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# From Philly to Fayetteville: Reflections on Teaching Criminal Law in the First Year

Brian Gallini

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I began my foray into the academic world in the fall of 2006 at Temple University's Beasley School of Law. Although the transition into academia was a more challenging one than I anticipated (who else gets tired of hearing "well, at least you've got your summers off"?), I found the exercise simultaneously strenuous, exhausting, and ultimately rewarding. After two years at Temple, however, my full transition into academia was hardly fully complete.

In the spring of 2008, I excitedly concluded the nauseating law teaching hiring process[1] by accepting a tenure-track offer from the University of Arkansas-Fayetteville. Other than the obvious relief of ending the hiring process,[2] I was elated to receive a course package that included all criminal courses, including first-year criminal law. The prospect of teaching criminal law in the first year raised numerous questions, like the following: (1) how many credits does the course receive; (2) what should I include in the syllabus; (3) how much of what is in the syllabus must I cover; (4) even if the students forget the many nuances of the course, what do I want them to take away; and the obvious coming from an easterner like me…where exactly is Fayetteville?

In this essay, I humbly offer some thoughts – from the "newbie's" standpoint – for your consideration in response to each of these

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[1] By the way, has anyone ever come up with a worse way to go about hiring? Let's be candid: who decided it would be a good idea to have every candidate interested in law teaching descend once a year on a single poorly laid out hotel for a three-day "conference" during which candidates must engage in awkward thirty-minute preliminary interviews with panels of faculty from each interested school? Perhaps the better question is how that person got every law school in the nation to respond by saying something like, "yeah, that sounds like a process that will simultaneously be relaxing and lead to the hiring of collegial and productive faculty without any sense of regret."

[2] My anecdotal research reflects that only about 1.5% of lawyers teach and only about 0.7% have tenure track positions. Richard E. Redding, *"Where Did You Go to Law School?" Gatekeeping for the Professoriate and its Implications for Legal Education*, 53 J. LEGAL EDUC. 594, 595 (2003).

questions. I conclude with some limited comments (reminders?) directed gently to my senior colleagues about teaching this generation of first-year law students.

*Course Credit*

Students at the University of Arkansas-Fayetteville complete the Criminal Law course in the first semester of their first year and earn three credits for doing so. This, as I understand it, is the norm. The better question raised by this portion of the essay is whether the course should actually receive four credits. Indeed, perhaps the minority number of law schools that award four credits to students for completing the course have it right.[3] Unlike some critics who view teaching criminal law as irrelevant at worst and unimportant at best,[4] I tend to view the criminal curriculum as evolving and socially relevant. Let me briefly address only the criminal law professors who teach a three-credit criminal law course: how many of you have covered the death penalty in any depth? Do any of you include a unit at the end of the course (or anywhere) briefly sensitizing students to your state's criminal

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[3] *See* Florida State University College of Law Criminal Course Description, http://www.law.fsu.edu/academic_programs/curriculum/CriminalLaw.html (last visited Feb. 23, 2009) ; Cornell University First Year Courses, http://www.lawschool.cornell.edu/admissions/degrees/jd/1l.cfm (last visited Feb. 23, 2009).

[4] *See generally* Douglas Husak, *Is the Criminal Law Important*?, 1 OHIO ST. J. OF CRIM. L. 261 (2003). Professor Husak contends that the criminal law is unimportant for essentially two reasons. First, Husak argues, even knowledgeable professors of criminal law cannot predict the fate of criminal defendants because the "real" criminal law "is in the hands of police and prosecutors." *Id.* at 266. Indeed, Husak continues, "[police and prosecutors] are constrained by almost nothing in performing their jobs. So what *really* happens does not much depend on the content of substantive criminal law. The criminal law we teach and theorize about turns out not to be very important." *Id.* The easy response to that argument, however, is that both prosecutors and police must *learn* the criminal law before being capable of performing their jobs. To the extent that Husak laments the lack of supervisory authority over police and prosecutors, that seems more like a generic observation about the problem of unchecked discretion. That complaint is more properly directed to the criminal justice system as a whole, rather than substantive criminal law specifically.

Husak's second fundamental contention is that criminal statutes are irrelevant given their sheer volume. *Id.* at 267-68. In other words, Husak suggests, there are *so many* statutes in existence that any of us can violate *some* law merely by going about our ordinary lives. *Id.* at 268. But, does that argument actually suggest the *increased* importance of a criminal law course? After all, if so few are aware of statutes that regulate or govern their conduct, it seems that more education about substantive criminal law is the answer.

code? How many cover embezzlement? How many even have time to get to defenses? Personally, I answered those questions "no", "no", "no", and "no time".

At a more fundamental level, I also think the criminal law finds a way to spill into almost every other aspect of our profession. How many large law firms that have securities regulation/litigation practices do not have a corresponding white-collar criminal defense group? I would ask the same question for tax, antitrust, and real estate practice groups. I raise those questions to suggest the obvious: the line between non-criminal and criminal behavior is often tenuous at best. Because of that, many corporate clients spend an inordinate amount of money to, from a preventative standpoint, be sure their proposed conduct is not criminal.

I raise the points mentioned in the prior two paragraphs to suggest the need to dedicate more time to the criminal law as a course.[5] Given the self-evident nature of my observations about course credit, I cannot help but wonder if the "traditional" criminal law course is just a classic example of law schools' apathy toward change. In other words, the familiar "that's just the way we've always done it" rationale seems to linger in the background.

*Syllabus Inclusion*

Having just completed my proverbial first time around the track teaching criminal law, I feel somewhat uniquely qualified to address what to include in a criminal law syllabus. Well, perhaps the truth is that I feel qualified to give you my thoughts about what I included in *my* syllabus.

Let me say at the outset, though, that no discussion of syllabus inclusion would be complete without first mentioning the importance of casebook selection. I will make no attempt to discuss, analyze, or even suggest an "appropriate" casebook. Instead, I will only generally observe that far too many criminal casebooks are, in my opinion, outdated and confusing.[6] As to the

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[5] *Accord* Markus Dirk Dubber, *Criminal Law: Reforming American Penal Law*, 90 J. CRIM. L. & CRIMINOLOGY 49, 53 (1999) ("The teaching of substantive criminal law therefore should be extended beyond a single semester of the first year.").

[6] To be fair, most will recognize that my observations are not limited to criminal law casebooks. *See* Matthew T. Bodie, *The Future of the Casebook: An Argument for an Open-Source Approach*, 57 J. LEGAL EDUC. 10, 14 (2007) ("Because [professors'] notion of the proper course materials is likely not to

first point, today's students seem uninterested in dedicating weeks of class – or even *a* class – to the finer points of retributive or utilitarian theory. Nor do they appear interested in discussing eighteenth-century cases from common law courts.[7] As a result, they are even less interested in doing the reading to prepare for such discussions. As to the second point, students find the vast majority of casebooks so confusing that they feel obligated to spend, in some cases, hundreds of dollars on supplementary materials. To remedy these two problems, let me humbly suggest a few general rules in the paragraphs that follow to criminal casebook authors everywhere.

First, start including more *helpful* material to introduce a topic/chapter. A law review article raising more questions than answers does not count. Instead, how about a clear-cut and concise series of paragraphs/pages that, by way of preview, explain the law and sensitize students to what legal issues are fairly raised in the pages that follow. I have never understood, either as a student or now as a professor, why more casebooks do not do this; are we professors afraid that the students will actually *learn* the material if we tell them what they should know?

Second, excepting Supreme Court cases, restrict inclusion of decisions more than ten years old as main cases. Surely there is a more recent case than 1875 to discuss mistake of fact.[8] Likewise, there must be something more relevant to this century than *Martin v. State*[9] to teach the voluntary act requirement. And, let's be clear, if there is no more recent authority, then we should not be

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match perfectly with that of the authors, most professors feel the need to 'edit' the casebook by leaving out some materials and adding others.").

[7] On this point, I cannot blame my students. As I prepare a course, I often use my own boredom as a proxy for assigning the materials. In other words, if the material provided by the casebook bores *me*, I can confidently conclude that I have virtually no prayer of engaging my students in the material. Particularly in the context of foundational common law cases, who can blame the students for being bored both by the terminology and facts found in these cases? As to the first point, how often do modern courts use the terms "prosecutrix"? Or, how about "misprison of felony"? Pope v. State, 396 A.2d 1054 (1979).

As to the second point, when was the last time you read an invigorating case about a sailor stealing rum? Regina v. Faulkner, 13 Cox. Crim. Cas. 550 (1877). Then again, how engaging can a set of facts be when they verbosely center on a defendant who rips a gas meter from a wall? Regina v. Cunninghum, 2 Q.B. 396 (Court of Criminal Appeal 1957).

[8] Regina v. Prince, L.R. 2 Cr. Cas. Res. 154 (1875).

[9] 17 So. 2d 427 (Ala. Ct. of App. 1944).

teaching it. My logic should presumably tell us something about the modern relevance of legality, various common law crimes, or the so-called "moral wrong" principle.[10] Perhaps I'm oversimplifying or picking unnecessarily on specific doctrines, but think more generally about reading cases from the students' standpoint: "how relevant can this topic be if the *best example* of this doctrine comes from a case more than a decade old?" Sure, there is value to understanding, for example, how the common law impacts the many facets of the criminal law, but I am not persuaded that first-semester first-year law students understand or even need that "value."

Third, do not include more than roughly five "notes and questions" after the main case. I have countless times encountered some version of the following scenario: a two to three page main case followed by a double-digit number of "notes and questions" spread across five to six pages. Although a few notes are no doubt necessary to explain modifications, updates, or nuances in the law that are omitted from – or unarticulated in – the main case, the use of more than around five notes suggests the need to select a different main case.

Fourth, as to the *content* of notes following the case, please include more hypotheticals/problems and omit the sets of seemingly random questions (e.g., "what result if the defendant had a peg-leg?") that can correctly be "answered" only by the casebook author (as the Teacher's Manual so often reveals). After all, criminal law exams will not ask the students to recall the facts, procedural history, holding, or reasoning of a particular case.

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[10] This past fall, my criminal law students read Garnett v. State, 632 A.2d 797 (Md. 1993), as an example of the moral wrong principle. The defendant in *Garnett* was a twenty-year-old man with an I.Q. of 52 who read on a third-grade level, performed math on a fifth-grade level, and interacted with others socially at the level of a child aged eleven or twelve. *Id*. at 574. Mr. Garnett met Erica Frazier, then aged thirteen, in November or December of 1990. *Id.* at 575. Approximately four months later, Mr. Garnett knocked on the door of Erica's home seeking a ride home. *Id.* Erica opened her bedroom window and encouraged Mr. Garnett to climb up. *Id*. He did and they had intercourse. *Id*. The Court of Appeals of Maryland justified affirming Mr. Garnett's conviction for statutory rape, at least in part, on the notion that he deserved punishment for "having . . . violated moral teachings that prohibit sex outside of marriage." *Id.* at 580. Several of my students mused at the prospect of courts utilizing similar rationale in a more modern case. I have no evidence, anecdotal or otherwise, to support the notion that courts have uniformly abandoned the rationale of the moral wrong principle. I nevertheless share my students' skepticism that it remains a persuasive rationale for strictly enforcing statutory rape laws.

Instead, most of our exams provide students with a set of facts and ask them to analyze the legal implications of those facts. Accordingly, it seems to make sense to, after students learn the legal principle embodied in the main case, test their ability to apply that principle to differing sets of facts.[11]

Finally, eliminate all law review articles from first-year criminal casebooks, particularly those inserted to introduce a new block of material. Now, some may respond that one of the purposes of the criminal course is to expose students to the importance of academic debate and ambiguity in the law. To that, I would say "fair enough." But, inserting law review articles in a first-year criminal casebook seems to put the cart before the horse. In other words, students do not possess, at this early stage, a command of the law that would enable them to thoughtfully consider proposals for reform or adjustment. For good reason, many first-semester first-year students struggle with the daily two-part task of (1) grasping the black-letter principle represented by the case du jour, and (2) understanding how that case/principle fits more broadly into the course. I hasten to add that clearer and more focused introductory readings would allow for in-class discussion to grow more organically into answering many of the same questions otherwise raised by the academic pieces included in so many criminal casebooks.

Let me offer a few more direct points about syllabus inclusion. First, (some more senior professors may want to cover their ears before reading the heresy in this sentence) if you teach criminal law in the first semester, consider including in your syllabus some limited material throughout the semester that exposes students to your views on how to be successful in law school. Consider, for example, spending some time throughout the semester on topics like case briefing,[12] note taking, outline drafting, how to study for a law school exam, and how to write a law school exam.[13]

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[11] *See* Craig Anthony, *Casebook Review: How Do Law Students Really Learn? Problem-Solving, Modern Pragmatism, and Property Law*, 22 SEATTLE U. L. REV. 891, 902 (1999) ("[W]ith the problem method, there is not only less disjunction between legal education and the legal profession, but also less disjunction between classroom education and assessment of students' learning, than there is with the case method.").

[12] If I have persuaded any of you to spend a few minutes at the beginning of the semester introducing the concept of how to brief a case *in your class*, I commend to you the case of *Bradshaw v. Unity Marine Corp., Inc*., 147 F. Supp. 2d 668 (S.D. Tex. 2001). This personal injury case involves plaintiff's attempt to sue Defendant-Phillips Petroleum for unspecified injuries. *Id.* at 669. The remarkable aspect of the case is not the facts, but rather the colorful

Before you scoff at my suggestion (and I know many of you will), answer me honestly: how many exams from your most recent criminal law class did you enjoy reading? Out of the sixty, seventy, eighty or one-hundred first-year exams you read during your precious holiday break, how many of them left you nodding your head saying things like, "now that's exactly what I was hoping to see." Five? Ten? Fifteen? Now ask yourself whether you would like to see more of those exams. I would hope everyone answered "of course."

The question therefore becomes how best to see an across-the-board improvement in the quality of exams. I contend that it comes from us. Not only should we sensitize students to *exactly* what is expected of them at the end of the semester – legally analyzing a complicated set of facts in a limited period of time – it is incumbent upon us to show them *how* to accomplish that task. After all, how else will students know how to write or study for your exam unless you tell them? Taking a few minutes at

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language the court uses to insult the litigants. In an effort to get you to read the case, let me tantalize you with some of the opinion's early remarks:

> Before proceeding further, the Court notes that this case involves two extremely likable lawyers, who have together delivered some of the most amateurish pleadings ever to cross the hallowed causeway into Galveston, an effort which leads the Court to surmise but one plausible explanation. Both attorneys have obviously entered into a secret pact--complete with hats, handshakes and cryptic words--to draft their pleadings entirely in crayon on the back sides of gravy-stained paper place mats, in the hope that the Court would be so charmed by their child-like efforts that their utter dearth of legal authorities in their briefing would go unnoticed. Whatever actually occurred, the Court is now faced with the daunting task of deciphering their submissions. With Big Chief tablet readied, thick black pencil in hand, and a devil-may-care laugh in the face of death, life on the razor's edge sense of exhilaration, the Court begins.

*Id*. at 670. The foregoing comments are merely illustrative (it was hard to choose just one block quote). Although this case obviously has nothing to do with criminal law, my experience with it has been uniformly positive. I have found the case is useful not only to break the ice, but also to get students to identify salient facts, the holding, and pertinent reasoning.

[13] In my opinion, it is also never too early to sensitize students to the potential problems with, and pitfalls of, our wonderful profession. You might consider Professor Schiltz's excellent article as a starting point to do so. Partrick Schilz, *Choices Facing Young Lawyers: On Being a Happy, Healthy, and Ethical Member of an Unhappy, Unhealthy, and Unethical Profession*, 52 VAND. L. REV. 871 (1999).

appropriate points in the semester to digress from routine case discussions in order to address how the concept you just covered applies to their immediate future (read: on the exam!) will break up the monotony, thereby energizing and focusing your next discussion.

Second, at least at the outset, I think any syllabus should focus broadly on the criminal law by, for example, discussing the elements of a crime, defenses, or complicity. Spending time on specific offenses at the expense of more generally applicable topics risks mistaking first-year students for seasoned practitioners. More importantly, if the students understand what the elements of an offense are, then they are ostensibly armed to apply those elements to any specific offense they may subsequently encounter during the semester or beyond. To my mind, the procession from broad to narrow topical coverage makes far more sense than covering a series of individual offenses.

For my part, I begin with a series of broad topics at the outset of the semester like the role of the jury, principles of punishment, and statutory interpretation. With at least something of a foundation in the course, I thereafter transition into a detailed discussion of each element of a crime before covering specific crimes. As a result, before turning our attention to any substantive offense, we cover actus reus, mens rea, social harm, actual cause, and proximate cause. From there, I turn the class's attention to the homicide materials, followed by rape, attempt liability, conspiracy liability, accomplice liability, and (time permitting) general defenses to crime.

Third, you will no doubt notice my inclusion of "rape" in the course materials and I cannot help but pause briefly in this essay to suggest that teaching the law of rape should be mandatory in a first-year criminal course. Although perhaps not as controversial a course inclusion as it once was,[14] the law of rape no doubt remains – for obvious reasons – a sensitive subject.[15] From my limited

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[14] *Compare, e.g.*, Joshua Dressler, *Criminal Law, Moral Theory, and Feminism: Some Reflections on the Subject and on the Fun (and Value) of Courting Controversy*, 48 ST. LOUIS L.J. 1143, 1161 n.64 (2004) ("Professor Tomkovicz recently informed me that notwithstanding his earlier doubts, he continues to teach rape law . . . ."), *with* James J. Tomkovicz, *On Teaching Rape: Reasons, Risks and Rewards*, 102 YALE L.J. 481, 506 (1992) ("At this point I am not certain that the law of rape will have a place in my future criminal law courses.").

[15] Although I recount one of my own "war stories" in more detail below, Professor Dressler tells a story of a rape discussion in his class that

experience, though, teaching rape law impresses on students like no other topic in the course that criminal lawyers confront challenging moral questions on a daily basis. Exposing students at this early stage in their law school careers to the difficulty of, for example, serving as court-appointed counsel to a defendant accused of forcible rape strikes me as an invaluable digression into the practical implications of practicing criminal law.

Of course, if they have not figured it out by this point in the class, the manner in which courts massage the language in forcible rape statutes reminds students of the value of learning basic statutory interpretation techniques.[16] Of course, other rape cases demonstrate to students that the presence of a distinct social climate may dictate a court's decision regardless of how refined and persuasive a litigant's statutory interpretation skills might be.[17]

The challenging nature of the topic of rape itself creates a charged atmosphere in the classroom that other topics are simply unable to replicate. The resulting discussions, although sometimes unpredictable, are uniformly rewarding. Indeed, students are forced to think hard about, for example, whether society should treat the violent serial rapist differently from the acquaintance rapist. If the resulting harm to the victim is the same – forcible non-consensual sexual intercourse – why treat the offenders differently? If the criminal law should indeed treat these offenders differently, should it do so at the guilt or sentencing phase? Perhaps the answers strike you as obvious, but you will no doubt learn *something* if you ask the class.

Finally, I will close this section by arguing that we should all take a hard look at our syllabi in an effort to reduce – not eliminate –

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resulted in a fist-fight. Dressler, *supra* note 14, at 1161. Evidently, the fight broke out between two male students after a class during which one student made a comment about the other's sister who had once been raped. *Id*. at 1161 n.66. Although Professor Dressler did not consider the inciting student's comment "extreme," he suspected that student's personality had just as much to do with the fight as the comment itself. *Id*. Significantly, Professor Dressler's story reminds us that the genesis of unpredictability in the classroom often comes not from the topic du jour, but rather from class dynamics *outside* the classroom.

[16] *See generally* In re M.T.S., 609 A.2d 1266 (N.J. 1992) (interpreting the statutory term "force" to include, without more, the act of intercourse).

[17] *See generally* Rusk v. State, 406 A.2d 624 (Md. Ct. Spec. App. 1979) (concluding that defendant's "light choking" of the victim was insufficient to constitute the "force" needed to sustain defendant's forcible rape conviction), *rev'd* State v. Rusk, 424 A.2d 720 (Md. 1981).

the amount of attention the common law typically receives in a criminal law course. On the one hand, students undoubtedly should be made aware throughout the course of the historic importance of the common law. Yet, strictly from a practical standpoint, I am skeptical that any court would ask an attorney to distinguish current precedent from the common law.

A more pressing classroom concern arises when students start to ask whether they need to keep track of three different jurisdictional approaches: (1) the common law, (2) the Model Penal Code, and (3) more modern statutory reforms. I cannot not help but question the value of dedicating pieces of several classes to understanding the common law just to later explain that it is rarely the law in any jurisdiction anymore and now simply provides the foundation for many criminal statutes. I think the practical-minded modern student is apt to think, "well, if it's not the law anywhere anymore, why did we spend so much time in class talking about it?"

*What should we cover from the syllabus?*

The debate of what a professor should (must?) cover from a syllabus is one that presumably can be heard throughout the hallowed hallways of law schools nationwide. Does the syllabus create a contract between professor and student such that the professor is obligated to cover all topics listed, much like the student is bound to follow all course policies?[18] Or, is it correct that the syllabus is no more than an aspirational document designed to provide the students with a structural outline of the course? Then again, perhaps still others are right that we professors really owe the students nothing and, as a result, no syllabus is necessary; we need only provide course readings on a week-to-week basis. Regardless of who is "right", all of these generic questions beg the more specific inquiry into whether the answer changes when one teaches Criminal Law. Let's take each question in turn.

I remember well as a law student having the occasional professor who, at the end of the semester, would double the reading load and add classes just to complete the coverage of every topic on the

[18] *See* Paula Wasley, *The Syllabus Becomes a Repository of Legalese: As Dos and Don'ts Get Added, Some Professors Cry 'Enough'*, http://chronicle.com/free/v54/i27/27a00102.htm ("[T]he notion of the syllabus as a contract has grown ever more literal, down to a proliferation of fine print and demands by some professors that students must sign and attest that they have read and understood.") (last visited Feb. 23, 2009).

syllabus. As a student, I resented those professors as I pored over fifty plus pages of materials in an effort to prepare for hastily taught final classes. I wonder now as a professor what prompts my colleagues to complain, beginning about mid-way through the semester, "I'm so far behind this semester" or "I'm going to have to add some make-up classes to get caught up." Behind according to . . .? Surely it is incorrect that we professors owe a contractual duty to cover the totality of the syllabus, even at the expense of the students' ability to learn the material.

For that reason, I prefer the second approach: include all topics most relevant to the course in the syllabus but be clear with the students at the outset of class that it may not be possible to cover all listed topics. It must be the case that in-depth coverage of each topic covered is preferable to some minimal coverage of all topics listed. My suggestion, of course, makes a few lofty assumptions about us professors: (1) broadly speaking, we genuinely want our students to learn the material; (2) more specifically, the only reason it may take longer than it should to cover a particular topic is that we are responding to a perceived difficulty the class is having with that topic; and (3) we are *teaching* the material provided on our syllabus in an organized fashion.

But, is there any merit to the third approach – offering students the readings on a weekly basis or releasing the syllabus in chunks? I think not. Most students, especially law students, crave organization and a sense of direction, and only a well-organized syllabus can provide that. Providing the readings on a weekly basis, releasing a syllabus in chunks, and/or issuing different "versions" of a syllabus all detract from the certainty that busy, anxious, and sometimes overwhelmed first-year law students no doubt deserve. It also seems reasonable for a student to view a professor's use of these approaches as a poor reflection of that professor's organization.

How do these observations apply to teaching the criminal law? In other words, do these thoughts apply any more strongly to the criminal law as a subject? I'm not sure. On the one hand, I would argue that Criminal Law as a course is one of the more abstract courses students will encounter in their first year. For that reason, perhaps the need for a well-organized guiding syllabus is amplified in the context of criminal law. Yet, it seems eminently reasonable – without regard to the amorphous nature of the subject material – for students to demand clarity and organization from their professors at all stages and most particularly from the course materials. I guess the true answer to my question about what we as

professors should cover from the syllabus boils down to a strategic choice of what core points we want students to take away from our classes.

*What's the point?*

The end of the foregoing section begs the question: what is, or should be, the point of teaching criminal law? Does the criminal law course help prepare students for criminal practice, or should we even care about that in a first-year class? Alternatively, is it appropriate to "teach to the bar"?

I am not persuaded that, taught as a first-year class, the Criminal Law course can reasonably be expected to help prepare students for life as a criminal practitioner. To be sure, some basic knowledge in the course cannot hurt a student's quest to become a criminal lawyer. But, I think most graduates would agree that the first year is ultimately such a blur of stress, emotion, and anxiety that it is difficult for them to recall anything of substance later in life. This seems a fair response. A new environment, perhaps a new city, and a new style of learning – to name but a few changes first-year students typically encounter – all come together in one perfect storm to make the transition into law school, by itself, a challenging endeavor.

Perhaps a more fundamental question, though, is why the Academy should even *be interested* in teaching the Criminal Law course to help prepare students for life as criminal lawyers. After all, what's the point of the first-year curriculum anyway? From a doctrinal course standpoint, surely it is not mastery of all subjects taught in the first year; rather, we are hoping that students learn (1) how to read and what to look for in a judicial opinion, (2) some basic understanding of statutory interpretation, (3) how to think on their feet, (4) how to assert, defend, and consider competing positions,[19] and (5) how the creation/implementation of the law interacts at every stage with societal, historical, or even political norms. All of these things are designed to – all together now – get students to "think like a lawyer." Subjects taught in the first year seem more properly understood as vehicles to help achieve these lofty goals.

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[19] Michael Vitiello, *Professor Kingsfield: The Most Misunderstood Character in Literature*, 33 HOFSTRA L. REV. 955, 997 (2005) ("The most important feature of a legal education is that it challenges our views and forces us to examine them with care.").

We have yet to identify the goal of teaching criminal law specifically. Maybe, as I suggested earlier, it is to help prepare students for the bar exam. This too seems an unrealistic and undesirable goal. At the outset, we should attempt to define what it means to "teach to the bar." After all, law school curriculum decisions to some extent already create, as an institutional priority, the goal of helping students pass the bar.[20] The Arkansas bar, for example, tests *inter alia* the following subjects: Contracts/Sales, Criminal Law/Procedure, Evidence, Real Property, and Torts. True to form, the first-year curriculum at the University of Arkansas School of Law requires that students take Criminal Law, Property, Civil Procedure, and Torts.[21] I think we can agree that some version of this curricular approach exists in every law school.

Perhaps, then, one correct approach to a first-year criminal course in Arkansas is to construct the class from bar exams past. Indeed, we can imagine structuring a course in this manner by (1) sensitizing students to the existence of the bar exam; (2) educating them about the differences between the Multi-State portion of the exam and the state specific essay questions; (3) organizing the course materials around the criminal law topics tested most frequently by the State and MBE (even the outdated topics!); and (4) focusing class discussions on review questions and test strategies. I will forego making the obvious comment about how the final exam might look.

Before making a few specific observations about why this approach is problematic, let's first put the bar exam in context. Admittedly, the exam is at once stressful, overwhelming, and intimidating. But, at bottom, the exam is a bare minimum competency licensing examination. It strikes me that, as educators, we should not concern ourselves with the *minimums*. Rather, it seems wholly reasonable and worthwhile for the academy to solely concern itself with fostering better ways of creating skill-laden, thoughtful, and highly ethical attorneys. If law schools are successful in consistently graduating students with these attributes, then surely the bar exam will take care of itself.

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[20] The ABA contributes to a significant extent to this institutional goal. Program of Legal Education § 301(a) (2009) ("A law school shall maintain an educational program that prepares its students for admission to the bar . . . ."), http://www.abanet.org/legaled/standards/20082009StandardsWebContent/Chapter%203.pdf.

[21] Other bar courses are required during students' second and third years. University of Arkansas School of Law Catalog of Studies 2008-2009 8-9, http://law.uark.edu/documents/Catalog_of_Studies_2008-09_(WEB).pdf.

Moreover, for first-year students, the bar exam is at least two years away and therefore hardly on the forefront of their minds. For good reason, students' attention is more properly focused on digesting their first-year experiences and applying those experiences more broadly to the balance of their law school careers. After all, students must *graduate* before taking the bar exam becomes an option.

Finally, any effort to "teach to the bar" presumes that all students will take the bar, and all students will take *the same* bar. Given the frequent refrain (from non-lawyers that is) that "there's so much you can do with a law degree," it bears noting that many students who attend and graduate from law school may never seek to gain admission to practice law in any jurisdiction.

A few more problems with this approach – specific to the criminal law course – leap off the page. First, what a boring way to approach the most interesting subject students will learn in their first year. Yes, I am biased, but catering exclusively to the bar exam in this manner ignores penal theory, whether a particular case or statute actually makes sense, practical pointers, the development of statutory interpretation skills, and the prospect of open and honest debate about controversial topics. In essence, the bar exam model takes the fun out of the course and replaces it with, well, barbri.

Second, assuming the criminal course has any relevance to becoming a criminal practitioner, the bar exam lasts for – at most – three days, whereas the practice of law lasts for a career. It seems, then, that viewed in this light, the criminal law course can hardly be expected to produce high quality criminal practitioners if it is pre-occupied more broadly with helping students become licensed attorneys.

Finally, "[t]he bar reinforces teaching that the law is fixed, neutral, and natural, rather than contingent, mutable, and often deeply flawed."[22] In a course where the *correct answer* to a student's generalized, but thoughtful, curiosity so often is "it depends," nowhere does this articulate quote resonate more than in the context of the criminal law.[23] Yet, the MBE in particular, by

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[22] Joan Howarth, *Legal Education for a Diverse World: Teaching in the Shadow of the Bar*, 31 U.S.F. L. REV. 927, 929 (1997).

[23] A friend of mine teaching criminal law at another law school recently remarked to me that he refuses to answer *any* student's questions until they

testing candidates using exclusively multiple-choice questions, wholly deemphasizes the need for thoughtful curiosity. Surely, then, it makes little sense to immediately expose students to an exam that demands a definitive answer one-hundred percent of the time. One overarching goal of any effective criminal law course must be emphasizing to students that identifying applicable doctrine is the beginning of the analysis rather than the end.

Criminal law, as a course, should more properly be understood to introduce students to general theories of punishment, general principles and elements of criminality, general theories of accountability, and general principles of defense.[24] Once that background is firmly engrained in the minds of students, these general principles can then be discussed through specific crimes or defenses. Along the way, students are of course tasked with reading numerous appellate cases. Each case, properly taught, should therefore invite meticulous discussion of the facts, procedures, issues, holdings, reasoning; what the cases stand for and how they might apply to other fact situations; and underlying policies and principles. The underlying but no doubt overarching thematic message to students throughout the semester should be clear: careful case reading, case analysis, and case briefing (note taking) are important not just in class, but in professional life.

Perhaps some version of the foregoing approach applies to all first-year doctrinal courses. But, the criminal course does have one unique attribute not fairly raised in the balance of the first-year curriculum: statutory interpretation. The value of inculcating students with the importance of developing statutory interpretation skills cannot be overstated. Many of the other first-year courses are so deeply mired in the common law that, by the time students make it to a the second year, the only exposure to statutory language they have had comes from the criminal course.[25] Small wonder, then, that students view reading the text of a statute with disdain when they reach their upper-level statute-laden courses (antitrust, secured transactions, corporations . . .). One wonders

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articulate a context and jurisdiction for their question. In addition to being a good idea, his remark reminds us how often the answer to a *substantive* criminal law question so often changes based simply on a change in jurisdiction.

[24] "General", in this context, means generally applicable to all crimes.

[25] I say that with the important caveat that the civil procedure course also at least preliminarily exposes students to the importance of reading rules carefully. I am, however, skeptical that students continue to develop needed statutory interpretation skills in the context of the federal rules or the well-settled language of venue, transfer, or subject-matter jurisdiction statutes.

how far that disdain reaches (raise your hand if you need a reference librarian to help you with legislative history research).

*Some final reminders*

Let me conclude by offering just a few generalized observations about teaching this generation of law students. First, an obvious point, but one I struggle to remain cognizant of – go *slow*, keeping in mind that perspective is everything. Think hard now, but remember sitting on the other side of the podium? Remember when you did not even know how the court system was organized? How about when you needed to keep a copy of Black's Law Dictionary next to you at all times just to navigate a judicial opinion? Even if your memory is hazy on these points (or if you exited the womb armed with this knowledge), I have learned that meaningfully acknowledging in class the challenges of first-year student life goes a long way in earning the trust of a classroom.

Second, expect the unexpected, particularly in the first semester. I will forever have tattooed on my memory my fall 2008 criminal law class's discussion of *State v. Alston*.[26] Briefly, in *Alston*, defendant successfully appealed his conviction for forcible rape, which arose from a particular sexual incident with his ex-girlfriend, with whom he had a sexual history both before and *after* the incident in question. Indeed, after the incident in question, when defendant learned that the victim had complained to the police about the circumstances of their earlier encounter, he approached the victim's apartment and gained entry after threatening to kick her door down. Once inside, defendant began kissing the victim and ultimately carried her into the bedroom. The court's opinion thereafter relayed the following about their post-incident relations: "He performed oral sex on her and she testified that she did not try to fight him off because she found she enjoyed it. The two stayed together until morning and had sexual intercourse several times that night."[27]

Seizing on the class's lively discussion about the controversial nature of the court's reversal of defendant's conviction, I pushed a little further, inquiring of the class whether even this post-incident intercourse could satisfy the elements of North Carolina's forcible rape statute. A hand immediately went up. "Yes, what do you think?" I asked, acknowledging the eager female student. "Well,

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[26] 312 S.E.2d 470 (N.C. 1984).

[27] *Id.* at 473.

the victim said she enjoyed the oral sex. That means, you know, that she was revved up. And you have to be pretty revved up for sex – you know, wet?" I would tell you how I responded, but I think I blacked out for a minute.

Finally, work to humanize the law school experience while balancing the need to hold students accountable. I have heard others describe this generation of students as the "entitled generation."[28] Although I am not willing to go that far in my assessment, I will concede that a healthy fraction of students have unrealistic expectations about either their place in the legal profession in terms of prestige/salary, or the ease with which they expect to succeed in law school.

A charitable explanation for this is that we professors simply misconstrue our students. On the subject of their future employment, perhaps they are simply bright-eyed and excited about being the next big thing, be it in private practice, non-profit, or government work. And, on the subject of law school work ethic, a part of me cannot help but point the finger inward. Perhaps, as I noted above, we professors have not taught the basics – how to take notes, draft an outline, or study for an exam – early enough for them to become culturally engrained.

Of course, a less charitable interpretation of modern student behavior is that this generation of students has, in fact, grown up in an environment that produces in them a sense of entitlement. Like so many things in the law (and in law school), the answer lies somewhere in the middle. Although I firmly believe that finding "the middle" is a personal and evolving process from professor to professor, I would argue that on the one hand we must be accessible to our students. By accessible, I mean being in your office during office hours and not getting antsy about returning to your scholarship when the student's questions run longer than five minutes. On the other hand, I would further argue that we need to hold our students accountable by, for example, calling on them when they are quite clearly elbow deep in instant messaging (e.g., they are laughing but you did not say anything funny) or

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[28] In fact, a recent study determined that students expected Bs simply because they attended class or completed the readings. Max Roosevelt, *Student Expectations Seen As Causing Grade Disputes*, N.Y. TIMES, Feb. 17, 2009, at A15 (noting that students' sense of entitlement "could be related to increased parental pressure, competition among peers and family members and a heightened sense of achievement anxiety").

penalizing the owner of a cell phone that rings in class.[29] I will save the attendance debate for another day, but suffice it to say that each of us should find a way to hold students accountable in some manner, keeping in mind that they will be representing clients in the not so distant future.

*Conclusion*

I thoroughly enjoyed my experience teaching first-year criminal law in the fall of 2008. After completing that semester, and reflecting on what else I *could* have focused on during those short months, I could not help but wonder (1) if my students had learned as much as I had hoped; (2) whether I had covered a sufficient amount of material; and (3) whether three credits is a sufficient allocation to the criminal law course. I hope my musings on these and related topics have, at a minimum, inspired a few of you to rethink portions of your syllabus, course organization, course coverage and, for extra credit, the prospect of thematically relaying to your students how they might enjoy success in law school both in your class and beyond.

[29] Although a touch off-topic, it seems that we, as an Academy, need to dispense with treating upper-level students differently from first-year students. Too many times I have heard fellow members of the academy make excuses for upper-level students who are unprepared in class; "they're interviewing," "it's the second semester," or "it's just that time of the semester" are a few that come to mind. It strikes me that the legal world is filled with bosses, clients, and judges who may not be so lenient on such basic issues.