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INTRODUCTION

Persons convicted of criminal offenses are strikingly absent from typical law school curricula. With the exception of sentencing courses and a few limited clinical offerings in capital punishment, law students have few opportunities to consider the fates of those upon whom the state has levied its most severe sanction—a criminal conviction.[1] Even those courses that purport to explain the myriad mechanisms by which the state administers criminal punishment rarely delve into considerations of the consequences of conviction.[2] And yet, while law students are pedagogically insulated from thinking seriously about the 2.3 million people currently incarcerated in this country—or the millions more who have a criminal conviction in their "background"—hordes of convicted persons continue to live under a cloud of scrutiny and proscription, and the troubling trends of mass conviction and mass incarceration in the United States remain largely unchecked and unexamined as a matter of law.

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[1] There are few exceptions: The clinical courses crafted by Anthony C. Thompson, at New York University School of Law and Sherrilyn Ifill and Michael Pinard, at the University of Maryland Francis King Carey School of Law are noteworthy, not only for the quality of their courses but also for their singularity in legal education; both clinics are taught by tenured faculty and Thompson's course was the first offender reentry clinic in the nation. In recent years, Herschella G. Conyers at the University of Chicago and Kenneth Streit at the University of Wisconsin have also implemented clinical offerings in offender reentry. In 2010, Rutgers School of Law – Camden established a Federal Prisoner Reentry Pro Bono Project in conjunction with the United States Office of Probation and the United States District Court for the District of New Jersey. Although the Pro Bono Project is a credit-bearing course, it is run by a non-tenure track Managing Director and is not a full clinical offering. Similarly structured projects are in operation at other law schools.

[2] *See* Sharon Dolovich, *Teaching Prison Law*, 62 J. LEGAL EDUC. 218, 218 (2012) ("In most American law schools, courses in criminal law focus on what might be called the 'front end' of the criminal justice process.); *see also id.* at 218 n.1 ("Even 'Bail to Jail' rarely gets all the way to jail.").

Scholars coined the term "mass incarceration" to denote the meteoric rise in rates of imprisonment in this country since the 1970s.[3] Between 1972 and 2000, for example, America's incarceration rate quintupled.[4] By 2010, the United States had 500 prisoners for every 100,000 residents.[5] In addition to the rising rates of incarceration, and the expansion of our prisons to accommodate this population, "citizens have become much more likely to experience other state interventions that are disciplinary in nature."[6] The origins and contours of this phenomenon, along with its concomitant effects, have been the subject of serious study.[7] In the legal academy, scholars have decried this expansive proliferation of criminal and civil sanctions in American law. Some authors have blamed America's addiction to incarceration as a method of social control on failed economic policies, neoliberalism, and inflammatory "tough-on-crime" political rhetoric while others have attributed the crisis to racial disparities in criminal law administration arising out of the failed "war on drugs."[8]

Given the range of possible explanations for the emergence of the American carceral state—and its implications for several areas of law, including, *inter alia*, constitutional law, administrative law, criminal law, sentencing, criminal procedure, civil procedure, legislation, employment law, civil rights, and immigration law—it is useful to consider seriously the treatment of this phenomenon in law school curricula. Since current rates of incarceration in the United States outpace the rates of every other democracy on the planet,[9] one would reasona-

[3] *See generally* MICHELLE ALEXANDER, THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS (2010).

[4] WILLIAM J. STUNTZ, THE COLLAPSE OF AMERICAN CRIMINAL JUSTICE 5 (2011).

[5] *See* PAUL GUERINO, PAIGE M. HARRISON, & WILLIAM J. SABOL, BUREAU OF JUSTICE STATISTICS, OFFICE OF JUSTICE PROGRAMS, U.S. DEP'T OF JUSTICE, PRISONERS IN 2010 1 (2011), *available at* http://www.bjs.gov/content/pub/pdf/p10.pdf ("The 2010 imprisonment rate for the nation was 500 sentenced prisoners per 100,000 U.S. residents, which is 1 in 200 residents.").

[6] Vesla M. Weaver & Amy E. Lerman, *Political Consequences of the Carceral State*, 104 AM. POL. SCI. REV. 817, 817 (2010).

[7] *See e.g.*, Richard D. Vogel, *Capitalism and Incarceration Revisited*, 55 MONTHLY REV. 38 (2003) (discussing "how much worse the prison problem has become" since his first publication on this topic in 1983, which looked at the "relationship between the capitalist economy and the prison system in America").

[8] *See generally* ALEXANDER, *supra* note 3.

[9] William Quigley, *Racism: The Crime in Criminal Justice*, 13 LOY. J. PUB. INT. L. 417, 423 (2012) ("Remember that the United States leads the world in putting

bly expect that criminal law and sentencing law casebooks would discuss this phenomenon and its effects in other aspects of civic life. One might also expect that these texts would take seriously the characterization of the "carceral state," "mass conviction," and "mass incarceration" as a *crisis*—an issue demanding immediate, imaginative attention. Yet no leading criminal law or sentencing casebook treats these issues with the seriousness that each deserves.

As more behaviors are classified as "crimes," more people are subject to the conditions of conviction and detention. People of color and the poor are overrepresented among this population,[10] leading to the implication that minority-group and class bias infects the criminal justice system. Notwithstanding that America's carceral crisis is widely considered the most critical civil rights and civil liberties issue of the present day, legal scholars have offered little guidance on its role in the law school curriculum.

This Article considers whether and how to incorporate mass conviction and incarceration into standard law school courses, and is intended to foster a conversation about this curricular silence. Part I presents the scope of the carceral crisis, including the statistical and societal consequences of incarceration in the United States. Part II argues that law schools and casebooks, even "prison law" texts, have turned convicted offenders into pedagogical "boogeymen," effectively hampering comprehensive ethical training for lawyers on these issues. This Part considers the stark example of California's current experiment with decarceration, and argues that a serious discussion about "realignment" policy ought to be in progress in the nation's law school classrooms, given both its promise and its pitfalls. Part III provides a model of how the carceral crisis can be incorporated into the law school curriculum, while Part IV illustrates how such inclusion can expand students' career prospects. The Article concludes with the emphasis that the foregoing subjects should be taught in law schools and

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our own people into jail and prison."); Adam Liptak, *Inmate Count In U.S. Dwarfs Other Nations*, N.Y. TIMES (Apr. 23, 2008) at A1 (noting that although "the United States has less than 5 percent of the world's population," "it has almost a quarter of the world's prisoners").

[10] *See, e.g.*, David B. Mustard, *Racial, Ethnic, and Gender Disparities in Sentencing: Evidence from the U.S. Federal Courts*, 44 J. L. & ECON. 285, 301 (2001) (showing that, among state prisoners in Georgia, offenders with annual incomes below $5,000 were sentenced to longer terms of incarceration than offenders with higher incomes).

that by doing so, the nation's carceral conditions might be both better understood and ameliorated.

I. THE SCOPE OF THE CARCERAL CRISIS

In the past thirty years, the U.S. criminal justice system experienced what the late Bill Stuntz termed "a punishment tsunami."[11] In 1980, 1.8 million people, or 1.1% of American adults were under correctional supervision (either in jail or prison, or on probation or parole); by 2009, that number had tripled.[12] At the end of 2011, there were nearly 7 million offenders under adult correctional supervision in the United States, or approximately 1 in every 50 adults in the country.[13] Of these, 1,598,780 people were incarcerated in state and federal prisons; over 760,000 more languished in local jails.[14] Another 400,000 people were detained in Department of Homeland Security Immigration and Customs Enforcement facilities.[15]

The demographics of America's carceral state reflect disturbing trends. For example, the numbers of women under correctional supervision more than tripled from 405,500 to 1,298,600 between 1980 and 2009.[16] Offenders of color are imprisoned at higher rates than white offenders, irrespective of age and sex.[17] In 2011, for example, the incarceration rate for black males was six times that for white males; the rate for Hispanic males was more than twice that for white

[11] *See* STUNTZ, *supra* note 4, at 251.

[12] *See* U.S. CENSUS BUREAU, STATISTICAL ABSTRACT OF THE UNITED STATES: 2011 217 tbl. 348, *available at* http://www.census.gov/compendia/statab /2012/tables/12s0348.pdf.

[13] *See* LAUREN E. GLAZE & ERIKA PARKS, BUREAU OF JUSTICE STATISTICS, OFFICE OF JUSTICE PROGRAMS, U.S. DEP'T OF JUSTICE, CORRECTIONAL POPULATIONS IN THE UNITED STATES, 2011 1 (2012) pdf ("There were 6.98 million offenders under the supervision of the adult correctional systems at yearend 2011 . . . about 1 in every 50 adults."), *available at* http://bjs.gov/content/pub/pdf/cpus11.pdf.

[14] *See* E. ANN CARSON & WILLIAM J. SABOL, BUREAU OF JUSTICE STATISTICS, OFFICE OF JUSTICE PROGRAMS, U.S. DEP'T OF JUSTICE, PRISONERS IN 2011 1 (2012), *available at* http://www.bjs.gov/content/pub/pdf/p11.pdf; *see also id.* at 32 tbl. 15 (indicating that 82,058 state and federal prisoners were held in jails).

[15] Chris Kirkham, *Private Prisons Profit from Immigration Crackdown, Federal and Local Law Enforcement Partnerships*, HUFFPOST (June 7, 2012, 6:54 PM), http://www.huffingtonpost.com/2012/06/07/private-prisons-immigration-federal-law-enforcement_n_1569219.html (noting that number of detainees in ICE-operated and –contracted facilities has doubled to roughly 400,000 annually).

[16] U.S. CENSUS BUREAU, *supra* note 12, at 217 tbl. 348.

[17] *See* CARSON & SABOL, *supra* note 14, at 8.

males.[18] The fallout from aggressive drug crime sentencing schemes is also apparent in the demographics of the prison population. In the federal system, for example, those serving time for drug offenses accounted for 48% of all inmate sentences in 2011.[19] Finally, and perhaps most disconcerting, the resources of the system are overwhelmingly devoted to punishing non-violent crimes. Between 1991 and 2003, America's violent crime rate fell by 37%, while its incarceration rate quintupled.[20]

Outside of prison walls, the number of Americans with criminal exposure has similarly skyrocketed. Each year, over ten million new criminal cases—of which more than 75% involve misdemeanor offenses—are closed by state prosecutors.[21] Arrests leading to such cases are also highly prevalent. A recent study published in the journal *Pediatrics* estimates that more than 30% of Americans will be arrested by age 23.[22] Widespread, low-cost access to information about criminal "backgrounds" has made it easier than ever to identify—and stigmatize—persons with criminal histories. At the end of 2008, the states held nearly 100 million criminal history records on individuals,[23]

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[18] *Id.* ("The imprisonment rates indicate that about 0.5% of all white males, more than 3.0% of black males, and 1.2% of all Hispanic males were imprisoned in 2011.").

[19] *Id.* at 1.

[20] *See* STUNTZ, *supra* note 4, at 5, 244. This perspective is, however, complicated by data suggesting that violent offenders are reclaiming space in the state prisoner census, as the "war on drugs" has waned. *See* HEATHER C. WEST, WILLIAM J. SABOL & SARAH J. GREENMAN, BUREAU OF JUSTICE STATISTICS, OFFICE OF JUSTICE PROGRAMS, U.S. DEP'T OF JUSTICE, PRISONERS IN 2009 1 (2011), *available at* http://bjs.ojp.usdoj.gov/content/pub/pdf/p09.pdf (reporting that violent offenders accounted for 60% of the growth in the size of the state prison population from 2000 through 2008).

[21] *See* U.S. CENSUS BUREAU, *supra* note 12, at 217 tbl. 314 (indicating that in 2007 there were 10,698,300 total arrests); *see also* STEVEN W. PERRY & DUREN BANKS, BUREAU OF JUSTICE STATISTICS, OFFICE OF JUSTICE PROGRAMS, U.S. DEP'T OF JUSTICE, PROSECUTORS IN STATE COURTS, 2007-STATISTICAL TABLES 1 (2007) (indicating that prosecutors closed 2.9 million felony cases in state courts in 2007), *available at* http://bjs.ojp.usdoj.gov/content/pub/pdf/psc07st.pdf.

[22] *See* Robert Brame et al., *Cumulative Prevalence of Arrest from Ages 8 to 23 in a National Sample*, 129 PEDIATRICS 21, 25 (2012) ("Our primary conclusion is that arrest experiences are common among American youth.").

[23] *See* BUREAU OF JUSTICE STATISTICS, OFFICE OF JUSTICE PROGRAMS, U.S. DEP'T OF JUSTICE, SURVEY OF STATE CRIMINAL HISTORY INFORMATION SYSTEMS, 2008 3 (2009) ("Over 92 million individual offenders were in the criminal history files of the State criminal history repositories on December 31, 2008."), *available at* http://www.ncjrs.gov/pdffiles1/bjs/grants/228661.pdf.

which "describe an arrest and all subsequent actions concerning each criminal event that are positively identifiable to an individual."[24] Concomitantly, access to criminal records facilitates public and private discrimination against persons with criminal histories, even though such records are frequently inaccurate and errors are difficult or impossible to cure.[25]

For those for whom criminal exposure resulted in a conviction, there are also myriad civil collateral consequences that accompany conviction. Federal, state, and local laws prescribe more than 38,000 civil and administrative consequences incidental to a criminal conviction in this country.[26] These sanctions—articulated in statutory and regulatory rules[27]—encompass restrictions and prohibitions on a number of significant rights and privileges, including, *inter alia*, infringe-

[24] GERARD F. RAMKER, BUREAU OF JUSTICE STATISTICS, OFFICE OF JUSTICE PROGRAMS, U.S. DEP'T OF JUSTICE, IMPROVING CRIMINAL HISTORY RECORDS FOR BACKGROUND CHECKS, 2005 1 (2005), *available at* http://bjs.ojp.usdoj.gov/content/pub/pdf/ichrbc05.pdf; *see also* James B. Jacobs & Dimitra Blitsa, *US, EU & UK Employment Vetting as Strategy for Preventing Convicted Sex Offenders from Gaining Access to Children* 1, 2 (N.Y.U. Pub. L. & Legal Theory Working Papers, Working Paper No. 365, 2012) (noting that the United States "makes all criminal history records publicly accessible"), *available at* http://lsr.nellco.org/nyu_plltwp/365.

[25] *See* HUMAN RIGHTS WATCH, NO SECOND CHANCE: PEOPLE WITH CRIMINAL RECORDS DENIED ACCESS TO PUBLIC HOUSING 76 (2004) ("One study found that 87 percent of criminal record after prosecution ("rap") sheets included at least one error."), *available at* http://www.hrw.org/reports/2004/usa1104/usa1104.pdf; *id.* at 76 n. 236 ("[A] study found that 41 percent of all records contained two or more errors, including missing disposition information, unsealed cases, unrecorded warrants that had been vacated . . . and inaccurately recorded disposition information.") (citing LEGAL ACTION CTR., STUDY OF RAP SHEET ACCURACY AND RECOMMENDATIONS TO IMPROVE CRIMINAL JUSTICE RECORDKEEPING 3 (1995)); LEGAL ACTION CTR., SETTING THE RECORD STRAIGHT: WHAT DEFENSE ATTORNEYS NEED TO KNOW ABOUT THE CIVIL CONSEQUENCES OF CLIENT CRIMINAL RECORDS 3–5 (2001) (discussing most common mistakes found in New York's four million criminal records), *available at* http://hirenetwork.org/sites/default/files/setting_the_record_straight.pdf.

[26] Amy Solomon, Senior Advisor to the Assistant Attorney General Office of Justice Programs, Written Testimony for Equal Employment Opportunity Commission (July 26, 2011) ("To date, the ABA has catalogued over 38,000 statutes that impose collateral consequences on people convicted of crimes, creating barriers to housing, benefits, and voting."), *available at* http://www.eeoc.gov/eeoc/meetings/7-26-11/solomon.cfm.

[27] *See generally* OFFICE OF THE PARDON ATTORNEY, U.S. DEP'T OF JUSTICE, FEDERAL STATUTES IMPOSING COLLATERAL CONSEQUENCES UPON CONVICTION (2000) (providing an overview of consequences resulting from federal convictions), *available at* http://www.usdoj.gov/pardon/collateral_consequences.pdf.

ment or abrogation of the right to vote,[28] exclusion from jury service,[29] restrictions on the ability to maintain familial relations (including the custody of children),[30] pension divestment,[31] exclusion and suspension from certain professions,[32] and deportation.[33] Many of these sanctions

[28] Nearly 6 million U.S. citizens are disenfranchised because of their convict status. *See* CHRISTOPHER UGGEN, SARAH SHANNON & JEFF MANZA, THE SENTENCING PROJECT, STATE-LEVEL ESTIMATES OF FELON DISENFRANCHISEMENT IN THE UNITED STATES, 2010 1 (2012) (estimating that, as of December 31, 2010, 5.85 million Americans were disenfranchised under criminal disenfranchisement laws), *available at* http://www.sentencingproject.org/doc/publications/fd_State_Level_Estimates_of_Felon_Disen_2010.pdf; N.Y. ELEC. LAW § 5-106(2–5) (McKinney 1982) (revoking right to vote for any person convicted of felony under New York state law, federal law, or any other state's laws, until pardoned or expiration of maximum sentence of imprisonment).

[29] *See* Darren Wheelock, *A Jury of One's "Peers": The Racial Impact of Felon Jury Exclusion in Georgia*, 32 JUST. SYS. J. 335, 336 (2011) ("At the state level, the majority of states ban current felons from serving on juries (forty-eight out of fifty states and the District of Columbia); thirty-one states ban individuals with felon status from serving on a jury for life.").

[30] The Adoption and Safe Families Act (ASFA) of 1997 requires states to abide by expedited timelines to place children in permanent homes whether through reunification or adoption or guardianship and termination of parental rights. *See* 42 U.S.C. § 675 (2006). If children are in foster care for fifteen of the most recent twenty-two months, a petition to terminate parental rights must be filed. *See* U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-07-816, AFRICAN-AMERICAN CHILDREN IN FOSTER CARE: ADDITIONAL HHS NEED TO HELP STATES REDUCE THE PROPORTION IN CARE 11 (2007) (explaining mandate, under ASFA, that states files petition to terminate parental rights for children in foster care for 15 of the most recent 22 months). The racial implications of the legislative mandate are staggering: Over 44% of all children with incarcerated parents in this country are African American. *See* LAUREN E. GLAZE & LAURA M. MARUSCHAK, BUREAU OF JUSTICE STATISTICS, OFFICE OF JUSTICE PROGRAMS, U.S. DEP'T OF JUSTICE, PARENTS IN PRISON AND THEIR MINOR CHILDREN 2 (2010) (reporting that, of 1.7 million children with a parent in prison, 767,000 were African American), *available at* http://bjs.ojp.usdoj.gov/content/pub/pdf/pptmc.pdf.

[31] *See, e.g.*, N.Y. COMP. CODES R. & REGS. Tit. 13, § 13-161(e)(6)(b–c) (2012) (permitting immediate divestment from retirement pension program for any New York City Transit Authority employee convicted of felony).

[32] *See, e.g.*, CONN. GEN. STAT. § 20-294(2) (2012) (authorizing suspension of architecture license if license holder is convicted of felony offense); *id.*§ 20-86h (2012) (authorizing Department of Public Health to take professional disciplinary action against any midwife convicted of felony offense); *see* Bruce E. May, *The Character Component of Occupational Licensing Laws: A Continuing Barrier to Ex-Felon's Employment Opportunities*, 71 N.D. L. REV. 187, 195 (1995) (discussing classification of state occupational licensing laws and how "criminal convictions" and "good moral character" statutes pose significant obstacles to a reentering offender's attempts to obtain a license).

are obscure, and neither defendants nor the general public are meaningfully aware of the scope and severity of their operation. For example, in each year between 2010 and 2012, inclusive, more than half of all deportees were removed because of a misdemeanor or felony conviction.[34]

Moreover, the vast majority of those who are incarcerated will eventually be released. Each year, in communities across this country, more than 600,000 individuals leave prison and return home,[35]—and the methods, theory, and practice by which federal, state, and local governments respond to their return have systemic implications. The universe of barriers to holistic or total reentry is immense and extends beyond the familiar areas of housing, education, employment, and public benefits. For this population, the intersection of state discrimination and private stigmatization will circumscribe life chances and access to justice. At the same time, the persistent stigmatization of people convicted of crimes functions to delegitimize the rule of law in the communities from which these people hail. Carceral contact is frequently geographically concentrated due to spatial disparities in highly targeted policing, resulting in significant community-level repercussions including depressed local economies, familial instability, and other criminogenic conditions.[36]

[33] The Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) mandates deportation for legal permanent residents sentenced to a year or more for "aggravated felonies," and crimes involving "moral turpitude" or controlled substances." Pub. L. No. 104-132, 110 Stat. 1214. In 2012, approximately 55% of all deported immigrants, or 225,390 people, were deported because of a misdemeanor or felony conviction. *See FY2012 Removals by Priorities*, U.S. DEP'T OF HOMELAND SECURITY-ICE, https://www.ice.gov/removal-statistics/ (last visited May 13, 2013) (reporting removal statistics for 2012).

[34] *See FY2008-FY2012 ICE Removals by Highest ICE Priorities*, U.S. DEP'T HOMELAND SECURITY-ICE, https://www.ice.gov/removal-statistics/ (last visited May 13, 2013) (reporting removal statistics for 2012); *see also* DANIEL KANSTROOM, DEPORTATION NATION: OUTSIDERS IN AMERICAN HISTORY 5 (2007) (examining U.S. immigration policy in light of the "recurrent episodes of xenophobia that have bedeviled our nation of immigrants").

[35] *See* CARSON & SABOL, *supra* note 14, at 1.

[36] *See* TODD R. CLEAR, IMPRISONING COMMUNITIES: HOW MASS INCARCERATION MAKES DISADVANTAGED NEIGHBORHOODS WORSE 9–10 (2007) (discussing the damage incarceration has on communities, especially among the poor).

II. TEACHING THE "BOOGEYMAN"

Recently, there have been calls for our curricular priorities to reflect more accurately the realities of mass conviction and its effects upon convicted persons and communities.[37] This Article does not retread the ground covered with exceptional depth and nuance by these scholars. Instead, my call to teach the carceral state in law schools is firmly grounded in the observation that convicted persons have become pariahs in American society; omitted from our law school casebooks and classroom discussions, offenders become pedagogical "boogeymen," stigmatized and occupying a space of fear and terror for future generations of the bench and bar.[38]

The demonization of offenders has a long history. James Fitzjames Stephen, a nineteenth-century English jurist, noted in 1883 that the criminal law functions to express a collective "hatred" of offenders and that it was "highly desirable that criminals should be hated."[39] Evolving rules of ethics and professional responsibility have, however, embraced a different system of values with respect to the imposition of criminal sanctions. Whether our students' career paths lead them into service as prosecutors, defenders, government lawyers, judges, or legislators, they will likely be called upon to render service in matters involving people's interactions with criminal law. The proper role of legal education is to provide them the basic skills to do so ethically, critically, and fairly.

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[37] In November 2012, for example, the *Journal of Legal Education* published a symposium on "Teaching Mass Incarceration," which included articles by Giovanna Shay, Sharon Dolovich, and Teresa A. Miller. *See generally* Giovanni Shay, *Inside-Out as Law School Pedagogy*, 62 J. LEGAL EDUC. 207 (2012); Dolovich, *supra* note 2; Teresa A. Miller, *Encountering Attica: Documentary Filmmaking as Pedagogical Tool*, 62 J. LEGAL EDUC. 231 (2012); *see also* Florian Miedel, *Increasing Awareness of Collateral Consequences Among Participants of the Criminal Justice System: Is Education Enough?* (May 9, 2005) (unpublished comment), *available at* http://www.courts.state.ny.us/ip/partnersinjustice/Is-Education-Enough.pdf ("Just as judges, lawyers, and prosecutors must alter their mindset for awareness to increase, law teachers need to recognize that a complete understanding of that system now has to include knowledge of collateral consequences and their impact.").

[38] Dressler and Thomas have termed this challenge "[t]he ethics of defending 'those' people." JOSHUA DRESSLER & GEORGE C. THOMAS III, CRIMINAL PROCEDURE: PRINCIPLES, POLICIES AND PERSPECTIVES 943 (2013).

[39] JAMES FITZJAMES STEPHEN, A HISTORY OF THE CRIMINAL LAW OF ENGLAND 82 (1883).

And yet, American law schools consistently fail to do so. People convicted of crimes are rarely, if ever, discussed in law school classrooms. One of the most striking erasures of convicted persons from our collective pedagogical imaginations happens in constitutional law, a required course. The Thirteenth Amendment to the United States Constitution, which includes in its text a provision permitting the forced labor of persons "duly convicted," is ignored in both constitutional law courses and casebooks.[40] Given that persons convicted of crimes are the only group of citizens (other than children) whose liberties are explicitly circumscribed by the text of the Constitution, this omission is curious.

Even law professors who purport to critically examine the ways that "hot button" issues in constitutional law are articulated in leading casebooks fail to account for the Thirteenth Amendment. For example, in 2012, Professor Juan Perea published a review of George Van Cleve's *A Slaveholders' Union: Slavery, Politics, and the Constitution in the Early American Republic* in the *Michigan Law Review*.[41] In his essay, Perea observes that notwithstanding the demonstrably "proslavery" ethic of the Constitution, few constitutional law casebooks examine the nation's compact in this light.[42] Professor Perea's otherwise meticulous review of the treatment of the proslavery Constitution in leading constitutional law casebooks is strangely silent on that provision which, to the present day, is used to justify the state's extraction of coerced labor from certain disfavored citizens.[43] Both Perea's analysis and that of the casebooks he examines omit any consideration of the Thirteenth Amendment's explicit tolerance for en-

[40] U.S. CONST. amend. XIII, § 1 ("Neither slavery nor involuntary servitude, *except as a punishment for crime whereof the party shall have been duly convicted*, shall exist within the United States, or any place subject to their jurisdiction.") (emphasis added).

[41] *See generally* Juan F. Perea, *Race and Constitutional Law Casebooks: Recognizing the Proslavery Constitution*, 110 MICH. L. REV. 1123 (2012).

[42] *See id.* at 1125.

[43] As recently as 2012, the United States District Court for the District of South Carolina held that a prisoner's claim alleging that "if you are legally convicted to the Dept. of Corr. you become a legal slave of that state" was "subject to summary dismissal as frivolous" on the grounds that the Amendment, "by its plain language, does not apply to a convicted criminal." Cox. v. United States, No. 3:12–50, 2012 WL 1158864, at *2 (D. S.C. Mar. 13, 2012); *see also* Erdman v. Martin, 52 Fed. Appx. 801, 803–04 (6th Cir. 2002) (holding that, where inmate's prison wages were garnished "up to an amount equal to the actual cost of confinement," his claim that he was a slave to the state was "meritless").

slavement or servitude for persons convicted of crimes. Criminal law and sentencing casebooks are similarly muted on this issue. This tolerance for coerced labor and persistent subjugation should be the basis of a serious scholarly conversation about constitutional law pedagogy.

With respect to other tentacles of the carceral state—including collateral consequences, prisoner privacy, sentencing regimes, probationer surveillance, prison privatization, and offender reentry—leading casebooks vary widely in the depth of their treatment. Most casebooks include little or nothing at all on the importance of the carceral crisis to criminal law (the study of how crimes are defined) or sentencing law (the study of how crimes are punished). Some provide a short introductory paragraph or two on the carceral crisis but fail to account for the profound systemic implications of this phenomenon. Others, while doing a better job of describing the policy implications of hyper-incarceration, give short shrift to its genesis and alternatives.

The proliferation of "crimes," coupled with aggressive policing strategies, precipitated the carceral state described here. American criminal law is expansive and encompasses broad proscriptions on conduct, whether undertaken here in the United States or abroad. Criminalization is a critical issue in criminal law, and one that can and should be introduced to—and debated with—law students during the course of their academic training. According to a 2008 study by Louisiana State University law professor John Baker, there are an estimated 4,500 federal crimes.[44] State and local crimes exponentially increase the total number of criminal enactments. The regulatory triggers of criminalization, together with the role of social and political forces in promulgating and maintaining such rules, are central to understanding American criminal justice policy, and yet are rarely covered in criminal law courses.

A. The Promise of Prison Law

Even "prison law" casebooks fall short. Palmer's *Constitutional Rights of Prisoners*, currently in its ninth edition and a mainstay of prison law course syllabi, omits any reference to the Thirteenth Amendment or to prison forced labor regimes and courts' responses to

[44] *See* Gary Fields & John R. Emshwiller, *As Criminal Laws Proliferate, More Are Ensnared*, WALL ST. J., July 2, 2011, at A1.

prisoners' attempts to challenge those regimes.[45] While Lynn Branham's recently revised *The Law of Sentencing, Corrections, and Prisoners' Rights* provides a comprehensive casebook treatment of prison law, sentencing and corrections are rarely taught within the same course.[46] Prison law clinical offerings exist, but they are rare.[47] From a pedagogical perspective, moreover, courses (in prison law, for example) that focus on convicted persons only to the extent those persons are detained or incarcerated tell only part of the story. The overwhelming majority of persons convicted of criminal offenses in this country are never incarcerated, and none of the leading constitutional law casebooks consider seriously the implications of what Gabriel "Jack" Chin has termed "mass conviction."[48]

Even those casebooks that examine impositions upon the rights of persons who have been incarcerated do so only in cursory fashion. Prisoner privacy and free exercise rights, for example, garner limited treatment. In Saltzburg and Capra's *American Criminal Procedure: Cases and Commentary*,[49] a short three-paragraph section on inmate searches under the heading "Jails, Prison Cells, and Convicts" describes *Hudson v. Palmer*,[50] a case in which the U.S. Supreme Court held that prisoners have no constitutionally protected expectation of privacy in their cells or in papers and personal effects stored in their cells.[51]

On the issue of privacy and the reasonableness of warrantless searches for convicted persons on the outside, most of the leading casebooks include a small subsection on the application of the *Terry v.*

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[45] *See generally* JOHN H. PALMER, CONSTITUTIONAL RIGHTS OF PRISONERS (9th ed. 2004).

[46] *See generally* LYNN S. BRANHAM, THE LAW OF SENTENCING, CORRECTIONS, AND PRISONERS' RIGHTS (9th ed. 2012).

[47] The following law schools are among those offering clinical course programs with a specific focus on prison law and the rights of prisoners: Yale, Georgetown, University of California – Davis, William Mitchell, Northwestern, Akron, and Wisconsin. This list excludes capital punishment clinics, which are more widely available.

[48] *See* Gabriel J. Chin, *The New Civil Death: Rethinking Punishment in the Era of Mass Conviction*, 160 U. PA. L. REV. 1789, 1803–06 (2012) (describing high rates of conviction).

[49] STEPHEN A. SALTZBURG & DANIEL J. CAPRA, AMERICAN CRIMINAL PROCEDURE: CASES AND COMMENTARY 81 (9th ed. 2010).

[50] 468 U.S. 517 (1984).

[51] *Id.* at 536.

Ohio[52] reasoning in the context of probationer and parolee searches.[53] Haddad, et al.'s *Criminal Procedure: Cases and Comments* similarly devotes only eight pages to the probationer and parolee search cases *Griffin v. Wisconsin*,[54] *United States v. Knights*,[55] and *Samson v. California*,[56] under a "Search of Prisoners, Probationers, and Parolees" subsection.[57] The Miller book neglects entirely any coverage of post-conviction police surveillance of persons convicted of crimes.[58] While the casebook discusses the effects of a prior conviction on sentencing, particularly in the context of the U.S. Sentencing Guidelines, there is scant discussion of how a prior conviction can affect Fourth Amendment rights and the scope of the police power to surveil.[59] Moreover, while most of the leading casebooks introduce students to recidivist sentencing schemes that enhance penalties for repeat offenders, in several of these, the treatment is limited.[60]

The virtual silence of legal education on the effects of misdemeanor convictions is particularly striking. While the work of Jenny Roberts and Alexandra Natapoff has sought to place misdemeanors in the center of a larger conversation about criminal justice administration, indigent defense, and the power of prosecutors,[61] leading casebooks on criminal law, criminal procedure, and sentencing fail to consider how misdemeanor offenses and convictions contribute to hyper

[52] 392 U.S. 1 (1968).

[53] *See, e.g.*, JAMES B. HADDAD ET AL., *Criminal Procedure: Cases and Comments* 679–80 (7th ed. 2008); SALTZBURG & CAPRA, *supra* note 49, at 284–87.

[54] 483 U.S. 868, 872–74 (1987) (holding that warrantless search of probationer's residence was reasonable under the Fourth Amendment, where it was conducted pursuant to state regulation governing warrantless searches of persons in state custody, on the grounds that supervision of probationers is a special need that warrants departure from usual warrant and probable cause requirements).

[55] 534 U.S. 112, 121 (2001) (holding that warrantless search of probationer's residence was appropriate where officer had reasonable suspicion that probationer was involved in criminal activity).

[56] 547 U.S. 843, 857 (2006) (holding that suspicionless, warrantless searches of parolees does not violate the Fourth Amendment).

[57] HADDAD ET AL., *supra* note 44, at 679–87.

[58] FRANK W. MILLER, ET AL., CRIMINAL JUSTICE ADMINISTRATION: CASES AND MATERIALS (2000).

[59] *Id.*

[60] *See, e.g.*, SALTZBURG & CAPRA, *supra* note 49, at1118–19.

[61] *See generally* Jenny Roberts, *Why Misdemeanors Matter: Defining Effective Advocacy in the Lower Criminal Courts*, 45 U.C. DAVIS L. REV. 277 (2011); Alexandra Natapoff, *Misdemeanors*, 85 S. CAL. L. REV. 1313 (2012).

criminalization and the proliferation of criminal histories among the populace.

B. An Evolving Ethical Landscape

Curricular gridlock is one reason cited for the slow pace of law school reform. Law schools devise curricula years in advance, and there remains residual resistance to altering its core.[62] Some also argue that content such as that described here will not fit easily into "bar courses"—courses that cover material to be tested by state bar examiners. Such concerns about curricular value are, however, misplaced for two reasons. First, many of the issues pertinent to this subject can be taught in required courses or advanced versions of required courses. Second, notwithstanding the testing whims of state bar examiners, law schools have a responsibility to prepare students for responsible, ethical practice.

Law schools ought to educate future lawyers about their own ethical obligations under the law. Other professional schools include ethics as an integral part of the curriculum. In graduate business schools, for example, students wrestle with ethical quandaries in each course.[63] In law schools, ethics or professional responsibility is often a single required course; students are not encouraged to explore ethical puzzles throughout the curriculum. And yet, ethical considerations caused the Supreme Court to hold in 2010 that defense counsel had a professional duty to inform clients of the risk of certain civil collateral consequences of a criminal conviction during the plea bargaining stage.[64] The ethical imperative for teaching the carceral state is most observable at three points in the process of a criminal contact: (1) at the charging decision, (2) during plea negotiations, and (3) at reentry.

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[62] *See, e.g.*, Edna Erez, *Victim Voice, Impact Statements and Sentencing: Integrating Restorative Therapeutic Jurisprudence Principles in Adversarial Proceedings*, 40 CRIM. L. BULL. 483, 500 n.98 (2004) ("Also, the curriculum process within the law schools presented a major barrier to the committee's efforts to insert victimization content into the curriculum . . . because the schools set their curricula far in advance and generally resisted making changes, particularly to core curricula.").

[63] *See generally* Donald L. McCabe, Janet M. Dukerich & Jane E. Dutton, *Context, Values and Moral Dilemmas: Comparing the Choices of Business and Law School Students*, 10 J. BUS. ETHICS 951 (1991) (studying how to improve future business leaders with ethical choices and practices in the business school).

[64] *Padilla v. Kentucky*, 130 S. Ct. 1473, 1486 (2010).

The ethical imperative for teaching the carceral state is also observable in the lack of information about civil collateral consequences in criminal law courses. For example, despite the implications of collateral civil consequences for all convicted persons, the Saltzburg and Capra casebook omits consideration of the myriad collateral sanctions that will, or may, confront a convicted person.[65] The propriety of the more than 38,000 incidental consequences discussed above is, increasingly, the subject of intense scrutiny among policymakers and advocates.[66] And yet, even as sanctions including involuntary civil commitments continue to gain traction among the states, this debate is oddly absent from the criminal law course classroom.

The silence around civil collateral consequences is even more unsettling given the Supreme Court's 2010 holding in *Padilla v. Kentucky* that defense counsel has a duty to inform defendants invited to enter plea negotiations of certain "integral" collateral consequences of their choices.[67] According to the Court, deportation is a "virtually inevitable" consequence of criminal conviction,[68] thereby elevating removal from a merely incidental consequence to an "integral part of the penalty" facing non-citizen criminal defendants.[69] The Court held that defense counsel's failure to inform Padilla of this likely consequence of his guilty plea ran afoul of the constitutional requirement in *Strickland v. Washington* that defense counsel provide "reasonable professional assistance" to the accused.[70]

Before *Padilla*, the American Bar Association (ABA) modified its practitioner guidelines to advise "To the extent possible, defense counsel should determine and advise the defendant, sufficiently in advance of the entry of any plea, as to the possible collateral consequences that might ensue from entry of the contemplated plea."[71] In

[65] The editors include a four-page consideration of fines and forfeitures in the context of the prohibition against double jeopardy under a section entitled "Civil Penalties As Punishment." *See* SALTZBURG & CAPRA, *supra* note 49 at 1575–79.

[66] *See Written Testimony for Amy Solomon, Senior Advisor to the Assistant Attorney General Office of Justice Programs*, *supra* note 26.

[67] *Padilla*, 130 S. Ct. at 1486.

[68] *Id.* at 1478.

[69] *Id.* at 1480.

[70] *Id*. at 1486. *See Strickland v. Washington*, 466 U.S. 668, 689 (1984).

[71] AM. BAR ASS'N, ABA STANDARDS FOR CRIMINAL JUSTICE: PLEAS OF GUILTY, STANDARD 14-3.3(f) (3d ed. 1999), *available at* http://www.americanbar.org/publications/criminal_justice_section_archive/crimjust_standards_guiltypleas_tocold.html.

the wake of *Padilla*, the profession has grappled with the implications of the Court's holding. In 2011, the ABA Criminal Justice Section established a "Task Force on Comprehensive Representation" in an attempt to study the role and duty of defense counsel and prosecutors post-*Padilla*.[72] While it is now accepted that counsel has a duty to inform a defendant of any potential deportation consequence, it remains undetermined whether, and how, *Padilla* applies outside this realm.[73] In a testament to this uncertainty, thousands of cases involving defendants seeking review of the circumstances surrounding their pleas have been adjudicated since 2010.[74]

In each of those cases, the role of defense counsel has been of critical importance. Some have argued that *Padilla* requires "a different type of defense lawyer"—one who is versed in the intricacies of civil collateral consequences under state and federal law.[75] To that end, the training available to defenders is key. Yet there are few systemic resources available to meet this charge. Structural limitations imposed on public defender offices, including shoestring budgets and crushing caseloads, have limited the abilities of those organizations to thoroughly train their staff in the intricacies of immigration law.[76] The private defense bar is also implicated here—one author has argued that motivating the private bar to obtain *Padilla* training is "challenging" especially "if training is not mandatory."[77] Curricular gaps in legal education have led to proposals for specialized certifications for criminal lawyers.[78] Clinical programs, held out as "the gold standard" in indigent defense training, are hamstrung by high costs and limited availa-

[72] Mark Walsh, *Task Force Probes Defense Lawyers' Role After Padilla*, A.B.A. J. (Mar. 31, 2011), http://www.abajournal.com/magazine/article/task_force_probes_defense_lawyers_role_after_padilla/.

[73] *See* DRESSLER & THOMAS, *supra* note 38, at 1019 (noting that "the full scope of *Padilla* is unknown.").

[74] *See generally*, J. McGregor Smyth, *From "Collateral" to "Integral": The Seismic Evolution of* Padilla v. Kentucky *and its Impact on Penalties Beyond Deportation*, 54 HOW. L.J. 795 (2011).

[75] *See, e.g.*, Joel M. Schumm, *Conference Report:* Padilla *and the Future of the Defense Function*, 39 FORDHAM URB. L. J. 3, 17 (2011).

[76] *Id.* at 18 ("Because of the complexity of immigration and other areas of the law, a few hours of training cannot provide mastery.").

[77] *Id.* at 19.

[78] *Id.* at 21 ("Law school seldom teaches the necessary skills to represent a person charged with a crime, but a diploma and bar passage allows graduates to hang out a shingle and often accept court appointments without any additional testing or training.").

bility.[79] At most law schools, clinic placements are highly desired and competitive; at the same time, clinics are limited in size due to resource scarcity, including the availability of supervising faculty.[80] As a result, most students will not have an opportunity to participate in a defense clinic during their law school education. Clinical offerings should be supplemented by doctrinal offerings in order to more fully develop practice-ready law graduates and to meet the challenges of this evolving legal-ethical landscape. As one commentator noted, "[d]octrinal courses need to shift away from exclusively focusing on reading appellate opinions and toward important things like understanding clients."[81] This need to understand clients, especially in the indigent defense context, however, is on a veritable collision course with the stigmatization of offenders in our curriculum and classrooms.

Padilla has done more than engender a conversation about training a different type of defense lawyer; the case also presents an unprecedented opportunity to consider whether a different type of prosecutor is necessary. Prosecutors have replaced jurors and judges as the most powerful players in the criminal trial, and the expansion and judicial condonation of seemingly unfettered prosecutorial discretion in charging decisions has revolutionized the plea bargaining process and rendered trials rare.[82] *Padilla* contemplates that prosecutors will consider the civil consequences of their charging decisions and plea offers.[83] While the profession has embraced a discussion of how *Padilla* affects defense counsel, far less attention has been paid to the ethical obligations for prosecutors contemplated by the Court.[84]

Current law school curricula fail to prepare students for the ethical obligations accompanying criminal prosecution. In an *amicus curiae* brief to the U.S. Supreme Court in *Connick v. Thompson*, a 2011

[79] *Id.* at 22–23.

[80] *See id.* at 23.

[81] Schumm, *supra* note 75, at 23.

[82] *See* STUNTZ, *supra* note 4, at 253 ("The law once gave juries and judges the power to decide whether the defendant had behaved badly enough to justify criminal punishment; [t]oday's substantive law leaves that power in prosecutors' hands.").

[83] *Padilla v. Kentucky*, 130 S. Ct. 1473, 1486 (2010) ("By bringing deportation consequences into this process, the defense and prosecution may well be able to reach agreements that better satisfy the interests of both parties.").

[84] Heidi Altman, *Prosecuting Post*-Padilla*: State Interests and the Pursuit of Justice for Noncitizen Defendants*, 101 GEO. L.J. 1, 8 (2012) ("The role of the prosecutor, however, has been largely unaddressed in the literature and advocacy materials that have emerged since *Padilla*.").

case involving allegations of *Brady* violations and other ethical failures by the Office of the New Orleans District Attorney, law professors from five schools argued that neither criminal law, criminal procedure, nor professional responsibility courses sufficiently educate future prosecutors on the "ethical pitfalls that sometimes accompany tough *Brady* decisions."[85] As noted by *amicus*, criminal procedure is not a required course, and professional responsibility courses "concentrate primarily on private civil practice and may, paradoxically, only reinforce adversarial tendencies that can be counterproductive when it comes to meeting the government's criminal disclosure obligations."[86] Such "adversarial tendencies" may also be counterproductive in the plea bargaining process, as prosecutors may value "wins" over a misguided perception of lenity towards offenders. Law schools can lead the charge in preparing future prosecutors to do justice, both within and outside the *Padilla* context.

Strikingly, while the editors of leading casebooks have devoted little attention to these issues, a contrasting trend is developing in legal and social science scholarship. Over the last decade, legal scholarship on reentry, the impact of convictions, and the role of lawyers in the carceral state has experienced a surge; law reviews have published nearly 2,000 articles in this area, over 40% of which were published in the last five years.[87] In the social sciences, criminologists, sociologists, epidemiologists, and penologists have augmented that scholarship with peer-reviewed research analyzing the factors precipitating criminal activity,[88] the role of implicit bias against disfavored groups in criminal case outcomes,[89] and the circumscribed life chances of convicted per-

[85] Brief for The Center on the Administration of Criminal Law, New York University School of Law et al. as Amici Curiae Supporting Respondents, *Connick v. Thompson*, 131 S. Ct. 1350 (2011) (No. 09-571) at 21.

[86] *Id.*

[87] A search of Westlaw's JLR database with the following search string—reentry & criminal & offender (padilla /p deport!) "collateral consequences" % mining—yielded 1,956 articles. Of these, 827 (more than 42%) were published since 2008.

[88] See, e.g., John Tierney, For Lesser Crimes, Rethinking Life Behind Bars, N.Y. TIMES, Dec. 12, 2012, at A1.

[89] Neuroscience, for example, has been instrumental to successful Supreme Court challenges to the imposition of the death penalty upon the developmentally disabled and children. See *Roper v. Simmons*, 543 U.S. 551, 570, 574 (2005) (relying on neuroscientific research regarding "[j]uveniles' susceptibility to immature and irresponsible behavior" to conclude that the execution of defendants under eighteen violated the Eighth Amendment ban on cruel and unusual punishment); Atkins v.

sons.[90] This research has fostered a renewed interest in and reliance upon social science research for judges considering issues of law related to convicted persons. Yet, while scholarly production in this area rises and an emerging judicial reliance on social science research to issues of criminalization and incarceration is apparent, curricular innovations remain stagnant. At the same time, student editors of law journals are less able to accurately assess the prospective influence of legal scholarship in this area.

C. Teaching Decarceration and a California Cautionary Tale

This stagnation has led to missed opportunities. Decarceration, or the systematic reduction in prison populations or imprisonment rates through policy reform, is also worthy of sustained legal scholarship and education. Prison populations in this country are declining: In 2011, the number of prisoners in state and federal custody fell by 0.9% or 15,023 people.[91] Recently, the politics and law of decarceration have taken on recent significance, given a confluence of judicial and legislative interventions, most notably in California. Prior to 2011, California held the honor of being the second most "incarcerative" state in America, with approximately one out of every seven American prisoners being incarcerated in its facilities.[92] California also had the largest population of re-entering offenders.[93] In 2001, Los Angeles and San Bernardino counties were among the three counties in the country with the highest number of released prisoners.[94] California also had a

Virginia, 536 U.S. 304, 318 (2002) (relying, in part, on assertion that the developmentally disabled "have diminished capacities to understand and process information, to communicate, to abstract from mistakes and learn from experience, to engage in logical reasoning, to control impulses, and to understand the reactions of others" to conclude that the execution of mentally retarded defendants violated the Eighth Amendment ban on cruel and unusual punishment).

[90] *See, e.g.*, Amy L. Solomon, *In Search of a Job: Criminal Records as Barriers to Employment*, NAT'L INST. OF JUST. (June 15, 2012), http://www.nij.gov/journals/270/criminal-records.htm.

[91] CARSON & SABOL, *supra* note 14, at 2.

[92] Ryken Grattet, et al., *Parole Violations and Revocations in California*, 73 FED. PROBATION 2, 2 (2009).

[93] JEREMY TRAVIS & SARAH LAWRENCE, JUSTICE POLICY CTR., URBAN INST., CALIFORNIA'S PAROLE EXPERIMENT 3 (2012), *available at* http://www.urban.org/UploadedPDF/CA_parole_exp.pdf.

[94] *Reentry Trends in the U.S.*, BUREAU OF JUS. STAT., (Feb. 27, 2013, 11:23 AM) http://bjs.ojp.usdoj.gov/content/reentry/releases.cfm. ("In 2001, Los Angeles County, CA, had the largest number of releases from prison (37,080), followed by Cook County, IL, (17,480), and San Bernardino, CA, (10,183).").

staggering predominance of repeat offenders in its prison population. While the national average for recidivist recommitments is 40%, it is 66% in California.[95] Before 2011, six out of ten admissions to California's prisons were returning parolees.[96]

In addition to its peculiar prison demographics, California was also unique in the operation of its determinate sentencing law, which automatically released 80% of the state's offenders at the conclusion of their sentences, and which allowed offenders to earn up to half their sentence in "good time."[97] Once released, virtually *all* of the state's prisoners were placed on formal parole supervision, usually for three years.[98] California stood apart in this practice of combining determinate sentencing with placing all of its released prisoners on parole; most other states either have an indeterminate sentencing system, where parole is reserved for only the most serious offenders or where a discretionary parole board determines release dates.[99]

California's burgeoning prison population, combined with its parole practices and lengthy parole terms, resulted in the state supervising far more parolees than any other jurisdiction in the United States. In 2007, for example, "California supervised about 120,000 parolees on any given day, accounting for 15% of all parolees in the country."[100] The confluence of these conditions led to persistent overcrowding in California's correctional facilities and, ultimately, litigation challenging the state's failure to provide constitutionally sufficient mental and physical health care to prisoners.[101] In 2009, a specially constituted three-judge panel convened under the authority of the federal Prison Litigation Reform Act (PLRA)[102] ordered the state to reduce its prison population by nearly 40,000 people (nearly 30% of its census), from 195% of design capacity to 137.5%.[103] The panel's pris-

[95] Grattet, et al., *supra* note 92, at 2.

[96] *Id.*

[97] *Id.*

[98] *Id.*

[99] *Id.* at 2–3.

[100] *Id.* at 3. Unsurprisingly, California also had one of the highest parole revocation rates in the nation. *Id.*

[101] *See* MAC TAYLOR, LEGISLATIVE ANALYST'S OFFICE, PROVIDING CONSTITUTIONAL AND COST-EFFECTIVE INMATE MEDICAL CARE 6 (2012), *available at* http://www.lao.ca.gov/reports/2012/crim/inmate-medical-care/inmate-medical-care-041912.pdf.

[102] *See* 18 U.S.C. § 3626(a)(3)(B).

[103] *Brown v. Plata*, 131 S. Ct. 1910, 1923 (2011).

oner release order—a rare remedy available under the PLRA—was affirmed by the Supreme Court in *Brown v. Plata*.[104]

In response to these judicial interventions, the California legislature enacted Assembly Bill (AB) 109 in March 2011.[105] Popularly known as the "realignment bill," AB 109 reallocates responsibility for low-risk offenders[106] from state prisons to local jail facilities. California's fifty-eight counties are now vested with the correctional authority (and duty) to implement, administer, and enforce appropriate sanctions for certain categories of newly-convicted offenders.[107] In the wake of its passage, AB 109 has raised serious legal concerns about the capacity of local jurisdictions to administer this new reality. For example, under AB 109, the state Division of Juvenile Justice—the state agency responsible for the detention, rehabilitation, probation, and parole of juvenile offenders—"shall no longer accept any juvenile offender commitments from the juvenile courts."[108] Although the population of affected juveniles is relatively low—1,100 in 2012, down from 9,700 in 1996[109]—the implications are significant. Under the current scheme, 88% of juvenile offenders are housed in county facilities.[110] These facilities are smaller and offer fewer services and assistance to detained youth.[111]

Plata is important for this discussion about teaching the carceral state because the decision articulates, in detail, the causes and effects of hyper-incarceration as state policy. The decision also reflects the Court's commitment to reconciling public perceptions of the public safety effects of incarceration with current, peer-reviewed social science research. Justice Kennedy's decision in *Plata* highlighted a conclusion ripped from the headlines of sociological and criminological research over the past few decades—that prisons themselves may be

[104] *Id* at 1947.

[105] Assemb. B. 109, Reg. Sess. (Cal. 2011).

[106] The category of "low-risk offenders" includes "non-violent, non-serious, and non-sex offenders," or in the common parlance, the "non-non-nons." *Public Safety Realignment*, CAL. DEP'T OF CORR. & REHAB. (Feb. 27, 2013, 11:41 AM), http://www.cdcr.ca.gov/realignment/.

[107] Assemb. B. 109, Reg. Sess. (Cal. 2011).

[108] *Id* § 620(c)(3)(d).

[109] *See* MAC TAYLOR, LEGISLATIVE ANALYST'S OFFICE, 2012-13 BUDGET: COMPLETING JUVENILE JUSTICE REALIGNMENT 6 (2012), *available at* http://www.lao.ca.gov/analysis/2012/crim_justice/juvenile-justice-021512.pdf.

[110] *Id*. at 6–7.

[111] *Id*. at 11.

criminogenic, as argued persuasively by Todd Clear and others.[112] The criminogeneity of prisons is not taught in law school; on the contrary, incapacitation through incarceration is held out as a legitimate and effective method of punishment. Teaching decarceration also creates an opportunity for faculty to introduce abolition as a legitimate public policy option--prisons are neither natural nor organic institutions, and our students ought to understand that alternative models for punishment exist.

III. THE RAW MATERIAL OF TEACHING THE CARCERAL STATE

The preceding Parts considered how leading criminal law, procedure, and sentencing law casebooks fail to examine the twin phenomena of mass conviction and hyper-incarceration. Given the omissions and elisions present in these texts, professors interested in incorporating the carceral state into their courses in the near term must design their own curricula. This Part briefly presents a sample model for incorporating mass incarceration into the standard law school curriculum. Such content is easily incorporated into a stand-alone course, but these materials could also complement a larger course such as constitutional law, criminal law, civil procedure, criminal procedure, sentencing, or remedies.[113]

The first time I taught my Confinement, Reentry, and Public Policy seminar, I assembled a set of materials that I thought students would find both interesting and informative.[114] They comprised sever-

[112] *See, e.g.*, CLEAR, *supra* note 36 at 6–7 (suggesting that concentrating incarceration in vulnerable communities has a destabilizing effect and may increase the crime rate because imprisonment severs inmates' ties to their jobs, families, and communities, expands opportunities for criminal networking, and subjects inmates to overcrowded and abusive conditions).

[113] The fourth edition of the Subrin et al. civil procedure casebook includes a multi-page treatment of *Brown v. Plata* in a module on institutional legitimacy and the limits of the courts' Article III power. *See* STEPHEN N. SUBRIN, ET AL., CIVIL PROCEDURE: DOCTRINE, PRACTICE, AND CONTEXT 634–51 (4th ed. 2012).

[114] The argument that the course content described here is absent from other law school courses on criminal law administration is further supported by a formal post-course survey taken of my Fall 2011 Confinement, Reentry, and Public Policy seminar. Of the students completing the survey, over 60% had previously completed an advanced course in criminal procedure, criminal adjudication, or sentencing; over 87% of students in the course reported that they learned something new each week in the course, irrespective of any advanced criminal law courses or any previous first-hand or anecdotal information they may have gathered pertaining to the criminal justice system. While the survey results are interesting, their probative value is limited

al subject modules, including criminal disenfranchisement, exoneration, collateral consequences, abolition, prison-based gerrymandering, offender reentry, and prison labor regimes. The course materials included judicial opinions,[115] law review articles,[116] monographs,[117] articles from edited volumes,[118] federal and state agency testimony transcripts,[119] news articles,[120] statutes,[121] audiofiles,[122] court filings,[123]

due to the small sample size. Eight students enrolled in the course completed the survey. *See generally* IRB Protocol # E12-555 (on file with author).

[115] *See, e.g.*, *Brown v. Plata*, 131 S. Ct. 1910, 1923 (2011) (addressing whether the court mandated reduction of California's prison population was an appropriate remedy); *Padilla v. Kentucky*, 130 S. Ct. 1473, 1478 (2010) (addressing whether counsel has to inform a defendant of collateral consequences of pleading guilty); *Farrakhan v. Washington*, 338 F.3d 1009, 1012 (9th Cir. 2003) (addressing whether evidence of racial discrimination in the criminal justice system should be relevant to the analysis under the Voting Rights Act).

[116] *See e.g.*, Michael Pinard, *A Reentry-Centered Vision of Criminal Justice*, 20 FED. SENT'G REP. 103, 103 (2007) (discussing how the criminal justice system should be focused on prisoner reentry)*;* Human Rights Program at Justice Now, *Prisons as a Tool of Reproductive Oppression*, 5 STAN. J. C. R. & C. L. 309, 312 (2009) (discussing how the prison operates as an "instrument of reproductive oppression" and ways the legal system could address this problem); Michael Pinard & Anthony C. Thompson, *Offender Reentry and the Collateral Consequences of Criminal Convictions: An Introduction*, 30 N.Y.U. REV. L. & SOC. CHANGE 585, 586–87 (2006) (providing an overview of the collateral consequences of criminal convictions); Catherine A. Christian, *Awareness of Collateral Consequences: The Role of the Prosecutor*, 30 N.Y.U. REV. L. & SOC. CHANGE 621, 621–22 (2006) (arguing that prosecutors should take collateral consequences into consideration when seeking convictions); Regina Austin, "*The Shame of It All": Stigma and the Political Disenfranchisement of Formerly Convicted and Incarcerated Persons*, 36 COLUM. HUM. RTS. L. REV. 173, 174 (2004) (discussing the stigma of incarceration that minority offenders and their family members face, and how that stigma relates to disenfranchisement).

[117] *See, e.g.*, ANGELA Y. DAVIS, ARE PRISONS OBSOLETE? (2003); JOAN PETERSILIA, WHEN PRISONERS COME HOME: PAROLE AND PRISONER REENTRY (2009); JEREMY TRAVIS, ET AL., JUSTICE POLICY CTR., URBAN INST., A PORTRAIT OF PRISONER REENTRY IN NEW JERSEY (2003), *available at* http://www.urban.org/UploadedPDF/410899_nj_prisoner_reentry.pdf.

[118] *See, e.g.*, Juan Cartagena, *Lost Votes, Lost Bodies, Lost Jobs: The Effects of Mass Incarceration on Latino Civil Engagement*, *in* BEHIND BARS: LATINO/AS AND PRISON IN THE UNITED STATES 133 (Suzanne Oboler, ed., 2009).

[119] *See, e.g.*, Cornell W. Brooks, Exec. Dir., N.J. Inst. for Soc. Justice, Written Testimony for Equal Employment Opportunity Commission (July 26, 2011), *available at*http://www.eeoc.gov/eeoc/meetings/7-26-11/brooks.cfm; Dale Ho, Asst. Counsel, NAACP Legal Def. Fund, Testimony Presented Before Ky. Gen. Assemb. Task Force on Elections, Constitutional Amendments & Intergovernmental Affairs (Aug. 23, 2011), *available at* http://www.naacpldf.org/files/case_issue/Dale%20Ho%20Testimony%20Kentucky.pdf.

unpublished autobiographical narratives,[124] and interactive multimedia tools.[125] Any attempt on my part to assign casebook pages as class preparation would have required my students to purchase multiple casebooks because there is no single text which captures the phenomena described in this Article. With most casebooks costing well over $100 each—and some topping the market at nearly $200 each—a requirement that students purchase multiple casebooks quickly becomes cost prohibitive for many.

I begin and end the course with critical considerations of the impact of law on the lives (and bodies) of convicted persons. The last two times that I have taught the course, I have begun with *Plata*.[126] *Plata* is a fitting opening to courses such as these because it provides students with a perspective on the effects of rising rates of incarceration. For many of our students, this will be the first time that they learn of this phenomenon even though many of them have personal experience with the criminal justice system. They do not recognize that the current administration of criminal justice represents a departure from administration in decades past. In this sense, historical context is use-

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[120] *See, e.g.*, Mary C. Delaney, Keith A. Findley & Sheila Sullivan, *Exonerees' Hardships After Freedom*, WIS. LAWYER (Feb. 2010), http://www.wisbar.org/NewsPublications/WisconsinLawyer/Pages/Article.aspx?Volume=83&Issue=2&ArticleID=1925; Janet Roberts & Elizabeth Stanton, *Free and Uneasy – A Long Road Back After Exoneration, and Justice Is Slow to Make Amends*, N.Y. TIMES (Nov. 25, 2007), http://www.nytimes.com/2007/11/25/us/25dna.html; Eric Schlosser, *The Prison-Industrial Complex*, ATLANTIC MONTHLY, Dec. 1998, at 51; Laura Sullivan, *Prison Economics Help Drive Ariz. Immigration Law*, NPR NEWS INVESTIGATIONS (Oct. 28, 2010, 11:01 AM),http://www.npr.org/templates/story/story.php?storyId=130833741.

[121] *See, e.g.*, A.09710-D, 233d Sess. (N.Y. 2010).

[122] *See, e.g.*, ANGELA Y. DAVIS, THE PRISON INDUSTRIAL COMPLEX (AK Press 2001).

[123] *See, e.g.*, Complaint, *Little v. LATFOR*, No. 2310-2011 (N.Y. Sup. Ct. Apr. 4, 2011).

[124] Lynne Holley, *The Narrative of Lynne Holley* (Nov. 2010) (unpublished manuscript) (on file with author). Gaining access to the voices of currently and formerly incarcerated persons has proven challenging for academics, due to institutional limitations both within penal facilities and within the academy. I address this silence by sharing with my students, with permission, the autobiographical narrative of a formerly incarcerated woman.

[125] *See, e.g.*, *Collateral Consequences Calculator – New York State*, COLUM. L. SCH., http://calculator.law.columbia.edu (last visited May. 12, 2013); *National Inventory of the Collateral Consequences of Conviction*, A.B.A., http://isrweb.isr.temple.edu/projects/accproject (last visited June 12, 2013).

[126] 131 S. Ct. 1910 (2011).

ful to disrupt students' assumptions that prisons are apolitical institutions that have always been (and must always be) characteristic of American law.

Plata is also instructive in at least four other substantive areas. First, I use the case to introduce and teach the PLRA. Enacted to restrict "frivolous" litigation over prison conditions, the PLRA has been demonstrably effective in curtailing prisoners' access to courts. In the first two years after its enactment, "federal civil rights filings by prisoners fell 33 percent," and "[b]y 2006 the number of prisoner lawsuits filed per thousand prisoners had fallen 60 percent since 1995."[127] Second, I use *Plata* to discuss the impact of drug control policies, "three strikes" laws, and truth-in-sentencing, mandatory minimum, and determinate sentencing schemes on the rise in the nation's carceral population.

Third, I use *Plata* as a mini-study of civil remedies. Over the twenty years that one of the cases comprising *Plata* was litigated, the three-judge panel ordered multiple remedial schemes, including a receivership and a recruitment and retention scheme for clinical staff.[128] Over the years, each of these remedies was deemed insufficient to cure the perceived failures in the system's administration of physical and mental health services to inmates, ultimately leading the court to conclude that prison overcrowding was the fundamental problem and that the only solution was a population reduction order.[129]

Finally, the Court's decision in *Plata* provides an exceptional window into the judicial decision-making process, specifically the process by which judges signal their intentions to the other branches of government. The opinions, together with the appendix attaching photographs of medical care facilities and inmates in their sleeping quarters, make visible the overcrowded and arguably inhumane conditions present in modern American prisons.[130] In *Plata*, Justice Kennedy de-

[127] HUMAN RIGHTS WATCH, NO EQUAL JUSTICE: THE PRISON LITIGATION REFORM ACT IN THE UNITED STATES 3 (2009), *available at* http://www.hrw.org/sites/default/files/reports/us0609webwcover.pdf.

[128] *See Plata v. Schwarzenegger*, No. C01-1351 TEH, 2005 WL 2932253, at *24 (N.D. Cal. Oct. 3, 2005).

[129] *Plata*, 131 S. Ct. at 1936–39.

[130] *See id.* at 1923–25; *id.* at 1949–50 app. B & C (containing two photographs of the crammed living conditions in two California prisons and one photograph of the telephone booth-sized holding cells for people waiting for medical treatment).

scribes in painstaking detail how California's penal system—which, in the years before *Plata* was decided, operated at over twice its capacity—treated the inmates committed to its care, from those held in cages while awaiting medical treatment to those forced to wait up to one year for professional mental health services.[131] The *Plata* decision spurred the California legislation to enact AB 109; it was also "warning shot" for other jurisdictions that might be similarly subjecting prisoners to such conditions. The Court, at least as currently constituted, is paying attention to prison conditions.

IV. EXPANDING OUR STUDENTS' EMPLOYMENT PROSPECTS

Beyond the pedagogical benefits discussed here, teaching the carceral state in law schools also expands our students' employment prospects by fostering their interest or expertise in the subject. I first proposed a course on the carceral state during my first year on the Rutgers – Newark faculty. Newark is "ground zero" for offender reentry in New Jersey. In 2002, 13% of all offenders released in New Jersey returned to Newark.[132] As the Manhattan Institute for Policy Research noted, "In a city of approximately 280,000 residents, more than 1,700 individuals return to Newark from state prison annually and an additional 1,400 Newark residents are released from the local jail, the Essex County Correctional Facility, every month."[133] In addition, local elected officials in Newark have made effective reentry a policy priority, through job readiness and placement programs and nondiscrimination-in-employment (i.e., "ban the box") legislation.[134] Newark has a citywide Office of Reentry, located in City Hall, which coordinates the city's reentry initiatives and serves as a referral resource for community-based organizations.[135] The city's efforts have also engendered a broader policy commitment to effective reentry around the state.[136] The law school's proximity to this work provides students

[131] *Id.* at 1924–26.

[132] *See* TRAVIS, ET AL., *supra* note 116, at 4.

[133] *Moving Men into the Mainstream: The Newark Prisoner Reentry Initiative*, MANHATTAN INST. FOR POL'Y RES., http://www.manhattan-institute.org/html/cci_moving_men_into_the_mainstream.htm (last visited May 12, 2013).

[134] *See, e.g.*, Press Release, N.J. Office of the Attorney General, State and County Prisoner Re-Entry Programs to Receive $3.2 Million in Funding (Oct. 30, 2009), http://www.nj.gov/oag/newsreleases09/pr20091030a.html.

[135] *See Moving Men into the Mainstream*, *supra* note 133.

[136] *See, e.g.*, Press Release, *supra* note 134.

with access to policymakers and service providers who are on the front lines of effective reentry in urban communities. The emergence of effective reentry as a statewide policy priority has also fostered the proliferation of New Jersey-specific research that gives students access to cutting-edge scholarship concerning the social, economic, and political effects of conviction and incarceration throughout the jurisdiction. In an attempt to leverage a broad cross-section of this scholarship, I have instituted course modules on the birth of the carceral state, gender and incarceration, collateral consequences (I include a "primer" on civil consequences as well as a separate module on the attorneys' role in navigating and mitigating civil consequences), offender reentry, wrongful convictions and exonerations, felon disenfranchisement, prison-based gerrymandering, stigma and civic engagement, the prison industrial complex, and abolition.

In my experience, the course is effective in altering students' perspectives about their own career paths. While 12.5% of students enrolled in the Fall 2011 seminar reported that they planned to pursue employment opportunities in criminal justice administration at the beginning of the course, 50% planned to pursue such jobs by the end of the course. If law schools are not introducing students to these tangled webs of state civil sanctions, we risk introducing well meaning but uninformed practitioners to the legal market.

In addition to impact litigation and class action opportunities for future lawyers, many of the issues covered in courses such as mine also present direct representation opportunities. While much of legal academia is currently engaged in a spirited debate over whether we are producing "too many lawyers," few consider seriously the dearth of lawyers and funding for civil legal services in this country.[137] In Newark, for example, the work of Newark Reentry Legal Services

[137] *See, e.g.*, Erin B. Corcoran, *Bypassing Civil* Gideon*: A Legislative Proposal to Address the Rising Costs and Unmet Legal Needs of Unrepresented Immigrants*, 115 W. VA. L. REV. 643, 644–45 (2012) (proposing a possible solution to the "pervasive and underreported crisis in the immigration system" of immigrants appearing before immigration judges "without qualified representation"). Funding problems are an issue in New York where the New York State Interest on Lawyer Accounts (IOLA) Fund, "traditionally the leading source of state funding for civil legal services, has seen its revenues plummet to a fifth of what they were just a few short years ago—from $32 million to $6.5 million." Hon. Jonathan Lippman, *Equal Justice At Risk: Confronting the Crisis in Civil Legal Services*, 15 N.Y.U. J. LEGIS. & PUB. POL'Y 247, 249 (2012).

(ReLeSe)—a legal services program of Volunteer Lawyers for Justice—has been critical in assisting people with criminal records with obtaining relief from certain consequences of conviction. Similar civil legal services for convicted persons seeking to challenge the arbitrary or erroneous imposition of collateral consequences is virtually nonexistent.[138] In an attempt to fill this advocacy gap, the American Bar Association has advocated the implementation of clinical educational opportunities to serve former prisoners.[139] As described above, however, clinical education alone is likely to be insufficient to meet these needs. As a result, the absence of these pedagogical "boogeymen" from the halls of civil justice persists, fostering further criminalization and stigmatization.

These classes also foster our students' interests in policy and reform work. A sustained, critical examination of the contours, causes, and effects of the carceral state allows our students to engage the political, economic, institutional, and social factors that contribute to this phenomenon. When media depictions of racial disparities in the criminal justice system are the ones upon which our students base their understandings of the system, we have failed our duty to challenge their assumptions and inform their decision-making. Integrative courses such as this one can be instrumental in teaching students to be informed and empathetic practitioners.

Law schools have the privilege of shaping students' conceptions of the limits of justice and state power.[140] On the first day of my "Confinement, Reentry, and Public Policy" seminar, I ask my students

[138] In most jurisdictions, offenders in actions to terminate parental rights may be eligible for court-appointed counsel. *See generally* VIVEK SANKARAN, A NATIONAL SURVEY ON A PARENT'S RIGHT TO COUNSEL IN TERMINATION OF PARENTAL RIGHTS AND DEPENDENCY CASES (2010), *available at* http://www.youthrightsjustice.org/Documents/SurveyParentRighttoCounsel.pdf.

[139] JUSTICE KENNEDY COMM'N, AM. BAR ASS'N, REPORT TO THE HOUSE OF DELEGATES, RECOMMENDATION 10 (2004) ("[T]he Commission recommends that law schools establish clinics in which students may gain both understanding and experience in representing those who have committed crimes and are imprisoned as a result, or who are seeking to reestablish themselves in the community through restoration of rights."), *available at* http://www.abanow.org/wordpress/wp-content/files_flutter/1267823151_20_1_1_7_Upload_File.pdf.

[140] A 2006 survey of 444 prosecutors suggested that "law school curriculums play a role in future indictment processes of their graduates." Dennis J. Stevens, *CSI Effect, Prosecutors, and Wrongful Convictions*, 45 CRIM. L. BULL. 591, 609 n.60 (2009).

to articulate the defining characteristics of an ideal criminal justice system. This is an exercise that I use in other courses, and it is grounded in the idea that the students should begin their study of the subject by articulating their innermost assumptions and biases about what is "good" and what is "bad." I then spend the semester attempting to change their minds.

There remain possibilities for students' perspectives (and career paths) to shift as a result of serious engagement with the subjects described here. I recently received the following emails from two students in the Fall 2011 seminar that exemplify the effect that such courses can have on students' professional capacity and expertise:

> I just wanted to check in and thank you again for your wonderful confinement and reentry seminar in Fall of 2011. Although I planned to become an environmental lawyer, I just interviewed with [redacted] a prisoner's rights organization headquartered in [redacted] . . . The organization handles prisoner's rights issues; they act as advocates during the administrative exhaustion process of civil rights claims, as well as a minute amount of litigation (minute, thanks to the PLRA). They are abolitionists at heart, definitely a unique crowd of attorneys, to say the least. I felt as though I fit in with them . . . .

> I am writing to you because your seminar class on prisoner reentry has changed the way I look at the community around me . . . . I have had the pleasure to help a woman start a non-profit organization for ex-offenders. The organization [redacted] is designed to teach ex-offenders trade skills to help obtain jobs . . . . I would have never even given this idea a second glance except that my eyes were opened from your prisoner reentry seminar. I learned the struggles of various members of society and how the law is not always applied evenly in communities such as Newark. After being aware of such issues occurring, I volunteered to help in hopes

> that this . . . organization could make a dent in a national issue. All it takes is one person to start a movement. Thank you for opening my eyes to issues that I never knew existed.

By their own accounts, each of these students was changed by the expansion of our law school's curricular offerings to include a seminar on criminal justice policy, with a focus on incarceration and offender reentry. Their experiences represent the fulfillment of one of the course goals, "to introduce participants to the reality and ramifications of America's obsession with incarceration, but also to engage participants in ongoing discussions about their role as future lawyers in an incarceration-obsessed society."[141]

CONCLUSION

The inclusion of these subjects in law school curricula could alter both the pace and scope of this country's current mass conviction and mass incarceration trends. It could also expand our students' employment prospects, while preparing them to meet the ethical obligations of practitioners in the criminal justice system and the policy challenges of incarcerative and decarcerative criminal justice reform. Law faculty can lead here, by incorporating supplementary modules into their required and advanced criminal law courses, and by proposing to teach standalone courses that engage this material with depth. Our efforts will spur casebook publishers to have this material collected and bound. Until then, a rapidly evolving legal, political, and professional landscape requires that we think expansively about the substance of "practice-ready" legal education.[142]

[141] Taja-Nia Y. Henderson, Confinement, Reentry, and Public Policy Seminar Syllabus (Fall 2011) (on file with author).

[142] *See* Miedel, *supra* note 37 at 11 (arguing that law schools must recognize that "knowledge of collateral consequences and their impact is a crucial component of the skill set students need to acquire as they prepare to become members of the criminal justice community").