaries*, available in American editions, remained highly influential throughout the nineteenth century. *Id*. *See* FRIEDMAN, *supra* note 3, at 19–20 (describing the battles between French, Spanish, English, and Native American conceptions of criminal punishment).

6. Jones, *supra* note 5, at 1097, 1100 (quoting MARY ANN GLENDON, A NATION UNDER LAWYERS: HOW THE CRISIS IN THE LEGAL PROFESSION IS TRANSFORMING AMERICAN SOCIETY 181-82 (1994)). Mary Ann Glendon describes the development of common law as a "living tradition," one that "constantly points beyond itself," wherein common law judges must fairly decide individual cases and expound legal principles that transcend those particular facts. *Id*. at 1096–97.

institution of juries,[7] emphasis on oral testimony, examination, and cross-examination,[8] and is primarily steered by lawyers rather than judges.[9] The English classified crimes in accordance with their purported seriousness into felonies and misdemeanors (or petty crimes).[10] These familiar elements of the criminal legal system provided the foundation for colonial American criminal law and procedure.[11]

The colonies' early iterations of criminal adjudication were amateurish, and their methods of punishment were markedly more brutal. The early criminal codes were sourced from what colonists could remember of English law and a core of norms extracted from religion,[12] while the roles of magistrate, constable, sheriff, and watchman were filled by ordinary members of the community.[13] The theories of punishment favored by the insular colonial communities were public shame, restitution, and repentance; common punishments included fines, forced labor, sewing a letter into the criminal's clothing representing their crime, as depicted in *The*

7. Civil law states and nations do not use juries, only judges. FRIEDMAN, *supra* note 3, at 20.

8. *Id.*

9. *Id.* at 20–21 (noting the differences with civil law nations where criminal cases are mostly judge-led).

10. Felonies required indictment by a grand jury before charges would be filed and later decided by a petit jury (trial jury). Petty crimes were managed by local courts and justice of the peace, a squire or gentleman living in the area, without the complicated process of using a jury. *Id.* at 21.

11. *Id.* at 22–23 ("Criminal justice in the colonies was cobbled together from . . . as much of the law and customs as the colonists brought with them from England and remembered . . . . The physical and social environment . . . that . . . produced problems that . . . English law had nothing to say about[,] [such as] [n]ative tribes and black slaves . . . . Also, the colonies were small, struggling communities . . . isolated, teetering on the brink of starvation, and at the edge of the wilderness.").

12. *Id.* at 33 ("The core of the criminal code consisted of norms that were not man-made but the gift and command of God. This was the colonial ethos. The goal of legal authority, as David Flaherty put it, was 'to translate the divine moral law into criminal statutes, in the interests of popular morality.'"); *see, e.g.*, Samuel Buisman, *Definite Convictions:* United States v. Alt *and the Seventh Circuit's Prohibition on Defining "Beyond a Reasonable Doubt,"* 109 MINN. L. REV. 413, 423 (2024) (discussing the religious tradition undergirding the American norms of criminal procedure).

13. This was before policing existed as it does in the modern context, wherein serving as sheriff or constable was a civic duty. FRIEDMAN, *supra* note 3, at 29 ("The system depended on lay people, as Pauline Maier has pointed out, on traditional institutions, such as the '"hue and cry," by which the community in general rose to apprehend felons.' In other cases, magistrates would turn 'to the posse comitatus . . . able-bodied men a sheriff might call upon to assist him.' As a result, 'the difference between legal and illegal applications of mass force was distinct in theory, but sometimes indistinguishable in practice.'").

Scarlet Letter, whippings, commitment to stockades, branding, dismemberment, and exile.[14] Death sentences were executed infrequently.[15] Friedman explains that the colonists' approach to crime and punishment was partially utilitarian, with colonies' survival dependent on maintaining already sparse populations with high mortality rates, and partially related to the deep religiosity that predominated colonial America.[16] Meanwhile, jails were primarily an "administrative apparatus aiding criminal courts" used for holding accused persons awaiting trial and debtors.[17] The use of incarceration as the primary method of punishment for criminal convictions would not emerge until the nineteenth century.

The eighteenth century was a time of increasing professionalism in the colonial American legal sphere, with lawyers enjoying increasing social and economic successes.[18] By the latter half of the century, each colony had a bar of respected legal professionals, and lawyers were particularly active in politics.[19] Attaining a legal education required students to study both legal treatises on the common law and influential Western literature on culture and political authority.[20] Aspiring lawyers who couldn't travel to England for study either pursued the career after some years of independent study of legal texts,[21] or completed apprenticeships with practicing lawyers.[22] Early American lawyers

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14. *Id.* at 36–40; *see* NATHANIEL HAWTHORNE, THE SCARLET LETTER (Dover Publications 2024) (1850).

15. *Id.*

16. *Id.* at 48 ("Nobody in the colonial period had yet advanced the idea that it was good for the soul, and conductive to reform, to segregate people who committed crimes, and keep them behind bars. Quite the contrary: rubbing the noses of offenders in community context was an essential part of the process of ripping and healing, which criminal justice was supposed to embody.").

17. Ashley T. Rubin, *Prison History*, *in* OXFORD RESEARCH ENCYCLOPEDIA OF CRIMINOLOGY (2018), https://doi.org/10.1093/acrefore/9780190264079.013.455 [https://perma.cc/JNM8-59G2]; *see* FRIEDMAN, *supra* note 3, at 48–49.

18. FRIEDMAN, *supra* note 3, at 66–67.

19. Jones, *supra* note 5, at 1056. Notably, twenty-five of the fifty-six signers of the Declaration of Independence were lawyers. *Id.*

20. Etienne C. Toussaint, *The Purpose of Legal Education*, 111 CALIF. L. REV. 1, 42 (2023) [hereinafter Toussaint, *Legal Education*].

21. A famous example of a self-educated lawyer is Abraham Lincoln, who studied the law in the early 1830s and was admitted to the Illinois bar in 1836. Jones, *supra* note 5, at 1061.

22. *Id.* at 1059. *See also* Charles R. McManis, *The History of First Century American Legal Education: A Revisionist Perspective*, 59 WASH. U. L. Q. 597, 600–06 (1981) (providing a survey of the methods of legal education during the colonial period).

"engaged important moral and ethical questions of the day, such as the meaning of justice in America's burgeoning democratic project."[23] Legal mentors, primarily judges, sought to impart upon their apprentices the lawyer-statesman ideal's emphasis on leadership, commitment to practical wisdom, and exemplary skills of deliberation, judgment, and persuasion.[24] Through study and practical training, law students learned to apply common law theory, which required using analogical reasoning to compare similar cases and utilized reflective reasoning to justify decisions based on the underlying general principles.[25] These analytical tools are the most consistent aspect of American legal education from its earliest iterations.[26]

As the colonies urbanized, courts hewed more closely to the English legal system in formality and "niceties," but with some marked differences that would impact the burgeoning American legal framework.[27] The utilization of public criminal prosecution by every colony by 1776,[28] for example, is believed to have weighed into the eventual inclusion of the right to counsel in the Bill of Rights.[29] Colonial lawyers experienced criminal trials that discarded the private prosecutor but neglected criminal defense;[30] mandating a right to counsel reflected the drafter's concerns over imbalanced power dynamics between the government and the individual.[31] Following the American Revolution, the ratification of the United States Constitution, the first ten amendments of the Bill of Rights,

23. Toussaint, *Legal Education*, *supra*, note 20, at 42. Apprenticeships followed a broad and humanistic curriculum, including foundational courses in the law of nature, political theory, practical training through case studies and legal precedents, and a theoretical framework based on general treatises on common, natural, and civil law. Jones, *supra* note 5, at 1064.

24. Jones, *supra* note 5, at 1125.

25. *Id.* at 1101.

26. Legal educators still rely on the classic case method and train students to "think like a lawyer." *See, e.g.*, David T. ButleRitchie, *Situating Thinking Like a Lawyer Within Legal Pedagogy*, 50 CLEV. ST. L. REV. 29 (2002) (arguing that "it is vitally important that all law students be exposed to the narrow notion of 'thinking like a lawyer.'").

27. FRIEDMAN, *supra* note 3, at 54.

28. *Id.* at 21. This is different than in England, which utilized private prosecution, which required the person accusing someone of a crime to personally pay a prosecutor to bring charges. *Id.* at 29–30.

29. *Id.* at 58.

30. Throughout the early eighteenth century, statutes were developed within individual colonies that would allow for legal assistance or representation under particular circumstances. *Id.* at 56–58.

31. *Id.*

and the creation of a federal court structure by the Judiciary Act of 1789 established the new American legal system.[32]

The reformation of American criminal law, codified in the Bill of Rights, rejected the autocratic aspects of British law in favor of republicanism by ascribing authority to the law, as opposed to the king,[33] and setting basic requirements for fair trials.[34] The founders sought for criminal law to be embodied in a clear and definitive code, not rendered incoherent by the whims of the powerful,[35] terminating the power of federal judges to form new common law crimes.[36] While the revolutionary era is commonly considered "a time of fundamental critique of every aspect of state power," the state's power to punish notably went unchallenged.[37]

In the federalist compromise, states retained the police power and ceded only those limited powers specifically enumerated in the federal Constitution. The power to punish, if it attracted any attention (if not critique), was simply identified as an obvious instance of the power to police. The power to police, however, as the manifestation of sovereignty, was essentially unlimited in scope, discretionary in nature, and defined by its indefinability. To limit the state's power to punish would have meant limiting its police power and therefore, ultimately, its sovereignty.[38]

Although the founding documents exhibit a respect for criminal defense and the protection of individual liberties alongside a commitment to restraining governmental power,[39] the state's

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32. *Id.* at 71.

33. *Id.* at 62. ("Law was the locus of legitimate authority, and the people were the source of law. The new 'fountain of justice' was the popular will.").

34. *Id.* at 71.

35. *Id.* at 63 (quoting Edward Livingston's proposed penal code for Louisiana in 1822) ("Laws, to be obeyed and administered, must be known; to be known they must be read; to be administered they must be studied and compared. To know them is the right of the people.").

36. *Id.* at 64.

37. Markus D. Dubber, *Histories of Crime and Criminal Justice and the Historical Analysis of Criminal Law*, *in* THE OXFORD HANDBOOK OF THE HISTORY OF CRIME AND CRIMINAL JUSTICE 597, 605 (Paul Knepper & Anja Johnsen eds., 2016) ("[T]he English conception of crime as an essential attribute of sovereignty was accepted without question and simply adapted to the new political environment . . . .").

38. *Id.* at 605–06.

39. The Constitution contains some text relating to criminal justice. *See* U.S. CONST. art. I, § 8–10 (counterfeiting, piracies and felonies at sea, Bill of attainder, ex post facto Law); *id.* art. III § 2 (trial by jury); *id.* art. IV § 2 (extradition). About half of the Bill of Rights is related to criminal justice. FRIEDMAN, *supra* note, 3 at 72;

unfettered power to police and punish as a tenet of state and national sovereignty rendered these safeguards toothless.[40]

B. Post-Revolutionary Era

Due to lawyers' key placement within structures of governance and commerce, and a presumably inherent "disinterestedness,"[41] professional lawyers were considered best suited to wield influence over the nation—much as they did their individual clients.[42] Categorized by some scholars as a "nomiocracy,"[43] the founding elites determined that a governing class of "disinterested" lawyers were required to realistically and successfully promote the common good of the nation.[44] The concept of disinterested parties originated with the belief that the "landed gentry" were best suited to lead as they were not influenced by the market.[45] Professionals, too, were considered to be "somehow free of the marketplace" and "less selfish."[46] This arrangement was also deeply connected to the ideal of the classically republican lawyer-statesman; a highly educated,

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see, *e.g.*, U.S. CONST. amend. IV (unreasonable searches and seizures, probable cause); *id*. amend. V (grand jury, double jeopardy, self-incrimination); *id*. amend. VI (speedy trial); *id*. amend. VIII (excessive bail, cruel and unusual punishment).

40. *See* Thomas Y. Davies, *The Fictional Character of Law-And-Order Originalism: A Case Study of the Distortions and Evasions of Framing-Era Arrest Doctrine in* Atwater v. Lago Vista, 37 WAKE FOREST L. REV. 239, 252 (2002) ("Modern procedure, which is structured to accommodate proactive enforcement of criminal laws and investigation aimed at 'ferreting out' complaintless crimes, accords police officers far more power than the Framers ever imagined or intended. Thus, any claim that broad police authority is consistent with the original understanding of constitutional criminal procedure is fictional. Law-and-order originalism is rooted in modern ideological commitments, not in historical fact.").

41. Russell G. Pearce, *Lawyers as America's Governing Class: The Formation and Dissolution of the Original Understanding of the American Lawyer's Role*, 8 U. CHI. L. SCH. ROUNDTABLE 381, 385 (2001) (citations omitted) ("The civic virtue necessary to republican government required 'equal, active, and independent citizens' who were willing to be 'disinterested' and 'to sacrifice . . . private interests for the good of the community.'").

42. *Id*. at 383 n.9 ("Although other legal traditions envisioned lawyers as disinterested and as having some responsibility for governance, none were so ambitious as the American conception of the disinterested governing class."); *id*. at 386 n.39 (citing Talcott Parsons, *The Law and Social Control*, L. & SOCIO. 69 (1962)) ("Parsons describes lawyers as serving a vital role in capitalist society as 'a kind of buffer between the illegitimate desires of . . . clients and the social interest.'").

43. Jones, *supra* note 5, at 1152 n.393 (citing PAUL JOHNSON, A HISTORY OF THE AMERICAN PEOPLE 186–87 (1997)) (defining "nomiocracy" as rule by lawyers).

44. *Id*.

45. Pearce, *supra* note 41, at 385–86 (explaining that the failures of this ideal led to the inclusion of professionals in the governing class, which is how lawyers came to be included).

46. *Id*. at 386.

civic-minded leader tasked with balancing common welfare, minority rights, and the law within a system of majority rule and self-interested constituents.[47]

It was shortly after the American revolution that the roots of institutionalized legal education were planted. The first attempt to refine the pedagogy of legal apprenticeship occurred with the creation of the Litchfield School, America's first independent law school, founded in 1784 and highly influential in legal and political circles.[48] Shortly thereafter, a small number of colleges began to include legal studies as a part of the general curriculum.[49] The contemporary model of separately established law schools within universities began in the early nineteenth century with Harvard Law School.[50] Two controlling models of curricula reflected a developing ideological divide in legal pedagogy.[51] The Harvard model utilized a narrow curriculum focusing on the common law and the Constitution,[52] whereas the Virginia model emulated the broader, Jeffersonian ideal of legal education which "located law in a 'seamless web' of cultural and political authority that also included great religious, philosophical, and literary texts."[53] While "the chief method of legal education [in the United States] was the

47. Jones, *supra* note 5, at 1125 n.308 (citing ANTHONY KRONMAN, THE LOST LAWYER: FAILING IDEALS OF THE LEGAL PROFESSION 14 (1993)) ("This 'spirit of citizenship' sets him apart from 'those who use the law merely to advance their private ends,' and from the 'purely self-interested practitioner of law.'").

48. *Id.* at 1161–64. Litchfield's graduates, many from the social elite, held significant social and political positions, including roles in the U.S. Supreme Court, Congress, and state governments. *Id.*

49. *Id.* at 1069–75. Notable historical lawyers such as Thomas Jefferson, John Marshall, and Henry Clay were educated on law at one such college, William and Mary. *Id.* at 1070.

50. *Id.* at 1080–82. There was an increasing effort towards uniformity under American law in the early nineteenth century that saw the publication of national treatises such as James Kent's *Commentaries on American Law* published between 1826 and 1830, and nine works by Supreme Court Justice and Harvard Law professor, Joseph Story. *Id.* at 1057–58.

51. *Id.* at 1083–85.

52. *Id.* at 1084 ("[T]he typically narrower approach towards the law school curriculum appears to reflect the great influence of Harvard Law School after its reorganization by Joseph Story."). Despite creating a comparatively narrow curriculum at Harvard and his removal of law school entrance requirements for the subsequent fifty years, Story stressed the value of a broad legal education for lawyers during his 1829 inaugural address and showed appreciation for David Hoffman's *A Course of Legal Study*. *Id.* at 1084–86 (citations omitted).

53. Jones, *supra* note 5, at 1070 n.451. *A Course of Legal Study* by David Hoffman served as the foundation of the Virginia model and unequivocally promoted the idea of lawyers as committed to the common good and responsible for governance. Pearce, *supra* note 41, at 388.

apprenticeship served in the office of an established practitioner of the law" well into the nineteenth century,[54] the rapid proliferation of law schools across the states signaled the approaching era of American institutionalization.

Another early indication of the nation's tilt towards institutionalization is observable from reformist approaches to crime and punishment that emerged in the nineteenth century. As American cities developed and began the process of industrialization, outpaced only by their rapidly growing populations, the newly emerging consensus was that the "waves of crime" experienced in large cities were the product of "bad company, vice-rotten cities, temptations, [and] weaknesses in the family."[55] The conception of a "standing army of professional law enforcers" emerged in response to this perceived spike in crime,[56] increasing prosecution of "victimless crimes" like gambling and public drunkenness by greatly reducing prosecutorial reliance on complaints from individuals directly harmed by criminal

54. Alton, *History of American Legal Ed.*, *supra* note 4, at 343–44 ("The apprenticeship system served as a device to keep the practicing bar small and to keep senior lawyers in firm command of the bar.").

55. FRIEDMAN, *supra* note 3, at 77. *See* Jill Lepore, *The Invention of the Police*, NEW YORKER (July 13, 2020), https://www.newyorker.com/magazine/2020/07/20/the-invention-of-the-police [https://perma.cc/M3D2-D3WE] ("New York established a police department in 1844; New Orleans and Cincinnati followed in 1852, then, later in the eighteen-fifties, Philadelphia, Chicago, and Baltimore. Population growth, the widening inequality brought about by the Industrial Revolution, and the rise in such crimes as prostitution and burglary all contributed to the emergence of urban policing. So did immigration, especially from Ireland and Germany, and the hostility to immigration . . . .").

56. FRIEDMAN, *supra* note 3, at 67–68. Before the formation of "standing arm[ies]," earlier forms of English and colonial policing revolved around recruiting local males to take turns on the "watch." Jill Lepore emphasizes slave patrols as the underrecognized foundation of modern policing, writing,

> The government of slavery was not a rule of law. It was a rule of police . . . . It is [] often said that modern American urban policing began in 1838, when the Massachusetts legislature authorized the hiring of police officers in Boston. This . . . ignores the role of slavery in the history of the police.

Lepore, *supra* note 55 (explaining the relationship between modern policing and slavery through examining the history of slave patrols in Cuba, Barbados, and eventually the American colonies of South Carolina (1702), Virginia (1726), and North Carolina (1753)).

behavior.[57] At this time, the nation also began to shift towards incarceration as the centerpiece of correctional theory.[58]

The emergence of the early American prison was part of a "century-long search for alternatives to capital and public corporal punishment"[59] with reformers seeking to substitute "a system of reason and justice" in place of arbitrary punishment.[60] Early prisons were to act as both a deterrent and a balm to crime; the desire to avoid tortuous incarceration was to deter the public from criminal behavior, while both the removal from corrupting influences and the purifying effect of hard labor were to reform the criminal themselves.[61] By incarcerating those who had been influenced into "deviant behavior" by the evils prevalent in society, prisons served as an "artificially created and therefore corruption-free environment."[62] These early American prisons suffered

57. FRIEDMAN, *supra* note 3, at 70–71. In the mid-nineteenth century, state police forces were increasingly armed with guns, thus becoming a powerful weapon for both crime control and state oppression. *Id.* at 71. *See also* Lepore, *supra* note 55 ("American police carried guns because Americans carried guns, including Americans who lived in parts of the country where they hunted for food and defended their livestock from wild animals, Americans who lived in parts of the country that had no police, and Americans who lived in parts of North America that were not in the United States. Outside big cities, law-enforcement officers were scarce.").

58. FRIEDMAN, *supra* note 3, at 67–68, 77–80. The harsh penitentiaries of the early 1800s sought to deter crime through fear of the harshly limited conditions and isolation of prison life while reforming prisoners through grueling servile labor. *Id.* at 80.

59. Michael Meranze, *Histories of the Modern Prison: Renewal, Regression and Expansion*, *in* THE OXFORD HANDBOOK OF THE HISTORY OF CRIME AND CRIMINAL JUSTICE 672, 673 (2016) ("Linked in the first instance with crime control, the prison since the eighteenth century has repeatedly been used as a mode of government over populations the state has defined as dangerous. But precisely because it emerged as a response to crisis of the old order, the prison has served as a means to legitimate states and to prove their essential modernity. It is the connection between state legitimacy and the modern prison that has so long sustained the commitment to thinking that the prison is, at its core, a necessary and reformist institution.").

60. Paul H. Robinson & Markus D. Dubber, *The American Model Penal Code: A Brief Overview*, 10 NEW CRIM. L. REV. 319, 321 (2007) ("As early as 1776, Thomas Jefferson had drafted a bill for the Virginia legislature that called for punishment based on the theory of prevention outlined by Cesare Beccaria and developed by Jeremy Bentham.").

61. FRIEDMAN, *supra* note 3, at 78–79; *see also* Meranze, *supra* note 59, at 676 (explaining that the prison reorganization effort proceeded "on the belief that the creation of an ordered social and work life under reconstituted authority, and not a deliberately constructed physical environment, held the key to successful reformation of inmates").

62. FRIEDMAN, *supra* note 3, at 77 (quoting Gerard C. Brandon, *The Unequal Application of the Criminal Law*, 1 J. CRIM. L. 893, 896-97 (1911)) ("This was, of course, quite different from the classic colonial view, which located the source of sin in individual weaknesses, or in the devil and his minions.").

frequent escapes, eruptions of violence, and open resistance while also failing to serve as an observable deterrent to crime.[63] On the heels of this failure came a new paradigm for prisons that sought to "control the smallest elements of the prisoner's environments through the power of architecture and construction."[64] The new prison model relied heavily on solitary confinement, triggering one of nineteenth century prison history's greatest debates—labor or solitude?[65] Reformer concerns underlying the debate were threefold: the economic burden of solitary confinement,[66] whether labor or solitude had the most efficacious reformative power on the incarcerated,[67] and which method was less humane.[68]

C. Antebellum Era

While the nation's developing legal and carceral systems largely kept pace with the rapid expansion and industrialization that marks the pre-Civil War era,[69] the turn of the century saw a growing popular movement of disdain for elites, including lawyers.[70] Alexis de Tocqueville famously observed that lawyers had become the "technicians" of change during American economic and geographic expansion in the nineteenth century,[71] concluding that "[t]he American aristocracy is at the lawyers' bar and on the

63. Meranze, *supra* note 59, at 676.

64. *Id.* at 677. There were two models for prisons at this time, one referred to as the "silent system" and another called the "separate system," both involving penal servitude and solitary confinement. The "silent system" prisons had prisoners work in a shared space and return to solitary afterwards, whipping prisoners who spoke to one another. The "separate system" kept prisoners working in their individual cells. See Rubin, *supra* note 17.

65. Meranze, *supra* note 59, at 678.

66. *Id. See also* FRIEDMAN, *supra* note 3, at 155–56 (highlighting the expense of solitary confinement).

67. Meranze, *supra* note 59, at 678 (explaining how proponents of solitary confinement in the United States believed solitude was so powerful a reformatory force that sentences could be dramatically reduced through its application).

68. *Id*. ("Was it crueler to force people to spend their time in almost-absolute solitude . . . or to strike at their bodies through whipping and debilitating work?").

69. Susan Katcher, *Legal Training in the United States: A Brief History*, 24 WIS. INTL. L.J. 335, 345 (2006).

70. *Id.*

71. *Id.* at 340 (first quoting Alexis de Tocqueville; and then citing ROBERT STEVENS, LAW SCHOOL: LEGAL EDUCATION IN AMERICA FROM THE 1850S TO THE 1980S 7 (1983)) ("[T]he new nation was almost inevitably bound to rely on lawyers to perform a wide range of functions. Lawyers became the technicians of change as the country expanded economically and geographically.").

judges' bench."[72] Sometimes referred to as the "Golden Age" of American law, the courts were marked by great "judicial creativity" in support of the nation's economic vitality.[73] American judges stepped into "the void" left by legislators of the era accompanied by American lawyers, making "[t]he law, lawyers, and judges . . . instruments of American economic and geographic expansion."[74] An "attack on the legal profession" was fully underway by the late 1830s, with many states moving to freely admit persons to the practice of law without educational or training requirements.[75] The influx of unregulated and undereducated lawyers across the nation, threatening the professionalism of the field and weakening American lawyers' social and economic standing, persisted until the American Bar Association intervened in the post-Civil War era.[76]

American prisons, too, would face a reckoning following the Civil War. Despite increasing social, political, and economic divisions between Northern and Southern states prior to the war, the states' approaches to punishment were fairly uniform.[77] Though Southern states comparatively utilized capital and corporal punishment to a greater degree than in the North, even external to the separate system of state supported private criminal justice associated with chattel slavery,[78] methods of carceral punishment mirrored those in the North.[79] Nearly every state had a prison by 1860, and all states with prisons aside from Pennsylvania had adopted the "Auburn system."[80] Under this system, prisoners were made to silently perform factory work by day in large workshops under threat of violent suppression, returning at night to solitary confinement in tiny cells.[81] This general uniformity of carceral punishment in the United States was disrupted by Northern and

72. 1 ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 439 (James T. Schleifer trans., Eduardo Nolla ed., 2010).

73. Alton, *History of American Legal Ed.*, *supra* note 4, at 345.

74. *Id.* at 346.

75. Peter A. Joy, *The Uneasy History of Experiential Education in U.S. Law Schools*, 122 DICK. L. REV. 551, 557–58 (2018).

76. *Id.*

77. Rubin, *supra* note 17.

78. *Id.*

79. *Id.*

80. *Id.* ("This approach was variously called the 'Auburn system,' the 'congregate system,' or the 'silent system.'").

81. *Id.* This system is the origin for the classic black-and-white-striped prison uniforms. *Id.*

Southern states' reactions to regional consequences stemming from the American Civil War.[82]

During the Civil War, Southern states suffered the destruction of many of their prisons, which had served as de facto factories, and were additionally confronted with the need for "some new punishment" to control a "newly liberated black population" following the passage of the Thirteenth Amendment.[83] The slavery loophole provided in the Thirteenth Amendment for convicted criminals catapulted the use of penal servitude to new heights.[84] A racially-tiered system of carceral punishment developed in the South. The rebuilt prisons were primarily used to incarcerate white criminal offenders, while Black Americans were targeted by the draconian "Black Codes," which prescribed excessive sentences for minor offenses, and subjected those convicted under the Black Codes to forced labor via "convict leasing."[85] Later, some Southern states would create "plantation style" prisons to manage growing populations of Black people convicted of crimes to replace "convict leasing," some of which still stand today and operate in a similar manner.[86]

Meanwhile, Northern state prisons suffered financial strain under turbulent post-war economic conditions and a dramatic increase in prison populations, causing significant issues of overcrowding and breakdowns of the strict penal methods utilized by the "Auburn system."[87] Post-war overcrowding led to early notions of modernly relevant prisoner classifications. For example, the influx created a sufficiently sized female prisoner population to warrant the construction of separate prisons.[88] Young adult and first-time offenders were also identified as a separate class of

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82. *Id.*

83. *Id.*

84. *Id.*; U.S. CONST. amend. XIII, § 1.

85. Rubin, *supra* note 17 ("Initially, forced labor took place through convict leasing in which the state leased mostly black prisoners to private entrepreneurs. These entrepreneurs then employed the prisoners in extremely difficult and dangerous work assignments . . . [and] had no incentive to keep their convicts healthy, which led to high mortality rates. This characteristic has led some scholars to call convict leasing 'worse than slavery.'").

86. Rubin, *supra* note 17. ("These new plantation-style prisons (e.g., Parchman Farm [Mississippi] or Angola [Louisiana]) were generally farms consisting of thousands of acres, often situated on former slave plantations.").

87. *Id.*

88. *Id.* Women had long ago gained the attention of reformers and been the frustration of prison administrators due to the expense and insufficient profitability associated with incarcerating them alongside men. *Id.*

convict that required separate facilities and penal methods when traumatized returning soldiers poured into Northern prisons.[89] Shortly after the war, however, the combined strain of overcrowding and new legislation in the 1870s that limited the sale of prison-made goods—enacted at the behest of increasingly powerful labor unions in the industrial North—would trigger the beginning of the end for the "Auburn system."[90]

Following the conclusion of the American Civil War and reestablishment of national stability over the following decade and a half, the legal community turned its attention inward once again. The ABA, newly formed in 1880, included a Committee on Legal Education and Admissions to the Bar tasked with putting forth a plan to set uniform requirements for bar admission across the Union.[91] By "imposing educational requirements that made entrance into the legal profession more time-consuming and costly," the ABA "shored up the status of lawyers by restricting entrance to the legal profession."[92] Around this time, the Dean of Harvard Law, Christopher Columbus Langdell, introduced radical changes to legal pedagogy and formalized the institution, creating what are now recognized as defining characteristics of modern legal education.[93] As Etienne C. Toussaint describes it, "Langdell crafted an epistemology of law as a science."[94] To Langdell, law was a body of work distinctly separate and complete; thus, legal education

89. *Id.* ("[P]risoners would perform labor to aid their rehabilitation and acquire skills, they would spend time in educational classes, and they would receive religious instruction. Prisoners entering the system would be diagnosed, evaluated, and their treatment designed accordingly. Upon completing their prison sentence, prisoners would continue to some form of supervision on parole or in some other community setting.").

90. *Id.*

91. Joy, *supra* note 75, at 556.

92. *Id.* at 558. In the following years, the ABA's leadership would push states to require bar examinations, three years of law school, and a mandatory apprenticeship, allowing for part of the apprenticeship to be replaced by law school; *id*. (citing ROBERT STEVENS, LAW SCHOOL: LEGAL EDUCATION IN AMERICA FROM THE 1850S TO THE 1980S, 25 (1983)). By requiring part of legal training to occur in law school, the ABA sought to improve overall competency within the profession while also making access more exclusive. *Id.* at 558 n.39. This exclusivity function disproportionately impacted immigrants and their children. *Id.*

93. ROBIN WEST, TEACHING LAW: JUSTICE, POLITICS, AND THE DEMANDS OF PROFESSIONALISM 101–02 (2014).

94. Toussaint, *Legal Education*, *supra* note 20, at 35. *Id.* at 42 ("By confining the content of legal education to the black letter law itself under the guiding normative theory of legal formalism, Langdell repositioned the lawyer's stance from ideological spokesman of neoclassical ideals to professional advocate for the so-called common man.").

should rely only on common law jurisprudence devoid of influence from the humanities.[95] By utilizing critical thinking and deductive reasoning to discern legal conclusions from abstract factual scenarios, law students learned how to "think like a lawyer."[96]

Langdell popularized the Socratic method of questioning students that has become emblematic of the law school experience.[97] He also sequenced coursework into foundational courses and advanced electives,[98] implemented written examinations containing complex hypothetical problems based on specific facts,[99] and propagated the "casebook" and case method of teaching.[100] Langdell's methods rapidly spread to law schools across the country, particularly the newly designed casebooks, which were successful for a multitude of reasons:

> It was inexpensive – one professor could teach a class of 75 students. It was "designed for the university," making it less accessible to poorer students, and "may have proved attractive to an initially recalcitrant bar because of the opportunities . . . to preserve [the cultural status quo] by barring 'undesirables' from the practice of law." The "professional law teacher," one (such as Ames) with little or no experience in practice but trained under the case method, was a product of the hiring practice of the time; law schools used recent graduates as well as practicing attorneys to teach. In addition, "the case method supported the status quo."[101]

Langdell is also credited with creating the academic meritocratic model of professional education, a type of educational formalism that, coupled with the goal of fostering academic merit, treated professional education as a "formal system of rational,

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95. WEST, *supra* note 93, at 77.

96. Toussaint, *Legal Education*, *supra* note 20, at 35–36.

97. *Id.* Pre-Langdellian legal instruction was critiqued as patently boring, from "mind-numbing recitation," to long and unvaried lectures that were often a running commentary on the law professors' own series of treatises. BRUCE A. KIMBALL, THE INCEPTION OF MODERN PROFESSIONAL EDUCATION: C. C. LANGDELL, 1826–1906, at 130 (2009).

98. KIMBALL, *supra* note 97, at 140.

99. *Id.* at 131. Written exams of this sort were a radical innovation in American professional education, wherein students previously only needed to attend the requisite courses to receive their degree. *Id.* at 160.

100. *Id.* at 131. Justice-critical views of Langdell's case method and casebooks describe Langdell as disproportionately responsible for the contemporary law school curriculum and pedagogy. *See, e.g.,* WEST, *supra* note 93, at 28 n.57 ("Langdell himself sought to describe law as both autonomous from history and politics and as internally just. His 'case method' and casebook, which contained hundreds of cases and literally no other materials, vividly illustrate both jurisprudential commitments.").

101. Katcher, *supra* note 69, at 361.

impersonal policies and rules guiding incremental progress that could be measured objectively."[102] Even Langdell's hiring practices set a new precedent for the teaching of law as a separate career distinct from the practice of law, and prioritized aspiring professors' academic merit "as determined by achievement in professional school."[103] These revolutionary changes faced strong opposition from students, professors, and the American Bar Association alike, as Langdell's model entailed "the uncomfortable transformation of gentlemen into professionals,"[104] but aligned with the increasingly bureaucratic and institutional nature of the industrial-era United States.[105]

II. American Legal Education: Debates and Critiques

While the administrative and pedagogical model of the American law school attributed to Christopher Langdell have largely persisted to the modern day, the heavily embattled territory of legal education has experienced various transformations and renovations in response to debates and critiques from those in and around the legal academy.[106] This Part will explore two reoccurring components of these larger ideological disagreements that have shaped, or attempted to shape, modern legal education: Subpart II.A. deals with the more abstract of the two components, focusing on the connection between law and the related (yet, distinct) concepts of morality and justice; Subpart II.B. addresses the more particularized component of criminal legal education, detailing the debates that shaped modern approaches to, and problems with, training future criminal practitioners.

For decades, critics of legal education from a wide range of disciplines and political ideological backgrounds have argued that law schools degrade their students' moral sensibilities and

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102. KIMBALL, *supra* note 97, at 2.

103. *Id.* at 169; *see also id.* at 192 ("Some historians consider this alone 'the most important development' in legal, if not professional, education during the late nineteenth century."); JOEL SELIGMAN, THE HIGH CITADEL: THE INFLUENCE OF HARVARD LAW SCHOOL 32–42 (1978) (quoting Langdell) ("What qualifies a person, therefore, to teach law, is not experience in the work of a lawyer's office, not experience in dealing with men, not experience in the trial or argument of cases, not experience, in short, in using law, but experience in learning law.").

104. KIMBALL, *supra* note 97, at 194 (quoting STOW PERSONS, THE DECLINE OF AMERICAN GENTILITY 247 (1973)).

105. *Id.* at 203–04.

106. *See generally* WEST, *supra* note 93 (describing the modern "crises" for law schools in connection to historical critiques and debates around legal education).

disconnect them from conceptions of justice.[107] While popular representations of law frequently use language implicating justice as an inextricably related concept—through common references to the various institutions and processes involved in crime regulation and punishment as the "criminal justice system"[108] or the various phrases indicating that judges "serve" justice upon a rightful conviction—the layperson may be surprised to learn just how irrelevant the concept of justice is to law's academic and practical application.[109] Some critics have pointedly accused law schools of creating amoralists;[110] others claim that legal education has a narrowing effect on the their "felt obligation to serve justice into a narrow concern for fidelity to clients."[111] Debates around these distinct but related concepts of morality and justice have sparked some changes to legal pedagogy;[112] whether those changes properly responded to the concerns posed by critics, or engendered the desired results that prompted them, is debatable.[113]

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107. *Id*. at 43–44.

108. Because of widespread recognition of injustice in American criminal courts, some scholars have opted to use different language to refer to the various institutions that regulate and punish deviant or criminal acts, such as the "criminal legal system," the "criminal punishment system," or even the "prison industrial complex." *See, e.g.,* Benjamin Levin, *After the Criminal Justice System*, 98 WASH. L. REV. 899 (2023).

109. WEST, *supra* note 93, at 25–26 (critiquing the irrelevance of justice in legal education and scholarship by analogizing excluding the concept of justice from legal education to excluding the concept of health from the study of medicine).

110. *Id.* at 64 (citing Roberto Mangabeira Unger, *The Critical Legal Studies Movement*, HARV. L. REV. 96 (1983); MARK KELMAN, A GUIDE TO CRITICAL LEGAL STUDIES (1987)).

111. WEST, *supra* note 93, at 44.

112. Examples include the inclusion of Professional Responsibility as a requirement for all ABA certified law schools, and the addition of elective seminars and clinical programs that engage with critical legal thought at some law schools. *See generally* Mark Curriden, *The Lawyers of Watergate: How a '3rd-Rate Burglary' Provoked New Standards for Lawyer Ethics*, ABA J. (June 1, 2012), https://www.abajournal.com/news/article/the_lawyers_of_watergate [https://perma.cc/86GD-ET7K] ("After Watergate, schools began to make legal ethics a required class. Bar examinations added an extra section on ethics. . . . In 1977, the ABA created the Commission on Evaluation of Professional Standards, whose work led to the adoption of the Model Rules of Professional Conduct by the association's policymaking House of Delegates in August 1983."); Amna A. Akbar, *Law's Exposure: The Movement and the Legal Academy*, 65 J. LEGAL EDUC. 352, 368 (2015) ("We leave critical theory, the relationship of law to inequality, and social movements to seminars or clinics.").

113. *See* Toussaint, *Legal Education*, *supra* note 20, at 64 ("Even efforts to integrate experiential learning across the law curriculum, which some have falsely deemed the answer to the concerns of critical legal theorists, fall short. Law school clinics can, and in rare cases do, perpetuate legal formalist ideals that reinforce conditions of hierarchy and subordination in society.").

Another longstanding point of disagreement and frustration between different schools within the legal academy, as well as the larger legal professional community, centers the education and training of students on criminal law. The criminal law, both as a field of law and an academic discipline, has been on the receiving end of critique since early in the United States' history. Many of the issues surrounding criminal law can be connected to a longstanding belief within the legal academy in its "exceptionalism"—a belief that the criminal law is unique from other types of law in important ways that make a poor fit for the regular standards and approaches that typically apply to law. In the earlier years of legal education, this meant that criminal law was largely overlooked, even looked upon as a discipline unworthy of study. After successful advocacy on behalf of the subject, more contemporary critiques have emphasized criminal law's ill-fitted incorporation into the greater legal academic canon. At the heart of both complaints is concern over the consequences of miseducating lawyers on the criminal law for American society. As this Note will address in Part III, these concerns were not ill-founded.

A. Critiquing the Culture: Justice and Morality in Absentia

The dismissal of morality as a concept worthy of study in American legal education can be traced back to the introduction of Langdell's formalist vision for the administration and pedagogy of legal education.[114] Almost immediately following legal education's turn to formalism, fervent critics, later designated "legal realists," made their opposition known.[115] The budding school of American legal realism criticized formalism for its wholesale reliance on common law, arguing that the method was antidemocratic and

114. WEST, *supra* note 93, at 30–32 (briefly overviewing the dismissal of morality from institutional legal pedagogy under Langdellian formalism).

115. Toussaint, *Legal Education*, *supra* note 20, at 36. *See also* WEST, *supra* note 93, at 70 ("[L]egal realists and Langdellian formalists disagreed on almost every jurisprudential, constitutional, and political issue facing the academy, the Supreme Court, and the country during the first three decades of the twentieth century."). Legal realists hold that legal questions are open to multiple analyses, denying the formalistic belief in the intrinsic value of past traditions; rules drawn from centuries-old cases, often filled with gaps and based on illogical and unpragmatic premises, are unlikely to be generative of principles on which a modern judge should draw in deciding a contemporary case. *Id.* at 71 n.70 (providing a detailed overview of the disagreements between the two schools). West analogizes these competing legal theoretical models to the views of modern libertarian and progressive lawyers. *Id.* at 75, 76 n.74.

disproportionately favored elite classes.[116] Instead, realists posed, judicial reasoning should be grounded in the "rigorous, empirical, precise calculations of public policy,"[117] forming conclusions based on the judge's informed understanding of the common good and not some truth discerned from a close reading of case law.[118] By solely focusing on "objectivity and rationality in doctrinal analysis," they argued, formalism "discount[ed] the morality of law by diminishing the lawyer's unique ethical responsibilities as a public citizen."[119]

The influence of legal realism within the academy, particularly in conjunction with formalism, cannot be overstated.[120] Realists are credited with leading the expansion of law school curricula to include more than courses in private law and common law subjects (such as property and contracts), introducing "a panoply of public law courses, such as Constitutional Law and Administrative Law, as well as courses dominated by statutes and regulations."[121] Legal realists also led the charge behind incorporating legal clinics into law schools, locating the pedagogical value of clinical education in its ability to expose students to the dynamic relationship between legal theory and practice, and the challenge it presented by asking students to consider the power imbalances reflected by legal rules and political arrangements.[122]

While the law school of today is often described as largely the product of manifold and hotly contested disagreements between realists and formalists, some leading scholars on legal education have emphasized some critical commonalities between the two legal schools.[123] In *Teaching Law*, Robin West identifies an area of

116. WEST, *supra* note 93, at 75 n.73. Favoring redistribution of wealth, legal realists were also skeptical of the powerful protections of liberty and property enshrined by the Constitution. Toussaint, *Legal Education*, *supra* note 20, at 37.

117. WEST, *supra* note 93, at 31. *See also* OLIVER WENDELL HOLMES, JR., THE COMMON LAW (1881) (arguing that solely focusing on objectivity and rationality disregarded moral and political theories, public institutions, and prejudice in legal actors).

118. WEST, *supra* note 93, at 31–32. Comparable to the Jeffersonian conception, legal realists supported a broader legal curriculum. However, these proponents asserted that the law should be developed through the empirical lens of contemporary social sciences rather than the historical and cultural texts that predominated in early American legal pedagogy. *Id.* at 77–78.

119. Toussaint, *Legal Education*, *supra* note 20, at 36–37.

120. WEST, *supra* note 93, at 75.

121. *Id.* at 74.

122. Toussaint, *Legal Education*, *supra* note 20, at 37–38.

123. *See* WEST, *supra* note 93, at 29 ("What these two deeply conflicting schools of

agreement between realists and formalists that became a "cornerstone" of twentieth century legal education: their mutual certainty in "the irrelevance of an independent study of the metric of justice to a good legal education."[124] She continues:

> [Formalists] viewed the study of the concept of justice as simply unnecessary to the study of law . . . [and] to law's practice. Law, [formalists] believed, is a complete system, . . . the major premises of which are just, so legal questions can be resolved . . . justly, by resort to purely legal concepts contained and expressed in legal precedents. *Justice . . . is embedded in the legal principles* from which legal conclusions are deduced . . . . [T]he legal realists . . . also eschewed the concept of justice as the outside source to which judges could or should look when [deciding] cases . . . or to which critics should look when seeking to criticize [law] . . . . The judge seeking . . . resolution of open legal questions should turn not to . . . conceptions of justice, but rather to *rigorous, empirical, precise calculations of public policy*. Judicial decisions should . . . lead[] to the best consequences for all, and the way to determine that is through the newfound methods of the social sciences.[125]

In a similar vein, Etienne C. Toussaint explains in his article, *The Purpose of Legal Education*, that the "functionalist" view of legal education, referring to the view created by the realist-formalist dichotomy, mutually promoted a particular "moral commitment to . . . global capitalism and Western liberal democracy."[126]

The formalist view emphasizes a restrictive notion of law as judge-made and thus focuses on doctrinal reform, whereas the realist recognizes the added importance of legislation and calls for broad-based public policy reform. Yet, this false dichotomy presumes—and this insight is a key motivation for the integration of critical theory in legal education—that there is "an objective, determined, progressive social evolutionary path."[127]

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jurisprudence, pedagogy, scholarship, and politics held jointly became, basically, unquestioned dogma, in part because so much of the terrain between them was so contested.").

124. WEST, *supra* note 93, at 29–30.

125. *Id.* at 30–31 (emphasis added).

126. Toussaint, *Legal Education*, *supra* note 20, at 44–45 (citing Robert Gordon, *Critical Legal Histories*, 36 STAN. L. REV. 57, 60-61 (1984)); *see also*, *id.* ("This moral commitment to modern global capitalism and Western liberal democracy as the undisputed champion of modernity must be seen as that—a moral commitment that rejects alternate conceptions of political economy, such as socialism, authoritarianism, or variations of the two.").

127. Toussaint, *Legal Education*, *supra* note 20, at 44.

Both Toussaint and West articulate that legal education under the realist-formalist conception ingrained students with a distinctive morality, alternately referred to as "legalism" or "legal liberalism."[128] West notes that the issues she identifies with legalism are reflected in the forthcoming complaint from emerging critical theories that legal education creates amoralists.[129]

The first of these critical schools to emerge was the Critical Legal Studies (CLS) movement in the 1970s.[130] Proponents of CLS questioned functionalist assumptions about the law's ability to be neutral, objective, or apolitical, arguing that the formalists' approach hindered law's responsiveness to the needs of society.[131] CLS advocates and early scholars of philosophical ethics critiqued law schools for "producing law graduates who enter the legal profession with a blunted ethical compass and dulled sense of moral responsibility."[132] Hailed as one of the CLS movement's most notable advocates, Duncan Kennedy delivered a scathing critique of law schools in his 1983 work, *Legal Education and the Reproduction of Hierarchy*, famously arguing that law schools are more suited to reproduce hierarchies and ideologies than to challenge them.[133] Brian Z. Tamanaha concisely described Kennedy's bleak portrayal of legal education:

> Kennedy argued that everything about law school, from the curriculum, to course material, to teaching styles, to the grading system and class ranking, to how law professors treat secretaries, to how people dress and talk, to the on-campus hiring system, and more, "train students to accept and participate in the hierarchical structure of life in the law."

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128. *Id.*; WEST, *supra* note 93, at 55–56.

129. Toussaint, *Legal Education*, *supra* note 20, at 64.

130. *Id.* at 45.

131. Katcher, *supra* note 69, at 368.

132. Toussaint, *Legal Education*, *supra* note 20, at 23 (citations omitted) ("For example, in 1975, Richard Wasserstom published *Lawyers as Professionals: Some Moral Issues*, which questioned whether a one-sided loyalty to clients 'renders the lawyer at best systematically amoral and at worst more than occasionally immoral in his or her dealings with the rest of mankind.' In 1978, William Simon published *The Ideology of Advocacy*, which critiqued the principles of partisanship, neutrality, and non-accountability in traditional legal ethics. Simon argued that a lawyer's moral convictions should play a central role in their lawyering activities.").

133. Duncan Kennedy, *Legal Education as Training for Hierarchy*, *in* THE POLITICS OF LAW 62 (David Kairys, ed., 1982) ("What is needed is to think about law in a way that will allow one to enter into it, to criticize without utterly rejecting it, and to manipulate it without self-abandonment to their system of thinking and doing."); *see also* Toussaint, *Legal Education*, *supra* note 20, at 24 ("Duncan Kennedy asserted that law's underlying cognitive structure embedded a contradiction between individual will and collective values.").

> Three years of law school, in Kennedy's account, amounts to indoctrination of law students to take their place serving elite power in American society.[134]

Kennedy elevated the question of morality in legal education by addressing the purposeful formation of a homogenic class of lawyer-elites, arguing that "[l]egal education structures the pool of prospective lawyers so that their hierarchical organization seems inevitable, and trains them in detail to look and think and act just like all the other lawyers in the system."[135]

The rise of the CLS movement opened the door for the introduction of various critical legal theories that make up "outsider jurisprudence" in the succeeding decades.[136] These critical approaches to law and legal education include, to name a few, critical race theory (CRT),[137] feminist legal theory,[138] LatCrit

134. Brian Z. Tamanaha, *The Failure of Crits and Leftist Law Professors to Defend Progressive Causes*, 24 STAN. L. & POL'Y REV. 309, 316 (2013).

135. Kennedy, *supra* note 133, at 71.

136. The term "outsider jurisprudence" was coined by Mari Matsuda in 1998. Toussaint, *Legal Education*, *supra* note 20, at 57.

137. As a critical analytical framework of race and the law that developed in the wake of the civil rights movement, emerging in the late 1970s, CRT recognizes that race is socially constructed and acknowledges that racism is embedded within systems that replicate racial inequality, thus racism is codified into law and public policy. CRT proponents reject the concepts of meritocracy and colorblindness in institutional education and argue that scholarship that remains "neutral" to race simply upholds the existing racial hierarchy. *See generally* KHIARA M. BRIDGES, CRITICAL RACE THEORY: A PRIMER (2019) (discussing the history and core concerns of CRT scholarship).

138. *See* Robin West, *Women in the Legal Academy: A Brief History of Feminist Legal Theory*, 87 FORDHAM L. REV. 977, 980–81 (2018) (describing feminist legal theory as an offshoot of 1960–70s feminist jurisprudence that emerged alongside critical race theory in the 1980s as "a body of scholarship in search of a theoretical understanding of the relation of law to women's subordination or, more simply, of law and patriarchy").

theory,[139] AsianCrit theory,[140] TribalCrit,[141] and QueerCrit.[142] While contemporary critical theories incorporate some elements of legal realism, positing the law as inherently political and approaching legal rules with skepticism,[143] these theories also present the existing order (e.g., distribution of wealth and power) as fundamentally unfair, arguing this order is upheld by "illegitimate structures of domination" based on race, gender,

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139. *See* FRANCISCO VALDES & STEVEN W. BENDER, LATCRIT: FROM CRITICAL LEGAL THEORY TO ACADEMIC ACTIVISM 1 (2021) (describing the dual goals of LatCrit, which emerged as an offshoot of CRT in the 1990s, as "(1) to develop a critical, activist, and interdisciplinary discourse on law and policy toward Latinas/os/x; and (2) to foster both the development of coalitional theory and practice as well as the accessibility of this knowledge to agents of social and legal transformative change").

140. *See generally* Robert S. Chang, *Toward an Asian American Legal Scholarship: Critical Race Theory, Post-Structuralism, and Narrative Space*, 81 CAL. L. REV. 1243 (1993) (arguing that CRT didn't account for Asian-Americans' unique issues, such as nativistic racism and myth of the model minority, and providing a framework for AsianCrit that acknowledged different positionalities of disempowered groups while maintaining the ultimate aim of solidarity); Vinay Harpalani, *DesiCrit: Theorizing the Racial Ambiguity of South Asian Americans*, 69 N.Y.U. ANN. SURV. AM. L. 77, 78 (2013) (designating the term "DesiCrit" to describe the positionality of South Asians as "racially ambiguous beings" under CRT frameworks).

141. Bryan McKinley Jones Brayboy, *Toward a Tribal Critical Race Theory in Education*, 37 URB. REV. 425, 427 (2005) (describing TribalCrit as rooted in CRT and other non-legal academic disciplines, with the aim of providing a framework "to address the complicated relationship between American Indians and the United States federal government and begin to make sense of American Indians' liminality as both racial and legal/political groups and individuals"); *see also* Lauren Ashley Week, *Cultural Resources, Conquest, and Courts: How State Court Approaches to Statutory Interpretation Diminish Indigenous Cultural Resources Protections in California, Hawai'i, and Washington*, 12 MICH. J. ENV'T & ADMIN. L. 103, 103 (2022) (providing a modern CRT/TribalCrit analysis of state courts' continuing tendency to "uphold interpretations rooted in white supremacy and settler colonialism that diminish indigenous cultural resources protections and thereby perpetuate modern day conquest").

142. *See generally* Francisco Valdes, *Beyond Sexual Orientation in Queer Legal Theory: Majoritarianism, Multidimensionality, and Responsibility in Social Justice Scholarship*, 75 DENV. U. L. REV. 1409 (1998) (outlining the field of sexual orientation scholarship that developed beginning in the late 1970s and rallying for intersectional queer scholarship in the CRT/outsider jurisprudence tradition); Nick J. Sciullo, *Defending Critical Race Theory*, 47 SEATTLE U. L. REV. 75, 77–78 (2024) (citing LIBBY ADLER, GAY PRIORI: A QUEER CRITICAL LEGAL STUDIES APPROACH TO LAW REFORM (2018) (applying QueerCrit to a variety of legal issues)) (referencing the term "QueerCrit" in a list of other "critical projects designed to better investigate systematic unfairness in the legal system").

143. Toussaint, *Legal Education*, *supra* note 20, at 43–44 ("By using empirical social science to promote skepticism about legal rules and legal facts, legal realists exposed the indeterminacy of legal judgments and their tendency to 'pass off contingent judgments as inexorable.'").

and/or class.[144] West's summary of the main thrust of these critical scholars' critiques is instructive:

> [B]oth the moral value of legalism writ large – basically, the respect it instills for the goodness and rationality of the American Rule of Law, as well as the worthiness of the moral values it encompasses taken individually (respect for precedent and tradition; a high regard for the importance of fair process, and more generally for procedural justice, understanding and commitment to horizontal or formal equality; and a near-reverential attitude toward constitutional rights)— – is entirely contingent on the moral value, or lack of moral value, of the legal system in which it is embedded.[145]

Legal education received particular attention from the critical legal movements, which recognized the historic structural privileging of whiteness in law schools to the exclusion of all others and legal education as an instrumentality of colonial power that teaches students to "assimilate . . . in the name of progress and prosperity" in order to keep each generation "socially tranquilized, culturally subjugated, and politically subordinated."[146] Though critical theories, including the early CLS movement, did not greatly disrupt the dominant "formalist" structure of legal education, their influence has subtly reshaped the discourse of legal academia and encouraged a broadening of legal pedagogy.[147]

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144. Gerald B. Wetlaufer, *Systems of Belief in Modern American Law: A View from Century's End*, 49 AM. U. L. REV. 1, 52 (1999).

145. WEST, *supra* note 93, at 64.

146. Toussaint, *Legal Education*, *supra* note 20, at 57–58 (quoting Francisco Valdes, *Outsider Jurisprudence, Critical Pedagogy and Social Justice Activism: Marking the Stirrings of Critical Legal Education*, 10 ASIAN L.J. 65, 69 (2003)). For example, CRT challenged the underlying liberalist and supremacist assumptions embedded in legal education by recognizing that the United States is "fundamentally a 'racial capitalist' state." *Id*. at 63 (first citing Nancy Leong, *Racial Capitalism*, 126 HARV. L. REV. 2151 (2013); and then citing Etienne C. Toussaint, *Black Urban Ecologies and Structural Extermination*, 45 HARV. ENV'T L. REV. 449 (2021)). Critical theorists seek to substantively prioritize marginalized and subordinated groups in the United States in an effort to overcome the "conditions of historical and contemporary subordination[.]" *Id*. at 57 (quoting Valdes, *supra*).

147. Toussaint, *Legal Education*, *supra* note 20, at 61–63. Proponents of CLS influenced the development of clinical education by advocating for legal clinics to be more responsive to community needs. Instead of being viewed and administrated primarily as sources for practical legal training of law students, CLS advocates proposed that clinical legal education should imbue law students with ethical literacy and a commitment to the public welfare. Since the turn of the twenty-first century, a growing number of law school curriculums have offered electives that engage with various critical theories—alongside a general trend of greater interdisciplinary offerings. Though some law professors engage in critical theoretical discussions of the law in core courses, it is still a deviation from the norm. *Id*. at 63–64.

B. The Criminal Law Problem

Criminal law has long been considered the problem child of the legal family, both in real-world application and as a course of study for budding American lawyers. Critiques over the state of American criminal law came to a head at the turn of the twentieth century, with criminal codes generally maligned as disjointed, repetitive, and inexplicable to the public.[148] According to Ristroph, the inelegance of these criminal statutes was attributable to the ever-changing composition of state legislatures, which "did not adhere to precedent nor attempt the coherence and consistency that judge-made law purports to display."[149] The "typical American criminal code" was more like "a collection of ad hoc statutory enactments,"[150] and forty-nine distinct and diverse criminal codes were operating simultaneously in the United States alongside the federal criminal code.[151] Though attempts were made at codifying American criminal law with varying success during the nineteenth century,[152] nothing near an "American Criminal Code" would exist until the development of the Model Penal Code (MPC) in the middle of the twentieth century.[153]

Within the legal academy, "the whole field of criminal law was seen as a messy array of often irrational policies and erratic enforcement practices, and on the scholarly side, an intellectual backwater in comparison to the rational, coherent fields of private law."[154] The content, and even necessity, of criminal law courses was up for debate throughout early twentieth century.[155] Criminal

148. Kimberly Kessler Ferzan, *From Restatement to Model Penal Code: The Progress and Perils of Criminal Law Reform in* AM. L. INST., A CENTENNIAL HISTORY 293, 295 (Andrew S. Gold & Robert W. Gordon eds., 2023).

149. Ristroph, *Curriculum of the Carceral State*, *supra* note 1, at 1641.

150. *See* Robinson & Dubber, *supra* note 60, at 322.

151. *Id.* at 319. Hawai'i and Alaska were not yet admitted as states. The count of forty-nine includes the District of Columbia.

152. *See* Robinson & Dubber, *supra* note 60, at 319.

153. *Id.* at 320–22. Edward Livingston made the first attempt by crafting ambitiously utilitarian and systematic federal and Louisiana criminal codes in 1826 that ultimately failed to be codified into law. David Dudley Field's New York criminal code was successfully enacted into law in 1881, pragmatically focused on making the law accessible to lawyers by simplifying extensive common law opinions. Both of these attempts at codification would influence later influence the development of the MPC. *Id.*

154. Ristroph, *Curriculum of the Carceral State*, *supra* note 1, at 1641–42.

155. *Id.* at 1640–41 ("When law emerged as an academic and intellectual discipline in the nineteenth century in the United States, criminal law almost got

practice was largely looked down upon by the legal academy as "not fitting for law students interested in a respectable career and superior 'social position.'"[156] Criminal law was difficult to comport with the dominant formalist pedagogy of the time, which viewed law as a precise science and focused narrowly on appellate opinions as the source of law:

> Unlike private law subjects . . . American criminal law is not a field of appellate cases. Quite the contrary; our criminal justice system is in reality a field of administrative law, organized by statutes that vest very broad discretionary power in public officials, especially prosecutors.

Only a tiny fraction of criminal prosecutions results in trials, and only some fraction of those include disputed points of criminal law. If there is a conviction and an appeal, those points of law will turn less on distinguishing precedents than on interpreting statutory language.[157]

While some early attempts to conform with the formalist vision of legal education were made, as demonstrated by the few criminal law casebooks that existed at the turn of the century,[158] criminal law would not be consistently included in law school curricula until the 1930s.[159] The push for criminal law to be viewed as a discipline worthy of attention was driven by the growing influence of legal realism,[160] the proponents of which placed greater

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left behind . . . [e]ven as criminal law began to creep into the legal curriculum, it struggled for respect, remaining "the Cinderella of the law course" . . . until at least the 1930s.").

156. Anders Walker, *The Anti-Case Method: Herbert Wechsler and the Political History of the Criminal Law Course*, 7 OHIO ST. J. CRIM. L. 217, 217–18 (2009) (quoting George Wilfred Stumberg, *Book Review*, 89 U. PA. L. REV. 1123, 1123 (1941)).

157. Donald A. Dripps, *On Cases, Casebooks, and the Real World of Criminal Justice: A Brief Response to Anders Walker*, 7 OHIO ST. J. CRIM. L. 257, 257 (2009).

158. Walker, *supra* note 156, at 221–22. The primary author of these casebooks, Joseph Henry Beale, was an adamant follower of the Langdellian tradition. *See id.* at 221–23. These early attempts did not provide commentary, outside sources, or even statutes, instead simply illustrating common law examples of criminal acts through cases. *Id.*

159. *See* Ristroph, *Curriculum of the Carceral State*, *supra* note 1, at 1641 n.38 (citing *Proceedings of the Association of American Law Schools*, 1931 AM. ASS'N L. SCH. PROC. 132, 150). Langdell did include Criminal Law and Procedure in the Harvard curriculum within a few years of becoming dean, though only for one hour a week. *Id.* (citing Bruce A. Kimball, *Students' Choices and Experience During the Transition to Competitive Academic Achievement at Harvard Law School*, 1876–1882, 55 J. LEGAL EDUC. 163, 172 tbl.2 (2005)).

160. Professor Albert J. Harno, speaking at the annual Association of American

value than formalists on legislation and believed that the law should be responsive to the needs of society.[161] Roscoe Pound and other prominent legal realists of the early twentieth century vigorously advocated for the creation of a "sophisticated intellectual paradigm" for the mostly overlooked *substantive* criminal law in academia, desiring that the subject be organized and taught alongside civil legal courses.[162] Herbert Wechsler and Jerome Michael of Columbia Law responded to these requests with the publication of *Criminal Law and Its Administration* in 1940, an integrated casebook of *substantive* criminal law, cases, and social science materials that, in addition to serving as the model for every succeeding generation of casebooks, completely revolutionized criminal legal pedagogy.[163]

Wechsler and Michael's casebook was a massive success within the legal academy in part because their approach seemed to civilize the unruly and low-class nature of that beast, criminal law. To the authors, the substantive criminal law was more valuable as an academic pursuit than criminal procedure.[164] Invested in the legal realist vision of law, Wechsler and Michael weren't interested

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Law Schools (AALS) symposium in 1922, advocated emphatically for legal realism in criminal law. *Minutes of the Twentieth Annual Meeting*, 1922 AM. ASS'N L. SCH. PROC. 50, 140 ("Perhaps no field of law has been more neglected than the criminal law."); *see also id.* (quoting Roscoe Pound, *The Administrative Application of Legal Standards*, 42 ANNU. REP. A.B.A. 445, 449 (1919)) (calling for greater attention to the "actual social effects of legal institutions and legal doctrines").

161. WEST, *supra* note 93, at 71 n.70 ("The concept of 'law,' in the realist imagination, and then in realist creations, was the product of legislation, as well as adjudication, but more deeply the product of the human will, not reason: it was a creation designed to better the lives of those from whom it came, not a deduction from rules and principles inherited in the past.").

162. Ristroph, *Curriculum of the Carceral State*, *supra* note 1, at 1642. *See also* Roscoe Pound, *What Can Law Schools Do for Criminal Justice?*, 12 IOWA L. Rev. 105, 113 (1927) ("A better organized, scientifically developed criminal law, such as can come only from legal scholars, would do much to relieve the pressure upon some of the most hopeful achievements of American inventive genius as applied to the problems of penal treatment . . . [l]et us not forget that we have yet to do for criminal law what we should have been doing a generation ago.").

163. JEROME MICHAEL & HERBERT WECHSLER, CRIMINAL LAW AND ITS ADMINISTRATION: CASES, STATUTES, AND COMMENTARIES (1940). Anders Walker believes this integration of social science and law in Wechsler and Michael's criminal course material was only possible due to the legal academy's general inattention to the discipline. *See* Walker, *supra* note 156, at 227–28.

164. Ristroph, *Curriculum of the Carceral State*, *supra* note 1, at 1646. The concept of substantive criminal law had recently been severed from that of procedural criminal law, a division that some leading criminal legal scholars now identify as problematic, as it separates the criminal (substantive) law from its (procedural) "human interpreters and enforcers." *Id.* at 1642, 1701.

in applying "old ideas to new facts," and instead sought to encourage students to "think about changing the law" rather than just applying it.[165] Reorienting the aims of criminal legal courses away from training criminal practitioners,[166] Wechsler and Michael's new iteration would prepare students for positions of greater social and political importance, teaching them how to be "'enlightened leaders,' as legislators, administrators, or simply influential citizens, to make criminal law the best that it could be."[167] Wechsler and Michael also emphasized law as an aspect of governance:

> It was part and parcel of Michael and Wechsler's approach to the study of law that it be regarded as an instrument of social control, a rational instrument of governance: "[T]he criminal law, like the rest of the law, should serve the end of promoting the common good; and . . . its specific capacity for serving this end inheres in its power to prevent or control socially undesirable behavior."[168]

Additionally, Wechsler and Michael's inclusion of the social sciences was an important repudiation of the "case-centered, doctrine-dominated teaching method . . . that successfully changed the way substantive criminal law was taught in law schools to this day."[169] Subsequent versions of Wechsler and Michael's casebook were heavily laden with references to the Model Penal Code (MPC),[170] of which Wechsler was the primary architect.[171] The MPC is a set of proposed criminal laws designed to serve as a model for state criminal codes that provide a comprehensive framework for defining crimes and their corresponding punishments.[172] First

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165. Angela P. Harris & Cynthia Lee, *Teaching Criminal Law from A Critical Perspective*, 7 OHIO ST. J. CRIM. L. 261, 261 (2009).

166. Walker, *supra* note 156, at 218 (citing JULIUS GOEBEL, JR., A HISTORY OF THE SCHOOL OF LAW: COLUMBIA UNIVERSITY 325 (1955)) (describing how Columbia Law School "modified their criminal law offering, hoping to use the class as a means of preparing students not for criminal practice, but for 'the phenomenal increase in governmental functions,' and rapidly increasing 'demand for competent lawyers' in Franklin Delano Roosevelt's New Deal").

167. Ristroph, *Curriculum of the Carceral State*, *supra* note 1, at 1645 (quoting Walker, *supra* note 156, at 230).

168. Lloyd L. Weinreb, *Teaching Criminal Law*, 7 OHIO ST. J. CRIM. L. 279, 284 (2009) (citing MICHAEL & WECHSLER, *supra* note 163, at 10).

169. Harris & Lee, *supra* note 165, at 261.

170. Ristroph, *Curriculum of the Carceral State*, *supra* note 1, at 1648.

171. *Id.* at 1644. The Code contained four parts: Part I stated the statement of general principles of liability, Part II defined specific offenses, and Parts III and IV addressed the sentencing, treatment, and corrections. *See* Robinson & Dubber, *supra* note 60, at 326.

172. *See generally* Robinson & Dubber, *supra* note 60 (providing an overview of the purpose, history, and structure of the MPC).

published in 1951, the MPC profoundly influenced modern American criminal law, prompting extensive reform of state codes throughout the sixties and seventies and dominating American criminal legal pedagogy since its promulgation.[173]

Ristroph has called the dominant mode of teaching criminal law the "curricular canon."[174] She describes Wechsler's MPC as an "abstract vision of criminal law as the backbone of civilized society," one that depicts criminal law as "exceptional" from all other law,[175] created to address the "deepest injuries"[176] with a distinct set of solutions or interventions that presume no alternatives to criminal legal recourse.[177] Seeking both to subvert the "irrationalities and overreach of criminal law" and engender acceptance and respect from the legal academy,[178] Wechsler's criminal law curriculum developed from a forward-looking, aspirational vision of criminal law.[179] Since its creation, excerpts from the MPC have been included and prominently featured in nearly every criminal law casebook since the 1960s,[180] including the clear successor of

173. *See* Robinson & Dubber, *supra* note 60, at 326; Ristroph, *Curriculum of the Carceral State*, *supra* note 1, at 1648 ("[N]early every criminal law casebook published since 1962 has featured the MPC prominently.").

174. Ristroph, *Curriculum of the Carceral State*, *supra* note 1, at 1637.

175. Alice Ristroph, *An Intellectual History of Mass Incarceration*, 60 B.C. L. REV. 1949, 1976–77 (2019) [hereinafter Ristroph, *Intellectual History*].

176. *Id.* at 1977 (quoting Herbert Wechsler, *The Challenge of a Model Penal Code*, 65 HARV. L. REV. 1097, 1098 (1952)).

177. *Id.* Ristroph defines criminal law exceptionalism as a model that "targets a narrow set of specific problems ('the deepest injuries') with a distinctive set of interventions, and society has no other recourse for these problems than criminal law." *Id*. (quoting Herbert Wechsler, *The Challenge of a Model Penal Code*, 65 HARV. L. REV. 1097, 1098 (1952)). Ristroph notes that Wechsler's previous work with his colleague Jerome Michael maintained some skepticism regarding criminal law exceptionalism. *Id*. at 1977 n.111. *See* MICHAEL & WECHSLER, *supra* note 163, at 20 ("[T]he criminal law can not be viewed in proper perspective unless it is remembered that making behavior criminal and treating criminals are only one of many methods that the state can and does employ in order to regulate social life; that the criminal law must not be considered in isolation of other methods of social control, especially education . . . .").

178. Ristroph, *Curriculum of the Carceral State*, *supra* note 1, at 1635.

179. *Id.* at 1648. As this Note addresses in Part III, Ristroph argues this vision bears little resemblance to the actual criminal legal system. *Id.* Wechsler acknowledged that when balancing the utilitarian goals of the MPC with the pragmatic requirements of the existing criminal legal system, he didn't "quite know how to draw a line between what is practical and what is ideal," a sentiment shared by some of his most vocal critics. Ferzan, *supra* note 148, at 302 (quoting Thursday Morning Session—May 20, 1954, 31 A.L.I. Proc. 71 (1954)).

180. *Ristroph, Curriculum of the Carceral State, supra* note 1, at 1648.

Wechsler and Michael's casebook: *Criminal Law and Its Processes* by Sanford Kadish and Monrad Paulsen, published in 1962.[181]

Modeled after the basic framework of its predecessor,[182] Kadish and Paulsen's casebook is still widely used (and commonly imitated) in contemporary criminal legal education.[183] Though primarily concerned with substantive criminal law, the normative model in Kadish and Paulson's casebook "emphasizes certain procedures, such as a presumption of innocence and the requirement of proof beyond a reasonable doubt, that give legitimacy to substantive law."[184] The casebook emphasized theories of punishment rather than theories of criminalization,[185] as the authors were very critical of the scope of actual criminal law and desirous of invigorating "meaningful limitations on the penal power."[186] This normative, sanitized version of criminal law provided in Kadish and Paulson's casebook garnered the respect of the Academy and, by the late twentieth century, was a part of most law schools' required curriculum.[187]

III. Modern Miseducation and Carceral Consequences

In her book *From the War on Poverty to the War on Crime*, Elizabeth Hinton asked "why, in the land of the free, one in thirty-one people is under some form of penal control."[188] When Hinton wrote her book in 2016, the rate of incarceration in the United States was five to ten times greater than other comparable nations,

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181. *Id.* (citing MONRAD G. PAULSEN & SANFORD H. KADISH, CRIMINAL LAW AND ITS PROCESSES (1st ed. 1962)).

182. Ristroph, *Curriculum of the Carceral State*, *supra* note 1, at 1649 ("With a few slight adjustments discussed below, *Criminal Law and Its Processes* kept Michael and Wechsler's basic framework in which students were provided both cases and extrajudicial materials and invited to imagine the best design for the law.").

183. *Id.* at 1648–49 ("This book replaced Michael and Wechsler's text as 'the classic in the field,' and [is] now in its tenth edition . . . .").

184. *Id.* at 1649.

185. *Id.*

186. *Id.* at 1650. Ristroph notes that Kadish also coined the term "overcriminalization" that same year, 1962. *Id.* (citing Sanford H. Kadish, *Legal Norm and Discretion in the Police and Sentencing Process*, 75 HARV. L. REV. 904, 909–11 (1962)).

187. *Id.* at 1651 (noting that unlike criminal law, criminal *procedure* has never become a regularly required course).

188. ELISABETH HINTON, FROM THE WAR ON POVERTY TO THE WAR ON CRIME 6 (2016) (describing the government's response to crime since the Civil Rights era to modern day, and how government actions have led to the exponential growth of the prison population).

representing 25% of the world's prison population.[189] Hyperincarceration, the beginning of which academics have traced to the 1970s,[190] encompasses not only the exponential growth of the prison population in the United States,[191] but also a massive expansion of "non-custodial sanctions such as fines or probation."[192] The criminal codes are so vast that the majority of Americans do not know how many laws there are, or even when they are breaking them.[193] Empirical evidence shows that harsh sentences do not deter crime,[194] and incapacitation is utilized with little regard to proportionality.[195] Still, "[t]he way we deal with people who have caused serious harm has been more resistant to scientific and

189. *Id.* at 5 ("The American carceral state has continued its rapid growth ever since [the Civil War], so that today 2.2 million citizens are behind bars—representing a 943 percent increase over the past half century.").

190. Ristroph, *Curriculum of the Carceral State*, *supra* note 1, at 1636 n.20 (first citing MARIE GOTTSCHALK, CAUGHT: THE PRISON STATE AND THE LOCKDOWN OF AMERICAN POLITICS 1, 16 fig.1.3 (2015); and then citing MICHAEL TONRY, MALIGN NEGLECT: RACE, CRIME, AND PUNISHMENT IN AMERICA 28–29 (1995)).

191. Wendy Sawyer & Peter Wagner, *Mass Incarceration: The Whole Pie 2023*, PRISON POL'Y INITIATIVE (Mar. 14, 2023), https://www.prisonpolicy.org/reports/pie2023.html [https://perma.cc/TA27-SFA8] ("The growth in the *total* jail population over the last 25 years is the direct result of increases in pretrial detention, not increases in the number of people held in jails."). In May of 2023 there were 1.9 million people in confinement nationwide, roughly a third of whom are in jail. *Id.* Pretrial detention is largely correlated to the ability of the accused to pay bail. A majority of those people have not been convicted. *Id.* Furthermore, roughly three quarters of those legally innocent people confined are accused of non-violent property, drug, or "public order" crimes—these include parole violations, traffic incidents, and "obstruction of justice" (such as not giving an officer their real name). *Id.*

192. Ristroph, *Curriculum of the Carceral State*, *supra* note 1, at 1697 n.19 (first citing SALLY T. HILLSMAN, JOYCE L. SICHEL & BARRY MAHONEY, NAT'L INST. OF JUST., FINES IN SENTENCING: A STUDY OF THE USE OF THE FINE AS A CRIMINAL SANCTION 7–9 (1984); then citing Joan Petersilia, *Probation in the United States*, 22 CRIME & JUST. 149, 149 (1997)). Michelle Alexander's now famous book contends that the criminal legal system is used as an instrument of racialized social control; disproportionate incarceration and the severe collateral consequences of incarceration serve to strip Black Americans of their social and economic mobility. *See* MICHELLE ALEXANDER, THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS (2010).

193. Benjamin Levin, *The Consensus Myth in Criminal Justice Reform*, 117 MICH. L. REV. 259, 261 (2018).

194. Mirko Bagaric & Sandeep Gopalan, *Saving the United States from Lurching to Another Sentencing Crisis: Taking Proportionality Seriously and Implementing Fair Fixed Penalties*, 60 ST. LOUIS U. L.J. 169, 188 (2016). General deterrence is the view that harsh penalties discourage crime; specific deterrence theorizes that criminal offenders are less likely to reoffend if the penalties are serious enough. *Id.* at 187–88.

195. *Id.* at 189.

technological advances than any other aspect of society."[196] Hyperincarceration requires participation from individuals who are willing to put upwards of 1% of American adults in prison.[197] Absent malicious intent, these individuals must view prosecution and incarceration as necessary, legitimate, and legally sanctioned.[198] In large part, they also must be lawyers.

The legal profession has failed "to scrutinize the evidentiary and logical foundations of modern policing and mass incarceration," while simultaneously failing in "everyday practice to ensure that the contemporary criminal legal system functions consistently with our rights and values."[199] There has not been a proper interrogation into the societal costs of our carceral system nor its "purported benefits," like actual crime reduction.[200] Mandatory minimums and other mechanized methods of determining criminal sentences, combined with the "limited efficacy of appellate review," result in decisions to incarcerate human beings for which no individual must bear the blame, nor face scrutiny for afterward.[201] Prosecutorial discretion[202] (coupled with broad criminal codes and their power to

196. *See* Mirko Bagaric, Dan Hunter, & Jennifer Svilar, *Prison Abolition: From Naïve Idealism to Technological Pragmatism*, 111 J. CRIM. L. & CRIMINOLOGY 351, 353 (2021) (advocating for the expansion of surveillance technology to reduce the prison population by 90%). *But see* Isaiah Strong, *Surveillance of Black Lives as Injury-In-Fact*, COLUM. L. REV. 1019, 1022 (2022) (noting that surveillance technology in the hands of the carceral state exacerbates many of the issues with current policing and surveillance, particularly of minority and poor communities).

197. Katherine Beckett, *Mass Incarceration and Its Discontents*, 47 CONTEMP. SOCIO. 11, 11 (2018) (providing contemporary prison statistics).

198. Ristroph, *Curriculum of the Carceral State*, *supra* note 1, at 1633. *See also* MARY DOUGLAS, HOW INSTITUTIONS THINK 3 (1986) (arguing that the survival of an institution depends on its ability to structure the thinking of the individuals that participate in and perpetuate the institution, wherein they view the institution as necessary and natural).

199. Alec Karakstanis, *Policing, Mass Imprisonment, and the Failure of American Lawyers*, 128 HARV. L. REV. F. 253, 254 (2015).

200. *Id*. at 254 (arguing that courts should be applying strict scrutiny to the benefits of the carceral state based on constitutional precedent).

201. Ristroph, *Curriculum of the Carceral State*, *supra* note 1, at 1633 (citing Andrea Roth, *Trial by Machine*, 104 GEO. L.J. 1245, 1266–69 (2016)).

202. With upwards of 90% of all criminal cases resolving in guilty pleas rather than a factual determination of guilt or innocence, contemporary pleading standards undercut the protections theoretically afforded by the criminal legal system. Ristroph, *Curriculum of the Carceral State*, *supra* note 1, at 1632–33 (citing Lucian E. Dervan & Vanessa A. Edkins, *The Innocent Defendant's Dilemma: An Innovative Empirical Study of Plea Bargaining's Innocence Problem*, 103 J. CRIM. L. & CRIMINOLOGY 1, 7 (2013)); John H. Blume & Rebecca K. Helm, *The Unexonerated: Factually Innocent Defendants Who Plead Guilty*, 100 CORNELL L. REV. 157, 161–62 (2014).

define sentencing differentials) is one of the most frequently cited causal factors for the boom in incarceration,[203] but these discussions focus on the discretionary power itself—not the lawyers who wield it. The pathologies necessary to support our violent carceral system are ingrained within the profession; removed from ordinary morality, lawyers normalize brutality behind a shield of bureaucratic justifications.[204]

While the carceral infrastructure in the United States has endured under a system of near constant reform, ouroboros-like in an eternal cycle of destruction and recreation,[205] contemporary law schools bear a remarkable resemblance to the model that developed between formalists and realists roughly a century ago. Despite the growing number of scholars developing complicated theoretical and practical responses to the current criminal legal system, these voices remain the minority in the larger scheme of legal academia.[206] Considering the dire condition of the American carceral state, why do most lawyers seem completely disengaged from these critical legal issues? And what is our way forward? These

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203. Ristroph, *Curriculum of the Carceral State*, *supra* note 1, at 1632; Darryl K. Brown, *Judicial Power to Regulate Plea Bargaining*, 57 WM. & MARY L. REV. 1225, 1233 (2016). Another common cause centers the lack of funding for, and overwhelming caseloads of, public defenders, though Paul D. Butler argues that even under the best circumstances, lawyers cannot protect the poor from a criminal legal system designed to incarcerate them. *See* Paul D. Butler, *Poor People Lose: Gideon and the Critique of Rights*, 122 YALE L.J. 2176, 2178 (2013).

204. Karakstanis, *supra* note 199, at 255 ("The legal profession and the doctrines that it produces exhibit a willful blindness to the extent of the physical and psychological punishments that we perpetrate."); *see also* W. BRADLEY WENDEL, LAWYERS AND FIDELITY TO LAW 10 (2010) (arguing that lawyers' morality should be based on fidelity to law and supported by democratic processes rather than relying on ordinary morality).

205. Meranze, *supra* note 59, at 677 (citations omitted) ("Beyond failure, the initial decades of the prison also indicated a series of continuing themes in its history: the importance of professionals and commercial forces in its spread, its recurring practice of taking over older institutions and practices rather than instituting a 'clean break,' and the recurrent insistence that the answer to the prison's failures was more prison . . . ."); *see also Ouroboros in* ENCYCLOPAEDIA BRITANNICA, https://www.britannica.com/topic/Ouroboros [https://perma.cc/W6Q2-C5PH] ("Ouroboros, emblematic serpent of ancient Egypt and Greece represented with its tail in its mouth, continually devouring itself and being reborn from itself. A gnostic and alchemical symbol, Ouroboros expresses the unity of all things, material and spiritual, which never disappear but perpetually change form.").

206. *See* Franklin E. Zimring, *Is There a Remedy for the Irrelevance of Academic Criminal Law?*, 64 J. LEGAL EDUC. 5, 6 (2014) ("Over a thousand of the best and the brightest criminal minds in America have been missing in action from two of the key debates of their field. How did this happen? How can we create closer links between legal education and scholarship and the critical policy turns in American criminal justice?") (describing his study of legal scholarship in regards to mass incarceration).

are the questions Part III of this Note seeks to answer. Subpart III.A. addresses the pro-carceral nature of legal education that has limited either the ability or the desire for contemporary lawyers to seriously engage in anti-carceral criminal legal discourse and furthermore has trained criminal practitioners to religiously uphold the carceral state despite the incomprehensible amount of human suffering that it perpetuates. Subpart III.B. argues that legal education can, and must, incorporate an anti-carceral approach to the law and legal practice. This Subpart presents two steps that, it argues, are necessary to decarceralize legal education: (1) Expand the theoretical underpinnings of legal education to include new frameworks, such as movement lawyering and abolitionism; and (2) change the culture of law schools that serves to limit students' morality and imagination.

A. The "Pipeline"

So, why do so many lawyers continue to blindly and faithfully participate in the administration of the ever-expanding American carceral system despite obvious moral provocation to act otherwise? The central argument advanced by this Note lays the blame, at least in part, at the feet of contemporary legal education. The modern law school resocializes law students, distancing them from their natural morality and sense of justice, with the goal of creating a homogeneous legal professional identity. In conjunction, the dominant criminal legal pedagogy provides students with a distorted understanding of criminal practice that inherently favors carceral institutions. The result is a seemingly endless stream of lawyers that willingly uphold and defend the carceral state, or, at best, comply with its demands due to their inability to imagine a better world. This Subpart will explore both critiques of contemporary legal education in connection with its carceral consequences in turn, starting with the socialization of law students that displaces their conceptions of morality and justice.

Echoing the concerns expressed by Duncan Kennedy in his seminal critique of legal education as hierarchical, but with particular attention to the criminal law, Shaun Ossei-Owusu argues that "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."[207] Because students are being socialized to "understand criminal justice issues within narrow legal frameworks," he argues that that students are left unprepared for practice.[208] Robin West describes the students that lose the moral sensibility they had upon enrolling in law school as "morally" and "psychologically[] unhinged," with their concern for social justice rewired on behalf of "technocratic competency."[209]

While some scholars have decried the creation of "amoralist" law students, West and Toussaint share the position that legal education instead imbues students with a "distinctive morality"—what West terms "legalism," as was briefly overviewed in Part II's explanation of the formalist-realist dichotomy developed in the early twentieth century.[210] Even contemporary "reformed" pedagogical approaches uncritically center the key tenets of legalism,[211] which Toussaint argues "elides cultural context, obscures systemic racism, and legitimates structural oppression by teaching law students how to sustain the status quo."[212] The thrust of West's critique of legalism is that it puts concern for justice "out of bounds:"

> Legalism is so encompassing a world view, and so effective a way of being in the world, and so morally ambitious, that it "crowds out" the law student's or scholar's inquiry regarding . . . the justice or injustice, of a law, regulation, or legal regime. It crowds out worries over whether the substantive injustice of a law or social arrangement requires a political or legal response . . . [or] worries over whether . . . an entire legal system[] is just or unjust. Substantive justice becomes "not the worry" of the law student or scholar, and therefore not the worry of the legally trained professional.[213]

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207. Shaun Ossei-Owusu, *Criminal Legal Education*, 58 AM. CRIM. L. REV. 413, 426 (2021).

208. *Id.* at 426.

209. WEST, *supra* note 93, at 46 ("[O]nce students lose the moral sensibility that in some cases brought them to law school in the first place, they are morally, as well as often psychologically, unhinged. Their concerns for social justice become displaced, basically, by a concern for technocratic competency.").

210. *Id.* at 55; Toussaint, *Legal Education*, *supra* note 20, at 13.

211. *See* Anthony V. Alfieri, *Against Practice*, 107 MICH. L. REV. 1073, 1074 (2009) (arguing that the pedagogies of clinical and skills courses exhibit the rise of new formalism in their claims of neutral lawyer judgement, technical lawyering based values, and client-centered representation in disregard of all others and of community building).

212. Toussaint, *Legal Education*, *supra* note 20, at 47.

213. WEST, *supra* note 93, at 66.

West lays out four ways in which legalism "crowds out" concern for justice. First, legalism overstates the virtue of process. If process is "applied scrupulously and fairly, then there's no grounds for lawyerly concern over the justice of the law itself."[214] Second, legalism overemphasizes horizontal equity,[215] for which the inquiry is not whether a general rule is unjust, but whether a particular case falls under that general rule—whether they are alike.[216] Third, legalism distinctly privileges individual rights. A law's "goodness or justice" is determined by whether it "promotes or violates rights."[217] Laws that promote rights are assuredly good, while laws that simply do not violate rights cannot do serious harm.[218] Fourth, and last, legalism touts the law as autonomous and complete.[219] The question "what is the law" must be answered "by resort to law and law alone."[220]

Replacing students' personal understanding of morality and justice with a commitment to legalism has many negative implications for future criminal practitioners. Prosecuting and defending individuals suspected of criminally punishable acts "undeniably implicates questions of right and wrong or good and bad, [but] the pedagogy producing these vocations submerges those binaries beneath rules and processes."[221] Combined with the general belief in criminal law exceptionalism, a tenet of which is the idea that criminal procedures are stronger and more extensive than

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214. *Id.* at 66 n.61 (citing Robert Cover, Justice Accused (1975)) (providing an example from Robert Cover's *Justice Accused*, which discusses "the capitulation of northern judges who were antislavery to legalist values when deciding cases under the Fugitive Slave Act, returning slaves to their masters").

215. Toussaint, *Legal Education*, *supra* note 20, at 25 ("[L]aw students are attuned to the moral value of horizontal equity (also known as legal equality, whereby a legal system treats 'like cases alike' as a way of maintaining faith in ancestral wisdom, establishing the predictability of the law, and furthering social conservatism), whether by comparing categories of injury in torts, or by measuring types of damages in contracts.").

216. WEST, *supra* note 93, at 67 ("The demands of morality, again, are exhausted by the legalist demand that 'likes' be grouped in a way that is morally defensible.").

217. *Id.*

218. *Id.* ("So long as we have freedom to speak, to associate, to worship, to not be discriminated against, and to hire a lawyer, that is all justice demands of our positive law . . . .").

219. *Id.* (stating that the autonomy and completeness of law is perhaps the central jurisprudential commitment of legalism).

220. *Id.* at 68 (allowing that "law" can include "moral principles" where those principles are "fairly inferable from past existing legal decisions").

221. RIAZ TEJANI, LAW MART: JUSTICE, ACCESS, AND FOR-PROFIT LAW SCHOOLS 209–10 (2017).

in other areas of the law,[222] legalism encourages students' faith that criminal process has justice built in and discourages them from examining substantive law more closely for injustice.[223] As this approach fails to introduce students to the ways in which the law perpetuates inequality,[224] future criminal practitioners are trained without critical insight on how to best serve diverse clients across gender, class, and race.[225]

In light of the extreme circumstances of the American carceral state, a small number of legal scholars are now scrutinizing the conceptual curricular model used to teach criminal law, particularly the selection of cases, narratives, and ideas utilized in the classes and casebooks of first-year law students. In *Curriculum of the Carceral State*, Alice Ristroph contends that "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."[226] The standard curricular model, Ristroph argues, perpetuates a false narrative that criminal law is "limited in scope, careful in its operation, and uniquely morally necessary," teaching students to accept and embrace criminal law and, therefore, reinforcing the American carceral state with willing participants.[227] Some areas of concern in the modern casebook highlighted by Ristroph are the overemphasis

222. Ristroph, *Intellectual History*, *supra* note 175, at 1977.

223. Toussaint, *Legal Education*, *supra* note 20, at 26–27 ("[W]hile law students grow accustomed to debating the *procedural* fairness of law, rarely do they engage the *substantive* justice of those very same legal rules, which tend to imbue the unfair power dynamics that current notions of justice would oppose.").

224. WEST, *supra* note 93, at 56 ("[S]tudents are not encouraged to even ponder, let alone develop arguments regarding the social, corrective, or distributive justice of the substantive rules they are being taught, apart from the procedural regularity or irregularity with which they are fairly or unfairly applied. In fact, such inquiry is quite routinely marginalized or discouraged.").

225. Ossei-Owusu, *Criminal Legal Education*, *supra* note 207, at 427 ("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.").

226. *Id*. at 420 (citing Ristroph, *Curriculum of the Carceral State*, *supra* note 1, at 1685–90).

227. Ristroph, *Curriculum of the Carceral State*, *supra* note 1, at 1636.

of "supposed constraints" provided by putative limits on substantive criminal law and near exclusive reliance on punishment theory.[228]

According to Ristroph, casebooks legitimate the punitive power in criminal law by emphasizing the constraints placed on the criminal law to prevent abuse of this great power,[229] particularly the principle of legality and presumption of innocence.[230] When coupled, these two concepts theoretically constrain criminal liability and "prevent[] prosecutors or courts from choosing who will be made a criminal."[231] Other key sections that provide criminal law with much needed legitimacy are the "void-for-vagueness" principle,[232] a culpability principle,[233] constitutional limits such as the prohibitions of cruel and unusual punishment,[234] and "possibly, rules of lenity and strict construction for penal statutes."[235] Ristroph notes that these principles and doctrines are rarely presented as "philosophical aspirations," but instead as "positive law with meaningful effects," providing reassurance to students that the harshness of criminal sanctions are frugally applied and only when justifiable.[236] She further argues that the heavy reliance on the MPC "creates a false impression of constraint" upon the administration of criminal law, often crafting a false dichotomy between sections of the Code and the common law.[237] Neither is a realistic depiction of any given state's criminal codes, as no state has wholly and solely codified the MPC without modifications or

228. *Id.* at 1688.

229. *Id.* at 1653.

230. *Id.* ("Legality, as an academic and curricular term, is meant to express something more than the mere distinction between permitted and prohibited conduct. As a legal term of art and in criminal law casebooks, legality encompasses the idea that criminal liability must not be imposed unless the defendant's conduct was prohibited by a *preexisting statute*; the ex post designation of conduct as criminal by an executive official or a judge is prohibited.").

231. *Id.* at 1653–54 (noting the "beyond a reasonable doubt" standard applied to the presumption of innocence).

232. *Id.* at 1654 (explaining that the doctrine "prohibits criminal statutes that are sufficiently vague to allow enforcers, or judges, to decide after the fact what is criminal").

233. *Id.* at 1657. Culpability refers to the requirement that criminal liability exists when both a blameworthy act *and* mental state are present. *Id.* at 1657 n.118.

234. Otherwise known as the constitutional proportionality requirement. *Id.* at 1656–57. *See also* WEST, *supra* note 93, at 113 ("Students learn in criminal law and procedure classes of the *Miranda* and *Gideon v. Wainwright* cases protecting the rights of criminal defendants, but nowhere of the excesses of punishment or the cruelty of prison life, all a function of state and federal legislation.").

235. Ristroph, *Curriculum of the Carceral State*, *supra* note 1, at 1658.

236. *Id.* at 1654.

237. *Id.* at 1658.

other statutory codification in conjunction, nor has a "common law of crimes" ever truly existed.[238] Though useful for testing purposes, the idea of coherency in criminal codes is both wildly inaccurate and, Ristroph argues, further promotes the legality principle as reasonably capable of constraining criminal law.[239]

Ristroph also alleges that the overrepresentation of punishment theory in the standard criminal law casebook is harmful to students' conceptions of criminal law, as they simultaneously legitimize the authority to restrict individual liberties and affirmatively argue for "the good that criminal law can achieve."[240] The four broad justificatory theories most often presented as the rationalization for criminal legal doctrines, what Ristroph coins as "the four horsemen of the carceral state," are retribution, deterrence, incapacitation, and rehabilitation.[241] These rationales are rarely explored in depth, preventing students from meaningfully engaging with questions about whether criminal punishment effectively serves the purported goal of a given rationale, or whether the punishment is justified at all.[242] Professor Benjamin Levin critiques criminal law casebooks for asking the wrong questions.[243] Rather than "*how severely* each defendant should be punished . . . or *how blameworthy* the conduct," Levin argues that the important question is a threshold one, asking, "Why is the problem at issue one that requires a criminal legal solution rather than some other sort of political, institutional, or regulatory response?"[244] Though some scholars believe that punishment theory would serve as a limitation on criminal law, Ristroph finds it unsurprising that "[a]rticulating the justification of a practice . . . is unlikely to foster restraint among those who engage in that practice."[245]

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238. *Id.* at 1659.

239. *Id.*

240. *Id.* at 1660.

241. *Id.*

242. *Id.* ("Indeed, the appropriateness of punishment is often presented as self-evident; students are asked to consider *why* punishment is justified, not whether.").

243. Benjamin Levin, *Criminal Law Exceptionalism*, 108 VA. L. REV. 1381, 1382–83 (2022).

244. *Id.*

245. Ristroph, *Curriculum of the Carceral State*, *supra* note 1, at 1662.

B. Decarceralizing Legal Education

To change the culture of law school, school administrations should reclaim the role of the lawyer in society and engage in those discussions of morality and justice that have been largely shelved since Langdell. Toussaint advocates for educating law students using the "foundational pedagogical principles of public citizenship lawyering."[246] Public citizenship in lawyering embodies a "democratic conception of professional responsibility whereby lawyers engage in routine critique of their lawyering practice through the lens of justice as a moral virtue."[247] Toussaint notes that the ideal of "public citizenship,"[248] though an important part of civil rights and social justice advocacy, has remained on the periphery of legal education,[249] allowing many law students to view the public purpose of legal education as optional.[250] Ossei-Owusu proposed that student initiatives should be supported and encouraged, describing students as critical players in attempts to modify criminal legal education.[251] Student primacy, he argues, fits into consumerist frameworks of education that have become popular in last few decades.[252] He additionally posits that faculty initiatives are imperative to internal change; though often seen as resistant to change, recent awareness of state-violence against racial minorities has challenged faculty within law schools to respond accordingly.[253]

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246. Etienne Toussaint, *The Miseducation of Public Citizens*, 29 GEO. J. POVERTY L. & POL'Y 287, 294 (2022) [hereinafter Toussaint, *Miseducation*].

247. *Id.* at 287.

248. Toussaint, *Legal Education*, *supra* note 20, at 32 (describing public citizenship as the "lawyer fueled by righteous indignation *against* those with corrupted power").

249. *Id.*

250. *Id.* at 55–56.

251. Shaun Ossei-Owusu, *The New Penal Bureaucrats*, 170 U. PA. L. REV. 1389, 1441 (2022).

252. *Id.* at 1441. Ossei-Owusu provides two examples of student initiatives that had success: The Federalist Society was student founded by conservatives and libertarians who felt their views were boxed out of legal education, and Critical Race Theory, the school of thought that helped diversify the general legal curriculum at the end of the twentieth century, was partially student led. *Id.* at 1397.

253. *Id.* at 1444–45. Ossei-Owusu recommends utilizing open-source content, like "The Guerrilla Guides to Law Teaching," to supplement or substitute standard legal materials for content that simultaneously gets at the policy implications as well as the traditional content of criminal justice courses. *Id.*

To make the injustice and bias embedded in law visible, discourse must be interrogated, early and often.[254] Simply critiquing the system (disruption) is insufficient; students must be trained to both critique and create within the legal framework.[255] Susan A. McMahon states that the primary way law schools interrogate the pedagogy of legal reasoning is by "marrying it with legal theory."[256] These frameworks should not only be available on the fringes, through optional elective courses or clinical education. Though clinics are a key piece in providing an anticarceral education, the theory needs to be presented in doctrinal law courses—what Toussaint calls a pedagogy of "reconstructive ordering" that will provide students alternative framings of the legal system to present "their client's worldview in the language of the court."[257] The foundation for a young lawyer's mind is built in the first year of law school, and this is a purposeful action aimed at training students as quickly as possible to "think like a lawyer." What kind of lawyer each student wants to be is not a part of the equation:

> Rather than focusing solely on procedural rules or appellate decisions, students should also be taught how to select, evaluate, and explore law's sources and the narratives that impact them. Students can engage more fully with transformational legal analysis by going beyond law's immediate sources to consider its social and cultural contexts. This will help students become archaeologists of the lawyering process, more adept at determining what the law is, and at articulating visions of what the law could and even should be.[258]

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254. Susan A. McMahon, *What We Teach When We Teach Legal Analysis*, 107 MINN. L. REV. 2511, 2535 (2023).

255. *Id.* at 2548 ("Disruption could lead to a wholesale restructuring of the legal system, a radical reimagining of what law could be. Yet this kind of large-scale reform work can be slow and painstaking; it often engenders a backlash from those who prefer (and benefit from) the status quo. It also does not help students create a new legal order. They know what's wrong with the old ways, but they don't have the skills to make it right. For these reasons, disruption alone is rarely successful. Instead, it should be paired with training in creation, particularly in creative reasoning, giving students the skills to craft new rules and argue for their adoption. This approach operates within the boundaries of traditional legal reasoning precepts, but aims to use the flexibility inherent in those structures to change law, move it forward, and make it more just.").

256. *Id.* at 2544.

257. Toussaint, *Miseducation*, *supra* note 246, at 328.

258. L. Danielle Tully, *The Cultural (Re)turn: The Case for Teaching Culturally Responsive Lawyering*, 16 STAN. J. CIV. RTS. & CIV. LIBERTIES 201, 244 (2020).

There needs to be space in these doctrinal courses for different perspectives. For those who want to diminish or wholly uproot the carceral state, this is particularly true for criminal law courses.

Law schools, and law professors, should consider incorporating abolitionist frameworks into legal education.[259] Abolitionist theory provides the methodologies that can uncover legal pathways towards transformative change and radically reshape legal analysis, allowing law students to think creatively through complex legal issues and solutions.[260] Activists view abolition as a way of thinking and theorizing about change, not simply a desire to remove specific institutions such as prisons.[261] It is the practice, analytical model, creation, and ideology of critical resistance.[262] Dorothy E. Roberts describes the three tenets of abolitionist theory as (1) the roots of today's carceral punishment system are in slavery and racial capitalism; (2) the expanding system oppresses Black people and other marginalized groups to maintain the racial capitalist regime; (3) we can build something new and more humane.[263]

Legal scholars have already begun advocating for the importance of abolitionist theory in law. Allegra McLeod employs the prison abolitionist framework, a set of principles and projects, toward "substituting a constellation of other regulatory and social projects for criminal law enforcement."[264] Jamelia Morgan presents abolitionist methodologies in legal education as a partner to critical legal studies and Critical Race Theory, another tool for deep critique of law and legal structures that provides students with the ability to think beyond the neoliberal approach to social problems.[265] Abolitionism has obvious applications to criminal legal education, where it would serve to challenge traditional theories of

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259. For a thorough understanding of abolitionist theory applied to law, *see* Amna A. Akbar, *Toward a Radical Imagination of Law*, 93 N.Y.U. L. REV. 405 (2018); Amna A. Akbar, *An Abolitionist Horizon for (Police) Reform*, 108 CALIF. L. REV. 1781 (2020); Allegra M. McLeod, *Prison Abolition and Grounded Justice*, 62 UCLA L. REV. 1156 (2015); Jamelia Morgan, *Responding to Abolition Anxieties: A Roadmap for Legal Analysis, We Do This 'Til We Free Us*, 120 MICH. L. REV. 1199, 1200 (2022); Dorothy E. Roberts, *Abolition Constitutionalism*, 133 HARV. L. REV. 1, 5 (2019).

260. Morgan, *supra* note 259, at 1202.

261. Roberts, *supra* note 259, at 6–7.

262. *Id.* (quoting Professor Dylan Rodriguez, founding member of Critical Resistance).

263. *Id.* at 7–8.

264. Morgan, *supra* note 259, at 1200 (quoting Allegra M. McLeod, *Prison Abolition and Grounded Justice*, 62 UCLA L. REV. 1156, 1161 (2015)).

265. *Id.* at 1221 (citing Sameer M. Ashar, *Deep Critique and Democratic Lawyering in Clinical Practice*, 104 CALIF. L. REV. 201, 218 (2016)).

punishment and crime.[266] Morgan argues that it serves a larger purpose:

> [I]ncorporating abolitionist thinking into legal analysis enables greater possibilities for change and building power through law, but in a way that does not center legal rights, lawyers, and other institutional actors in legal institutions. Instead, it centers lived experiences and communities. Inspiring this thinking in law students and new lawyers is imperative.[267]

Professor Brendan Roediger's four approaches to practicing abolitionist law are (1) demystifying; (2) delegitimizing; (3) disempowering/dismantling; and (4) dreaming.[268] These are useful as frameworks for teaching abolitionist legal theory to law students. Professors should demystify the legal system or its various apparatuses, exploring what it actually does as opposed to what it is *supposed* to be doing. They can then delegitimize the system by explaining the underlying reasons the system works that way. Disempowering and dismantling would best be implemented in clinical education, where students can learn and work to collectively implement interventions that diminish suffering while weakening the legal system or apparatus.[269] The fourth approach, "dreaming," is not a throwaway but instead a critical piece of abolitionist theory. Professors should encourage their students to use their imagination and express their vision for a better future, rather than constantly cementing them in the realities of our current legal system.

Abolitionism aligns with other theoretical frameworks that have been gaining steam in the legal academy over the last decade. Movement lawyering is an offshoot of "public-interest" lawyering that is collaborative, community-centric, movement-oriented, and resistant to the idea that legal problems are best solved through the courts. Movement lawyering requires lawyers to reframe legal

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266. *Id.* at 1223.

267. *Id.*

268. Nicole Smith Futrell, *The Practice and Pedagogy of Carceral Abolition in A Criminal Defense Clinic*, 45 N.Y.U. REV. L. & SOC. CHANGE 159, 168 (2021) (citing Brendan Roediger, *Abolish Municipal Courts: A Response to Professor Natapoff*, 134 HARV. L. REV. F. 213, 215 (2021)).

269. Clinical education has long been used in similar ways. Some schools have developed clinics specific to movements and decarceration, such as NYU Law's Racial Justice and Abolition Clinic and UC Berkeley Law's Abolitionist Lawyering Project. *See Racial Justice and Abolition Clinic*, NYU L., https://www.law.nyu.edu/academics/clinics/RJAC [https://perma.cc/D2M3-TTYT]; *Berkeley Abolitionist Lawyering Project*, UC BERKELEY L., https://www.law.berkeley.edu/experiential/pro-bono-program/slps/inactive-student-initiated-legal-services-projects-slps/berkeley-abolitionist-lawyering-project/ [https://perma.cc/58PF-6CBV].

practice as an opportunity to work in solidarity with community members struggling against "sociopolitical systems of oppression, not merely individuals with legal problems."[270] Rather than prioritizing "fidelity to law,"[271] movement lawyering centers a "fidelity to community,"[272] which rejects the idea that the legal system is imbued with moral value that precludes the necessity of lawyers to "consider ordinary morality."[273] Gerald Lopez describes movement lawyering as a departure from the traditional approaches that "filter the experiences of subordinated clients through dominant cultural narratives and political economic power structures."[274] Rather than focusing solely on rights, Lopez infuses "human dignity[] and moral agency" into legal discourse, emphasizing the autonomy and individual determination of the poor.[275] Movement lawyers work with social movements both in their professional capacity, challenging the laws at issue, and in their individual capacity, becoming involved in direct action and fundraising.[276] By committing to the community and grassroots social organizing, lawyers are held morally accountable to the injustices and inequality created and upheld by law.[277]

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270. Toussaint, *Legal Education*, *supra* note 20, at 68.

271. Theoretically, fidelity to law provides positive law with the legitimacy necessary to protect the rights and entitlements of citizens by elevating procedural fairness over the individual; this fosters democratic stability while maintaining the adversarial nature of the court. Toussaint, *Legal Education*, *supra* note 20, at 28. Toussaint explains that "Wendel grounds the fidelity to law framing in the standard conception of *legal* ethics, which confines the lawyer's role to the ethical principles of: (1) partisanship; (2) neutrality; and (3) moral nonaccountability, ultimately affirming the amorality of law practice." *Id.* (emphasis added) (citing WENDEL, *supra* note 204, at 10).

272. Toussaint, *Legal Education*, *supra* note 20, at 30 (quoting Anthony V. Alfieri, *Educating Lawyers for Community*, WIS. L. REV. 115, 146–55 (2012)) ("Anthony Alfieri points toward a 'fidelity to community' and social justice movements that 'builds spiritual kinship,' 'permits lawyers to reflect emotionally and intellectually in situations of partisan conflict,' and 'enables lawyers to listen and communicate across boundaries of difference, power, and privilege.'").

273. *Id.* at 29.

274. *Id.* at 66–67 (quoting GERALD P. LOPEZ, REBELLIOUS LAWYERING: ONE CHICANO'S VISION OF PROGRESSIVE LAW PRACTICE 23 (1992)).

275. *Id.* at 67 (quoting Anthony V. Alfieri, *Rebellious Pedagogy and Practice*, 23 CLINICAL L. REV. 5, 10 (2016)).

276. *Id.* (citing Amna A. Akbar, Sameer Ashar & Jocelyn Simonson, *Movement Law*, 73 STAN. L. REV. 821, 850–51 (2021)).

277. *Id.* at 30.

Toussaint advocates for inclusion of movement lawyering in the legal curriculum.[278] He explains that law professors should explore the harms associated with "lawyer-centric" practices while teaching doctrine:[279]

> Both critical legal theories of law and movement law share two fundamental aims in U.S. law practice: (1) achieving political legitimacy, notwithstanding law's historic role in the sociopolitical construction of systemic domination and hierarchy; and (2) striving for justice, where the lawyer serves as a public citizen aspiring to dismantle vestiges of racial and economic oppression embedded in the law. Collectively, these insights point toward the need for a reformed legal pedagogy that will guide the strivings of law students toward new visions of American democracy.[280]

Providing law students with community-based lawyering strategies and justice-based critiques of legal practice decreases the likelihood of those students underestimating the probability of injustice in their future work as lawyers.[281] Toussaint believes that the inclusion of community organizers and political activists in clinical education particularly could help "law students develop a critical consciousness of the political implications of their professional lawyering identity" and "greater awareness of the scope of their calling as public citizens."[282] Some schools have already begun to expand their clinical experiential education programs to interact with social movements,[283] but there is little evidence of a shift in doctrinal criminal law courses.

An anti-carceral legal education can be achieved by examining alternative theoretical frameworks that redefine criminal law as a human endeavor, moving away from its portrayal as an infallible, self-sufficient system separate from all other law. By familiarizing students with abolitionist and community law theories, criminal legal education can incorporate critiques and challenges to the

278. *Id.* at 70 ("While many law students across the country engage in social movements and law reform efforts through public interest clinics and student-led organizations, some law students graduate without ever meddling in political questions of power and resource allocation that are generally deemed outside the realm of legal education.").

279. *Id.* at 68.

280. *Id.* at 57 (citations omitted).

281. *Id.* at 68 (relying on psychologists Amos Tversky and Daniel Kahneman's definition of the "availability heuristic" which impacts a person's estimation of the probability of an event happening based on how easily it comes to mind).

282. *Id.*

283. *Id.*

penal bureaucracy and hierarchy, encouraging students to understand their role in the carceral state.

Conclusion

In light of the current political and legal climate in the United States, this Conclusion will restate the underlying arguments of the piece with even greater urgency. First, law schools are failing to meet their duty to the public by miseducating future lawyers to disastrous effect. The United States has led the world in prison, policing, and surveillance technology for much of its history, which is reflected in the way the carceral state—and particularly the criminal legal system—has developed and expanded to subsume large portions of American life. Mass incarceration began to capture the attention of the public twenty-five years ago, but it still receives very little attention from the legal academy. Meanwhile, law schools ingrain students with the necessary pathologies to uphold a brutal, excessive system of punishment and control by proscribing procedures and naming them as evidence, even guarantees, of justice, and warping students' sense of morality to comport with the legal profession. The legal academy *must* change tack and reorient legal education away from operating on behalf of, or at the behest of, the executive administration, big business, and the academy itself, and instead recommit itself to advocating for the public and defending the health of this nation's legal institutions.

Second, this Note argues that the way forward for legal education is by incorporating abolitionist and movement lawyering strategies in legal pedagogy. Both abolitionism and movement lawyering have theoretical and practical components that center humanity and community. Incorporating these approaches to criminal legal education is particularly important, as they can provide the necessary framework to critique and challenge hyper-carcerality and educate future penal bureaucrats on their role in the carceral state. While originally this Note called for teaching students to challenge injustices that flow from the status quo, it is apparent that there is a new vision for the nation being forcibly implemented by the current administration that inevitably requires more from all of us. Now more than ever, students need to feel empowered to challenge injustice perpetuated by powerful institutions.

While these recommendations are made in earnest, shouted upwards from the depths of educational despair, they are also made with the full awareness that they will not likely be heeded—or even

heard—by the decision-makers within the legal academy. So, instead, this Note is dedicated to the many law students around the country that are struggling to comport their worldview, ethics, or general sense of humanity with the lessons being taught (and not taught) within the four imposing walls of their school. The chasm between regular morality and the synthetic morality of legalism has widened drastically over the two years spent developing this Note, so our numbers are growing. As the executive branch of the United States barrels through our legal system's procedural guardrails, law students watch as powerful lawyers provide "legal" cover for the unconstitutional (and otherwise repugnant) actions of this administration in a manner so dishonorable, it would put Nixon's lawyers to shame. While law students find themselves in the crosshairs of the carceral state for exhibiting the exact qualities that were considered archetypical of the great American lawyer, that spirit of citizenship and commitment to common welfare, minority rights, and the law, they stand without the protection of the institutions that they've poured their time, money, and talent into. The disorientation is severe.

In *Teaching Law*, West explained that the moral value of legalism is contingent upon the moral value of the legal system in which it is ingrained—or lack thereof.[284] Under legalism, students are taught to prioritize individual rights, but individual rights are under attack in new and creative ways.[285] The purported autonomy of the law has been drawn into question by continuous instances of executive overreach.[286] Particularly in the realm of "crimmigration," it is increasingly clear that legalism's wholesale reliance on procedural protections is inapt and cannot stand in as a proxy for justice.[287] So, what conclusions are we law students meant to draw about the morality of our legal system? Perhaps our own.

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284. WEST, *supra* note 93, at 64.

285. *Cf. id.* at 67.

286. *Id.*

287. *Id.* "Crimmigration" refers to the increasing overlap between criminal and immigration law, immigration enforcement resembling criminal law enforcement, and immigration proceedings assuming some features of criminal procedure. *See* Juliet Stumpf, *The Crimmigration Crisis: Immigrants, Crime, and Sovereign Power*, 56 AM. U. L. REV. 367, 381 (2006).