

Strategies and  
Techniques for  
Teaching Criminal Law

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# Strategies and Techniques for Teaching Criminal Law

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Strategies and  
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## I. Background

In the vast majority of American law schools, Criminal Law is a first-year course, usually for three, but sometimes four, credits. Criminal Law is almost always a required course, except in some of the schools that teach it in the upper levels. Criminal Law is also on every bar exam in the United States. It is generally considered essential to being an educated lawyer. Moreover, because most students do not go on to practice criminal law, for many of them the basic course will be the only one they take in the area. This book focuses primarily on Criminal Law as a first-year course, with occasional comments on differences in teaching it at the upper levels.

Professors and even entire schools differ in their justifications for offering Criminal Law in the first year. Those justifications affect teaching choices in ways that are explained later.

Most teachers agree that one of Criminal Law's main functions is to teach the skill of statutory interpretation. Although several first-year courses rely at least partly on statutes or rules (for example, Contracts addressing Article 2 of the Uniform Commercial Code and Civil Procedure addressing the Federal Rules of Civil Procedure), Criminal Law is different. First, *all* Criminal Law in the United States is statutory. Accordingly, every Criminal Law case is implicitly or explicitly about statutory interpretation. Second, 34 states have adopted substantial portions of the American Law Institute's Model Penal Code (MPC). The remaining states have systems that codify much of the common law. But neither group of states is "purely" an MPC or common law jurisdiction. Most states, in fact, have systems combining aspects of the common law, the MPC, and features unique to that state.

It is neither possible nor wise to try to teach the law of every jurisdiction. Consequently, most professors teach two separate (but often related) systems: the "classic" common law and the MPC. Teaching the MPC allows students to work with an entire substantive statute, rather than merely an occasional statutory provision or numerous provisions but from multiple jurisdictions. Describing two entire systems of law—the common law and the MPC—can be daunting for a teacher new to the subject. Yet the effort is worth it precisely because of the MPC's value in teaching statutory interpretation. On the other hand, it is impossible not to teach the common law, both because it plays such an important role in well-known cases and

because it provides some striking contrasts to the MPC. Moreover, because most jurisdictions combine aspects of the MPC and the common law, ignoring either one could insufficiently prepare students for practice. The common law can also play an important role on bar examinations. It is not “cheating” for a professor teaching the course for the first time to turn to the many outlines, mini-hornbooks, and other study aids that delineate the differences and similarities between the MPC and the common law.

Other teachers prefer using selected statutes from “real” jurisdictions on the theory that the best way to teach real legal practice is to simulate it as closely as possible. A few teachers use their own state’s criminal code rather than the MPC as their means for achieving an extended focus on one jurisdiction. They do so in an effort to mimic legal practice even more closely. The disadvantage of this approach is its focus on a single jurisdiction when many schools’ student populations will practice in a variety of states. Many teachers combine aspects of all these approaches. A very small number of instructors emphasize only the common law on the theory that adding the MPC is too much to ask of first-year students. These teachers conclude that the case law analyzing statutes is sufficient to teach statutory interpretation skills, at least at the level that first-year students can best absorb. Whichever approach a teacher finds most agreeable, the main point is that statutory interpretation skills are essential to the course.

A second common justification for teaching Criminal Law in the first year is its potential for emphasizing the trial, rather than the pretrial or appellate, process. Although the course emphasizes substance rather than procedure, almost all the cases involve appeals from trial verdicts. Despite the high level of guilty pleas, juries play a more important and frequent role in the criminal than the civil system. Most criminal cases also depend more on the raw facts and the inferences from those facts than on the substantive law. Did the defendant pull the trigger, or did someone else do so? Witnesses might disagree. Thus, credibility issues abound. The legal standards themselves are often intentionally ambiguous—Did the defendant act with a “depraved heart”?—inviting moral evaluation. That in turn requires covert or overt appeals to social norms and emotions while crafting competing stories in the ways that the best trial lawyers do.

A third justification for making Criminal Law a first-year course is its alleged accessibility to law students and the excitement it lends to

otherwise seemingly dry first-year classes. The greater accessibility of the law is a myth propagated by professors unfamiliar with the area. Many aspects of Criminal Law *doctrine* are complex, technical, and even boring for recent college graduates unused to the close parsing of language. But the *facts* are accessible and exciting. Murder, rape, torture, child abuse, drug-dealing, theft, and robbery are the stuff of prime-time television. The facts can excite students, motivating them to wrestle with difficult concepts that might otherwise seem too abstract.

A fourth justification for offering Criminal Law in the first year is its potential to introduce students to jurisprudential issues. Any course might, of course, be used for that purpose. But Criminal Law more obviously (to relative laypersons, anyway) deals with grand issues of justice (only Constitutional Law II: Individual Rights is a serious competitor). Words like *retribution*, *rehabilitation*, *mercy*, *excuse*, *justification*, *entrapment*, and *self-defense* invite the language of justice. They do so in a way that also has a strong emotional appeal. That can set the stage for seemingly more technical jurisprudential questions: What is an act? What is a mental state? Is there free will?

The fifth justification for the course stems from a different direction: social science. Social science offers much insight into jurisprudential questions like whether free will is real. Social science can also serve as an alternative or supplement to jurisprudence. For example, social science studies can examine people's instincts as to what punishments fit what crimes, completely apart from whether some abstract theory justifies those choices. Additionally, social science can inform discussion about the consequences of various criminal law statutes, such as whether harsher punishments more effectively deter crime. Furthermore, social science can suggest which social institutions are best suited to what tasks or what unexamined assumptions underlie particular provisions in a criminal statute. Social science can also explore how juries process evidence, what biases affect their reasoning, and whether they can be overcome. Social science and jurisprudence can thus inform discussions about law reform. Given the statutory nature of Criminal Law, these discussions also inevitably involve some understanding of the legislative process. Social science can shed light on that process as well.

Although these are the major justifications for including Criminal Law in the first year, no one teacher can serve each goal equally. Each professor's background tends to affect his or her choice for emphasis.

Criminal law seems to be a field that attracts more teachers with substantial practice experience than is true for many other subjects. Former prosecutors and public defenders thus tend to emphasize the statutory and trial aspects of the course. But they also rarely ignore jurisprudence and social science entirely, if only because both things matter to practitioners. For example, a self-defense claim might require understanding at least the basis of the strengths and weaknesses behind “battered woman’s syndrome.” Professors who have not practiced or who have advanced degrees in philosophy or literature tend to gravitate more toward jurisprudential concerns. Yet they clearly cannot omit statutes or some discussion of the trial process from the course. Educators with advanced social science degrees tend to play to their perceived strengths, beefing up the social science emphasis. Yet the law is statutory, and criminal convictions occur at trials, with trial processes being a favorite topic of social science investigation.

Regardless of an individual professor’s background or interests, the nature of a school’s population and its mission also affect course emphases. Where bar passage is a concern, jurisprudence and social science will likely appropriately get short shrift. Where schools assume that their students will pass the bar, teachers might feel freer to relax a focus on practice in favor of more systemic issues. Some schools adopt as part of their mission a commitment to skills training. Other schools see their mission as more heavily devoted to law reform. Where Criminal Law is taught as an upper-level course, especially where it is an elective, many professors might assume that Criminal Law’s first-year goals have been met in other ways. Upper-level teachers might therefore also feel more freedom to mold the class closer to their personal interests.

I see my task here as presenting a variety of options for teachers to consider. My hope is that teachers experienced in the field and those new to it will find that these options spark their pedagogical imagination. However, for those new to the subject, I address bare-bones basics, from course content to exam design and grading. I also give warnings about pitfalls in teaching the course and hints about how to survive them. One danger of my approach is that new teachers might find the number of options daunting. I will make a few comments about this risk at the book’s end, but here I note the following: I see it as a long-run disservice to limit the options available to each teacher, who should always want to grow and



change. Furthermore, each teacher necessarily has different skills, personalities, and goals from other instructors. To insist that any one model of teaching should govern is to put the square professor into the round pedagogical hole. It guarantees failure. Although I sometimes express my own views on certain approaches, I do so to prompt deliberation rather than end it. Similarly, I cannot hide my passion for the subject, and part of my goal is indeed to convey that passion to new teachers who might face the subject with trepidation when what it merits is excitement.

Thus far this book has focused on justifications for treating Criminal Law as serving special goals. But the course also shares at least three goals with all other courses: teaching doctrine, case analysis, and rule application. Yet, even in these areas, Criminal Law differs somewhat from other courses.

## **II. The Doctrine**

### **A. WHAT IS UNIQUE ABOUT CRIMINAL LAW?**

Many substantive law courses proceed largely through the elements of various causes of action. Elements play an even more critical role in Criminal Law. But most instructors do not start with a focus on specific offenses. Rather, they begin with the “general part” of the Criminal Law; that is, the part that defines principles applicable to *all* crimes and the general nature of the major categories of elements: acts, results, mental states, and attendant circumstances. The theory of doing so is that the elements of specific crimes cannot be adequately understood without knowing the broader context. Moreover, because there are thousands of crimes, it is impossible to teach more than a small sampling of them. Teaching basic principles gives students the tools for better understanding entirely new crimes to which they are exposed in practice. Furthermore, most criminal statutes follow the general part, specific part distinction, even if not always so labeled. It is important to warn students used to learning elements elsewhere why they must first learn these general principles. Otherwise, they might feel lost and ask just what it is they are supposed to know. Microsoft PowerPoint slides outlining the general principles and commenting on their link to the later study of specific elements can be one way to allay student concerns. Some casebooks

have Web sites making such presentations available to users. Users can then modify those slides to meet their specific needs.

Of course, broad principles seem meaningless to students without concrete illustrations. Books thus often include cases or notes at least outlining the basic elements of some crimes to which the general principles can be applied—even though more detailed discussion of each such crime’s elements will await a later part of the course. Alternatively, the instructor might simply list the elements of a few illustrative crimes on the chalkboard, whiteboard, or PowerPoint slides. Common examples of crimes used for these purposes are burglary, larceny, rape, and some form of homicide.

A few professors reverse the general part–special part order based on the belief that concrete examples better aid understanding of later, more general principles. Some professors elide the distinction entirely, focusing on specific crimes only, in great detail, but using them to teach general principles as well. There are, however, very few casebooks departing from the general part–special part approach, thus limiting the choice of off-the-shelf materials.

The unusual nature of the general part–special part distinction can confuse, for example, Torts teachers who are teaching Criminal Law for the first time—*unless*, that is, they are forewarned. The distinction can also confuse impatient students unless they too are forewarned, accompanied with an explanation for the distinction and lots of concrete examples. That approach also builds in some repetition. For example, early on students might study the “mistake of fact” defense generally, perhaps illustrating it with a theft offense, later returning to that defense in the context of specifically studying sexual assault in depth. Doing so also enhances transferability of learning from one context to another. Students see that mistake of fact applies to theft, then later see that it applies equally to the very different crime of rape.

Even before teaching the general part, most courses start with three basics: (1) the steps in the criminal justice system, (2) the purposes of sentencing and of the criminal law (generally viewed as being identical) and the nature of the sentencing process, and (3) the basics of statutory interpretation. The first topic is sometimes covered by background reading, other times by brief class discussion, and still other times by an entire class. The goal is to give students enough of the procedural setting to understand procedural references in the cases. The second topic, sentencing, helps students understand

the policy goals underlying the Criminal Law, which will prove important in many later classes. All criminal cases result in dismissal, acquittal, or conviction, followed by sentencing. Studying sentencing thus gives students a sense of what is at stake. Moreover, it reminds students that practicing lawyers must be thinking about potential sentencing as soon as they take on a case. Knowing the potential and likely sentences becomes crucial in deciding whether to plead guilty or go to trial, what pretrial rehabilitative services to provide for a client, the likelihood of obtaining bail, and a host of other tactical decisions. Sentencing theory also provides the building blocks for later jurisprudential discussions given the broad purposes of sentencing: retribution, deterrence, norm-education, isolation, and rehabilitation. The third topic, statutory interpretation basics, gives students the tools for repeatedly exercising that critical skill throughout the course.

## B. THE GENERAL PART

The major focus of the discussion of the general part is on the nature of the voluntary act (*actus reus*) and mental state (*mens rea*) elements. Discussion of these topics usually follows a brief overview of the meaning of identifying an element and the four broad types of elements (again, act, mental state, result, attendant circumstances). This deep exploration of element types and of their role in statutory interpretation and trial proof is part of what makes the course such a good vehicle for teaching element analysis.

### 1. The Act

The act requirement usually focuses first on the meaning of an act (a bodily movement) and of the mandate that it be voluntary. Voluntariness necessarily raises questions about free will and the difference between the conscious and unconscious minds, either of which might account for a bodily movement.

Study of the act element usually moves next to the rare instances in American law in which an omission can substitute for an act. Generally, there is no duty to act, but there are a small core number of common exceptions. These exceptions are similar to those studied in tort law.

The third major topic under the “act” rubric is the act of possession. This topic can be confusing for students because that act is generally defined as knowing you have dominion and control over a thing. You do not have to know what the thing is, but you do have to know that you have dominion and control over it. (Thus if you know that you control a cigarette but do not know that it is marijuana, you still commit the “act” of possession, although you might not be guilty of the crime because other elements are missing). The reference to knowledge sounds like a mental state, thus accounting for student confusion. It is important to stress to them that the law treats it as an act.

But proving the “act” of possession does not establish guilt of the crime. The other elements of the crime must all be proven beyond a reasonable doubt. Possessing cocaine, for example, might require the attendant circumstance of the substance actually being cocaine. But the crime will also usually require the mental state of knowing that the substance is indeed cocaine, not merely that the substance is some unidentified “thing.” It is important to emphasize to students that the state must prove all three elements—the act of possession, the fact that the thing possessed is cocaine, and the mental state of knowing that it is cocaine—beyond a reasonable doubt. A jury with a reasonable doubt as to any one of these elements must acquit.

Many teachers conclude the act discussion with a brief examination of due process case law governing whether a “status,” such as being a drug addict, can be punished. The status discussion also highlights the bodily movement concept of an act. There are arguably small differences between the common law and MPC conceptions of an act, so studying the act requirement also allows an easy introduction to the MPC.

## 2. Mental State

Many people think that the study of mental states provides yet another justification for the first-year study of Criminal Law. Torts also addresses mental states under the rubric of intentional torts. But schools teaching Torts in one semester will devote little time to intentional torts. Even where the topic gets greater coverage, mental states occupy merely a corner of Tort Law, whereas they are pervasive in Criminal Law.

There are four “core” mental states defined in the MPC: purpose, knowledge, recklessness, and criminal negligence. Although the common law sometimes uses different terminology, most common law terms can be translated into these same four mental states. That translation provides a common language for discussing the common law and the MPC. Studying these core mental states also makes it easier later to understand additional, mostly common law, mental states like “heat of passion,” “depraved heart,” and “willful, deliberate, premeditated” murder. The four core mental states, at least as recited in the MPC, seem to turn on cognitive (intellectual) mental processes. It is important to stress to students that there are emotional aspects to many later-studied mental states, illustrated, again, by acting in the heat of passion or with a depraved heart. Motive, sometimes colloquially defined as why a person has a mental state, is also often emotional in nature. For example, the motive for a suspect’s wanting to kill another (i.e., having the purpose to kill him) might be greed (inheriting the victim’s money as the sole survivor) or jealousy (killing a cheating spouse).

Much of the use of case law, text, notes, and problems in this area is designed to illustrate the four core mental states. Other source material will illustrate strict liability—the supposed rarity of the *absence* of any mental state in a particular offense definition. I say supposed “rarity” because most criminal law theorists stress the important role of mental states as justifying the state’s use of the powerful remedies of the criminal law. If strict liability is meant to be rare in theory, in practice it seems to be expanding beyond its original, limited role. Nevertheless, strict liability is usually limited to minor offenses with very modest punishments. There are exceptions, however, such as felony murder and statutory rape, two strict liability crimes with potentially severe sentencing consequences.

Three common mental state doctrines are also usually studied: willful blindness (a substitute for true knowledge), transferred intent (e.g., trying to shoot and kill A but missing, killing B), and conditional intent (“I will kill you *unless* you give me all your money”). Two related mental state defenses—mistake of fact and mistake of law—are also studied. Mistake of fact (“I thought she was consenting, so it wasn’t rape”) and some kinds of mistake of law illustrate the difference between derivative or failure of proof defenses and affirmative defenses. Failure of proof defenses are of this form: “Because of something I, the defendant, know you, the

prosecutor, cannot prove this element beyond a reasonable doubt. Your proof fails.” For example, a mistake of fact defense takes this form: “I, the defendant, thought the television set was mine. Therefore, you, the prosecutor, cannot prove beyond a reasonable doubt that I ‘knowingly’ received stolen property.” Your students might have seen a similar distinction made in their Contracts or Torts course—failure of an element of a *prima facie* case as opposed to proving all the elements of a defense. If so, good. But many students might still lack a firm grasp on the concept.

Affirmative defenses are of this form: “Even if you, the prosecutor, can prove every element of the crime beyond a reasonable doubt, I, the defendant, am not responsible because I have a justification or excuse.” One variant of the mistake of law defense is just of that latter form, namely, “Even if you, the prosecutor, prove every element of the new crime of ‘sexting’ beyond a reasonable doubt, I, the defendant, am not guilty because I reasonably relied on an official statement of the law declaring conduct like mine reasonable under these circumstances.”

The failure of proof—affirmative defense distinction can also be used to offer early on an example of the difference between the burden of production and of persuasion. For most common law failure of proof defenses, the state places only the burden of production on the defense, then shifts the burden of persuasion to the state. For most common law affirmative defenses, however, the state places both the burdens of production and persuasion on the defense. The MPC law as to burdens is more complex. These distinctions might have been addressed in Contracts, Torts, or Civil Procedure. If so, you can build on that knowledge, demonstrating some measure of continuity between the criminal and civil justice systems. If not, Criminal Law offers a terrific opportunity to introduce the law of burdens.

Mistake of fact also illustrates the significance of another common law mental state distinction: that between “general intent” and “specific intent” crimes. This distinction would first be covered early in the mental state unit. The distinction matters only under the common law. Be forewarned: This distinction is the most confusing one in the course. Different states, and even different courts or judges in the same state, define specific and general intent differently. Indeed, the same court might define these terms inconsistently in different contexts. Sometimes courts do not define the terms at all. Yet the definitions are critical under the common law. This is so

partly because the rules for certain failure of proof and affirmative defenses vary with whether the crime is one of “general” or “specific” intent. For example, at common law, mistake of fact is a defense if it negates the specific intent portion of a specific intent crime, even if the mistake was *unreasonable*. But mistake of fact is a defense to a general intent crime only if the mistake was both honest and *reasonable*. Rephrased, proving the mental state for a general intent crime generally means proving an unreasonably held belief. But an unreasonable belief is another way of saying it was negligently held. However, this more straightforward way of stating the rule is not the language of the common law.

Another mental state issue commonly covered is the *absence* of a statutory mental state; that is, strict liability. The absence of a mental state being expressly recited in a statute does not mean, however, that the legislature intended that absence. The exercise is thus one of statutory interpretation to divine just what mental state the legislature did intend.

A final aspect of the mental state unit typically concerns issues of proof. Examples include direct versus circumstantial evidence, the instruction that persons can be assumed to intend the natural and probable consequences of their actions, the sufficiency of evidence of intent, and the problem of false testimony.

### 3. Results and Causation

The result element of a crime is defined as a statutorily specified fact that must be true and that the defendant must cause. Causation is thus the central matter for discussion when analyzing results. The law of causation in the criminal context is, however, only subtly different from the law of causation in Torts. Moreover, the Torts class devotes substantial time to causation. Accordingly, some Criminal Law professors omit causation entirely to save time for other topics. Because the major result crime studied in the course is homicide, some professors teach causation as part of the homicide unit rather than during the discussion of the general part.

### 4. Attendant Circumstances

*Attendant circumstances*—statutorily specified facts other than an act or mental state, but that the defendant need not cause—are simple. For example, the common law requirement that burglary

occur “at night” is an attendant circumstance. The simplicity of the concept means that it usually is not addressed as a separate unit but is examined as it arises in the course of other discussions. Yet students must be able to identify attendant circumstances for these reasons: First, their presence alerts the practitioner that there is no need to prove that the defendant caused them (a defendant does not “cause” night to fall); second, the MPC defines some mental states differently based on whether they relate to attendant circumstances or results.

### C. PROOF PROBLEMS

Professors who want to emphasize trial issues will lay the groundwork by following the study of the general part with the study of problems of proof. Other professors leave these issues for a later point in the course, such as after the study of one crime (like homicide) in depth. Still others will sprinkle these issues throughout the study of specific crimes or select only a few of these issues to study. Teachers preferring a jurisprudential or social science emphasis might omit these issues entirely. Reasonable coverage of most of these issues takes about three 50-minute hours. Thorough coverage would require an additional hour of instruction.

The primary doctrinal issues in the proof unit are these: (1) the meaning of “beyond a reasonable doubt,” (2) the concurrence requirement (roughly stated, the requirement that the act and the motivating mental state occur simultaneously), (3) the differing remedies for procedural errors (resulting in a new trial) versus insufficiency of the evidence (resulting in acquittal), (4) jury nullification and jury unanimity, and (5) jurisdiction and venue. Some professors also teach presumptions, a topic that takes a full class but that is also sometimes covered in Evidence classes.

Some professors also spend time honing such skills as making credibility arguments. That could also involve a brief introduction to some rules of evidence, such as character evidence versus motive versus habit, as well as basic techniques for impeaching a witness. Professors emphasizing credibility analysis will likely need to address only a few of the other doctrinal questions of proof, address them fairly cursorily, or sprinkle them throughout the course.



## D. THE SPECIAL PART

### 1. Basic Crimes

The one crime that is nearly universally studied in great depth is homicide. That includes the study of both the various common law versions of the crime and the MPC versions. Many teachers focus on each of the common law versions, comparing each to the analogous MPC version. Other instructors teach the common law as an entire unit, and then turn to the MPC. The common law types of homicide are first-degree murder (willful, deliberate, and premeditated; poison or lying in wait; and some kinds of felony murder), second-degree murder (including depraved heart and intentional killings not rising to first-degree or mitigated to manslaughter), and voluntary and involuntary manslaughter. The MPC variants are various types of murder, two types of manslaughter, and negligent homicide. The MPC replaces felony murder with a presumption of murder if the death stems from certain listed felonies.

Most professors also teach about sexual assault, primarily rape. Some professors shy away from this topic because of its emotional sensitivity (a point discussed in more detail later in this book). Lawyers practicing criminal law must learn to deal with such issues, however, and they might appear on bar examinations. Precisely because of their emotional sensitivity, sexual assault issues provide important teaching opportunities. Among those opportunities are recognizing cultural assumptions implicit in the law; forecasting juror sensibilities based on similar assumptions; exploring the link between grassroots social movements (such as the rape reform movement) and legal change; and learning to listen carefully to, and respond respectfully to, those who disagree with you on important issues. Minimally two—ideally three—50-minute hours focusing on rape can accomplish much. Some professors will devote more time to the topic, although that requires cutting other material.

Many professors also spend at least a few classes discussing the major common law theft offenses: larceny, embezzlement, burglary, robbery, extortion, and false pretenses. The elements of some or all these offenses might have been touched on as examples of doctrinal principles throughout the course, but a theft unit explores the meaning of these elements in more depth, perhaps through a combination of cases, hypotheticals, and problems. One reason to

focus on these offenses in depth is that the common law rules are often complex and appear on bar examinations. The various types of larceny and the arcane rules that grew around them can be especially complex. Professors emphasizing teaching rule application or who love puzzles are particularly enamored of this topic. Modern variants of the common law theft offenses also often make up a substantial portion of the docket in most criminal courts. The subject is thus directly helpful for practice. Some teachers amplify its practice value by adding time to compare common law statutes to modern variants and to the MPC. That approach also teaches statutory interpretation skills.

Lovers of white-collar practice might add time to address white-collar theft offenses, including federal ones, particularly the Racketeer and Corrupt Organizations (RICO) Act, which can involve theft issues. Business clients often face both potential civil and criminal liability. Because most law graduates will be civil practitioners, awareness of this civil–criminal overlap can be especially important to these clients. White-collar offenses are also great fodder for teaching statutory interpretation skills. They also raise interesting questions about the respective state versus federal roles in crafting criminal law. For these very reasons, some teachers might forego the common law theft offenses entirely to make room for white-collar issues.

The seeming sheer stupidity of some of the common law theft rules, which result more from history than logic, can make this subject dry. Moreover, theft lacks the attention-getting appeal of homicide and rape. Furthermore, despite the complexity and absurdity of the common law rules, students who accept them for what they are can learn the material fairly quickly. For these reasons, many professors simply leave this topic until the end of the course, feeling little guilt if they run out of time to address it.

## 2. Inchoate Offenses

Most Criminal Law professors spend significant time on the major inchoate offenses: attempt, solicitation, and conspiracy. Pursuing inchoate offenses is based on the idea of stopping crime before most of the resulting social harm has been inflicted. None of the inchoate offenses stand alone. They all relate in some way to completed offenses. For example, no one is guilty simply of “attempt.” Rather, you must be proven guilty of attempting a specific crime, such as

attempted murder. This point is one that students sometimes initially miss. For this reason, the inchoate offenses are generally taught after the completed offenses (primarily meaning after homicide, rape, and theft, although, as noted earlier, given time pressures, theft might be moved to the course's end). Many professors teach inchoate offenses immediately after the completed offenses. Other professors might first follow the completed offenses with affirmative defenses, then the inchoate offenses. The logic of the first approach is that both completed and inchoate offense units primarily address the prosecutor's case-in-chief. The logic of the second approach is that once students have an understanding of an entire case—the prosecutor's and the defense's proof—they are better situated to address inchoate offense complexities.

Many of the inchoate offenses, such as solicitation and conspiracy, necessarily involve multiple potential defendants. That complicates analysis, but in ways that closely mimic real-world practice. These offenses also raise difficult jurisprudential questions: How do we punish such "precrime" (no harm yet caused) without merely punishing thoughts? How do we distinguish acts sufficient to be true attempts from mere preparation? How is culpable group action different from isolated individual action, and should we (and can we) apportion responsibility in some fashion among the individual members of the group?

The MPC inchoate offense provisions also involve many subtleties. That provides excellent opportunities to practice statutory interpretation. State inchoate offense statutes can serve a similar purpose. Some inchoate offenses, like conspiracy, also require touching on some procedural doctrines, such as the coconspirators' exception to the hearsay rule.

### 3. Accomplice (and Other Derivative) Liability

Accomplice liability is usually taught in conjunction with the inchoate offenses. Accomplice liability is not, however, itself a crime. Rather, it is a form of derivative liability—of holding one person liable for another person's conduct. For this reason, accomplice liability is also linked to other offenses. For example, an accomplice to a murder is simply convicted of murder. Under codes like the MPC, one can also be guilty of inchoate offenses, such as attempted murder, via accomplice liability. Accomplice liability—purposely aiding another

in committing a crime—is not the only form of derivative liability. For example, one person can be liable for a crime committed by an “innocent agent”—a person unknowingly duped into committing a crime. Some common law jurisdictions (“Pinkerton” jurisdictions) also make coconspirators liable for one another’s crimes under certain circumstances. Again, accomplice and other derivative liability doctrines are standard fare in practice, raise multiple-actor issues, highlight proof problems, help in reviewing earlier doctrine, and allow for more complex, sophisticated analyses.

#### 4. Defenses

The defenses unit primarily covers affirmative defenses but also might cover some derivative offenses usually not addressed in the general part portion of the course. The major affirmative defenses covered are self-defense, insanity, involuntary intoxication, diminished capacity, duress, necessity, and entrapment. Professors with more time might also address defense of others and of property. Nearly all professors address at least one derivative defense in this unit: voluntary intoxication. Some professors also teach alibi and related “wrong guy” defenses. Many professors like to precede the discussion of specific affirmative defenses with a more general discussion of issues cutting across defenses, such as the distinction between justifications and excuses and the “cultural defense” (rarely an independent defense, but one that argues that cultural differences are relevant to proving the mens rea elements of defenses under certain circumstances). Some professors might also address procedural and constitutional doctrines, such as the right to present a defense, the problem of inconsistent defenses, and due process doctrines concerning the insanity or other mental health defenses.

Defenses are a central part of the course. Without covering defenses, students see the world primarily through the prosecutor’s eyes. Defense counsel becomes restricted to poking holes in the prosecutor’s case—a crucial function. Yet if that function is the only one emphasized, it paints an incomplete picture of defense counsel’s role. Affirmative defenses also raise important questions about culpability: When, if ever, should someone proven to have committed a harmful act with a seemingly evil intent be held not responsible for the crime? When are seeming crimes’ occurring in fact more socially beneficial than their not occurring (the “necessity” or “choice of evils”

defense purports to provide one answer to precisely this question)? When should we excuse or mitigate criminal responsibility because of human weakness? What insights do social science and philosophy offer in answering these questions?

Defenses also raise gripping issues of human drama: protestors at military bases trying to prevent nuclear Armageddon, battered spouses struggling to save their lives, usually honest politicians enticed by forbidden fruit. The nature of these narratives makes for exciting classroom discussions.

Some defenses, particularly self-defense under the MPC, arise from startlingly complex statutory language. Study of this language allows repeated drilling of students' interpretive skills. All the defenses also raise practical proof problems and illustrate the application of varying burdens of production and persuasion. Nearly all the defenses also starkly raise questions of moral responsibility and social policy. Issues concerning the roles of race, gender, class, and sexual orientation particularly seem apt in this area.

As noted earlier, given the centrality of defenses to the course, many professors teach the topic right after completed offenses, others after inchoate offenses. The choice of placement is critical, however. Placing defenses after inchoate crimes means that defenses will come close to the course's end, perhaps resulting in their getting short shrift. On the other hand, placing defenses earlier could mean that inchoate offenses risk getting short shrift. Part of the choice involves making judgments about how time-consuming it is to teach these respective subjects. If the instructor's focus is primarily on the elements of each defense, the defenses can be taught fairly efficiently. That might also still leave some time for a skills or review exercise. Furthermore, defenses are so interesting that teaching them near the course's end can be a great way to avoid flagging student interest after many weeks of instruction. On the other hand, instructors wanting more time to explore social policy questions, law reform, jurisprudential issues, and lawyering in this area might want to teach it earlier, giving it more time. A few professors go still further, seeing defenses as so important that, after introductory topics, they start the course with defenses rather than offenses.

## 5. A Note on the Death Penalty

The death penalty is a highly contentious and interesting topic. It is a common part of the first-year course. It logically fits in with the discussion of sentencing purposes early in the course. Many instructors indeed teach it at that point because it so powerfully raises questions about retribution, education in morally infused social norms, and general deterrence (deterrence of potential offenders other than this defendant), while rendering rehabilitation and specific deterrence (deterrence of this defendant) irrelevant. Dead men cannot be rehabilitated. Nor can they be “deterred,” although they certainly will not offend again. The death penalty also raises questions about the dangers of arbitrary procedures, the risks of convicting the innocent, the problems with insufficiently limiting decisionmaker discretion, and the respective roles of the judge versus the jury.

Yet, as the courts often say, “death is different.” For this reason, I address it under a separate heading from sentencing. Death is a uniquely irreversible punishment. Despite the flaws in the death penalty process claimed by its many critics, capital offenders still often get far more process than the typical criminal offender. Actually executing someone requires unusually time-consuming and expensive procedures. Moreover, the jurisprudence on death sentencing is complex and voluminous. Granted, some small aspects can be selected for fruitful first-year discussion, but that selection can arguably mislead students about the nature of the capital process. Furthermore, very few practitioners will ever handle capital cases. New practitioners are highly unlikely to do so, even in a supporting role, although there are exceptions. There are good reasons to teach the death penalty in the first-year course, but given only 13 or 14 weeks to teach the course and many competing concerns, some professors skip this topic entirely. Other professors, because of the law’s complexity, leave the topic for later in the course. It can even be made the last topic, thus bringing the course full circle, back to sentencing.

## 6. Time Allocation

In 13 to 14 weeks, it is impossible to teach all these special part topics with equal attention and rigor. Some material must usually be cut. Other material can be taught with more or less intensity, depending on the individual instructor’s judgments about each topic’s

relative importance to practice or theory or relative value in furthering certain teaching goals. Still other professors will have idiosyncratic ideas about topic choice and coverage. Nevertheless, most teachers would likely agree that extensive coverage of homicide (after teaching all aspects of the general part and the basics of sentencing) and of at least one other crime (rape or the theft offenses), combined with teaching defenses, inchoate offenses, and accomplice liability, form the course's heart. The distribution of time among these topics and the amount of time allocated to other topics are subject to wider debate.

## 7. Preparing to Teach the Course

Some professors teaching a course for the first time spend endless hours of their summer reading background material. My own view is that this is a waste of time. Abstract reading will not result in retention, nor will it aid you in teaching a good course. At best, you might remember enough about overall themes or a few tidbits of information to answer a few more student questions without saying, "We'll get to that later." In my view, time is better spent preparing an outstanding syllabus. Reading, or at least skimming, a good mini-hornbook, along with relevant portions of your casebook, should be done, but only to the degree necessary to prepare an excellent syllabus.

Thus each class on the syllabus requires you to skim enough information to choose just what pages and problems to assign for a particular class. You should then consider whether you also want to assign supplementary materials of your own for that class or perhaps use a supplementary pamphlet or book. Likewise, you can decide what video clips or PowerPoint presentations, charts, or other study aids to use in class or what in- or out-of-class role-plays to assign. Similarly, you can choose what real-world documents you might post on your course Web site. Once finished with that task, you can move on to planning the next class on your proposed syllabus. Such planning requires you to review casebook authors' syllabi and colleagues' syllabi, and to brainstorm with colleagues or read articles or books on teaching Criminal Law.

This approach is time-consuming and exhausting, but it is time well spent. You will know, more or less, what you have to do to prepare for each class and will have a general idea of *how* you plan

to teach. I say “more or less” because you will inevitably get a few classes behind and will have to build into the syllabus some classes that you do not realistically expect to reach. That is why the last few classes are best left for material that you can live with deleting. This approach also allows you to retain more information because you prepare your syllabus in a thoughtful, purposive manner. It is worth noting that the first class requires particularly thorough preparation. This is so because first impressions matter. If the first class goes well, students will have a favorable impression of your teaching style and of the course. I offer some suggestions for approaching the first class as an appendix to this book.

You can prepare for each class more thoroughly a day or two in advance. Such preparation will give you still more ideas about how to teach the particular class, and you can always revise your original plans. But having plans means you are never at a loss for ideas, and if you change your original teaching scheme, you will have carefully considered alternatives, thus making more informed choices. Preparing an excellent syllabus thus has many class-preparation and course-design advantages.

This last point is better understood by reviewing some leading teaching methods to guide your planning, a task to which we next turn.

### **III. Teaching Methods**

#### **A. “CASE” METHOD**

As noted earlier, case law discussion in Criminal Law tends to focus on modeling statutory interpretation or illustrating the application of doctrine. Unlike a constitutional law course, there are not usually a series of cases on a single doctrinal issue from a single jurisdiction to synthesize. Nor is there much room for pure common law doctrinal evolution. The criminal lawyer’s world is a statutory one. Doctrine evolves, but it evolves from statutory roots.

Of course, cases can be used for many purposes. Case facts or rationales might raise fascinating jurisprudential questions, contradict empirical studies, and suggest economic theories of relative institutional competence (for example, whether judges or juries are better suited to make certain decisions). Professors planning to teach



solely by the case method can indeed use cases for these purposes and for many others. A caution is in order, though. If you want to use a case or series of cases to make points not discussed by the court itself, you must give students the tools to understand your point. An economic analysis requires some reading on economic methodology and on the specific issue you want to discuss. A jurisprudential focus on the idea of consent in rape cases requires reading philosophers' views on the meaning of the concept. Sometimes casebooks include this material, and other times they do not. In the latter case, preparing your own materials is a wise move. In doing so, remember not to give crushingly long reading assignments. Remember that students likely have four other courses. Assigning more than 20 pages of case law or more than 30 pages of total reading per 50-minute hour is a risky proposition. If you expect students to do other tasks as well, such as comparing common law and MPC approaches to an area of doctrine, preparing problems, engaging in role-plays, or completing short writing exercises, much shorter reading assignments—or at least fewer and more heavily edited cases—will be required.

Another caution is that not every case can serve every purpose—at least if you plan to cover more than one case in a class. If your casebook has three cases exploring one area of doctrine, but each case makes a slightly different substantive point, you might emphasize interpretive techniques in one case, policy wisdom in another, and rule articulation and application in the third. The doctrinal point of each case might thus be made quickly, or even done by lecturing. Alternatively, you might choose to teach only one or two of the cases thoroughly, covering the points of the other case through other means, such as lecture, PowerPoint slides, problems, or role-plays.

You must also make judgments about the relative importance of cases to your teaching approach and goals. If you plan to use multiple teaching methods, these methods might consume most of some classes, as might some role-plays or discussions of drafting exercises. Other classes might best be taught primarily through certain cases. Flexibility becomes the watchword. On the other hand, if you plan to teach primarily via case law, the cases will always be at the core of your teaching. Some alternative methods—such as the problem method or role-playing and oral argument—can be used as a way to teach the cases, as discussed later.

Using cases to teach statutory interpretation is almost always time-consuming and always worthwhile. It is important to remind

the students that the key legal authority is the statute. Even if the statute is relegated to a footnote in the opinion, it can be helpful to have students start with the exact language of the statute, next identifying the specific interpretive issue. The case can then be taught as a quest to solve the interpretive problem. Students can also be repeatedly drilled on the data sources relied on and weight given them by the court: text, canons of interpretation, legislative debates, committee reports, broader political history, policy, dictionaries, analogous statutory language, and analogous precedent. Dissenting opinions can be used to highlight other choices about what data to rely on, how much weight to give them, and how to justify using them. Often cases interpret a specific state statute, one based on the common law or a state's uniquely quirky choices. Where that is so, the case's outcome can be compared to that under the MPC. That exercise requires students to apply interpretive skills to a new statute after the skills themselves have been modeled.

Using cases to illustrate doctrine can be done in a fairly straightforward fashion. One way to do so is to have students identify the doctrinal rule first, then recite the case facts and procedural history, and then explain the court's holding and rationale. The rule can then be tested by applying it to various hypotheticals or problems. Again, if the case is based on the common law, students can also be asked to divine the MPC rule, and then apply it to the same facts. Indeed, casebook authors tend to emphasize common law cases precisely because (1) there is no "Model Common Law Code," so the cases are the only way readily available to teach common law rules; and (2) the MPC can then be applied to the same case fact pattern.

Most casebooks focus on appellate court opinions. It can be helpful to supplement that diet with trial court opinions. Such opinions bring students closer to the trial setting, making it easier to imagine the preverdict circumstances facing the lawyers. Issues of strategy, tactics, credibility assessment, witness selection, case planning, and drafting jury instructions become easier to approach. Occasionally adding case briefs into the mix—whether at the trial or appellate level—also allows a more intense exploration of lawyering strategy.

The procedural setting of the case matters as well. Insufficiency of the evidence versus procedural flaws meriting a new trial are the two broad underlying procedural issues that dominate most criminal law cases, whether on appeal or in postverdict motions.

Students must become practiced at spotting the sufficiency versus procedure distinction. Some cases occur preverdict—such as at a preliminary hearing—but these cases, too, involve claims of evidentiary insufficiency (judged by a lighter standard than posttrial) or procedural error (albeit of a different sort than generally reviewed on appeal).

## B. THE PROBLEM METHOD

The problem method generally uses a relatively brief set of facts—sometimes recited in a single paragraph, other times containing more substantial text. These facts mimic a real client’s situation. Longer problems can be used for review or to synthesize complex concepts, shorter problems to teach narrow, focused points. Problems can be approached in several ways. First, they can be used to illustrate the application of a legal rule. Second, they can be used to teach analogy by making the problem the focus of discussion, then bringing in the relevant case law as helpful in resolving the problem. Third, problems can aid statutory interpretation skills, either by providing a novel statutory text supplemented with legislative history or by expecting students to divine the relevant rule from a familiar statute (such as the MPC). Fourth, problems can serve to add the sort of real-world complexities of fact-finding, tactics, and ethics that enliven real practice. For example, a problem might include conflicting witness stories, raising credibility and case investigation issues. It could posit an admittedly lying client seeking to testify, raising questions of professional responsibility.

Advocates of the problem method see it as having numerous advantages over a pure case method. Notably, cases studied in the abstract can seem pointless or confusing to students and can make it hard for them to transfer their knowledge and skills to new situations. Reading cases with an eye toward solving a problem also clues students into what are the most relevant aspects of a case for the purposes of the class. Knowing they have a client with a particular need, students view the cases as one way to help solve the problem. Some of these functions might be served by hypotheticals, but hypotheticals tend to be brief, oversimplifying reality. Class discussion can result in varying the hypothetical so frequently and quickly that students get lost. Additionally, hypotheticals sprung on students for

the first time in class rob them of the opportunity to reflect on the client's situation in advance, to discuss it with other students, and to use it in class preparation. Precisely because problems mimic reality and can be written to reflect the dire state of affairs facing a real human being, problems can better motivate students to prepare for class. The factual richness of problems also makes it easier and more efficient to teach fact analysis and case-planning skills. Problems can be varied or can be supplemented with additional materials to permit more informed policy discussion as well.

The downside of problems is that they are even more time-consuming than the pure case method the first time a professor teaches. Problems require the instructor not only to learn the case and statutory law, but to outline the many ways that they apply to an individual set of circumstances. That extra time drops precipitously, however, the second time the instructor teaches the problem. Moreover, good teachers' manuals provide thorough answers to all the problems.

Another objection some teachers have to problems is that they believe that it crowds out time for discussing the cases. Aficionados of the problem method disagree. To the contrary, the problems can help improve student understanding so that they read cases more critically, speeding class discussion and improving its effectiveness. Furthermore, practicing lawyers (and judges, law professors, and law reformers) do not simply read cases. They resolve conflicts, aid clients in achieving goals, promote creative solutions to social difficulties, and plan for the future. These actions require sensitivity to facts and to client needs, and they require mastery of a much wider range of skills than is involved in simply reading cases. Problem-method fans do not see doing pure case analysis alone as really teaching students to "think like lawyers" at all. Moreover, they see using problems as a form of active learning, and pure case study as more passive (simply demonstrating how someone else—the judge—has done analysis).

A more moderate position sees problems as valuable but as only one tool in the toolbox. Some classes might involve pure case analysis, others the use of hypotheticals, and others problems of varying lengths. Each class session has a slightly different goal, and each class should be tailored to achieve that goal. Long problems seem best suited for review classes; indeed, law school essay exams are generally simply long problems. But synthesizing seemingly

disparate lines of cases might mean spending time on the cases alone without the complications of problems.

Problems can be obtained from a variety of sources. An increasing number of casebooks include problems of varying frequency and complexity. Other criminal law professors are often quite willing to share problems they have devised. Using the CrimProf listserv is one way to reach most criminal law professors quickly with a request of this sort. Many will be eager to share what they have done. There are also a few supplementary pamphlets that contain problems that can be used with any casebook. If you cannot find enough problems that suit your needs, you can write your own. Doing so in any significant quantity is not advisable the first time you teach a course. But writing exams is really an exercise in writing problems. Indeed, a single exam can be used as a megaproblem, teaching aspects of it as relevant to individual class topics. Once you have written a single exam, you are therefore poised to write problems more easily and have some already at your fingertips. Recent case law in individual jurisdictions, hot news stories, international events, and even rumors can all serve as sources for drafting problems. The CrimProf blog reports on such things daily and can be an excellent resource for problem drafting.

Teaching with problems is a somewhat different skill than case analysis or synthesis. It takes practice and careful thought. Often problems teach best by discussing the problem first, as a way to get into the case law or a specific statute. Experience will reveal that sometimes students need more background, however, requiring you to go through the rules of law and at least some cases *before* getting to the problem. Sometimes you will discuss the cases and statutes in the abstract, go to the problem, then return to apply the cases and statutes to the problem, an iterative method of teaching. Alternatively, you might discuss cases first because your goal with a particular problem is solely to practice rule application rather than case analogy.

It is also usually advisable to read the problem aloud before discussing it. Even though students have supposedly read it, this refreshes their memory, allows them to read along so that they start turning their cognitive energies to it, and gives them a chance to catch their breath and reflect. If the problem is very long, a synopsis might be used instead. Students who have not done the reading or have not done it thoroughly will also have a chance to assimilate the problem and even to contribute. A few students will be bored by this reading

aloud, but most appreciate it, and nearly all benefit from it, whether they know so or not. Simply launching into a problem without reading it aloud can be jarring for students. Just as you ordinarily might have a student “brief” a case for the class to ensure that everyone is on the same page before analyzing the case more closely, reading a problem aloud serves a similar function.

### C. ROLE-PLAYING

Role-playing can be a terrific way to teach. It requires actually asking students to play the role of an attorney. It is the antithesis of passive learning. Role-plays can be done in class or outside of class. You can ask students to do anything that real lawyers do: negotiate guilty pleas, make opening or closing statements, argue motions or appeals, interview clients or witnesses, conduct depositions—literally anything. Role-plays can be very brief (make a simple objection and defend it) or very long (conduct an entire deposition) or anything in between (negotiate a proposed sentence). Role-playing excites students, gives them a sense of the emotional commitment involved in representing clients, sparks creativity, and is a great vehicle for encouraging teamwork. Although students should ideally get some background on how to conduct each task (perhaps a brief handout), no single role-play can achieve full student competence in a basic Criminal Law class. Instead, the major goals are to motivate students, “complexify” their cognitive tasks to incorporate the multidimensional thinking of real lawyers, and teach doctrine and its application through another means. Secondarily, role-plays at least expose students to some skills so that they have a better sense of what they involve, help to improve by repetition (if done in other courses) whatever limited command of the skill students might have, teach them that doctrine and statutes can be applied to many lawyering tasks, and make ethical issues come alive.

However, there are two major problems in using role-plays: making student involvement widespread and consuming lots of time. If, for example, an oral argument role-play is done in class, only a few students can actually make the oral argument. Other students will become mere observers—perhaps bored ones—if they just sit and watch. Moreover, if they have not prepared for the role-play,

they will not easily follow what is happening, and they will miss the lesson that each lawyering task requires significant preparation.

For in-class role-plays, there are several ways around the problem. First, every student can be required to hand in written evidence of preparation. For example, an outline of an oral argument, including citation to key cases and statutory sections, might suffice. Second, even if a small number of role-players are designated in advance (thus maximizing the chances that they will do a good enough job for the exercise to be useful), students should still be told that *any* class member can be called on to serve as cocounsel. Third, you might have to cut off a role-play after a third or half of the class time to allow for discussion. Without debriefing, most students will enjoy the experience but not be sure what they were supposed to learn. Fourth, any student who wants to participate as cocounsel can be allowed to stand until the teacher calls on him or her, thus enabling that student to join in the activities. For out-of-class role-plays, similar results can be achieved by also requiring handing in a written product.

Serious role-plays are time-consuming. Only a few can be done each semester in a thorough fashion. Having students role-play at home can save the time actually involved in doing the role-play in class. But they will not get the full benefit of the experience if most or all of an entire class is not devoted to discussing the role-play. Sometimes a written record to be handed in (perhaps a written plea agreement) can also include a self-critique of the artistic aspects (if you want to discuss those), as well as the tactical and intellectual ones involved. But at least one or two role-plays can be extremely valuable—especially if they are used as ways to review a major topic or several such topics.

Time-limited role-plays that are not discussed in class can be assigned, too. For example, simply require a student to complete some task outside of class, preferably online, thereafter submitting proof of the task's being done. Once the student has submitted such proof, he or she could receive canned online feedback. This approach can be optional for students seeking more practice, or made mandatory by arranging for a Web site to keep track of students engaging in the task. This way of using role-plays requires huge initial time investments by the instructor to come up with the materials and canned feedback. However, several publishers are coming out with inexpensive preprepared materials for professors wishing to take this canned approach. Be careful not to assign too many role-plays. At

some point, they will take study time away from other classes, an outcome that will not please your colleagues. Avoiding role-plays entirely might soon not be an option. Multistate skills examinations are becoming more complex and more frequently are portions of bar examinations. Only if bar passage is deemed irrelevant as a purpose of law school teaching can incorporation of some role-playing be abandoned entirely.

As with most teaching materials, you can draft your own role-plays, collect them from fellow teachers, or find a few available for classroom use online.

#### D. MULTIMEDIA

Using film clips, songs, song lyrics, animations, real-case videos, and the like is increasingly becoming a staple for teachers of Criminal Law. The CrimProf multimedia site collects many such materials that are available for download or for accessing during class. The site does not charge its users but does ask professors to submit new materials when they come across them. YouTube is also easy to navigate to find interesting clips. If you ask students to suggest some, you will be surprised at how helpful they can be. Start collecting clips on a DVD so that you have a standard set from which you can choose in teaching various classes. Software is available to aid in making clips. Clips can be used in class or posted on a course Web site (including TWEN) for students' own review. Where such posting might raise copyright issues, links to the YouTube clips can instead be posted. Students love multimedia, so no incentive is usually needed to get them to use the clips.

Clips must be short, and they should generally not be used solely for entertainment value. Rather, you must decide in advance how the clip will advance class discussion or out-of-class review. Sometimes you will need aid in combining clips. Your school's audiovisual team should be able to help, as might your students. For example, two brief clips melded together from the movie *Daredevil* can show the lead character's initial obsession with destroying evil and how over time Daredevil learned that killing even the evil should be beyond the pale. That raises the opportunity to discuss the wisdom of the death penalty and what would constitute fair death penalty procedures. The final *Seinfeld* episode's ending minutes, where the show's main



characters are jailed for failing to prevent a robbery, offers another example. A clip of those ending minutes allows for amusing but useful discussion of when, if ever, there should be a duty to aid others that, if violated, subjects the violators to criminal, not merely civil, liability. Musician Citizen Cope's song about the police can be used to examine how criminal statutes can create broad police discretion and its consequences. A brief clip from the animated film the *Little Mermaid*, in which the heroine is expected to make a man fall in love with her based solely on her beauty, sacrificing the ability to speak, can prompt discussion of jury preconceptions about "proper" female behavior in date rape cases. The possibilities are limited only by your imagination.

Discussing clips with other faculty in your area or with former students can be an excellent way to get a feel for how you can use the clips in class. The various books on law and film, as well as articles in that area, can also spark ideas. Clips can be assigned to be viewed at home in conjunction with reading assignments, too (a good approach for somewhat longer clips), but you need to give students some questions to think about in applying their assigned readings to the film clip. Clips and songs, whether concerning fiction or nonfiction, provide excellent ways to bring questions of tactics or ethics into the conversation. The many films about criminal lawyers preparing for or participating in a trial can be especially useful for raising such questions.

## E. DRAFTING DOCUMENTS

Active learning can also be promoted by having students draft brief documents or portions of documents. For example, drafting a complaint in a case turning on establishing a duty to act can be an excellent exercise, but students must understand that factual and legal investigation are required before drafting. Thus students might be paired up as client and lawyer, with each lawyer required to interview the client before the class on the duty to act. A third student might act as an associate taking notes. Those notes would be the basis for each student trio's written product. Students would be required to do the reading on the duty to act, then to draft and hand in the complaint. They can be given brief online articles or a professor-drafted guide to simple complaint drafting. The facts can be fairly straightforward,

perhaps taken from a well-known case not in the casebook (these are easily found by looking at other casebooks). The class can be focused around the exercise: What case law in the reading guided each student's drafting? How is each of the assigned cases similar to, or different from, the exercise case? Why did you ask the questions you did during the interview? Did some of the answers undercut your theory of the case? What is the theory of the case? (A theory of the case is the theme or story that the lawyer chooses to craft from among the possible legal stories to be told—a choice of what facts to emphasize and how to structure them to meet certain legal tests, survive witness credibility challenges, and appeal to juror emotions. Thus an insanity defense requires a different story from self-defense, with mistaken identification or mistake of fact defenses requiring still different stories).

Another possible drafting exercise can be jury instructions for one aspect of a case (for example, the insanity defense). Still another possibility is drafting a motion to suppress an alleged rape victim's diary in a rape case. This latter option can be chosen only if you have briefly discussed rape shield laws, including studying an example of them. A fourth option might be having students draft a motion to dismiss (without a supporting memorandum) a first-degree murder charge for insufficiency of the evidence that the defendant acted willfully, deliberately, and premeditatedly. Each exercise can be quite brief, but it forces students to engage in active learning—applying rules and cases to craft a product useful for a specific client. The amount of work for the students is not onerous, especially if only a few short exercises are used throughout the semester.

An even less time-consuming variant can be document-critiquing rather than document-drafting exercises. In these exercises, students would be handed a fact pattern, a poorly written jury instruction, motion to dismiss, client letter, or the like. They are then asked to identify with specificity what is wrong with the assigned document, what is right with it, and the legal and strategic reasons for those conclusions. Again, discussion can center on the document, using the assigned cases and other readings for the purposes of critique. Students can be asked to hand in written explanations for their conclusions to ensure that no one blows off the assignment (although this cuts against the time-saving goal). Editing is a different skill from writing, so students critiquing poor writings can be valuable in a way distinct from drafting a document from scratch.

Teachers can choose the degree of feedback and performance incentives they wish to give. Feedback could be limited to class discussion. Alternatively, students might be given a “model” document after handing in their work. That document might simply be distributed or could be woven into class discussion. The teacher can also hand out “best” student responses, although preferably with teacher comments about what was good and what could have been done better and why (because student product will rarely, if ever, be perfect). Failing to offer commentary might mislead students concerning what true professionalism involves. In small sections, individual written feedback might be provided to each student. Similarly, grading can range from none, to merely deducting points for exercises not handed in or not demonstrating a good-faith effort, to counting excellent performance as a plus toward class participation points, to actually assigning grades to each individual document as a percentage of the final grade. Class size will be an important factor in deciding how much feedback to give and how to determine grading procedures.

## F. MODELING

Modeling lawyering skills is one important aspect of teaching. There are many ways to model. A teacher can orally run through an analysis of a case or of a statute occasionally for students to see how it is done. “Veiled lectures” accomplish this task as well—that is, responding to student questions with answers, and then briefly modeling lawyering behavior in the answer. For example, if a student asks how the defense could ever have made a convincing closing argument in the case being read, a professor might just launch into a short version of a closing argument. Likewise, a teacher might introduce for class discussion a topic via this sort of question: “What questions could the prosecution have asked this witness at trial in the closing argument?” The teacher might, after some discussion, then role-play those questions with a student as witness and the teacher as lawyer.

This kind of off-the-cuff modeling of oral lawyering skills will likely come easily only to professors with some significant practice background. Those with less of a practice background can, however,

easily show brief film clips of these activities by practicing lawyers in analogous cases.

Written models are also useful. Most case excerpts are from appellate cases and merely summarize what a jury instruction said or reproduce only the tiniest portion of a jury instruction. Distributing sample instructions—both those addressing narrow legal points and entire model jury instructions—at least give students the flavor of what instructions look like. If combined with drafting and critiquing exercises, students get a much more practical feel for the importance of jury instructions. But even models alone help to make legal abstractions concrete. Models can be offered of motions to exclude evidence, motions to dismiss charges, notices of appeal, appellate briefs, oral arguments (or brief excerpts from each of these), with some class time devoted to the models themselves.

## G. OUT-OF-CLASS AND ONLINE TEACHING

Not all teaching need occur in the classroom. Course Web sites, The West Education Network (TWEN) sites, or Lexis's Web courses in a box can be used as the central repositories for course information. Written models can be posted in separate locations, as can video clips, video links, PowerPoint slides, guides to learning, poems, song lyrics, cartoons, and a host of other materials.

It is important to avoid copyright violations, of course. Products that you, the teacher, create do not present this problem. Nor is it problematic to use documents freely and knowingly donated to you by practicing lawyers (that is, knowing the uses you plan to make of the documents). Publicly available documents are likewise safe. But artistic products (movies, songs, poems) or continuing legal education or other products from which the authors might earn some income should not be posted in their entirety. It is safer to post links to Web sites where these items are publicly available, such as YouTube.

You must always decide in advance just why you are posting something. For example, detailed PowerPoint slides reviewing and explaining all the black-letter rules in a course can provide clarity and useful review for professors who do not see this as "spoon-feeding" (or who do see it that way but bow to the inevitable fact that students will turn to sometimes flawed study aids on their own). Just showing such presentations in class and reading them to the class is boring,

pointless, and takes away from valuable time engaging in more active analytical tasks. Yet PowerPoint slides that contain merely a few points reciting the high spots of a lesson, or that display the text of a statute or key language of a case can be very helpful in organizing a lesson. Slides diagramming complex facts or statutory provisions, displaying charts comparing MPC and common law approaches, and reciting the elements of crimes can also be useful. On the other hand, any items that you do show in class should also be posted on the course Web site to permit students time for review.

Web sites can also be used to post review exercises that you never plan to discuss in class. Thus you might post multiple-choice questions (with answers), Computer-Assisted Legal Instruction (CALI) exercises, cartoons making brief and instantly understandable points, or old exams or midterms (perhaps with sample answers). Over the years, you can accumulate written guides responding to common student questions. These guides can be substantive (What does the word *reasonable* mean when it appears in the law?), procedural (What is the sufficiency of the evidence inquiry about?), skills-oriented (What are the steps to engage in when doing statutory interpretation?), or study methods-oriented (How do I prepare an outline? How can I diagram case facts in complex cases?).

Some professors use their Web sites to encourage wiki-outlines: a single outline that any student can add to or modify. Wiki-outlines seem to work best if students are told they can only bring the wiki-outline into the exam, not individual outlines. That creates an incentive for the class as a whole to get the wiki-outline right. The professor can also monitor the wiki-outline, using its errors as clues to what is not coming across clearly enough in class. Free-riders can be discouraged by counting wiki-outline contributions toward class participation and subtracting class participation points from, for example, any student not making at least three contributions to the wiki-outline. Some highly competitive classes resist wiki-outlines. These class members view each other as engaged in a Darwinian struggle for grades, thus preferring to prepare individual outlines excluded from the exam rather than contributing to shared outlines permitted to be used during the exam.

Discussion can also be promoted online. Sometimes this could be by live chats, other times via using e-mail to make postings accessible to the whole class. Some professors will start discussions themselves by posing questions or will schedule specific times to join in online

chats. These discussion boards and chat rooms can be used to clear up confusion, enrich the class by discussing matters of interest beyond those on the syllabus, aid in improving learning skills, analyze new legal developments, or simply pique student interest in the subject matter by entertaining.

Teachers can also post recent news stories relevant to matters discussed, or soon to be discussed, in class. For stories in the “to-be-discussed” category, the news story might be assigned as a problem to be analyzed in class or as the basis for a role-play or writing or critiquing exercise.

## H. STUDY GROUPS, TEAM ACTIVITIES, AND TUTORING

Encouraging cooperative, team-based, or group-based activities can also help to improve learning. Study groups work for some but not all students. Study groups can also be very time-consuming. I strongly urge that students who do not like study groups find a “study buddy.” The idea of the study buddy is to talk at least by phone for a minimum of half an hour after doing the assigned reading. The discussion can focus on arguments for and against the defendant in an assigned problem, answering hypotheticals recited in a casebook’s notes, getting the rules of law embodied in the cases clear, or understanding how sections of the MPC interrelate. The key is to get a different perspective and to exchange ideas. Talking about assigned materials in a critical way improves memory, sharpens understanding, practices skills in rule divination and application, and provides motivation to succeed. It is hard to free-ride when there are only two of you and your cooperation is not mandated (the threat of your simply dropping the other person if he or she never contributes is real). Simultaneously, working together makes the material more fun, and each person will work harder so as not to let down the partner in the relationship.

I would make similar comments about study groups. Study groups that just divide portions of outlines might save time, but often mean that each member truly understands only one portion of the course. Study groups that merely discuss whether case briefs are accurate might serve some purpose early in the first semester of law school but are increasingly useless as each individual’s briefing skills improve and as the number of skills expected of students increases.

Study groups that focus on rule application, analogical reasoning, statutory interpretation, rule clarification, compiling of questions for professor office hours, and challenging the wisdom and fairness of cases or statutes serve far more valuable functions. At the same time, both study group and study buddy time must be limited in advance. Students need time to wrestle with material on their own, and they have many classes. It is easy for study groups to consume so much time that these more isolated but essential activities are given insufficient time or never occur at all.

Do not assume that students know how to use study buddies or study groups. They must be told, either in writing or briefly in class. You might even offer to visit study buddy or group meetings at the law school and at convenient times for you to offer critique. You would probably need to schedule a special optional study group or buddy session where you can float around from group to group, giving each just a few minutes, listening to their efforts, then critiquing them. It is irrelevant that law school orientation sessions have discussed these matters or that other classes do so. Students need constant repetition of all topics and skills to gain even the most minimal mastery of them.

When doing role-plays or writing exercises, team activities can promote similar benefits to study buddies and groups. Teams can be assigned jointly to brainstorm among their members about how to interview a witness, make an opening argument, or draft a set of preliminary hearing questions. If you are collecting and grading assignments, you might ask that individuals write such product alone but that group members can and should discuss the issues as much as they want. Alternatively, some professors prefer a team-written product. That dramatically reduces the number of documents for the teacher to review or grade.

Arranging for tutoring can also be an excellent idea. My experience is that upperclass students who have done well in your class are flattered to be asked to tutor current students running into trouble. These upperclass students are often willing to do this for free. They get satisfaction from helping others and find that tutoring keeps the material fresh for the bar exam.

## I. REVIEW

Review is critical to student learning. Given the amount of material to be covered and the challenging skills to teach and have students practice, review can easily be seen as too time-consuming for class, relegated to each student's own, independent, unguided efforts. Such an attitude is a mistake. First, each class session tends to focus on one doctrine or skill. These isolated matters make little sense disconnected from the bigger picture. Review allows students to see the forest for the trees. They can come to understand the broader analytical structure to which each doctrinal brick contributes. They can also see how different aspects of the law interrelate. For example, studying early in the course how to identify a "result" element in a statute means little absent later, fuller discussion of causation. Results require proof of causation, whereas attendant circumstances, mental states, and voluntary acts do not. Yet students cannot fully understand many other aspects of the course without early on identifying results elements. Thus the MPC defines mental states as to results differently than those relating to acts or attendant circumstances. Result identification must thus be taught before students are ready for the more complex discussion of causation.

Likewise, students first learn how the prosecution must prove its case in chief. But they will not truly understand the moral structure of the criminal law until they also study affirmative defenses—those that result in an acquittal even though the state has proven every element of the crime beyond a reasonable doubt. Yet by the time teachers cover affirmative defenses, students might have forgotten details about proving the case-in-chief. Nor will they really appreciate the connection between the case-in-chief and affirmative defenses without reviewing both in a single context.

Second, review simply aids memory. Students do not retain all they have learned from a single exposure. Review also occurs at a time when students are better able to see interconnections. As just noted, highlighting interrelationships itself improves memory.

Third, because review covers multiple topics at once, review necessarily requires using more complex fact patterns. The added complexities stretch students' analytical skills beyond their previous comfort zone.

Review can be done in many ways. It can be helpful to schedule one class midsemester to use a complex problem solely for review.



This reminds students of the essential building blocks studied before moving on to constructing the higher floors of the course's analytical architecture. Review at this stage also allows students early on to identify gaps in their understanding at a point where there is plenty of time to fill them. However, doing such a full-class review more than once per semester starts to create conflict with coverage concerns.

A series of briefer reviews can occur throughout the course by building some earlier issues into problems focusing on new material. Thus a rape problem might include an unusual statute silent on mental state but giving students the legislative debates and other background needed to explore what mental state the legislature intended. That same problem can also ask students what the mental state should be under common law mistake-of-fact principles. Additionally, the problem might ask them what the mental state should be under the MPC mental state default provisions. A problem on distinguishing between first-degree and second-degree murder might likewise incorporate duty-to-act issues from the course's first few weeks.

Assigning one long or two short practice midterms can further promote review. Review can be enhanced further by handing out sample answers, perhaps combined with optional review sessions. Ambitious professors might provide individualized feedback as well.

Multiple-choice questions can also be used for review. One class on a new topic might require briefly reviewing two or three multiple-choice questions covering a topic from the immediately preceding class or from several classes earlier. This review can take as much or as little time as you choose, and it too can be done only occasionally. Alternatively, multiple-choice and essay or brief answer questions can be posted online—along with the answers and explanations—to encourage students' review on their own.

Optional sessions (one or two) to review old essay and multiple-choice exams offer another avenue for review. The key point is that review and repetition must be woven into a course repeatedly throughout the semester and need not necessarily be a time sink.

## J. THE PERVASIVE METHOD OF TEACHING ETHICS

You will note that earlier I mentioned using various teaching techniques to prompt discussion of ethical issues. Some teachers eschew ethics questions as taking too much time away from the

substantive material that the Criminal Law course is meant to cover. Other teachers are not well versed in ethics codes and feel incapable of fully integrating ethics into the course. I am, however, a fan of the *pervasive method* of teaching ethics. This method assumes that the Professional Responsibility course is insufficient on its own to make ethical lawyers. Rather, students must come to see being ethical as an inseparable part of every lawyering task. That goal can be achieved only if ethical issues are interwoven into every class, including Criminal Law.

By *ethics*, I partly mean teaching relevant aspects of the codes of ethics. But those codes are incomplete, subject to interpretation, and simply do not readily resolve many sorts of ethical conflicts. Practicing lawyers often have no choice but to reason through to their own conclusion about what is “right” under the circumstances, given their lawyering role, the client’s interests, and the broader interests of society. Students must be encouraged to see ethical issues and to think about them systematically. Sprinkling even a few issues throughout the course accomplishes this goal. Some issues might be discussed cursorily, others given a bit more time. But if the teacher remembers that the goal is less to teach formal rules than to make ethical reasoning an integral part of all substantive legal reasoning, ethics need not become a time sink. Instead, ethics simply becomes a natural portion of any discussion.

Nor is professor ignorance an adequate excuse. Increasingly, casebooks include excerpts from formal ethical codes, where relevant. Some casebooks also include brief excerpts from articles or other background materials on ethics questions not readily resolved by the rules. Supplementary pamphlets do this as well. Even if your assigned casebook does not have such materials, you can ask a Professional Responsibility teacher to suggest some materials and issues to infuse into your course.

## **IV. Choosing a Casebook and Other Materials**

Choosing a casebook is perhaps the most important initial decision to be made about the course. The choice will be dictated by your course goals, preferred teaching methods, and the extent to which various authors have prepared materials serving your particular goals. Sometimes no one book will do the job, requiring

you to assign several books or to prepare your own supplementary materials. For first-time teachers especially, casebook choice will turn on the quality of the teachers' manual. A good manual can make your pedagogical life significantly easier.

Criminal law casebooks come in several primary types. The most traditional casebooks are what they sound like: books collecting cases. These cases might be supplemented by notes providing further information or posing questions. Traditional books have two primary virtues: case focus and flexibility. Because cases provide almost the entire fodder for discussion, these books provide ample material for teaching case analysis and synthesis. Especially when Criminal Law is taught in the first semester of law school, that might be a major goal of an instructor. Additionally, because cases do not dictate any particular perspective on teaching, they can be taught from any angle the instructor chooses. Students can be prompted to focus on underlying philosophical theories, case analogy and distinction (especially if supplemented by in-class hypotheticals), case-modeling of statutory interpretation skills, and a host of other matters.

Traditional books also have negatives, however. They lack problems (although notes might contain briefer hypotheticals), and their focus is primarily on appellate cases rather than trial processes. They assume that students can tackle complex ideas effectively on their own without more background material on how to do so. They leave students at sea in determining the black-letter law, embracing the idea that they must learn the skill of diving in on their own—a position with which not all teachers agree. (The counterposition is that classroom modeling aids this skill but does not perfect it, that practicing lawyers entering new areas routinely turn to hornbooks or law review articles for the big-picture overview, that students will turn to study aids rather than struggle endlessly with rule divination from case law, and that the sheer press of time from having many classes makes it unlikely that most students have the time to figure out the black-letter law effectively case-by-case.) Traditional books might also do little to encourage students to practice statutory interpretation on their own—apart from reviewing how judges have done it—beyond perhaps reproducing the MPC as an appendix. This approach risks student passivity and boredom.

A second group of casebooks adds problems to the mix. Casebooks vary in the degree to which they do so. Some sprinkle but a few problems throughout the text. Others are problem heavy.

Some use primarily brief problems, others primarily longer ones, and still others a combination of problem lengths and complexities. Some books start with a single problem, viewing the cases as material for the students to use to solve that problem. Other books offer multiple problems, drawing on the cases to make points about specific doctrines. Some books have periodic review problems after major course units are completed, but other books do not. Which book best serves your purpose depends on the degree to which you want to fill class discussion with analyses of problems, the extent to which you favor built-in review, and the degree to which you favor variety in problems focusing on narrow points versus synthesizing broader ones. If you do not favor the problem method, there is no obvious advantage that these books have over more traditional ones.

A third group of casebooks might be called the problem method on steroids. These casebooks include extensive explanatory text in addition to the cases. They also include numerous real-world statutes, in addition to weaving the MPC throughout the book and comparing it to common law approaches. These casebooks usually include varied materials—including law review articles, perhaps case briefs, and sometimes oral argument excerpts. They are more likely to focus on using a wider range of skills (interviewing, counseling, and negotiating, for example) than the basic problem books or the traditional books. These steroidal books also tend to increase the emphasis on trial-level processes relative to appellate ones. And they usually provide background and materials for a broad range of teaching techniques, such as role-plays, drafting exercises, and review problems. Additionally (although there is no necessary connection), these books in practice are more likely to have well-developed Web sites with supplementary teaching materials (including articles, movie clip links, case motions and briefs, model exams, cartoons, and even interactive exercises). These casebooks tend to be most attractive to teachers with a substantial criminal law practice background, although there is no reason they should be so limited if supplemented by an adequate teachers' manual. Some professors might also view these texts as trying to accomplish too much, although there is no logical reason that a user cannot simply pick and choose among the wide array of available materials.

A fourth group of casebooks takes a more theoretical approach. Some of these casebooks might, for example, include extensive material on the philosophy of criminal law, why we criminalize

conduct, empirical evidence relevant to criminal justice policy, or broad conceptual matters (What is an act? What is a mental state? What constitutes consent?). This subcategory of theoretical books is best suited to professors who prefer a strong policy emphasis or want to emphasize law reform. Another subcategory takes a particular theoretical perspective on all issues covered, such as feminist, critical race, economic, or class-based views of the criminal law. Such perspectival approaches are consistent with traditional case method, problem method, or any other teaching approach, but seek to infuse it with a particular way of viewing the world. Most often, however, perspectival books seem to emphasize cases, supplemented with extensive notes or law review article excerpts on the relevant perspective. Perspectival books seek to open student minds to visions of the world that might otherwise escape them, thereby challenging the students (even those students who feel little affinity for the perspective chosen).

At least one casebook emphasizes sentencing throughout the text. This book includes photographs, detailed factual background (beyond that in any reported case), and queries asking students essentially to choose and justify a sentence along with deciding the relevant substantive and procedural issues. The more detailed facts can allow for a much more fact-intensive analysis than is permitted by study of reported cases alone. The focus on sentencing highlights for students the ultimate consequence of most cases—namely, the choice of sentence. The sentencing emphasis also returns students periodically to considering the underlying purposes of the criminal law. The text otherwise takes a heavily theoretical and empirical approach to the criminal law, encouraging that sort of emphasis in the classroom. But the text is also consistent with a heavy emphasis on statutory analysis. Some users might feel that the sheer length and complexity of the case facts make it hard to focus readily on some narrow points of doctrine. Other users will appreciate the effort to combine greater realism with sentencing and other Criminal Law theory.

Of course, casebooks are not the only resources available. The same author just discussed makes his case files available as a supplement to be paired with any casebook. Other supplements of problems are available. Users who want to add a theoretical spin to an otherwise more practice-focused course might prefer supplements that collect excerpts from leading law review articles.

Another supplement tells the detailed background stories to leading cases in great detail, permitting either a more extended focus on lawyering strategy and tactics in certain cases, a greater focus on underlying theory, or a fuller exploration of the socioeconomic and political forces contributing to case results or flowing from them. The downside of substantive supplements (as opposed to problem, case file collecting, or documentary supplements) is the increase in reading assignment length required by students having to read law review articles or detailed background recitations.

Study aids are, of course, numerous. Some aids simply review the black-letter law, and then briefly explain it, in outline-like fashion. Others add more detail about the underlying policies and the place of each doctrine in the broader legal structure, serving as full-length or mini-hornbooks. Still others include short questions, followed by answers; essays, followed by sample answers; or multiple-choice questions, followed by answers and explanations. Some professors urge students to eschew study aids on the theory that they detract from students developing the skill of learning the material on their own. Other professors recognize that almost all students will turn to study aids, so it is wiser to recommend the better ones or even to require them. Still other professors embrace study aids as fostering doctrinal repetition, aiding students in seeing the big picture, and permitting students to practice exam-taking skills. CALI exercises, substantive taped lectures, flash cards, and a wide array of other commercially available materials can serve similar purposes.

## **V. Difficult Topics to Teach**

Perhaps the hardest topic to teach is rape. Rape is such a delicate topic that some teachers avoid it altogether. My own view is that this is a disservice to students. Those who become prosecutors or defense attorneys will inevitably face rape or other sexual assault cases in their career. Moreover, practicing lawyers must learn to deal with emotionally difficult issues in a sensitive, professional fashion. Furthermore, rape raises such important questions about the role of gender in the criminal justice system that ignoring the topic leaves an unfortunate intellectual hole. Additionally, rape law can offer important lessons on how the law evolves. Finally, precisely because of the emotional sensitivity of the topic, the study of rape provides

excellent lessons about lawyering tactics and strategy under difficult circumstances.

One way some professors try to dilute the contentious nature of the topic is to teach it as a statutory drafting exercise. Thus, class members can be divided into teams of “legislative staff” for different legislators. Each team might even be told something about the political views of the legislator who employs them. Team members can be asked to draft a statutory definition of rape and be prepared to defend their views to their employing legislator. One student in the group can be chosen as that legislator. The class as a whole can then come together to debate each of the proposals (which would be distributed in advance). Teams might be fairly large to limit the number of proposals, or the professor might combine substantively similar proposals into a single package, thus reducing the proposals to a smaller series of packages. The various legislators can then debate the various proposals, drawing on the reading assignment to do so. The debate leaves the discussion at a relatively abstract level of policymaking rather than at the more emotional level of discussing specific persons suffering in specific cases. That can arguably be a negative precisely because it dilutes the emotions that dominate real rape cases.

An alternative is to approach teaching rape in a manner similar to any other subject, with some qualifications. Thus a teacher might, the day before the class, explain that he or she does not want to silence any views, but how they are expressed is especially important. The professor can explain that, based on pure statistics, there are likely rape survivors and men who believe they were falsely accused of rape or of some lesser offense in the class. Because ideas on rape embody strongly held beliefs about proper gendered behavior, emotions can run strong even among those never directly involved. Emotions, the teacher can explain, should be used to inform thinking and discussion, not to hurt others, even inadvertently, or to cloud reason.

The advocate’s stance is one potentially effective way to get students to have a productive discussion. By “advocate’s stance,” I mean asking students to craft the arguments that the prosecution or the defense would make in a particular case. These arguments thus need not be presented as each student’s personal view. The problem method can be particularly effective, using a problem to craft arguments as to witness credibility, the state of the law, proper

jury instructions, and the meaning of consent and of an accused's reasonable (or unreasonable) belief in it.

Assigning proper materials is also particularly important. Some teachers might prefer to assign anti-rape-movement, feminist writings in an effort to overcome the blinders of gendered preconceptions. But some students react to this sort of presentation as ideological brainwashing, making them less, not more, receptive. A teacher concerned about this eventuality might prefer to present evenly balanced materials, either in the form of law review article excerpts or originally written material summarizing articles. The teacher need not necessarily hide his or her own views but can take care to present alternative ones.

Some discussion of seemingly "technical" issues can also provide a relatively calm way to enter into emotionally fraught conversations. For example, the common law mistake of fact doctrine provides a defense to general intent crimes where the mistake was honest and reasonable, effectively requiring negligence to prove guilt. That doctrine accordingly requires debate about the meaning of the "reasonable" creature. I use the word *creature* because reasonableness is always from someone's perspective. Thus we might use the reasonable neutered person, the reasonable man, the reasonable woman, or the reasonable sexually sensitive man as options that have long been discussed in the literature. Choosing among them turns on policy judgments about which approach best serves the purposes of the criminal law, both as a philosophical matter and an empirical one. On the other hand, the MPC requires recklessness as to consent, making even a negligent person not guilty if he or she was not aware that there was a substantial and unjustifiable risk of his or her belief in consent being a mistake.

Failing to discuss race—another hot-button issue—is also, in some instructors' view, irresponsible because of the extreme overrepresentation of certain racial groups in the criminal justice system. Some commentators attribute this to differences in rates of offending, but others find such purported rate differences woefully inadequate to explain the degree of the disparity. The latter group sees racial disparities as the result of conscious or unconscious discriminatory enforcement of the criminal law. But the substance of the criminal law can also arguably have this effect. Once again, where the "reasonable creature" is at issue, should that creature be the reasonable African-American? The reasonable African-American



woman? The reasonable white person? The reasonable white woman? If no race is specified, will jurors default to an assumed race for the reasonable person? Are there average differences in racial perceptions? If so, why should averages matter? Is the “reasonable person” a majoritarian concept (what most people would think)? A subgroup majoritarian concept (what most members of some specified subgroup would think)? Or is it a purely normative, value-based conception? These issues arise in, for example, self-defense where the race of alleged offender and victim differ. They can also arise in efforts to apply “cultural” defenses, such as the “black rage” defense, as an entrée into the insanity defense. Additionally, they might appear in an objective theory of entrapment, in which what police investigative techniques a “reasonable” man might fairly be expected to resist might arguably have a racial component. Race can also play a sub-silentio role, affecting juror perceptions of witness credibility, judicial perceptions of offender dangerousness, and prosecutor perceptions of likelihood of rehabilitation or need for retribution. Such subconscious forms of racial bias, for those who accept them, are pervasive, affecting every aspect of the system.

For professors who accept the plausibility of this pervasiveness argument, even if they do not necessarily themselves endorse it, race can become a potential issue anywhere in the course. The instructor thus must be ready to respond to it should students raise questions about it. The professor also might raise race-related questions for brief discussion at various points throughout the course. But more extended discussions (because of time management) must likely be limited to selected classes, such as in the examples of affirmative defenses just discussed.

When approaching race, an instructor can draw on methods similar to those discussed earlier under the topic of rape. Thus a matter-of-fact (rather than highly dramatic) lecture on the importance of respectful discussion, avoidance of racial epithets, and the need to support conclusions with theories, empirical data, and highly specific arguments and authorities can help to set the right tone. Assigning balanced but insightful materials can promote more open minds and a fuller discussion. Putting students in the advocate’s stance, freeing them from being viewed as personally endorsing some perspective that might offend other students, can also help to defuse tensions. At the same time, when students come from very different backgrounds, true empathy can be hard. Assigning brief personal stories from

writings by the convicted, the convicted but innocent, and victims alike can help to promote empathy.

If there are few racial minority members in a class, they might be reluctant to participate for fear of not being understood. Cold-calling on students, while making it a point to call on students with varied racial and ethnic backgrounds, can help to bring many voices into the discussion. Again, this can most effectively be achieved if done from the advocate's stance. Note the emphasis on diversity. It is important not to make any single student feel like he or she holds the burden of articulating some supposed "black perspective." Nor should a teacher create the impression that race mechanistically determines opinions, as might arise if only white students are asked to defend the "race-is-irrelevant" perspective. That same impression might be created if only African-Americans, Latinos, or Native Americans are asked to adopt a racial-victimization perspective. The teacher must teach with a sensitive ear for even subtle racial insults or dismissiveness of certain arguments, intervening to address how arguments can be phrased more productively.

Importantly, racism is not the only "ism" that matters. Sexism (rape being a clear example), ethnic bias, and homophobia (even though the latter two do not actually contain an "ism") also arguably play pervasive roles in the criminal justice system. Some professors add a hate crimes statute or hate-motivated sentencing enhancement statute to problems addressing murder, rape, or theft as a way to raise these issues. Using suitable cases, such as one involving a homophobic motive to kill by a heterosexual accused claiming to have been propositioned by someone of the same sex, provides ample fodder for discussion. The important point is to see that ignoring these other group-based biases both contracts reality and might turn off student members of such groups who feel their plight is being ignored. Any group-based discussion raises similar pitfalls to discussing race and thus can be addressed by similar methods to those just discussed.

Conspiracy and accomplice liability can be difficult classes to teach for reasons entirely disconnected from worries about emotional sensitivity. Both doctrines complicate analysis by introducing multiple defendants. Students can get easily lost in the fact patterns of cases and problems. This danger can be especially great in teaching the difference between "wheel" and "chain" conspiracies, two common kinds of conspiracy structures relevant to determining whether several crimes are part of a single giant conspiracy or several

smaller conspiracies. It is critical, whether through drawing on the whiteboard or through PowerPoint slides, to diagram the facts of such cases, including how each doctrine might apply differently to each codefendant. Codefendant interests also sometimes conflict. Using charts or diagrams to illustrate conflicts of interest, clashing credibility concerns, and tactical options also aids in teaching. These aids are required because of the sheer complexity of the fact patterns when multiple defendants are involved.

## **VI. Drafting Examinations and Grading**

Exam-drafting options are limited only by the imagination. Major challenges in drafting good exams include adequate coverage, adequate skills testing, promoting and defending rational grading, limiting the time devoted to grading, and coming up with fact pattern ideas. The most common kind of examination is the straightforward essay exam. Traditionally, this means drafting one or several fact patterns, each followed by one or several questions. It is important to keep in mind that the greater the number of fact patterns, the more time each test-taker must devote to processing new facts and likely the more time it will take the instructor to grade the exams. A single fact pattern followed by several questions can give students more time to write and professors more ease in grading.

Fact pattern ideas can come from many sources: real cases not included in your casebook, newspaper stories, cases you handled in practice, hypotheticals from law review articles, case briefs, and problems in continuing legal education courses. Fact patterns can also be drawn from novels or songs, or made up entirely from scratch. For the new professor, this last approach can be especially difficult. Attaining proper issue coverage probably requires making a list of all the issues in a course, gauging the relative amount of time spent on each, and then working selected issues into the fact pattern. No exam can cover every issue, but a good question should cover at least two crimes (generally homicide and something else), either conspiracy or accomplice liability, either an affirmative defense or a failure of proof defense, and some issue or issues in statutory interpretation. For most professors, a good exam should test both the common law and the MPC. One way to do this is to have one fact pattern followed by three questions: one requiring application of the

common law, one applying the MPC, and one requiring interpreting a statute the students have never seen before. Because few real-world or fictional cases embody all the issues you want to test, you might want to combine several sources into one fact pattern (or several). As your experience level rises, it will become easier for you to draft examinations from scratch. Remember, too, that students likely need more time than you think. Cutting a few issues out of your first draft is one way to guard against asking for more than students can deliver. Writing out a model answer and ideally comparing it, in length, to your previous exams (or those of a colleague) is another.

Another way to get greater exam coverage is to give part of the exam, perhaps even half of it, as a series of multiple-choice questions. Multiple-choice questions are highly effective ways to test knowledge of doctrine and rule application. Model questions can be drawn from the CrimProf exam bank (which is unavailable to students) or from colleagues who have previously drafted questions. Even if this is your first time giving a Criminal Law exam, it is probably wise to draft a few questions on your own so that you start to develop multiple-choice drafting skills. Although multiple-choice question exams need not all be made available to students (many schools require that you post at least one such exam), it is wise to switch around correct answer letters, slightly change some questions, and add new questions each year to guard against the unlikely possibility that old questions that you want to reuse are lurking “out there.” If you plan to use multiple-choice questions, working some typical questions into your teaching can help students get the feel for such questions. Multiple-choice questions can simply take the place of some problems as a way of teaching rule application.

Because multiple-choice exams give broader coverage, the essay portion of the exam can be briefer and more focused, and thus easier to grade more quickly. Some professors go a step further, giving entirely multiple-choice exams. The justification for doing so is their belief that multiple-choice and essay scores track each other closely. Individual student grades will therefore not be affected by the form of the exam. Other professors disagree. Most probably believe that some practice in essay writing is important for first-year students. Moreover, bar exams include both multiple-choice and essay exams, so practice in both arguably promotes bar preparation.

More creative exam types are possible. Exam questions can ask students to draft or critique jury instructions, motions to dismiss, judicial opinions, client letters, or witness cross-examination questions. Doing so can occur in either an ordinary sit-down exam or a take-home test. Teachers who like take-home exams argue they better mimic real life by giving students more time and the opportunity to do research, thus allowing teachers to raise expectations as well. That might all be true, so the experience—the teaching value of the exam—could justify the approach. But most teachers who have tried take-home exams also likely believe that performance is not appreciably improved and that individual grades are unaffected. Page limits can reduce the grading burden, but students differ in their attitudes toward such exams. Some students prefer more time to get the job done, but others—probably most—object to the strain of having, for example, 24 hours rather than 3 hours to focus on a single exam, especially when they have other exams requiring their attention.

There are two broad approaches to grading: the gestalt approach and the points approach. The gestalt approach awards grades based on a global assessment of the relative quality of each paper. This approach has the virtues of being able to reward writing and persuasive skills amply, as well as creativity. But educational research suggests that gestalt judgments may be inconsistent, being both less reliable and less valid as indicators of performance than is a point-based approach. Gestalt judgments are also harder to justify to students, unless the grader offers detailed comments explaining the grade—a very time-consuming task. On the other hand, judges, lawyers, and juries make gestalt-based judgments all the time—intuitive decisions resulting from a global judgment of the persuasiveness of an argument.

The points-based approach preassigns points to each issue and subissue. How many points a student actually receives turns on the completeness of the answer, its consideration of opposing arguments, and the quality of the writing. It might be helpful to prepare a checklist with two columns, one listing the maximum points for each issue, the other listing the points actually awarded to the individual student for each issue. Grading an exam simply requires filling in the form as to each issue. A student who misses an issue gets a zero for that part of the checklist. Separate boxes are sometimes added for bonus

points, either for seeing plausible issues you did not anticipate or for particularly strong overall writing and performance. A commentary box can be added as well, if desired.

Points-based approaches are more consistent than gestalt ones. With gestalt, the grader must consider what points to award an exam that is very well written but omits important issues versus one that spots most issues but is poorly presented. The grader must also remember in detail every aspect of each earlier exam fairly to compare it to later ones, a daunting intellectual feat. Point-based exams require, for many issues, simply entering a zero for entirely missed issues. For spotted issues, the point range is more limited, and judgment is easier because it is made for one issue at a time rather than all at once. Moreover, when students come to review their exams, it is easy to give them fairly precise feedback.

Using the final exam as the entire basis for the grade is the traditional law school approach. Some professors vary this approach. They might give a midterm, a series of short multiple-choice exams (perhaps 10 minutes each), class participation points, role-play points, or written exercise points. There is no single “right” point allocation among these performance tests, although most instructors still give the most weight to the final exam. Many instructors use these performance tests only as a way to increase a final grade for superior performance. Alternatively, they might use these tests solely as teaching tools, without assigning specific grades (although perhaps deducting points for students who do not hand in assignments or do not show a good-faith effort). The more performance tests and feedback mechanisms used—up to a breaking point—the more learning that likely occurs. On the other hand, more testing consumes enormous amounts of time. More tests also encourage students to devote more time to your course than to other courses, raising equity questions about the fair distribution of their effort and perhaps angering colleagues. Furthermore, although many students might appreciate more opportunities to shine, others might resent the added pressure given multiple classes and perhaps the demands of a job they work to pay their bills or in the hope of landing a permanent position after graduation. Straying too far from whatever is the norm at your school can also irritate many students, who become used to the status quo.

## **VII. Putting It All Together: A Brief Note for the Teacher New to Criminal Law**

The many options offered here can seem overwhelming to the teacher new to the course. This will be especially true for those who are just starting their career as academics. It is important to remember that mastering teaching a course does not come from doing so once. Nor can all teaching approaches and all the new substantive content be thoroughly mastered immediately. Many new teachers might thus want to begin slowly. If mastering the common law and the MPC for every doctrine seems too much the first time out, some professors might initially want to focus on selected doctrines in which to emphasize both systems of law. The remaining doctrines can be mastered the second time around. Similarly, if a teacher wants to use the problem method but is new to it, he or she might include a single problem a week when first teaching the course. More problems can be added in later years. The same approach might be taken for drafting exercises or role-plays—using one each during the entire semester in year one, then perhaps more in years two and three.

But a case can be made for a more ambitious approach, too. That ambition need not extend to every aspect of the course. For example, a new teacher might decide consistently to focus on comparing and contrasting the MPC and the common law on every doctrine. Having mastered the course's substance in the first go-round, the teacher can focus on expanding his or her repertoire of teaching techniques the following year. The many similarities between the common law and the MPC make this approach less daunting than it might first appear. Whether to be more or less ambitious in various respects is ultimately a matter of personality, particular course goals, and developing confidence in teaching skills.

Perhaps the more important lesson is that learning to teach is a never-ending process. You can always do better tomorrow than you did today. Moreover, a good teacher is willing to experiment. Some experiments will fail and others will succeed, but absent the risk of trying something new, no teacher can grow. Equally important, good teachers learn from one another. It is important, therefore, to keep up a continuing dialogue with colleagues in your field. I hope that this book contributes to just such a dialogue.

## VIII. Conclusion

Teaching Criminal Law is an exciting experience. The course offers the opportunity to teach students statutory interpretation skills to a degree not likely to occur in other courses. The course also invites discussion of trial-based issues, partly because (compared to civil cases) so many criminal cases go to trial. The facts of the cases are inherently fascinating, often confronting students with the need to balance reason and emotion, learning that each supports rather than defeats the other.

Issues of race, gender, sexual orientation, and class are also necessarily implied by the theory and application of the Criminal Law. Grand policy questions of justice, retribution, fairness, and equality underlie virtually every issue in the course. Empirical questions, such as the extents to which particular criminal law doctrines deter wrongdoing, likewise must be considered.

Additionally, the course can readily be taught in a variety of ways, from the traditional focus on cases, to problems, to role-plays, to drafting exercises. It offers new teachers a chance to learn and hone their skills within a substantive area that delights students and readily promotes voluntary, enthusiastic class participation. It is a core course allowing its purveyors to strike pure teaching gold.

## IX. Appendix: Teaching the First Class: Some Suggestions

The first class of any course is particularly important. The initial class sets the tone for all that follows. It needs to grab students' imagination, give them an overview of what is to come, and give them an introduction that enables them to understand all that follows. Remember that the Criminal Law course generally begins with a discussion of sentencing and of the purposes of the criminal law. The choices for covering this topic are endless, but here I mention two proven approaches that might at least be a great way for a teacher new to the course to begin it.

The first is an oldie but still a goodie: discussing the *Queen v. Dudley and Stephens* case, which appears in most casebooks. This case involved English seamen, starving on an escape boat, after abandoning a sinking ship. The seamen killed and ate an apparently



dying teenage crew member in the (probably reasonable) belief that if they did not do so, everyone, not merely the teenager, would die of thirst and starvation. The men were rescued several days thereafter.

The outcome of the case is unimportant. What matters is the opportunity that the facts offer for discussing the purposes of the substantive criminal law and of sentencing. If the defendants' beliefs were reasonable under the circumstances, do they merit conviction at all? The elements of the crime of murder were unquestionably proven beyond a reasonable doubt, but should there be a defense if not committing the criminal act would likely do more social harm (all would die) than would committing the crime (one dies, but the others live)? Students will later study the defense of necessity—also called choice of evils—including discussing whether it applies to homicide cases. But they need not have any knowledge of defenses to debate what the law *should* be. What if the defendants were wrong about the teenager's imminent death; can you be reasonable but wrong? What if their beliefs were sincere but not reasonable? Does that change whether they should be convicted of murder?

These questions should be debated by forcing students to articulate answers in terms of the purposes of the criminal law, namely, retribution, deterrence, norm education, isolation, and rehabilitation. For example, this was an unusual and horrible set of circumstances. This suggests that these men are unlikely to kill again, thus not needing deterrence. In everyday life, they might be fine citizens, thus not in need of rehabilitation. It is also arguably unlikely that failing to convict them will weaken societal norms against killing.

Retribution might be more debatable. They ultimately did treat their lives, at least in combination, as more valuable than the teenager's. This is arguably a form of insult to his worth as a human being. Furthermore, death is a uniquely permanent ending. There was always the chance, no matter how small, of a quicker rescue than they expected. On the other hand, perhaps the teen's life was worth less than theirs in that he was so ill that it could not have held much value for him. Moreover, his time left with a pulse was likely very short anyway. As a member of a community, maybe he has an obligation to accept sacrifice for the greater good under highly unusual circumstances. Additionally, these unusual circumstances could fairly be seen as having severely limited the realistic choices available to the

defendants. And they quickly confessed their crime and apparently deeply regretted the circumstances. Their tortured consciences alone might be substantial punishment. These considerations might argue against any retributive need or render the need quite small.

If the need for retribution is small but not nonexistent, that raises the possibility of mitigating the crime to a lesser degree rather than complete acquittal. This is a possibility students might not have considered. The facts also raise the question whether there is a role in the substantive criminal law for compassion—here meaning reducing the defendants’ suffering from what the law might otherwise make it. If compassion does play a role, does it reduce the need for retribution?

Another issue raised by the case is the distinction between convicting someone of a crime (with a *potentially* substantial punishment) and the actual sentence imposed. The potential punishment serves a stigmatizing function: The higher the potential punishment, the more stigmatizing will be conviction of that particular crime (or at least this is arguably true). But an individual’s mental state, life circumstances, or actions might require crafting the actual sentence to be something less than the maximum. Under this view, sentencing becomes the primary opportunity to individualize punishment. However, this can be in tension with the idea of sentencing guidelines, whose purpose is to prevent seemingly arbitrary disparities based on the accident of the judge to whom the case is assigned.

The case thus provides an opportunity to discuss the conviction–sentencing distinction and what lawyers can do for their clients at sentencing. A teacher might give fictional sentencing reports on each of the defendants to the students as a way of discussing sentencing strategy and tactics. Additionally, the class can be asked (perhaps with some background reading) to consider a variety of sentencing options—from probation, to intensive probation, community service, house arrest, jail time, prison time, some incarceration followed by parole, or any creative alternatives they craft during the discussion.

The case also provides an opportunity to talk about how juries react to certain facts as opposed to judges, thus raising questions about what guides the tactical choice between bench and jury trials. For example, if the case is assigned to a “pro-defense” judge, that might suggest waiving the right to a jury trial. But if the case is assigned to a “hanging judge,” perhaps a jury would exercise more

compassion. Indeed, in a case like *Dudley and Stephens*, a jury might nullify, choosing not to convict despite a rigid application of the criminal law requiring the contrary result. Is nullification lawlessness, or a democratic safeguard against overly rigid, underindividualized application of the law?

*Dudley and Stephens* thus can be used in an exciting way to preview all the major themes of the Criminal Law course: mens rea, the criminal act, the nature of sentencing, the practicalities of defense and prosecution decision making, the tension among sometimes conflicting criminal law purposes, the idea of elements, and the possibility of affirmative defenses. Because there were multiple offenders, the case even offers an opportunity to discuss accomplice liability and conspiracy.

An alternative to *Dudley and Stephens* is to use a real-world presentencing report raising similar issues. There are supplementary pamphlets that include such reports, a few casebook Web sites do so, and sample ones can easily be found online. Many more mundane criminal cases raise issues similar to those in *Dudley and Stephens* and can thus be discussed in a similar fashion. The advantage of the presentencing report approach is simply its greater relevance to actual modern practice. It also offers an opportunity to talk about what a sentencing report is, who prepares it, and what role the defense attorney or prosecutor can play in using or contesting the report—although an informed discussion on these points probably requires assigning some brief background reading. The disadvantage of the presentencing report approach relative to *Dudley and Stephens* is that the former seems far more technical at a time when students know next to nothing. But real cases are not necessarily less exciting than *Dudley and Stephens*. Real sentencing reports often raise the drama of poverty, drug abuse, suffering victims, broken families, and fractured neighborhoods. They can implicitly raise issues of race, class, and gender in ways that *Dudley and Stephens* does not.

Finally, either approach can be supplemented with case or article excerpts or problems designed to better serve the particular teacher's goals. If Criminal Law is a first-year, first-semester course, students will especially expect and need practice in case analysis. Accordingly, assigning a case justifying or critiquing a modern sentence can be wise, either to model the relevance of a presentence report or to contrast the modern case with the older British one. Relatively

brief problems summarizing case facts and information relevant to sentencing can serve a similar purpose. Finally, article, brief, or think-tank report excerpts can provide useful background in understanding how sentencing works and the difference between guidelines and nonguidelines jurisdictions.