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UNIVERSITY *of* PENNSYLVANIA LAW REVIEW

Founded 1852

Formerly
AMERICAN LAW REGISTER

© 2022 University of Pennsylvania Law Review

VOL. 170

JUNE 2022

No. 6

ARTICLE

THE NEW PENAL BUREAUCRATS

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INTRODUCTION1390

[†] Presidential Professor of Law, University of Pennsylvania Carey Law School. Portions of this article draw from previous treatments on this issue. *See generally* Shaun Ossei-Owusu, *Criminal Legal Education*, 58 AM. CRIM. L. REV. 413 (2021); Shaun Ossei-Owusu, *Making Penal Bureaucrats*, INQUEST (Aug. 23, 2021), <https://inquest.org/making-penal-bureaucrats> [<https://perma.cc/CBR2-283A>]. This Article benefitted from feedback and conversations with Atinuke Adediran, Amna Akbar, Chaz Arnette, Rachel Barkow, Khiara Bridges, Bennett Capers, Guy-Uriel Charles, Andrew Crespo, Angela Davis, Roger Fairfax, Trevor Gardner, Osamudia James, Maximo Langer, Ben Levin, Erin Murphy, K-Sue Park, Eve Primus, John Rappaport, Dan Richman, Jonathan Simon, Jocelyn Simonson, Henry Bluestone Smith, and Adnan Zulficar. Special thanks to Megan Russo for excellent research assistance. I also benefitted from engagements with participants in the Virtual Crim Workshop, the Criminal Justice Roundtable, and faculty workshops at the University of Chicago Law School and George Washington University Law School. While working on this

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INTRODUCTION

Law professors have penned essays about criminal justice reform for decades. In some ways, reform is an organizing scholarly orientation for people in the legal professoriate that can come in many flavors. A few include; correcting policy problems; addressing perverse bureaucratic incentives; closing doctrinal gaps; or solving a theoretical puzzle that may have practical implications. These are important endeavors. The racialized ballooning of our criminal justice system, often described as mass incarceration, is a policy problem. Allowing police departments to (handsomely) profit off the people they arrest, in violation of due process principles, is definitionally perverse. And despite some people's disinterest in theory, the explanations for why we punish are central to bubbling calls for abolishing, as well as defending, penal institutions (e.g., police and prisons). This work matters. There is no complaint here about what criminal legal scholars are doing. My concern here is about what has been given less attention relative to its implications, and that is the role of law professors in our current penal crisis.

Law professors train some of the bureaucrats that are central to the problems in the criminal justice system: public defenders, prosecutors, and

Article, I came into the community with a group of professors working to get scholars of punishment to confront our collective role in our penal moment. I benefited from that intellectual community, and it includes Amna Akbar, Chaz Arnette, Monica Bell, Nicole Smith Futrell, Sean Hill, Jamelia Morgan, Allegra McLeod, Naomi Murakawa, Ngozi Ogidegbe, K-Sue Park, Jocelyn Simonson, Priscilla Ocen, and India Thusi. I'd like to add a special thanks to Courtney Bledsoe, Karli Ramirez, and the editors at the University of Pennsylvania Law Review, for their editorial assistance and work in making this piece better. All errors are mine.

judges. With the exception of people who might have personal or professional experience with the criminal justice system before law school, professors who teach in the criminal justice curriculum are often the initial points of contact for budding penal bureaucrats. These instructors play a critical role in the initial training of these students. Some of these students go on to work in the same flawed criminal justice system that professors often critique. Nevertheless, the role of the professor and of legal training in general are often ignored or given short shrift in our public discussions about the criminal justice system.

The publicized murder of George Floyd, shortly after the killings of Breonna Taylor and Ahmaud Arbery, prompted a subtle shift. As was the case in other professions, a wave of legal educators issued statements denouncing the police brutality and racial subjugation that typify parts of our criminal justice system.¹ Law school deans penned powerful messages that gestured toward the relationship between legal education and social change. Anecdotally, portions of the professoriate seemed to be more receptive to integrating questions of race, poverty, gender, and inequality into the legal curriculum. Notwithstanding such introspection, it is unclear that the education of future criminal justice actors will change. Women and minority scholars have recognized the need for curricular change for more than three decades, particularly in the field of criminal legal education (e.g., criminal law, criminal procedure, and evidence). Although the nature of the commentary has changed, the core critiques are still relevant today.² Why is

¹ For examples of such statements, see, for example, *Allard K. Lowenstein International Human Rights Clinic Statement on the Extrajudicial Killings of Black People in the United States*, YALE L. SCH. (June 9, 2020), <https://law.yale.edu/yls-today/news/allard-k-lowenstein-international-human-rights-clinic-statement-extrajudicial-killings-black-people> [<https://perma.cc/9V82-LC52>]; *Statement of the Deans of the Ten Texas Law Schools*, U. TEX. SCH. L. (June 10, 2020), <https://law.utexas.edu/news/2020/06/10/statement-of-the-deans-of-the-ten-texas-law-schools> [<https://perma.cc/Q6AT-AHVP>] (quoting BRAD TOBIN, MICHAEL F. BARRY, PATRICIA E. ROBERTS, JENNIFER M. COLLINS, ROBERT B. AHDIEH, JACK WADE NOWLIN, JOAN R.M. BULLOCK, LEONARD M. BAYNES, WARD FARNSWORTH & FELECIA EPPS, STATEMENT OF THE DEANS OF THE TEN TEXAS LAW SCHOOLS CONDEMNING RACISM AND REMEMBERING GEORGE FLOYD (2020)).

² See, e.g., LANI GUINIER, MICHELLE FINE & JANE BALIN, *BECOMING GENTLEMEN: WOMEN, LAW SCHOOL, AND INSTITUTIONAL CHANGE* 58 (1997) (describing various aspects of law school that alienate and discourage women students); PATRICIA J. WILLIAMS, *THE ALCHEMY OF RACE AND RIGHTS* 80-97 (1991) (discussing the inappropriate ways race, class, and gender are treated and ignored in criminal law classes and exams); Amna A. Akbar, *Law's Exposure: The Movement and the Legal Academy*, 65 J. LEGAL EDUC. 352, 368-69 (2015) (describing the ahistorical treatment of issues such as slavery and Jim Crow in legal education and inviting these kinds of discussions in criminal law); Angela P. Harris & Cynthia Lee, *Teaching Criminal Law from a Critical Perspective*, 7 OHIO ST. J. CRIM. L. 261, 265 (2009) (“[S]ubstantive criminal law is inevitably entwined with culture, and American culture is shot through with subordination on the bases of race, gender, sexuality, and class”); M.K.B. Darmer, *Teaching Whren to White Kids*, 15 MICH. J. RACE & L. 109, 111 (2009) (critiquing pedagogical approaches to race in criminal procedure); Catharine A. MacKinnon, *Mainstreaming Feminism in Legal Education*, 53 J. LEGAL EDUC. 199, 206-

the contemporary racial reckoning in legal education so belated? One of the many reasons are tied to the ways legal scholarship treats law professors as outside the problem of criminal justice reform.

Accordingly, this Article argues that law schools and law professors play an underappreciated role in our current penal crisis. This contention is not causal, nor does it suggest that law professors are directly responsible for the state of our criminal justice system. Instead, my argument is premised on the belief that the training of students who become criminal justice lawyers matters and is not insulated from the critiques levied by legal experts in their writing. Querying legal education is not a navel-gazing exercise, but instead, is a call for the kinds of reflexivity that is valued in some social sciences and helpful for having fuller understanding of the world.

Scholarly gaps also contribute to the general understanding of law professors as outside the bounds of criminal justice reform. A significant subset of criminal justice scholarship focuses on penal bureaucrats—the individuals tasked with meeting the various imperatives of the criminal justice system (e.g., policing, prosecution, indigent defense, criminal supervision). The broad literature on penal bureaucrats typically focuses on their practice and work environments.³ This rings particularly true for *legal* scholarship on penal bureaucrats, which traditionally examines incentives, pathologies, organizational culture, and constraints in the worlds of policing, prosecution, and indigent defense, amongst other areas.⁴

07 (2003) (discussing the need for more robust discussions about gender in criminal law courses); Kimberlé Williams Crenshaw, *Foreword: Toward a Race-Conscious Pedagogy in Legal Education*, 11 NAT'L BLACK L.J. 1, 6, 8-9 (1989) (highlighting issues with how criminal law instructors might engage issues of race in a criminal law course and making suggestions about how conversations about race could be better handled in the provocation section of a criminal law class); see also *infra* Section I.A.

³ See generally, e.g., NICOLE GONZALEZ VAN CLEVE, CROOK COUNTY: RACISM AND INJUSTICE IN AMERICA'S LARGEST CRIMINAL COURT (2016) (prosecutors and defense attorneys); JOSHUA PAGE, THE TOUGHEST BEAT: POLITICS, PUNISHMENT, AND THE PRISON OFFICERS UNION IN CALIFORNIA (2011) (correctional officers); PETER MOSKOS, COP IN THE HOOD: MY YEAR POLICING BALTIMORE'S EASTERN DISTRICT (2008) (police officers).

⁴ For further reading on penal bureaucrats and their impact on the criminal justice system, see generally RACHEL ELISE BARKOW, PRISONERS OF POLITICS: BREAKING THE CYCLE OF MASS INCARCERATION (2019) [hereinafter BARKOW, PRISONERS OF POLITICS]; Eve Brensike Primus, *Culture as a Structural Problem in Indigent Defense*, 100 MINN. L. REV. 1769 (2016); L. Song Richardson & Phillip Atiba Goff, *Implicit Racial Bias in Public Defender Triage*, 122 YALE L.J. 2626 (2013); Stephanos Bibas, *Prosecutorial Regulation Versus Prosecutorial Accountability*, 157 U. PA. L. REV. 959 (2009); Angela J. Davis, *The Legal Profession's Failure to Discipline Unethical Prosecutors*, 36 HOFSTRA L. REV. 275 (2007); Susan Bandes, *Loyalty to One's Convictions: The Prosecutor and Tunnel Vision*, 49 HOW. L.J. 475, 479 (2006); Bruce A. Green, *Judicial Rationalizations for Rationing Justice: How Sixth Amendment Doctrine Undermines Reform*, 70 FORDHAM L. REV. 1729 (2002); Daniel Richman, *Prosecutors and Their Agents, Agents and Their Prosecutors*, 103 COLUM. L. REV. 749 (2003); Kim Taylor-Thompson, *Individual Actor v. Institutional Player: Alternating Visions of the Public*

On the other end is legal profession scholarship, which overlaps with professional responsibility and traditionally investigates questions tied to legal education, socialization, and demographics, amongst other issues.⁵ Interestingly, scholars of the legal profession who write about criminal justice have focused much of their attention on the legal ethics of criminal practice.⁶ Again, this is an appropriate concern considering the moral quandaries and dilemmas penal bureaucrats encounter. But the lack of unified attention to the legal education, socialization, and demographics of future public defenders and prosecutors means there are gaps in knowledge about lawyers working in the penal bureaucracy.⁷ This is unfortunate because a cross-

Defender, 84 GEO. L.J. 2419 (1996); Tracey L. Meares, *Rewards for Good Behavior: Influencing Prosecutorial Discretion and Conduct with Financial Incentives*, 64 FORDHAM L. REV. 851 (1995).

⁵ For examples of legal profession scholarship, see generally MEERA E. DEO, *UNEQUAL PROFESSION: RACE AND GENDER IN LEGAL ACADEMIA* (2019) [hereinafter DEO, *UNEQUAL PROFESSION*]; ALAN K. CHEN & SCOTT L. CUMMINGS, *PUBLIC INTEREST LAWYERING: A CONTEMPORARY PERSPECTIVE* (2013); Eli Wald & Russell G. Pearce, *Making Good Lawyers*, 9 U. ST. THOMAS L.J. 403 (2011); ELIZABETH MERTZ, *THE LANGUAGE OF LAW SCHOOL: LEARNING TO “THINK LIKE A LAWYER”* (2007); DEBORAH L. RHODE, *IN THE INTERESTS OF JUSTICE: REFORMING THE LEGAL PROFESSION* (2000); GUINIER ET AL., *supra* note 2; Susan P. Sturm, *From Gladiators to Problem-Solvers: Connecting Conversations About Women, the Academy, and the Legal Profession*, 4 DUKE J. GENDER L. & POL’Y 119 (1997); David B. Wilkins & G. Mitu Gulati, *Why Are There So Few Black Lawyers in Corporate Law Firms?: An Institutional Analysis*, 84 CALIF. L. REV. 493 (1996); Cynthia Fuchs Epstein, Robert Sauté, Bonnie Oglensky & Martha Gever, *Report: Glass Ceilings and Open Doors: Women’s Advancement in the Legal Profession*, 64 FORDHAM L. REV. 291 (1995).

⁶ For reading on the legal ethics of criminal practice, see generally Monroe H. Freedman, *The Use of Unethical and Unconstitutional Practices and Policies by Prosecutors’ Offices*, 52 WASHBURN L.J. 1 (2012); Peter A. Joy, *Ensuring the Ethical Representation of Clients in the Face of Excessive Caseloads*, 75 MO. L. REV. 771 (2010); Monroe H. Freedman, *In Praise of Overzealous Representation—Lying to Judges, Deceiving Third Parties, and Other Ethical Conduct*, 34 HOFSTRA L. REV. 771 (2006); Bruce A. Green, *Prosecutorial Ethics as Usual*, 2003 U. ILL. L. REV. 1573; Anthony V. Alfieri, *Race Prosecutors, Race Defenders*, 89 GEO. L.J. 2227 (2001); Abbe Smith, *Can You Be a Good Person and a Good Prosecutor?*, 14 GEO. J. LEGAL ETHICS 355 (2001); William H. Simon, *The Ethics of Criminal Defense*, 91 MICH. L. REV. 1703 (1993).

⁷ There are exceptions that gesture toward the issues described in this Article. See Alice Ristroph, *The Curriculum of the Carceral State*, 120 COLUM. L. REV. 1631 (2020) [hereinafter Ristroph, *Curriculum*] (describing the role criminal law courses play in producing mass incarceration); Ronald F. Wright & Kay L. Levine, *Career Motivations of State Prosecutors*, 86 GEO. WASH. L. REV. 1667 (2018) (examining the motivational profiles of prosecutors); David Alan Sklansky, *The Progressive Prosecutor’s Handbook*, 50 U.C. DAVIS L. REV. ONLINE 25, 42 (2017) [hereinafter Sklansky, *Handbook*] (discussing how prosecutors’ offices fail to consistently collect demographic data and comparing diversification efforts to that of police forces); Kenneth P. Troccoli, *“I Want a Black Lawyer to Represent Me”: Addressing a Black Defendant’s Concerns with Being Assigned a White Court-Appointed Lawyer*, 20 L. & INEQ. 1 (2002) (discussing race and legal representation); Sherrilyn A. Ifill, *Judging the Judges: Racial Diversity, Impartiality and Representation on State Trial Courts*, 39 B.C. L. REV. 95 (1997) (discussing the demography of the judiciary); see generally Ryan D. King, Kecia R. Johnson & Kelly McGeever, *Demography of the Legal Profession and Racial Disparities in Sentencing*, 44 L. & SOC’Y REV. 1, 1-2 (2010) (finding that increasing the number of Black and Hispanic attorneys in a county decreases the Black-white and Hispanic-(non-Hispanic) white disparities in sentencing);

pollination of criminal justice and legal profession scholarship has the potential to prompt changes in an area that law schools actually have direct dominion over, as opposed to important but symbolic statements about police violence that may have a shorter shelf life and weaker societal impact.

Reexamination of the structure of legal education and its relationship to our criminal justice system is particularly urgent considering trends in both areas. Here I am referring to generational change. Every year Millennials (members of Generation Y born between 1981 and 1996) enter law school and the penal bureaucracy. At the same time, their post-Millennial successors (members of Generation Z born after 1997) are increasingly entering law school and will also become public defenders and prosecutors thereafter. Both cohorts are more diverse than the Generation X and baby boomer professors that typically teach in the criminal justice curriculum.⁸ Millennials and post-Millennials also have different experiences with law enforcement and less punitive politics than their predecessors.⁹ Some of these young people will be prosecutors and public defenders and have the potential to reshape the criminal justice system. But the generational nature of criminal legal education and lawyering has been overlooked by scholars. Instead, age-based inquiries are often relegated to pedagogical discussions about how members of Generation Y and Z learn and consume information.¹⁰ But analyses of criminal legal education and its relationship to generational change tee up larger issues about the future of criminal justice administration. Millennial and post-Millennial leadership during the summer 2020 protests and the

Geoff Ward, Amy Farrell & Danielle Rousseau, *Does Racial Balance in Workforce Representation Yield Equal Justice? Race Relations of Sentencing in Federal Court Organizations*, 43 L. & SOC'Y REV. 757 (2009) (investigating factors contributing to racial disparities in federal criminal sentencing).

⁸ Richard Fry & Kim Parker, *Early Benchmarks Show 'Post-Millennials' on Track to be Most Diverse, Best-Educated Generation Yet*, PEW RSCH. CTR. (Nov. 15, 2018), <https://www.pewresearch.org/social-trends/2018/11/15/early-benchmarks-show-post-millennials-on-track-to-be-most-diverse-best-educated-generation-yet> [<https://perma.cc/N75E-YVQ6>].

⁹ See, e.g., Heejin Lee, Francis T. Cullen, Alexander L. Burton & Velmer S. Burton, Jr., *Millennials as the Future of Corrections: A Generational Analysis of Public Policy Opinions*, CRIME & DELINQ. 1, 14 (forthcoming) (discussing Millennials' unwillingness to support capital punishment); Vesla M. Weaver, Andrew Papachristos & Michael Zanger-Tishler, *The Great Decoupling: The Disconnection Between Criminal Offending and Experience of Arrest Across Two Cohorts*, 5 RUSSEL SAGE FOUND. J. SOC. SCIS. 89, 91 (2019) (discussing an increased number of run-ins with law enforcement among "members of the late-1990s cohort" versus their older counterparts).

¹⁰ See generally Lauren A. Newell, *Redefining Attention (and Revamping the Legal Profession?) for the Digital Generation*, 15 NEV. L.J. 754, 756 (2015) (discussing the effect of exposure to information and communication technologies on "members of the Digital Generation who grow up to be legal professionals"); Shailini Jandial George, *Teaching the Smartphone Generation: How Cognitive Science Can Improve Learning in Law School*, 66 ME. L. REV. 163, 164 (2013) (exploring how cognitive learning theory can inform teaching of digital native law students); Kristen E. Murray, *Let Them Use Laptops: Debunking the Assumptions Underlying the Debate Over Laptops in the Classroom*, 36 OKLA. CITY U. L. REV. 185, 186-87 (2011) (examining the debate over whether laptops should be allowed in law school classrooms).

politicization of current law students underscore this point.¹¹ Accordingly, this Article makes a unique contribution to criminal justice scholarship by explicating how law schools contribute to our carceral regime and providing insights into how legal education can be responsive to generational developments in ways that accord with the growing consensus around criminal justice reform.

This Article proceeds in three parts. Part I particularizes the long-standing critique that legal education is not designed to challenge the status quo.¹² Assuming this is right, and available empirical accounts of legal education seem to suggest so,¹³ this would mean that the core criminal justice courses taught in law school are not immune from this critique. Indeed, Alice Ristroph's recent deep dives into the history of substantive criminal law—the only of their kind—put forth the closest message: “American law schools, through the required course on substantive criminal law, have contributed affirmatively to the collection of phenomena commonly labeled mass incarceration.”¹⁴ Professor Ristroph's assessment is correct and is one part of

¹¹ See William H. Frey, *The Nation's Racial Justice Protests Are a Pivotal Moment for Millennials and Gen Z*, BROOKINGS (June 9, 2020), <https://www.brookings.edu/blog/the-avenue/2020/06/08/the-nations-racial-justice-protests-are-a-pivotal-moment-for-millennials-and-gen-z> [<https://perma.cc/6XWG-D8LS>] (distinguishing the racial justice protests of 2020 from 1960s-era activism and noting that “today's movement is occurring in the midst of a fundamental demographic transformation”); Tyler Ambrose, Zarinah Mustafa & Sherin Nassar, *Law Schools' Complicity on Racism Must Be Challenged*, THE APPEAL (June 24, 2020), <https://theappeal.org/law-schools-racism/> [<https://perma.cc/2QGT-DVTP>] (“As rising second-year Black and brown students at Harvard Law School . . . we recognize and embrace our responsibility to challenge the racially sterile curriculum of law school classrooms.”); Hannah Taylor, *The Empty Promise of the Supreme Court's Landmark Affirmative Action Case*, SLATE (June 12, 2020, 1:50 PM), <https://www.slate.com/news-and-politics/2020/06/grutter-v-bollinger-michigan-law-diversity-racism.html> [<https://perma.cc/4K4J-EDRB>] (referencing a list of demands made by Black law students, including mandatory anti-racism programming and curriculum changes).

¹² See generally Duncan Kennedy, *Legal Education and the Reproduction of Hierarchy*, 32 J. LEGAL EDUC. 591 (1982) (examining the ways in which legal pedagogy entrenches existing social, professional, and legal hierarchies); see also Jedediah Britton-Purdy, David Singh Grewal, Amy Kapczynski & Sabeel Rahman, *Building a Law-and-Political-Economy Framework: Beyond the Twentieth-Century Synthesis*, 129 YALE L.J. 1784, 1789-90 (2020) (noting that law students often learn not to challenge aspects of the law that fail to address, and even perpetuate, various forms of inequality and injustice).

¹³ See, e.g., MERTZ, *supra* note 5, at 5 (“Another feature of the linguistic ideology that emerges in law school classrooms is an emphasis on layers of textual authority as neutral sources for legal decisionmaking.”); GUINIER ET AL., *supra* note 2; WENDY LEO MOORE, *REPRODUCING RACISM: WHITE SPACE, ELITE LAW SCHOOLS, AND RACIAL INEQUALITY* 51-54 (2008) (outlining a discussion in a constitutional law course in which the professor had “an implicit bias for the interests of white men in the formation of a government to protect their interests, certainly not the interests of African Americans”).

¹⁴ Ristroph, *Curriculum*, *supra* note 7, at 1635; Alice Ristroph, *An Intellectual History of Mass Incarceration*, 60 B.C. L. REV. 1949, 1985 (2019) [hereinafter Ristroph, *Intellectual History*] (arguing that the idea that criminal law is both “essential and narrowly targeted to address distinctive social harms” is pervasive in criminal law pedagogy and “is linked to the growth of the carceral state”). See

a larger narrative about legal education's reluctance to take full account of its role in our criminal justice crisis. Part I picks up the baton and widens the discussion beyond substantive criminal law and illustrates how three issues that are central to the study of the legal profession—education, socialization, and demographics—offer insight into how law schools reproduce our penal status quo.

Part II shifts to the missing discussion about generational change in the legal profession. This Part explains the distinctiveness of Millennial and post-Millennial law students and situates them within two recent developments in the criminal justice system: mass incarceration-influenced “progressive prosecution” and indigent defense reform. Empirical research has long demonstrated how legal education morphs and sometimes neuters students' social justice ambitions.¹⁵ But the core criminal justice curriculum imposes a strict law/policy divide that leads to thin treatments of the practical issues facing penal bureaucrats. This divide also contributes to an under-engagement with reform trends in the criminal justice system and their real limitations. The sidelining of reform conversations in courses that are denuded of full social context means that students are receiving a suboptimal legal education. It is suboptimal because it is not responsive to the social justice concerns that inspire some students' decision to go to law school,¹⁶ it does not harness the working understandings of social inequality that Generations Y and Z bring to their legal education,¹⁷ and it implies that social justice concerns are additive as opposed to considerations to be examined alongside doctrine and blackletter law.¹⁸ In short, future penal bureaucrats

also Legal Scholars in Solidarity, *A Time for Solidarity: An Open Letter to Our Colleagues*, MEDIUM (Aug. 24, 2020), <https://medium.com/@solidarityinthemoment/a-time-for-solidarity-8a1ce0e52210> [<https://perma.cc/67DQ-F2E9>] (calling law professors and scholars of punishment to account for their role in mass incarceration and address anti-black racism and white supremacy in the legal system).

¹⁵ See *infra* Part II.

¹⁶ See John Bliss, *From Idealists to Hired Guns? An Empirical Analysis of “Public Interest Drift” in Law School*, 51 U.C. DAVIS L. REV. 1973, 2020 (2018) (describing how students begin law school with sincere but vague public interest commitments).

¹⁷ See Jonathan D. Glater, *Statutory Analysis: Criminal Law and an Ever-Evolving Law School*, 10 U.C. IRVINE L. REV. 401, 416 (2020) (noting that “[m]any students in this millennial generation have studied what behaviors constitute microaggressions and have thought about their own intersectional identities” and suggesting that students often are eager to delve into the social implications of the caselaw they read); Akbar, *supra* note 2, at 370 (“Our students are more sophisticated than we give them credit for. They experience the contradictions inherent in living with relative privilege in this unequal world. They can read between the lines of court opinions. They are capable of respectable debate about big social problems.”).

¹⁸ See Susan A. Bandes, *Moral Shock and Legal Education*, 65 J. LEGAL EDUC. 298, 302 (2015) (“[W]e need to help our students learn how to read closely and articulate and defend their arguments and place doctrine in larger theoretical, social, and political contexts.”); David E. Pozen & Adam M. Samaha, *Anti-Modalities*, 119 MICH. L. REV. 729, 781 (2021) (“[T]he emphasis on modal

receive legal training that is loosely connected to a criminal justice system that scholars across the ideological spectrum have long-argued needs reform. This version of criminal legal education serves the penal status quo.

Part III offers some normative suggestions on how the legal profession might harness the reform-minded developments described in Part II in ways that could address the intractable problems in legal education discussed in Part I. These prescriptions are weighty and tethered to three important constituents: students, faculty, and employers. I describe the siloed as well as coordinated efforts by law students around the country to develop reading groups, syllabi, and organizations that address the shortcomings in criminal legal education. At first glance, this student organizing may seem insignificant, but it is important to note that intellectual movements like critical race theory and organizations such as the Federalist Society began through the efforts of students.¹⁹ The conversation moves to reform-devoted faculty, whom I argue should crowdsource, streamline, and publicize lessons of the key clashes between empirical realities of criminal justice and legal doctrine. This information would elevate the nature of conversations students have with professors inside and outside the classroom by providing insights for students who are interested in socially relevant criminal legal education but precluded because they lack vocabulary or understanding. These efforts would force professors to offer more updated, socially connected instruction ex-ante or by way of informed, real-time student questions in class. Part III is rounded out with a discussion of employers. I show how prosecutor and public defender offices can engage in demand-side reforms in the criminal justice curriculum. Much like law firms who recruit from specific schools based on their strengths in corporate law, intellectual property, or health law, these offices should hire students from schools who take a specific interest in reforming criminal legal education. Employers would still prioritize hiring people who understand how the various doctrines, cases, rules, tests, and

reasoning in law schools . . . trains many lawyers to see statistical evidence as 'sociological gobbledygook' and law as an autonomous discipline."); Cynthia Lee, *Making Black and Brown Lives Matter: Incorporating Race Into the Criminal Procedure Curriculum*, 60 ST. LOUIS U. L.J. 481, 482 (2016) ("[M]any criminal procedure casebooks present the Supreme Court's criminal procedure jurisprudence as a series of race-neutral decisions. If the law professor who teaches Criminal Procedure wants students to think about race, the professor often has to *supplement* the cases in the traditional casebook with other materials.") (emphasis added).

¹⁹ See AMANDA HOLLIS-BRUSKY, *IDEAS WITH CONSEQUENCES: THE FEDERALIST SOCIETY AND THE CONSERVATIVE COUNTERREVOLUTION* 1 (2015) (discussing how the Federalist Society began with a small group of conservative and libertarian law students at Yale and the University of Chicago); Richard Delgado, *Liberal McCarthyism and the Origins of Critical Race Theory*, 94 IOWA L. REV. 1505, 1510-15 (2009) (discussing how student activism inspired critical race theory); CRITICAL RACE THEORY: THE KEY WRITINGS THAT FORMED THE MOVEMENT, at xxi (Kimberlé Crenshaw, Neil Gotanda, Gary Peller & Kendall Thomas eds., 1995) (describing the development of an alternative course at Harvard that served as the genesis for critical race theory).

exceptions in the criminal justice curriculum apply to different fact patterns; but they would also recruit students who best understand how these aspects of law interface with the bureaucratic realities of the criminal justice system.

The Conclusion reiterates the urgency of this issue of criminal legal education, which is important to emphasize here at the outset. Scholarship on the criminal justice system occupies prime real estate in flagship law journals, and justifiably so. Meanwhile, substantive discourse on the legal profession is often confined to specialty journals, symposium issues, or exists in the social sciences, outside the purview of mainstream legal scholarship.²⁰ As Gerald López has explained, law students and law teachers do not spend much time talking about matters of legal education in a “serious [or] publicly shared way.”²¹ Instead, they “treat these issues as matters of only professional concern, rather than as matters of general political significance.”²² This is unfortunate considering the integral role lawyers play in our society and in our criminal justice system. This Article elevates criminal legal education as a pressing problem, which, if attended to, could help mitigate the problems of a penal system that the general public is increasingly understanding as deficient.

A quick note on terminology and the title may be helpful before proceeding. In a searing critique of criminal justice reform, civil rights attorney Alec Karakatsanis uses the terms “punishment bureaucracy” and “punishment bureaucrat.”²³ For Karakatsanis, both have an unambiguously negative valence. Karakatsanis explains: “A major achievement of the punishment bureaucracy is that it has retained mainstream respect even though it crushes unprecedented numbers of people with no evidence of any unique social benefit while simultaneously allowing enormous amounts of lawlessness that cause massive harm.”²⁴ Describing the population, he notes, “[a]s the bureaucracy expands, it employs larger and larger numbers of police officers, prosecutors, probation officers, defense attorneys, prison guards, contractors, and equipment manufacturers. People working in the system become dependent on its perpetuation for their livelihoods and even their

²⁰ Two helpful recent symposia that include reflections on teaching in the criminal justice curriculum and pedagogical strategies include Symposium, *Teaching Criminal Procedure*, 60 ST. LOUIS U. L.J. 363 (2016) and Symposium, *Ferguson and Its Impact on Legal Education*, 65 J. LEGAL EDUC. 261 (2015).

²¹ Gerald P. López, *Training Future Lawyers to Work with the Politically and Socially Subordinated: Anti-Generic Legal Education*, 91 W. VA. L. REV. 305, 309 (1989).

²² *Id.*

²³ See Alec Karakatsanis, *The Punishment Bureaucracy: How to Think About “Criminal Justice Reform”*, 128 YALE L.J.F. 848, 851 (2019) (critiquing the emerging political consensus about “criminal justice reform” as “superficial and deceptive”) (quotations omitted).

²⁴ *Id.* at 901.

identities.”²⁵ I share Karakatsanis’ alarm regarding the large expanse of the criminal justice system but deploy the slightly different terms “penal bureaucrat” and “penal bureaucracy.” I use these categories for conceptually specific reasons.

First, my use of the terms “penal bureaucrat” and “penal bureaucracy,” is more normatively neutral. In this sense, the purpose of these terms is to describe two functions in the criminal justice system—indigent defense and prosecution—and the different trends occurring in these worlds as they relate to legal education. Make no mistake, both are implicated in our criminal justice system, as different Parts of the Article explain. However, at least for the purposes of this Article, I do not imagine the bureaucratic post *itself* (whether it be prosecutor or defense attorney) as inherently responsible for the penal status quo. I place responsibility on the people *occupying* these fraught posts. That distinction is integral for thinking about possibilities for change and leaves room for the reform-minded students and real-time attorneys interested in upending our criminal justice system.

Second, my use of the terms “penal bureaucrat” and “penal bureaucracy” is rooted in the social sciences, specifically in Michael Lipsky’s famous analysis of “street-level bureaucracies.”²⁶ Lipsky helpfully defines these entities as public agencies that deliver services (e.g., legal aid, welfare departments) or allocate public sanctions (e.g., police, prosecution).²⁷ Social scientists have built upon Lipsky’s idea and looked beyond street-level bureaucrats’ categorization as public servants. These scholars have examined how personal and professional identity influences these bureaucrats’ work.²⁸ Celeste Watkins-Hayes’s book *The New Welfare Bureaucrats*, which inspires this Article’s title, is noteworthy here.²⁹ Watkins-Hayes illustrates how professional identity and workplace dynamics interface with the race, class, and gender of welfare workers and recipients in ways that influence welfare administration.³⁰ My use of the term “penal bureaucrat” speaks to these social and professional aspects of identity. The term also includes generational

²⁵ *Id.*

²⁶ MICHAEL LIPSKY, STREET-LEVEL BUREAUCRACY: DILEMMAS OF THE INDIVIDUAL IN PUBLIC SERVICES 3 (1980).

²⁷ *Id.*

²⁸ *See, e.g.*, BERNARDO ZACKA, WHEN THE STATE MEETS THE STREET: PUBLIC SERVICE AND MORAL AGENCY 10 (2017) (examining the “moral sensibilities, affective dispositions, and role conceptions” of agents “at the front lines of the state”); STEVEN MAYNARD-MOODY & MICHAEL MUSHENO, COPS, TEACHERS, COUNSELORS: STORIES FROM THE FRONT LINES OF PUBLIC SERVICE 4 (2003) (describing how identity, personal beliefs, and value systems coexist with “policies, rules, and administrative oversight” in bureaucratic decisionmaking).

²⁹ CELESTE WATKINS-HAYES, THE NEW WELFARE BUREAUCRATS: ENTANGLEMENTS OF RACE, CLASS, AND POLICY REFORM (2009).

³⁰ *Id.* at 10-11.

dimensions and pays close attention to the legal education that helps form attorneys' professional identities. This understanding of penal bureaucrats, I hope, can help shape how the legal profession thinks about the relationship between lawyers' education and the operations of the criminal justice system.

I. THE SAME LEGAL PROBLEMS

This Part describes three longstanding issues in legal education and the legal profession that provide alternative ways of thinking about the criminal justice system's problems. It begins with an examination of the different ways scholars have described the inequality-producing features of legal education. The reproduction argument is typically associated with corporate law firms, but Section I.A explains how it applies to criminal legal practice. Section I.B discusses law school socialization, specifically the ways legal education promotes certain kinds of attitudinal dispositions toward law, in this instance criminal law, criminal procedure, and evidence. I show how legal education socializes students to think about these areas in narrow ways that do not fully reflect prosecutorial or indigent defense practice. This leaves students who choose these career paths underprepared. Part I concludes with a discussion on the demographic shape of indigent defense and prosecutorial offices. Empirical information about each is fairly slim. The relative unavailability of information, along with inattention to how future bureaucrats are socialized, provides some explanatory insights into how criminal legal education reproduces the status quo.

A. *Criminal Legal Education and the Reproduction of Hierarchy*

Social scientists have spent decades writing about how schools and education systems reproduce the social order.³¹ The nature of this reproduction is multi-dimensional and spans the educational gamut. Young boys and girls learn about gender divisions and sex identity through seemingly mundane activities such as restroom use, teasing, and play.³² Racial

³¹ See, e.g., MICHAEL W. APPLE, *EDUCATION AND POWER* 9 (2d ed. 2012) (exploring the role that schools play in "reproducing a stratified social order" marked by "domination and exploitation"); PIERRE BOURDIEU & JEAN-CLAUDE PASSERON, *REPRODUCTION IN EDUCATION, SOCIETY AND CULTURE* 5 (1990 ed.) (analyzing the symbolic violence of education institutions which "reproduce the cultural arbitrary of the dominant"); MICHAEL W. APPLE, *IDEOLOGY AND CURRICULUM* 4 (4th ed. 2019) ("Our social concepts . . . are totally prefigured or predicated upon a pre-existing set of economic conditions that control cultural activity, including everything in schools."); PIERRE BOURDIEU, *DISTINCTION: A SOCIAL CRITIQUE OF THE JUDGEMENT OF TASTE* 23 (Richard Nice trans., 1979) (describing schools as a method of building and transferring the academic and cultural capital of the elite).

³² See BARRIE THORNE, *GENDER PLAY: GIRLS AND BOYS IN SCHOOL* 34-40, 52-55 (1993) (discussing the ways through which elementary-age children discover gender and sex identities).

lessons are conveyed through curricular choices as well as practices of punishment.³³ From elementary to high school, residential segregation produces a range of inequalities that ultimately shape who goes to college and where they choose to enroll.³⁴ From Ivy League schools to politically embattled for-profit colleges, higher education—the presumed bastion of social mobility—is freighted by a high wire act of accommodating accumulated advantage and entrenched inequalities.³⁵ Schools of all levels do supply their students with knowledge—some basic and some technical. But educational systems also inculcate their students with middle-class value systems in preparation for an economically and socially stratified society.

Legal education is not immunized from reproduction analyses. Duncan Kennedy lodged a scathing critique almost forty years ago and scholarship on the legal profession has had to contend with it since.³⁶ For the uninitiated, unfamiliar, or misremembered, the gist of Kennedy’s argument is this: the seminal first-year courses of law schools are indoctrination factories that teach students the mystified skill of legal reasoning but do so in ways that are detached from actual lawyering as well as pressing policy problems. In doing so, law schools endow students with a set of political attitudes that naturalize inequality and prepare them to be foot soldiers in the legal order—primarily in private sector law firms, but also in the other spheres of the legal profession.³⁷ Since Kennedy’s critique, scholars have offered slightly more

³³ See AMANDA E. LEWIS, *RACE IN THE SCHOOLYARD: NEGOTIATING THE COLOR LINE IN CLASSROOMS AND COMMUNITIES* 4, 8 (2003) (depicting how race and racial inequality are reproduced in quotidian social interactions at school through an ethnographic study of three schools in Southern California).

³⁴ See MEGAN M. HOLLAND, *DIVERGENT PATHS TO COLLEGE: RACE, CLASS, AND INEQUALITY IN HIGH SCHOOLS* 17-38 (2019) (detailing the influence of racial segregation and its effects on aspirations to go to college and on the cultural knowledge necessary to navigate the application process); ANN L. MULLEN, *DEGREES OF INEQUALITY: CULTURE, CLASS, AND GENDER IN AMERICAN HIGHER EDUCATION* 74-78 (2012) (highlighting the various reasons students gave for applying to and matriculating at Yale University, including family encouragement and exposure to professional occupations from a young age); ANNETTE LAREAU, *UNEQUAL CHILDHOODS: CLASS, RACE, AND FAMILY LIFE* 3 (2d ed. 2011) (using intensive observational research of families to document the “largely invisible but powerful ways that parents’ social class impacts children’s life experiences”).

³⁵ ANTHONY ABRAHAM JACK, *THE PRIVILEGED POOR: HOW ELITE COLLEGES ARE FAILING DISADVANTAGED STUDENTS* 23 (2019) (detailing the way elite universities “bend over backward to admit disadvantaged students” while simultaneously “maintain[ing] policies that not only remind those students of their disadvantage, but even serve to highlight it”); JENNIFER M. MORTON, *MOVING UP WITHOUT LOSING YOUR WAY: THE ETHICAL COSTS OF UPWARD MOBILITY* 8 (2019) (describing the ethical costs facing low-income students who strive for a better life through post-secondary education, including loss of relationships with self, family, and community).

³⁶ Duncan Kennedy, *Legal Education and the Reproduction of Hierarchy*, 32 J. LEGAL EDUC. 591 (1982).

³⁷ *Id.* at 595-610.

nanced and less polemical takes on legal education.³⁸ Still, the basic premise about law school's inequality-producing features remains.

Investigations into law schools' reproductive qualities have also brought more granular approaches to race and gender. Lani Guinier and her colleagues describe how the male-oriented nature of legal education denigrates women and can have career-defining effects by influencing their academic performance (and ultimately determining things like who gets on law review, receives clerkships, and graduates at the top of the class).³⁹ Wendy Leo Moore's ethnographic study of law schools, unambiguously titled, *Reproducing Racism*, details how legal education reproduces ideas of white superiority by focusing on racially subtle messages that emerge from the plastering of white alumni across law school buildings, as well as the more obvious sites such as classroom discussions and pedagogy.⁴⁰ Class bias also lurks in the background of legal education. A handful of scholars highlight how most law schools draw their faculty from the same small pool of elite law schools, which leads to a socioeconomically homogenous professoriate that is insensitive to social stratification in their teaching.⁴¹ The conclusion that one is left with based on these texts, related scholarly literature, and a cottage industry of

³⁸ For one particularly thoughtful take, see Lucille A. Jewel, *Bourdieu and American Legal Education: How Law Schools Reproduce Social Stratification and Class Hierarchy*, 56 BUFF. L. REV. 1155, 1173-1201 (2008).

³⁹ See GUINIER ET AL., *supra* note 2, at 27-77 (describing the gendered performance differential in elite law schools and its lifelong material consequences for women who struggle to assimilate); see also Sari Bashi & Maryana Iskander, *Why Legal Education is Failing Women*, 18 YALE J.L. & FEMINISM 389, 403 (2006) (discussing how men "dominate class discussions" and "use their classroom experiences as a springboard for building academically and professionally rewarding relationships with faculty members" while noting that "[d]iminished or less effective classroom participation by women . . . [contributes to] diminished or less effective out-of-class interactions between faculty members and female students").

⁴⁰ MOORE, *supra* note 13, at 37-38, 42-44, 49-62.

⁴¹ See Jewel, *supra* note 38, at 1197 ("The American legal profession has long been viewed as occupying the cultural and social space of the aristocracy."); Milan Markovic, *The Law Professor Pipeline*, 92 TEMP. L. REV. 813, 815 (2020) (describing how new law professors are drawn primarily from the most elite private colleges that serve the wealthiest segments of society); Eric J. Segall & Adam Feldman, *The Elite Teaching the Elite: Who Gets Hired by the Top Law Schools?*, 68 J. LEGAL EDUC. 614, 618 (2019) (finding that eighty percent of the faculty in the top twenty-five law schools went to a top ten law school); Eli Wald, *Serfdom Without Overlords: Lawyers and the Fight Against Class Inequality*, 54 U. LOUISVILLE L. REV. 269, 298 (2016) ("[Law schools] exclusively retain faculty from privileged backgrounds."); Michael J. Higdon, *A Place in the Academy: Law Faculty Hiring and Socioeconomic Bias*, 87 ST. JOHN'S L. REV. 171, 175 (2013) (noting that "students who attend top-tier law schools are overwhelmingly representative of the elite socioeconomic class" and arguing that "hiring faculty members from primarily those ranks undermines a law school's ability to achieve socioeconomic diversity on its faculty and instead helps perpetuate a class-based monopoly within the legal academy to the detriment of all involved"); Jeffrey L. Harrison, *Confess'n the Blues: Some Thoughts on Class Bias in Law School Hiring*, 42 J. LEGAL EDUC. 119, 119-20 (1992) (suggesting that "people with working-class backgrounds" are not found in legal academia and describing the class bias in the legal professoriate).

autobiographical takes on legal education is this: law schools do not have clean hands when it comes to the production of social inequality.⁴²

Yet much of the relevant legal scholarship on the reproduction of hierarchy focuses on legal practice more generally or is specific to the private sector, but is rarely applied to criminal practice (e.g., prosecution and criminal defense). Since private law constitutes the lion's share of work graduates go into,⁴³ this particularized focus makes sense. But this begs the question: what does the reproduction of hierarchy look like in the world of criminal justice? Available literature allows us to make some reasonable inferences. Put simply, a wide range of scholarship suggests that legal education contributes to our penal status quo through its poor handling of race, poverty, and gender issues in the criminal justice curriculum. This poor handling occurs through omission, lack of attention to these categories, and in some instances, outright fumbling.

Evidence law is arguably the least scrutinized of the three core criminal justice courses when it comes to questions of pedagogy. Still, there have been longstanding critiques around the subject's treatment of gender.⁴⁴ The

⁴² See, e.g., KATHRYNE M. YOUNG, HOW TO BE SORT OF HAPPY IN LAW SCHOOL 79-103 (2018) (describing anecdotal and structural examples of bias within law schools); ALFREDO MIRANDÉ, THE STANFORD LAW CHRONICLES: DOIN' TIME ON THE FARM 51, 115 (2005) (accounting such biases that Chicano students faced); ROBERT GRANFIELD, MAKING ELITE LAWYERS: VISIONS OF LAW AT HARVARD AND BEYOND 2-3 (1992) (recounting how law school curricula and culture steered students away from public-interest work); RICHARD D. KAHLENBERG, BROKEN CONTRACT: A MEMOIR OF HARVARD LAW SCHOOL 96-98 (1999 ed.) (same); ROBERT V. STOVER, MAKING IT AND BREAKING IT: THE FATE OF PUBLIC INTEREST COMMITMENT DURING LAW SCHOOL 43-67 (1989) (same).

⁴³ ABA, EMPLOYMENT OUTCOMES AS OF APRIL 2021 (CLASS OF 2020 GRADUATES) 1 (2021), https://www.americanbar.org/content/dam/aba/administrative/legal_education_and_admissions_to_the_bar/statistics/class-of-2020-employment-summary-release.pdf (last accessed Mar. 26, 2022) (stating 57.3% of 2020 graduates were employed in law firms or in "business & industry" generally by March 15, 2021).

⁴⁴ See generally Aviva Orenstein, *Apology Excepted: Incorporating A Feminist Analysis into Evidence Policy Where You Would Least Expect It*, 28 SW. U. L. REV. 221, 222 (1999) ("[O]ffer[ing] a feminist critique to challenge the Federal Rules[] [of Evidence's] so-called objectivity and neutrality"); Aviva Orenstein, "MY GOD!": *A Feminist Critique of the Excited Utterance Exception to the Hearsay Rule*, 85 CALIF. L. REV. 159 (1997) (analyzing the excited utterance doctrine from a feminist perspective); Malinda L. Seymore, *Isn't It a Crime: Feminist Perspectives on Spousal Immunity and Spousal Violence*, 90 NW. U. L. REV. 1032 (1996) (discussing how supposedly neutral rules of evidence privilege men in domestic violence cases); Rosemary C. Hunter, *Gender in Evidence: Masculine Norms vs. Feminist Reforms*, 19 HARV. WOMEN'S L.J. 127, 127 (1996) (examining "the gender effects of the rules of evidence and the conduct of adversarial court proceedings"); Ann Althouse, *The Lying Woman, the Devious Prostitute, and Other Stories from the Evidence Casebook*, 88 NW. U. L. REV. 914 (1994) (assessing how evidence casebooks use reductive and harmful stereotypes of women to illustrate the doctrines); Susan Stefan, *The Protection Racket: Rape Trauma Syndrome, Psychiatric Labeling, and Law*, 88 NW. U. L. REV. 1271, 1330-33 (1994) ("[E]videntiary frameworks such as] rape trauma syndrome . . . reinforce[] rape myths by representing women's behavior in response to the rape as being pathological, needing explanation by a mental health expert. Women's reality, and the

existence of rape shield laws, marital privilege, and issues tied to domestic violence and rape trauma have made it so that at a bare minimum, gender surfaces in evidence courses, but assumptions remain.⁴⁵ Catharine MacKinnon's argument that gender should be "mainstreamed" and brought to the fore of evidence courses captures some of the elisions that evidence students may miss. MacKinnon objects to the flattening of social categories like gender. How much does evidence law "ignore how inequality constructs reliability," she questions.⁴⁶ She also asks how much evidence law "assume[s] a uniformity of experience" that conditions of inequality actually refute.⁴⁷ Shining light on more omissions and conflation that likely filter into teaching, evidence scholars have discussed the lack of attention to race.⁴⁸ As Jasmine Gonzales Rose explains, "[m]ost judges, lawyers, and scholars appear to assume that . . . evidence law is facially race-neutral" and that "it applies equally to all persons irrespective of race . . ."⁴⁹ Of particular concern here are the ways in which race filters through ideas about character evidence⁵⁰ and evidentiary credibility.⁵¹ Also relevant are the intersectional oversights of an adoptive admission rule that ignores the role silence plays in non-white communities;⁵² the uncritical use of prior convictions notwithstanding a

understandable reasons for their behavior—are silenced."); Kim Lane Scheppele, *Just the Facts, Ma'am: Sexualized Violence, Evidentiary Habits, and the Revision of Truth*, 37 N.Y. L. SCH. L. REV. 123, 125-126 (1992) (discussing how the same factors that can influence how women discuss traumatic experiences of abuse are often used as evidence that the testimony is not credible); Kit Kinports, *Evidence Engendered*, 1991 U. ILL. L. REV. 413, 414 (scrutinizing the Federal Rules of Evidence from a feminist perspective); Harriett R. Galvin, *Shielding Rape Victims in the State and Federal Courts: A Proposal for the Second Decade*, 70 MINN. L. REV. 763, 776 (1986) (assessing the shortcomings of rape-shield evidentiary reform).

⁴⁵ Roger C. Park & Michael J. Saks, *Evidence Scholarship Reconsidered: Results of the Interdisciplinary Turn*, 47 B.C. L. REV. 949, 998 (2006) (noting the increase in the number of discussions regarding gender in the evidence sphere).

⁴⁶ MacKinnon, *supra* note 2, at 209.

⁴⁷ *Id.* at 209-10.

⁴⁸ See generally Gabriel J. Chin, *"A Chinaman's Chance" in Court: Asian Pacific Americans and Racial Rules of Evidence*, 3 U.C. IRVINE L. REV. 965 (2013) (discussing the ways evidence law historically discriminated against Asians).

⁴⁹ Jasmine B. Gonzales Rose, *Racial Character Evidence in Police Killing Cases*, 2018 WIS. L. REV. 369, 375.

⁵⁰ See Chris Chambers Goodman, *The Color of Our Character: Confronting the Racial Character of Rule 404(b) Evidence*, 25 LAW & INEQ. 1, 1-2 (2007) (discussing how racial references are either admitted or excluded as character evidence under Federal Rule of Evidence 402).

⁵¹ Jasmine B. Gonzales Rose, *Toward A Critical Race Theory of Evidence*, 101 MINN. L. REV. 2243, 2260 (2017) ("While a white witness automatically has their credibility bolstered, a witness of color is precluded from doing so unless their character is formally attacked and then must invest resources to secure and introduce a character witness.").

⁵² See Maria L. Ontiveros, *Adoptive Admissions and the Meaning of Silence: Continuing the Inquiry into Evidence Law and Issues of Race, Class, Gender, and Ethnicity*, 28 SW. U. L. REV. 337, 338-39 (1999) (suggesting that the adoptive admission rule, which can treat a party's failure to speak up and refute certain statements as an admissible acceptance of such statements, ignores how race, class, gender,

demonstrably biased and flawed criminal justice system;⁵³ and the variety of ways race creeps into evidentiary considerations.⁵⁴ The inattention to race and gender in evidence law can lead to the reasonable conclusion that future criminal lawyers are leaving law school with incomplete understandings of how some fundamental evidentiary concepts can play out in practice.

The reproduction of inequality also occurs through the omission of important topics in classroom discussions and in the casebooks that are the primary educational tools for students. Scholars have highlighted this problem in criminal law and procedure. Feminist scholars identified the issues of sex bias in criminal law teaching in the late 1980s and 1990s,⁵⁵ and though gender operates somewhat differently in these courses now, teaching sexual assault and rape still remains a challenge, as some instructors have refused to teach it out of fear, discomfort, or disinterest.⁵⁶ While some of that reluctance is understandable, Jeannie Suk Gersen's observation is instructive: not teaching sexual assault remarginalizes a topic that was once considered unimportant. Such non-teaching may unwittingly (or purposely) reproduce a status quo where sexual violence is not taken seriously.⁵⁷ Other omissions

and ethnicity influence silence and equivocation); Mikah K. Story Thompson, *Methinks the Lady Doth Protest Too Little: Reassessing the Probative Value of Silence*, 47 U. LOUISVILLE L. REV. 21, 41 (2008) (“[Racial] differences in perceptions of the police may explain why some arrestees choose to remain silent. If arrestees believe they will receive unfair treatment regardless of what they say, or if arrestees believe the police have already decided their guilt, they may conclude that silence is their best option.”).

⁵³ Montré D. Carodine, “*The Mis-Characterization of the Negro*”: *A Race Critique of the Prior Conviction Impeachment Rule*, 84 IND. L.J. 521, 526-27 (2009) (contending that the use of prior convictions in evidence law is inherently unreliable due to (heavily substantiated) racial bias in the criminal justice system, that the practice ultimately imposes a “black tax” on black defendants, and that prior convictions fit into the category of hearsay).

⁵⁴ Bennett Capers, *Evidence Without Rules*, 94 NOTRE DAME L. REV. 867, 874-93 (2018) (describing how issues like dress, demeanor, and race go underregulated by the Rules of Evidence, are unchecked by evidentiary gatekeepers, and are ultimately used by factfinders in their determinations of guilt).

⁵⁵ See, e.g., Nancy S. Erickson, *Final Report: “Sex Bias in the Teaching of Criminal Law”*, 42 RUTGERS L. REV. 309, 313 (1990) (“[W]omen students have expressed much concern about the presentation of [criminal law] . . . [S]ex bias in this field ultimately bears on everyone subject to a criminal justice system largely devised and implemented by law school graduates.”); see generally Nancy S. Erickson & Mary Ann Lamanna, *Sex-Bias Topics in the Criminal Law Course: A Survey of Criminal Law Professors*, 24 U. MICH. J.L. REFORM 189 (1990) (assessing the extent to which 238 professors include gender-related topics in their basic criminal law classes); Mary I. Coombs, *Crime in the Stacks, or A Tale of a Text: A Feminist Response to a Criminal Law Textbook*, 38 J. LEGAL EDUC. 117 (1988) (offering a feminist critique of a criminal-law textbook and proposing reforms).

⁵⁶ See Jeannie Suk Gersen, *The Socratic Method in the Age of Trauma*, 130 HARV. L. REV. 2320, 2340 (2017) (“[S]ubjects regarding sexuality that were once marginalized from the curriculum because of their perceived unimportance are at risk of being remarginalized because of their perceived weight.”). Cf. Susan Estrich, *Rape*, 95 YALE L.J. 1087, 1089 (1986) (candidly discussing these topics from the author’s personal experience).

⁵⁷ Gersen, *supra* note 56.

abound. Alice Ristroph's recent work on the history and development of criminal law casebooks are especially trenchant.⁵⁸ Lamenting the "pro-carceral" messages in substantive criminal law casebooks, Professor Ristroph catalogs the non-inclusion of gun and drug possession crimes that contributed to mass incarceration.⁵⁹ Frank Zimring similarly does not mince words and contends that academic criminal law is "irrelevan[t]" because of its failure to meaningfully address "the important policy discourses of the modern age," which he describes as "the sevenfold growth in the incarcerated population that happened after 1972 . . . and the massive 'war on drugs' that exploded in the United States between 1985 and 1995."⁶⁰

Reviewing several criminal procedure casebooks, Judge Stephanos Bibas has explained how there are "few materials on race, politics, or drugs, beyond the occasional doctrinal subsection."⁶¹ For Judge Bibas, omissions of race, politics, and drugs are crucial since these factors influence how legislators define what is a crime, how law enforcement polices regulate criminal behavior, and how prosecutors enforce criminal laws.⁶² The "sophisticated interplay of politics, race, and doctrine," he argues, "teaches students far more about the real world than a simple presentation of the selective-prosecution doctrine would."⁶³ Ronald Wright and Kay Levine likely agree. They have argued that "[t]he criminal-law curriculum tends to have fairly anemic offerings about the criminal justice system itself."⁶⁴ Professors Wright and Levine also rightfully point out that many law schools fail to offer courses that "expose students to structural concerns . . . or invite students to take a hard look at empirical data about crime rates, incarceration rates, and the intersections of race, poverty, and crime."⁶⁵ The inattention to questions about race, poverty, and politics is particularly striking since these are issues that criminal justice scholars have identified as being at the center of our penal status quo.⁶⁶ Ultimately, empirical, theoretical, and descriptive takes on

⁵⁸ See generally Ristroph, *Curriculum*, *supra* note 7; Ristroph, *Intellectual History*, *supra* note 14.

⁵⁹ Ristroph, *Curriculum*, *supra* note 7, at 1669-70.

⁶⁰ Franklin E. Zimring, *Is There a Remedy for the Irrelevance of Academic Criminal Law?*, 64 J. LEGAL EDUC. 5, 5 (2014).

⁶¹ Stephanos Bibas, *Book Review: The Real-World Shift in Criminal Procedure*, 93 J. CRIM. L. & CRIMINOLOGY 789, 805 (2003).

⁶² *Id.* at 806-07.

⁶³ *Id.* at 810.

⁶⁴ Ronald F. Wright & Kay L. Levine, *The Cure for Young Prosecutors' Syndrome*, 56 ARIZ. L. REV. 1065, 1125 (2014).

⁶⁵ *Id.*; see also Catherine M. Grosso and Barbara O'Brien, *Grounding Criminal Procedure*, 20 J. GENDER, RACE & JUST. 53, 55 (2017) (examining leading criminal procedure casebooks and finding that "discussions of race or racism [were] overwhelmingly absent from the cases").

⁶⁶ See, e.g., BARKOW, PRISONERS OF POLITICS, *supra* note 4, at 8, 11 (examining the ways in which the criminal justice system has been rooted in politics and urging "agencies to demonstrate that their policies are cost-benefit justified and represent the best options for achieving public

legal education lead one to the reasonable inference that law schools are important sites for the consideration of criminal justice inequality.

B. Law School Socialization

Whereas the reproduction thesis is premised on the idea that law schools reflect and replicate some of the larger problems in American society, law school socialization focuses on the ways in which legal education promotes certain kinds of attitudinal dispositions toward law.⁶⁷ As a threshold matter, socialization is often examined through the lens of “public interest drift,” which posits that law students begin their legal education with public interest commitments but are socialized into valuing the economic incentives that come with working in the higher paying private sector.⁶⁸ As it relates to this Article’s discussion on the reproduction of criminal justice inequality, public interest drift is important to the extent that it is likely siphoning students away from indigent defense and prosecutorial work. But scholars have applied pressure to the idea of public interest drift, and perhaps more crucially, the thesis tells us less about what happens to the students who do decide to enter the penal bureaucracy.⁶⁹

More relevantly, law schools reproduce the penal status quo by socializing students into understanding law primarily as a science that is superordinate to social, political, economic concerns—particularly as it relates to marginalized groups.⁷⁰ Such extra-legal concerns about marginalized groups

safety”); ALEXANDRA NATAPOFF, PUNISHMENT WITHOUT CRIME: HOW OUR MASSIVE MISDEMEANOR SYSTEM TRAPS THE INNOCENT AND MAKES AMERICA MORE UNEQUAL 10 (2018) (“We have come to understand mass incarceration as an engine of race discrimination that unfairly and disproportionately criminalizes black and Latino Americans.”); PETER EDELMAN, NOT A CRIME TO BE POOR: THE CRIMINALIZATION OF POVERTY IN AMERICA, at xv (2017) (noting that the combination of poverty and racism “create[s] a toxic mixture that mocks our democratic rhetoric of equal opportunity and equal protection under the law”); see generally PAUL BUTLER, CHOKEHOLD: POLICING BLACK MEN (2017).

⁶⁷ See Gregory J. Rathjen, *The Impact of Legal Education on the Beliefs, Attitudes and Values of Law Students*, 44 TENN. L. REV. 85, 118 (1976) (finding that law school experiences have an “indirect effect” on views of Supreme Court policy and women in the legal profession).

⁶⁸ See *id.* at 93 (arguing that legal education socializes students toward an entrepreneurial model as opposed to a social welfare model); see also Susan Ann Kay, *Socializing the Future Elite: The Nonimpact of Law School*, 59 SOC. SCI. Q. 347, 350 (1978) (noting a decline in law students who may be classified as “social welfaris[t]” over three years of coursework).

⁶⁹ But see Bliss, *supra* note 16, at 2003 (describing the malleability and uncertainty of public interest commitments); Monroe H. Freedman, *The Loss of Idealism—By Whom? And When?*, 53 N.Y.U. L. REV. 658, 658 (1978) (rejecting the public interest drift thesis); Howard S. Erlanger & Douglas A. Klegon, *Socialization Effects of Professional School: The Law School Experience and Student Orientations to Public Interest Concerns*, 13 LAW & SOC’Y REV. 11, 31-32 (1978) (finding that changes in public interest attitudes are smaller than reported).

⁷⁰ The idea of law as a science is hardly new and a byproduct of the pedagogical design of law school, particularly the first-year—but also for doctrinal—courses. See Thomas C. Grey, *Langdell’s*

are not absent from legal education *in toto*; law schools typically supply some combination of clinical offerings, elective courses, programming, and affinity groups for students interested in getting a deeper understanding of legal inequality.⁷¹ These are all powerful and necessary learning opportunities. But they are also educational adjuncts that are subject to self-selection, competition with other demands on time, and of course, availability. These educational supplements are not part of the core first year classes (with the notable exception of criminal law). Although these educational adjuncts are akin to evidence and criminal procedure in that they are often not required, they are also not bar courses that students often feel pressure to take and ultimately enroll in.⁷²

Looking inside the core courses, law school socialization often encourages students to think in ways that are unemotional and detached from pressing social problems.⁷³ Elizabeth Mertz has detailed this dynamic in her innovative empirical study of eight law schools that examined the frequency and duration of classroom speech.⁷⁴ Professor Mertz found that legal education provides students with a distinctive legal world view but that it also precludes important social and political discussions that ultimately disserve the public.⁷⁵ They learn how to “think like a lawyer,” which is generally understood as

Orthodoxy, 45 U. PITT. L. REV. 1, 5 (1983) (describing how the theory of law as science has shaped legal education and “greatly influence[d] the practical work of lawyers and judges”).

⁷¹ See, e.g., *Course Finder: Browse Courses*, PENN LAW, <https://goat.law.upenn.edu/cf/coursefinder/browse> [https://perma.cc/2JLN-JFXZ].

⁷² See James E. Moliterno, *The Future of Legal Education Reform*, 40 PEPP. L. REV. 423, 433-34 (2013) (“Students, depending on their level of insecurity, feel a need to fill up their schedules with as many bar courses as possible. Law schools feel a corresponding obligation to offer as many bar courses as possible.”); *Society of American Law Teachers Statement on the Bar Exam: July 2002*, 52 J. LEGAL EDUC. 446, 449 (2002) (“From the moment they enter law school through graduation, students realize that unless they pass the bar examination, their substantial financial commitment and their years of hard work will be wasted. As a result, many students concentrate on learning primarily what they need to know in order to pass the bar exam, which often translates into high student attendance in courses that address the substantive law tested on the bar examination and reduced participation in . . . courses such as environmental law, poverty law, civil rights litigation, law and economics, and race and the law. As a result, the students fail to fully engage in a law school experience that will give them both the practical skills and the jurisprudential perspective that will make them better lawyers.”).

⁷³ RIAZ TEJANI, *LAW MART: JUSTICE, ACCESS, AND FOR-PROFIT LAW SCHOOLS* 209-10 (2017) (“Law school teaching in the United States has long separated justice and morality Though work prosecuting and defending criminal suspects, or litigating against negligent corporations, undeniably implicates questions of right and wrong or good and bad, the pedagogy producing these vocations submerges those binaries beneath rules and processes.”).

⁷⁴ See MERTZ, *supra* note 5, at 4 (presenting a study of “the epistemology and process of legal training” which entailed an analysis of classroom interactions during Contracts courses at eight law schools).

⁷⁵ See *id.* at 5 (discussing the tendency of law school to place disproportionate emphasis on legal doctrine and textual interpretation while downplaying the importance of social and cultural contexts).

gaining an analytic ability that legal professionals uniquely possess (e.g., understanding doctrine, proof, reasonableness, intent).⁷⁶ But “thinking like a lawyer” is often *not* understood as a cultural form of thinking that can rest on unproven assumptions, has its own biases, and in some instances, disregards other forms of reasoning and information that might help resolve legal problems.⁷⁷ The “detached mastery” of legal education aggressively focuses on logical and analytical reasoning while denying the more dynamic and interpersonal dimensions of criminal justice matters.⁷⁸ This detachment communicates several messages that are relevant to this Article’s inquiry: primarily, that interdisciplinarity, along with *legal* understandings, of racism, sexism, and poverty “can be developed on their own, easily picked up in practice, or are simply not as demanding or significant in the development of foundational expertise for lawyers.”⁷⁹ Learning to think like a lawyer in these ways can lead students to be unaware of the legally specific ways various “isms” and “phobias” crop up in criminal justice administration. To the extent that students have their own understandings of social justice, this form of thinking like a lawyer can lead them to overdetermine how race, poverty, and sexism operate in our system of punishment. In this iteration, students over-assign value to these categories or suggest that they operate everywhere because their ideas have not been battle tested by professors and student colleagues.

Law schools also socialize their students into understanding their learning experiences through a host of tiered binaries: law vs. policy, skills vs. knowledge, and process vs. substance. These categories can be conceptually appropriate and pedagogically convenient but have consequences for future penal bureaucrats’ professional development. First, in legal education, the “policy implications” of law are commonly ignored or understood as marginal.⁸⁰ Contrary to basic principles of bureaucracy theory, law students are socialized into understanding indigent defense and prosecution simply as the practice of law and not as significant sites of criminal justice

⁷⁶ *Id.* at 97-98.

⁷⁷ *Id.*

⁷⁸ Susan Sturm & Lani Guinier, *The Law School Matrix: Reforming Legal Education in a Culture of Competition and Conformity*, 60 VAND. L. REV. 515, 531 (2007).

⁷⁹ *Id.*; see also Deborah L. Rhode, *Legal Education: Professional Interests and Public Values*, 34 IND. L. REV. 23, 33 (2000) (observing how race, gender, ethnicity, and sexual orientation are often “tacked on as curricular afterthoughts—as brief digressions from the ‘real’ subject”).

⁸⁰ See YOUNG, *supra* note 42, at 235 (noting that sometimes law professors discuss history and policy implications but noting that, “nine times out of ten,” those insights won’t be helpful on the grade-determining final exam and advising students preparing for finals that, “[u]nless a stack of sample answers tells a different story, assume that come grading time, your policy-analyzing, theory-discussing, poetic-waxing professor will turn into a lean, mean, lawyerly grading machine”).

policymaking.⁸¹ Indeed, this is why the progressive prosecution and indigent defense reform described in Part II has appeal with law students. Yet it is not clear that these conversations have permeated the walls of core criminal justice classes. Socializing students into understanding the legal system through a law–policy lens minimizes the roles prosecutors increasingly play in criminal justice governance. This divide also obscures how the contemporary travails of indigent defense organizations are byproducts of legislative stinginess and a conservative jurisprudential landscape.⁸²

Legal education also insists on a substance–process binary that further partitions how students understand the criminal justice system. The division between criminal law and criminal procedure best illustrates the substance/process distinction. This division is rooted in legitimate differences between the two fields in terms of objectives, the sources of law they emanate from, and the sheer amount of content in both fields. But these differences need not be determinative. In fact, they are arguably impractical.⁸³ Still, this division shapes the legal education of future public defenders and prosecutors. To the extent that questions of race and poverty do emerge in the criminal justice curriculum, they are understood as procedural matters—byproducts of the Warren Court’s Due Process revolution and its legacy.⁸⁴ Some of these issues include police contact with citizens, the right to counsel,

⁸¹ See Ristroph, *Curriculum*, *supra* note 7, at 1701 (arguing that such distinctions “gravely distort[] our understanding of criminal law”); *see also* Ristroph, *Intellectual History*, *supra* note 14, at 1978 (“At most American law schools, substantive criminal law is a required first-year course, and judging by the casebooks in use, students are still taught that the substance of criminal law resides in judicial opinions and statutes, not the decisions of enforcement officials such as police and prosecutors.”).

⁸² Ronald F. Wright, *Parity of Resources for Defense Counsel and the Reach of Public Choice Theory*, 90 IOWA L. REV. 219, 22 (2004) (although state and local governments periodically revisit the question and reluctantly decide to increase funding, it is more common for them to search for methods to “control the costs” of indigent defense” (internal quotation marks omitted)); Shaun Ossei-Owusu, *The Sixth Amendment Façade: The Racial Evolution of the Right to Counsel*, 167 U. PA. L. REV. 1161, 1211–29 (2019) (discussing right to counsel jurisprudence since the 1970s).

⁸³ These distinctions do not match up neatly with criminal practice, which certainly emphasizes one more than the other, but requires an integrated understanding of both. Moreover, to the extent that producing “bar-ready” or “practice-ready” attorneys is a law school’s objective, the bifurcation of criminal law and procedure (and sometimes trifurcation, with criminal procedure being split into courses on investigation and adjudication) raises efficiency questions since the bar exam crams all these fields into one section of twenty-five questions—the same as evidence, civil procedure, torts, and other core courses. My purpose is not to advocate for the consolidation of these fields, but to denaturalize these distinctions and begin to gesture toward what they mean for students. *See Preparing for the MBE*, NAT’L CONF. BAR EXAM’RS, **Error! Hyperlink reference not valid.** <https://www.ncbex.org/exams/mbe/preparing> [<https://perma.cc/UT5H-ZK65>] (outlining the format, scope, and subject-matter coverage of the Multistate Bar Examination).

⁸⁴ *See* Gary Peller, *Criminal Law, Race, and the Ideology of Bias: Transcending the Critical Tools of the Sixties*, 67 TUL. L. REV. 2231, 2232 (1993) (“The first assumption [underlying commentary on race and criminal law] is that significant racial issues all involve questions of criminal *procedure* rather than substantive criminal law.”) (emphasis in original).

prosecutorial discretion, and sentencing. But it is important to pause and reiterate here that robust conversations about race and poverty, as observed by criminal procedure scholars and noted in the previous subsection, are sparse in corresponding casebooks. Assuming the criminal justice curriculum attends to race and poverty, criminal procedure is the main event. This focus underappreciates how substantive criminal law—what and how we punish—is not just influenced by abstract theories of punishment—but by a long and empirically demonstrated history of racial subjugation and poverty management.⁸⁵ Ultimately, criminal legal education socializes students into having uneven or incomplete understandings of the ways race and poverty animate the criminal justice system. To the extent that more sophisticated understandings are sought, they must come autodidactically, through elective education, or through public defender and prosecutor offices that *may* engage in relevant training.⁸⁶

The theory–skills binary varies by school but can have the effect of socializing students often into privileging one over the other at the expense

⁸⁵ See generally JULILLY KOHLER-HAUSMANN, GETTING TOUGH: WELFARE AND IMPRISONMENT IN 1970S AMERICA 2 (2017) (describing how politicians in the 1970s began “getting tough” on drugs, crime, and welfare, resulting in the unprecedented growth of the penal system and the evisceration of America’s welfare programs); ALEXES HARRIS, A POUND OF FLESH: MONETARY SANCTIONS AS PUNISHMENT FOR THE POOR 1-2 (2016) (“For most poor, unemployed, undereducated, and physically and mentally disabled individuals who have contact with the criminal justice system, monetary sanctions are insurmountable.”); TALITHA L. LEFLOURIA, CHAINED IN SILENCE: BLACK WOMEN AND CONVICT LABOR IN THE NEW SOUTH 5 (2015) (“[C]hronic[ing] how imprisoned women’s lives and labors were ordered within Georgia’s carceral polities . . . [and how the] economy influenced the gendered workings of involuntary servitude in the much touted ‘industrial capital’ of the New South.”); CHARLES R. EPP, STEVEN MAYNARD-MOODY & DONALD HAIDER-MARKEL, PULLED OVER: HOW POLICE STOPS DEFINE RACE AND CITIZENSHIP 7 (2014) (arguing that when it comes to police stops “attention should focus on institutionalized practice: how the structure of incentives, training, and policy in contemporary policing makes it more likely that officers will act on the basis of bigotry or implicit stereotypes, leading to racial disparities in outcomes”); DOUGLAS A. BLACKMON, SLAVERY BY ANOTHER NAME: THE RE-ENSLAVEMENT OF BLACK AMERICANS FROM THE CIVIL WAR TO WORLD WAR (2008) (exploring the forced labor of incarcerated people, overwhelmingly African American men, through the convict leasing system used by states, local governments, white farmers, and corporations following the American Civil War); JONATHAN SIMON, POOR DISCIPLINE: PAROLE AND THE SOCIAL CONTROL OF THE UNDERCLASS, 1890–1990, at 13 (James B. Jacobs ed., 1993) (examining, in part, “the political and social conditions of parole from the mid-1970s to the present”); David Arnold, Will Dobbie & Crystal S. Yang, *Racial Bias in Bail Decisions*, 133 Q. J. ECON. 1185, 1885 (2018) (“Racial disparities exist at every stage of the U.S. criminal justice system.”); Bruce Western & Katherine Beckett, *How Unregulated is the U.S. Labor Market? The Penal System as a Labor Market Institution*, 104 AM. J. SOCIO. 1031, 1031 (1999) (“[S]tud[ying] the penal system as a labor market institution and provid[ing] evidence that . . . [it] deepens inequality . . .”). A notable casebook exception in this regard is CYNTHIA LEE & ANGELA P. HARRIS, CRIMINAL LAW: CASES AND MATERIALS, at v (4th ed. 2019).

⁸⁶ See *infra* notes 248–251 (observing that public defender and prosecutors’ offices should aim to hire interns that have a more holistic understanding of criminal legal curriculum).

of a more integrated legal education.⁸⁷ Most crudely, elite law schools often emphasize theory in core courses.⁸⁸ But this focus on theory is relatively light and concerned with black letter law and legal doctrine, leaving less space for meaningful conversations about law's relationship to power, bias, poverty, and other inputs that determine criminal justice outcomes.⁸⁹ Tragically, by the end of their legal education, students are not fully equipped to "describe and critique the political and economic theories underlying various legal arrangements."⁹⁰ Riaz Tejani's study of for-profit legal education describes what happens on the other end of the elitism spectrum. Professor Tejani shows how economic pressures can lead some law schools to focus on skills development.⁹¹ This focus on skills is premised on producing "practice-ready" attorneys, but often eclipses knowledge acquisition and the public policy deliberation.⁹²

At law schools across the spectrum, the theory/skills divide is prominent.⁹³ The criminal justice curriculum's theoretical focus on litigation does not comport with the practice reality that ninety-five percent of criminal cases are resolved before trial and fails to provide students with the skills necessary to be better problem-solvers and negotiators.⁹⁴

Law school socialization produces future public defenders and prosecutors who are poised to understand the core areas of the criminal justice curriculum

⁸⁷ See Lucille A. Jewel, *Oil and Water: How Legal Education's Doctrine and Skills Divide Reproduces Toxic Hierarchies*, 31 COLUM. J. GENDER & L. 111, 111 (2015) ("[The doctrine-skills] dichotomy is responsible for reinforcing class, gender, and race segmentation in legal education, which limits the quality of instruction that law schools can provide and abets the reproduction of existing power relations in the legal profession and society at large.").

⁸⁸ In different criticisms levied on elite law schools, Judge Harry Edwards and Judge Richard Posner have both argued that legal education and scholarship are hopelessly detached from the problems of the legal profession. See RICHARD A. POSNER, *DIVERGENT PATHS: THE ACADEMY AND THE JUDICIARY* 10 (2016) (observing that many faculty members at elite law schools "have little experience in the practice of law"); Harry T. Edwards, *The Growing Disjunction Between Legal Education and the Legal Profession*, 91 MICH. L. REV. 34, 34 (1992) (expressing concern over the growing disconnect between legal education and the legal profession).

⁸⁹ See López, *supra* note 21, at 326 ("[L]egal education . . . religiously avoids theory.").

⁹⁰ *Id.*

⁹¹ TEJANI, *supra* note 73, at 210-11.

⁹² *Id.* at 214 (quotation marks omitted).

⁹³ Nancy B. Rapoport, *Changing the Modal Law School: Rethinking U.S. Legal Education in (Most) Schools*, 116 PENN ST. L. REV. 1119, 1124 (2012) (categorizing law schools into three groups: elite, modal (which occur the most frequently), and precarious law schools).

⁹⁴ Wright & Levine, *supra* note 64, at 1124-25 ("Most of the current curriculum touching on criminal topics asks the students to picture themselves in litigation contexts such as trials, hearings on pretrial motions, and sentencing hearings. Competitions and simulation exercises usually arise in litigation contexts. But litigation skills courses and competitions do not adequately prepare a student for real practice in U.S. criminal courts, where approximately 95% of criminal cases are resolved short of trial A more relevant legal education would include workshops on negotiating strategies or judgment exercises, along with clinical experiences that allow students to observe and participate in the resolution of real cases.").

mechanistically and in ways that do not approximate the penal bureaucracy that they enter. It is no wonder why one prosecutor complained, “[p]ractically speaking, my law degree . . . was worth about as much as ballet lessons . . . when I started out.”⁹⁵ It also makes sense that graduating law students sometimes “feel like they are left holding a Costco-sized-receipt-cum-diploma for a mediocre learning experience.”⁹⁶ To be sure, the technical focus in criminal legal education is not inherently bankrupt. The criminal justice curriculum is replete with rules, tests, exceptions, defenses, and doctrinal landmarks that students need to know to have a basic understanding of this area of law. But socializing students to understand criminal justice issues within narrow legal frameworks comes with costs that are borne when penal bureaucrats move to practice. Accordingly, scholars have suggested that reform prosecutors and indigent defense offices focus on broader attorney comprehension of penal bureaucracy in their recruitment and training, and it is unsurprising that some offices have heeded that call.⁹⁷

C. *Demographics*

Who is socialized into reproducing the criminal justice status quo? This subsection describes how sluggish diversification has hampered the attorney ranks of the penal bureaucracy. Legal profession scholars have long paid attention to the demographics of the bar, yet they and criminal justice scholars underappreciate how the social composition of prosecutors and public defender offices may shape penal outcomes. As a general matter, no clearinghouse collects consistent data on the race or gender of lawyers who work in these fields.⁹⁸ This is a stark difference from the granular data available about attorneys in the private sector as well as robust information available about criminal offenders and police departments.⁹⁹ In any event,

⁹⁵ *Id.* at 1125 (quotations omitted).

⁹⁶ SpearIt, *Priorities of Pedagogy: Classroom Justice in the Law School Setting*, 48 CAL. W. L. REV. 467, 467 (2012).

⁹⁷ See *infra* notes 248–251.

⁹⁸ The National Association for Law Placement’s annual report focuses primarily on race and gender in law firms. See NAT’L ASS’N L. PLACEMENT, 2018 REPORT ON DIVERSITY IN U.S. LAW FIRMS 3 (2019) (“[W]omen and Black/African Americans made small gains in law firm representation”); Katie Dilks, *Why Is Nobody Talking About Gender Diversity in Public Interest Law?*, NALP BULLETIN, June 2010, https://www.nalp.org/uploads/0610_Gender_Diversity_in_Public_Interest_Law.pdf [<https://perma.cc/BF9M-K8GR>] (finding that public interest law has gender disparities that are often overlooked). The organization’s last report on diversity and public interest was in 2003. *Minorities at Private and Public Sector Employers*, NALP BULLETIN, Apr. 2003, <https://www.nalp.org/2003aprminorities> [<https://perma.cc/X4EW-FQ7W>].

⁹⁹ See David Alan Sklansky, *Unpacking the Relationship Between Prosecutors and Democracy in the United States*, in PROSECUTORS AND DEMOCRACY: A CROSS-NATIONAL STUDY 296 (Máximo Langer & David Alan Sklansky eds., 2017) [hereinafter Sklansky, *Prosecutors and Democracy*] (“The

available data—mostly samples, qualitative studies, and anecdotal accounts—allow for a provisional composite of penal bureaucrats.

American prosecutorial offices are unrepresentative of the general population. The United States is the only country in the world where chief prosecutors are elected, and this practice applies to “[a]bout [85%] of prosecutors in the state system.”¹⁰⁰ In 2019, 95% of chief prosecutors were white, and approximately 75% of them were white men.¹⁰¹ The proportion of women has climbed up from 18% to 24% between 2015 and 2019, and the number of women of color increased from 1% to 2% during that time period.¹⁰² Of course, many parts of the country are predominantly white, yet when one looks locally at counties where minorities constitute 50-60% of the population, there is only a modest improvement as approximately 80% of elected prosecutors there are white.¹⁰³ Data on the line attorneys and supervisors who work under elected prosecutors are rare. Some local studies lead to similar conclusions in the context of race and suggest that gender representation is better in these ranks.¹⁰⁴ The Stanford Criminal Justice Center’s study on prosecutors in California, often considered to be the most diverse state in the country, found that 9% of prosecutors in the state were Latinx, even though this group comprised nearly 39% of the population.¹⁰⁵ Although women fared better (more representatively comprising 48% of the prosecutorial population), white attorneys still dominated and made up nearly 70% of California prosecutors, though only about 39% of the state population.¹⁰⁶ The nine-office study of prosecutors’ offices conducted by Ronald Wright, Kay Levine, and Marc Miller consisted of a prosecutorial population of 58% women and 16% minorities.¹⁰⁷ The portrait that emerges

available statistics on the demographics of American prosecutors are paltry compared to those that are available on the police—and that have been available for decades.”)

¹⁰⁰ Ronald F. Wright, *Beyond Prosecutor Elections*, 67 S.M.U. L. REV. 593, 598 (2014).

¹⁰¹ REFLECTIVE DEMOCRACY CAMPAIGN, WOMEN DONORS NETWORK, TIPPING THE SCALES: CHALLENGERS TAKE ON THE OLD BOYS’ CLUB OF ELECTED PROSECUTORS 1 (2019) [Error! Hyperlink reference not valid.](#)

¹⁰² *Id.* at 2.

¹⁰³ Kate Stohr & Deirdra Funcheon, *America’s Prosecutor Problem*, FUSION (Dec. 29, 2016), available at [Clean Up City of St. Augustine, Florida](https://cleanupcityofstaugustine.blogspot.com/2016/12/fusion-few-things-whiter-than-americas.html), <https://cleanupcityofstaugustine.blogspot.com/2016/12/fusion-few-things-whiter-than-americas.html> [<https://perma.cc/SE4J-BSM5>]. Moreover, consider the following states minority populations in relation to the number of minority elected prosecutors: California (63%/10%); Texas (58%/13%); Maryland (49%/19%); Florida (46%/10%); New York (45%/5%); Arizona (45%/6%). REFLECTIVE DEMOCRACY CAMPAIGN, *supra* note 101, at 4.

¹⁰⁴ KATHERINE J. BIES, ISAAH M. DEPORTO, DARRYL G. LONG, MEGAN S. MCKOY, DEBBIE A. MUKAMAL & DAVID ALAN SKLANSKY, STAN. CRIM. JUST. CTR., STUCK IN THE ‘70s: THE DEMOGRAPHICS OF CALIFORNIA PROSECUTORS 8 (2015).

¹⁰⁵ *Id.* at 10.

¹⁰⁶ *Id.* at 13.

¹⁰⁷ Ronald F. Wright, Kay L. Levine & Marc L. Miller, *The Many Faces of Prosecution*, 1 STAN. J. CRIM. L. & POL’Y 27, 39 (2014).

from prosecutorial offices is one that is predominantly white-led, with more diverse, but still relatively unrepresentative rank and file.

The few empirical studies on race and gender in prosecutorial offices indicate that both categories matter,¹⁰⁸ but this demographic point is rarely connected to the educational background and profiles of prosecutors. Importantly, the purpose here is not to lay the blame for our penal status quo on prosecutors. That work has been effectively done elsewhere.¹⁰⁹ Moreover, although the sheer unrepresentativeness of prosecutorial offices can lead to the easy conclusion that white prosecutors are one source of our criminal justice woes, that interpretation would be valid, but incomplete. The many controversies involving prosecutors of color demonstrate that the implications of prosecutorial diversity are far from straightforward.¹¹⁰ What

¹⁰⁸ Amy Farrell, Geoff Ward & Danielle Rousseau, *Race Effects of Representation Among Federal Court Workers: Does Black Workforce Representation Reduce Sentencing Disparities?*, 623 ANNALS AM. ACAD. POL. & SOC. SCI. 121, 131 (2009) (finding more equitable racial outcomes in districts with more Black prosecutors); Ryan D. King, Kecia R. Johnson & Kelly McGeever, *Demography of the Legal Profession and Racial Disparities in Sentencing*, 44 LAW & SOC'Y REV. 1, 24 (2010) (finding that racial disparities in sentencing attenuate as the number of Black and Latinx attorneys in a county increases); Lisa Frohmann, *Convictability and Discordant Locales: Reproducing Race, Class, and Gender Ideologies in Prosecutorial Decisionmaking*, 31 LAW & SOC'Y REV. 531, 531 (1997) (highlighting, through an ethnographic study, how prosecutors reproduce race, class and gender ideologies in their decisionmaking); Stephanie Holmes Didwania, *Gender-Based Favoritism Among Criminal Prosecutors* 5 (manuscript on file with author) (finding that defendants are charged more leniently when they are the same gender as their prosecutor).

¹⁰⁹ See generally BARKOW, PRISONERS OF POLITICS, *supra* note 4; VAN CLEVE, *supra* note 3; see also ANGELA J. DAVIS, ARBITRARY JUSTICE: THE POWER OF THE AMERICAN PROSECUTOR 4 (2007) (“[P]rosecutors [hold] almost all of the cards . . . [and] deal them as they [see] fit.”); David A. Sklansky, *The Nature and Function of Prosecutorial Power*, 106 J. CRIM. L. & CRIMINOLOGY 473, 474 (2016) [hereinafter Sklansky, *Nature and Function*] (“[P]rosecutors seem to be getting ever more powerful . . .”). But see Jeffrey Bellin, *The Power of Prosecutors*, 94 N.Y.U. L. REV. 171, 174 (2019) (questioning the arguments about the immense power of prosecutors and applying a critical lens to claims about prosecutorial preeminence).

¹¹⁰ See Allyson Chiu, *Beyoncé, in Letter to Kentucky AG, Demands Officers Involved in Breonna Taylor Shooting Be Charged*, WASH. POST (June 15, 2020), <https://www.washingtonpost.com/nation/2020/06/15/kentucky-beyonce-breonna-taylor> [<https://perma.cc/8NK5-S6A2>] (identifying that Beyoncé, in her letter to Cameron, Kentucky's first African American attorney general, stated that he should end the pattern of inaction and delays after tragedies); Alan Feuer, *Liberal Brooklyn Prosecutor Faces Unlikely Foes: Liberal Activists*, N.Y. TIMES (May 16, 2016), <https://www.nytimes.com/2016/05/17/nyregion/kent-thompson-liberal-brooklyn-prosecutor-faces-unlikely-foes-liberal-activists.html> [Error! Hyperlink reference not valid.<https://perma.cc/4Y79-H2D9>] (noting that even black, liberal prosecutors who campaign to restore justice are facing opponents); Esther J. Cepeda, *Anita Alvarez: A Trailblazing Latina Who Fell Short of Expectations*, CHI. TRIB. (Mar. 19, 2016, 7:00 PM), <https://www.chicagotribune.com/opinion/commentary/ct-anita-alvarez-latina-latina-perspec-0321-md-20160319-story.html> [<https://perma.cc/6HUY-5Q98>] (stating that Anita Alvarez, Chicago's first female, Hispanic, career prosecutor to be elected as Cook County's state attorney, lost her bid for re-election due to her lack of action on racial and ethnic issues). As Devon Carbado and Song Richardson note, “the persistence of racial inequality in the United States derives from problems of power and structure, rather than simply individual choice and identity . . . if racial diversity is the only game in town we are in civil rights trouble.”

I am trying to draw attention to is a different way of thinking about how race and gender influence how these attorneys enter their fields. Prosecutors, mostly, but not exclusively white, enter the penal bureaucracy on a yearly basis after being socialized to understand the law in very narrow terms. When prosecutorial work and identity are understood through the lens of socialization and demographics, the mechanisms that lead these attorneys to reproduce inequality become clearer.

Indigent defense suffers from its own lack of diversity but often comes under less critical scrutiny because these attorneys are understood as being allies of people accused of crimes. But as scholars have explained, assumptions about race, gender, and class figure prominently in the provision of legal services.¹¹¹ Again, the statistics here are fuzzy because there is no consistent collection of data on indigent defense attorneys.¹¹² In any event, available studies suggest that racial minorities constitute between approximately 10-20% of that portion of the legal profession.¹¹³ Gender statistics are less clear. Some studies suggest that, like prosecution, men outnumber women in criminal defense somewhere between 4:1 and 2:1, but those examinations are less representative of the kinds of cases that populate the criminal justice

Devon W. Carbado & L. Song Richardson, *Book Review: The Black Police: Policing Our Own*, 131 HARV. L. REV. 1979, 1980 (2018). The same applies to gender. *Id.* at 2002-03.

¹¹¹ See generally ANDREA D. LYON, *THE FEMININE SIXTH: WOMEN FOR THE DEFENSE* (2018) (describing the gender-specific experiences of nine women defense attorneys); CYNTHIA SIEMSEN, *EMOTIONAL TRIALS: THE MORAL DILEMMAS OF WOMEN CRIMINAL DEFENSE ATTORNEYS* 3 (2004) (detailing “the social processes involved in an unexplored relationship between emotion and ideology” for women defense attorneys); Ossei-Owusu, *supra* note 82, at 1163 (noting “the instrumental role that race play[s] in the development of right to counsel jurisprudence”).

¹¹² The Bureau of Justice Statistics last conducted its study of indigent defense more than a dozen years ago and that study dealt more with the organizational structure of indigent defense than it did questions of population. BUREAU JUST. STATS., U.S. DEP’T JUST., NCJ 234211, *PROSECUTORS IN STATE COURTS, 2007 – STATISTICAL TABLES* (2011). See also COMM’N ON WOMEN PRO., AM. BAR ASS’N, *A CURRENT GLANCE AT WOMEN IN THE LAW* (2018), https://www.americanbar.org/content/dam/aba/administrative/women/current_glance_2019.pdf [<https://perma.cc/7KSZ-YKXB>] (collecting information on women in the legal profession, private practice, as general counsel, law school deans, law students, on law review, in the judiciary, in state and federal judgeships, but not in public interest law or indigent defense).

¹¹³ See INST. FOR INCLUSION LEGAL PRO., *IILP REVIEW 2019–2020: THE STATE OF DIVERSITY AND INCLUSION IN THE LEGAL PROFESSION* 27 (2020) (finding that approximately nine percent of minorities in the classes of 2013, 2014, 2015, and 2016 entered public interest); 2018 REPORT ON DIVERSITY, *supra* note 98, at 9 (finding that approximately twenty percent of staff attorneys at law firms were minorities). Importantly, data on public interest lawyers often includes indigent defense, civil legal aid, and prosecution, which means that this dated information may under or overrepresent. See, e.g., Nat’l Ass’n L. Placement, *Employment Patterns — 1982–2004*, NALP BULLETIN (June 2006), <https://www.nalp.org/2006junemploymenpatterns> [<https://perma.cc/KKH7-ZFKG>] (disaggregating public interest from government and finding that 6.8% of minorities in the class of 2004 entered public interest jobs).

system.¹¹⁴ Other studies corroborate longstanding literature on gender segregation and women's work in the "pink ghetto" that is public interest law.¹¹⁵ The best information, a twelve-year longitudinal study conducted by The American Bar Foundation (ABF) and The National Association for Law Placement (NALP), found that women attorneys in the sample consistently and significantly outnumbered men.¹¹⁶ The meaning of these demographics is still unclear. The most favorable interpretation of available demographic information indicates that the indigent defense bar is slightly more diverse than its prosecutorial counterpart. A more skeptical vision suggests that there is not enough information or empirical interest in determining whether the indigent defense bar is an exception to a relatively unrepresentative legal profession.

The incomplete portrait of indigent defense chafes against a growing recognition by scholars and practitioners that race and gender matter in the provision of legal services. The most heavy-handed commentary has come from Rachael Rollins, a black woman who led the Suffolk County District Attorney Office, (which includes Boston), and is now the United States Attorney for the District of Massachusetts. In a discussion about the perceived shortcomings of indigent defense in Massachusetts and lack of racial diversity in the Committee for Public Counsel Services (the state public defender), Collins blasted, "Ask some of the criminal defendants who are incarcerated—is this a rainbow coalition of people who are representing

114 AD HOC COMM. TO REV. CRIM. JUST. ACT PROGRAM, 2017 REPORT OF THE AD HOC COMMITTEE TO REVIEW THE CRIMINAL JUSTICE ACT 180 (2018) (finding that 80% of federal panel attorneys working under the Criminal Justice Act were men and 20% were women); STEPHANIE A. SCHARF & ROBERTA D. LIEBENBERG, FIRST CHAIRS AT TRIAL: MORE WOMEN NEED SEATS AT THE TABLE 13 (2015) (finding that in criminal cases that include privately retained counsel at law firms, men represent 67% of attorneys while women constitute 33%).

115 Sandra Simkins, *The "Pink Ghettos" of Public Interest Law: An Open Secret*, 68 BUFF. L. REV. 857, 862 (2020) ("[A]ny profession that is primarily staffed with women becomes a problem—a 'pink ghetto.'"); Cynthia Fuchs Epstein & Hella Winston, *The Salience of Gender in the Choice of Law Careers in the Public Interest*, 18 BUFF. J. GENDER L. & SOC. POL'Y 21, 21 (2010) ("[W]omen are about twice as likely as men to [work in public interest law]."); Kathleen E. Hull & Robert L. Nelson, *Assimilation, Choice, or Constraint? Testing Theories of Gender Differences in the Careers of Lawyers*, 79 SOC. FORCES 229, 233 (2000) ("[W]omen are . . . overrepresented in government and public-interest law . . ."); Carrie Menkel-Meadow, *Feminization of the Legal Profession: The Comparative Sociology of Women Lawyers*, in 3 LAWYERS IN SOCIETY: COMPARATIVE THEORIES 211 (Richard L. Abel & Philip S.C. Lewis eds., 1989) ("[W]omen are concentrated in the lowest echelons of the profession.").

116 The study was conducted in three waves. In Wave 1, 4.1% of respondents working legal services or public defender offices were women compared to 2% men. In Wave 2, 2.7% were women and 1% were men. In Wave 3, 3.5% were women and 2.3% were men. This figure included civil and criminal legal aid. AM. BAR FOUND. & NALP FOUND. FOR L. CAREER RSCH. AND EDUC., AFTER THE JD III: THIRD RESULTS FROM A NATIONAL STUDY OF LEGAL CAREERS 65 (2014).

these individuals?”¹¹⁷ She added, “I refuse to pretend like this is Thurgood Marshall and Martin Luther King are working for CPCS right now and running this operation.”¹¹⁸ Others have been a little more conceptually and empirically grounded. One study found that defense attorneys generally negotiate plea deals with higher sentences for black clients than they do white clients.¹¹⁹ Other commentators have pointed out how racial bias impacts people beyond the black/white binary. Theodore Eisenberg and Sheri Lynn Johnson used the Implicit Association Test and found evidence of implicit racial bias among black, white, and Asian American death penalty defense lawyers.¹²⁰ Andrea Lyon, who worked as the Chief of the Homicide Task Force in the Cook County Public Defender’s office, has noted that while working in the office she realized that liberals were not necessarily “good” on race issues and observed that “stereotypes and prejudice are problems for everyone,” including defense attorneys.¹²¹ Moving outside the bias framework, same-race attorney-defendant relationships (for example, black lawyer and black client) can cause minority attorneys to overidentify with their clients and have assumptions about the people they represent.¹²²

Gender matters in indigent defense as well. For defendants, gender can influence how counsel describes mental health problems (for example, male defendants have “anger issues” while female defendants suffer from co-

¹¹⁷ Andrea Estes, *Rachael Rollins Retreats from Attack on ‘Overwhelmingly Privileged’ Public Defenders After Strong Backlash*, BOS. GLOBE, www.bostonglobe.com/2020/05/07/metro/rachael-rollins-retreats-attack-overwhelmingly-privileged-public-defenders-after-strong-backlash/ [<https://perma.cc/682Q-EFPZ>] (last updated May 7, 2020, 1:14 PM) (quotations omitted).

¹¹⁸ *Id.* (quotations omitted).

¹¹⁹ Vanessa A. Edkins, *Defense Attorney Plea Recommendations and Client Race: Does Zealous Representation Apply Equally to All?*, 35 LAW & HUM. BEHAV. 413, 422 (2011) (“[P]racticing defense attorneys displayed a tendency to recommend plea bargains for African Americans that were longer than those that they would recommend for Caucasian clients.”).

¹²⁰ Theodore Eisenberg & Sheri Lynn Johnson, *Implicit Racial Attitudes of Death Penalty Lawyers*, 53 DEPAUL L. REV. 1539, 1553 (2004). *See also* David S. Abrams & Albert H. Yoon, *The Luck of the Draw: Using Random Case Assignment to Investigate Attorney Ability*, 74 U. CHI. L. REV. 1145, 1150 (2007) (finding that Latinx defense attorneys obtained shorter sentences for their clients than black and white attorneys).

¹²¹ Andrea D. Lyon, *Race Bias and the Importance of Consciousness for Criminal Defense Attorneys*, 35 SEATTLE U. L. REV. 755, 755 (2012).

¹²² Julie D. Lawton, *Am I My Client? Revisited: The Role of Race in Intra-Race Legal Representation*, 22 MICH. J. RACE & L. 13, 44 (2016) (“The lawyer of color risks making assumptions about the client’s needs, preferences, and reactions based on the lawyer’s over-identification with the client. For example, the lawyer’s assumptions about how his African-American male client reacted to an unwarranted police search can unwittingly be based on the lawyer’s experience as an African-American man subjected to unwarranted police searches.”). *But see* Alexis Hoag, *Black on Black Representation*, 96 N.Y.U. L. REV. 1493, 1498 (2021) (arguing for an expansion of the Sixth Amendment’s right to choice of counsel that would allow indigent black defendants to select black attorneys).

dependency, trauma, and anxiety).¹²³ Gender is also deployed by defense attorneys to construct ideas about defendants' deservingness of leniency (for example, their women clients are "good caretakers" and male defendants are "good providers").¹²⁴ Gender can influence how judges treat women attorneys,¹²⁵ how juries interpret women's courtroom performance and credibility,¹²⁶ and shapes assumptions that they are clerks, interpreters, or secretaries and not lawyers—especially when it comes to women of color.¹²⁷ Gender surfaces uniquely in cases involving sexual violence,¹²⁸ which are sometimes actively avoided in the criminal justice curriculum,¹²⁹ and influences the ineffectiveness assistance of counsel defendants who are domestic violence survivors receive.¹³⁰ Laura Bazelon candidly describes how gender operates in the penal bureaucracy: "Sexism infects every kind of

123 Danielle M. Romain Dagenhardt, *Observing Gender and Race Discourses in Probation Review Hearings*, 15 FEMINIST CRIMINOLOGY 492, 501 (2020) ("There were . . . gender differences in the ways mental health was used to frame a probationer's actions and which illnesses or issues were mentioned.").

124 M. J. Gathings & Kylie Parrotta, *The Use of Gendered Narratives in the Courtroom: Constructing an Identity Worthy of Leniency*, 42 J. OF CONTEMP. ETHNOGRAPHY 668, 675, 679 (2013) (noting "the portrayal of [male] defendants as good fathers and providers for their families" and judicial perceptions of female defendants "as wives, mothers, and caretakers as opposed to criminals").

125 Abbe Smith, *Judges As Bullies*, 46 HOFSTRA L. REV. 253, 270 (2017) ("There is a persistent casual sexism in court in which male lawyers are taken more seriously than female lawyers. It is subtle but palpable . . .").

126 Mary Stewart Nelson, *The Effect of Attorney Gender on Jury Perception and Decision-Making*, 28 LAW & PSYCH. REV. 177, 187 (2004) ("[A]n attorney's presentation style and its fit with the attorney's gender significantly affect the jury's perception of the attorney and consequently the jury's decision-making.").

127 See JILL L. CRUZ, MELINDA S. MOLINA & JENNY RIVERA, HISP. NAT'L BAR ASS'N COMM'N ON STATUS OF LATINAS LEGAL PRO., HISPANIC NATIONAL BAR ASSOCIATION COMMISSION ON THE STATUS OF LATINAS IN THE LEGAL PROFESSION: STUDY ON LATINA ATTORNEYS IN THE PUBLIC INTEREST SECTOR 49-50 (2010) (study of Latina attorneys where 74.2% indicated that they were mistaken for a translator, court reporter or another non-attorney in the workplace); see generally María Chávez, EVERYDAY INJUSTICE: LATINO PROFESSIONALS AND RACISM (2011) (describing the negative experiences of Latino lawyers in search of legitimacy, respect, and acceptance from their white colleagues).

128 See PATRICIA YANCEY MARTIN, RAPE WORK: VICTIMS, GENDER, AND EMOTIONS IN ORGANIZATION AND COMMUNITY CONTEXT 60-64 (2005) (describing, through a qualitative study, a range of insights on public defenders that include: a lack of concern for victims of sex crimes, the belief that rape victims and battered women are no different from other victims, the belief that such victims receive better treatment, and the perceived need to inject ideas about sex during voir dire to obtain favorable outcomes).

129 See *supra* note 56 and accompanying text.

130 Sarah M. Buel, *Effective Assistance of Counsel for Battered Women Defendants: A Normative Construct*, 26 HARV. WOMEN'S L.J. 217, 218 (2003) (discussing how battered women defendants receive ineffective assistance counsel because of attorneys' failure to present relevant defense theories as well as the refusal of judges to apply the law).

courtroom encounter, from pretrial motions to closing arguments”¹³¹ Nevertheless, the dynamic ways that gender and race influence the provision of legal defense are not objects of inquiry in the criminal justice curriculum despite available scholarship that demonstrates their practical relevance.

Prosecutors and indigent defense attorneys occupy two different sides of the penal bureaucracy, but their demographic composition, along with circumscribed legal education, provides insight into the criminal justice system’s operation. It is no secret that diversity in the legal profession is an issue, but there is a related and arguably deeper issue of how future penal bureaucrats—irrespective of their race and gender—are socialized into understanding the relevance of these categories to their lawyering. The legal system tasks a relatively unrepresentative set of attorneys with prosecuting and representing criminal defendants in a world where race, gender, and poverty influence assumptions about crime as well as its regulation. In the courses that are central to their legal education, they are socialized to believe that these categories are either irrelevant or additive in ways that might be the case in some instances and not in others.¹³² Curricular marginalization of these social categories, along with penal bureaucrats’ longstanding lack of introspection, are bad combinations for criminal defendants. Optimistically, there are some trends in the legal profession that have the potential to mitigate the demographic realities of the penal bureaucracy and its reproduction of inequality.

II. THE NEW PENAL BUREAUCRATS

This Part describes three significant trends in the legal profession that have the potential to mitigate some of the issues identified in Part I and reshape the American criminal justice system. The first development is the shifting generational composition of the legal profession, which has not been adequately addressed by criminal justice scholars. Indigent defense reform and the rise of “progressive prosecutors”—the two other developments discussed in this Part—have been cataloged by legal scholars but are often untethered to legal education. This Part briefly describes these three issues

¹³¹ Lara Bazelon, *What It Takes to Be a Trial Lawyer If You’re Not a Man*, ATLANTIC (Sept. 2018), www.theatlantic.com/magazine/archive/2018/09/female-lawyers-sexism-courtroom/565778/ [<https://perma.cc/G6Y5-T7J9>].

¹³² See Ristroph, *Curriculum*, *supra* note 7, at 1682 (“Discussions of discretion, mass incarceration, and racial disparities appear too much like accessories added as afterthoughts—which, for the most part, they have been. That allows the unattractive aspects of contemporary criminal law to be seen as bugs, not features, or as newly discovered pathologies that may yet be excised with a still-better model penal code or the right constitutional decision from the Supreme Court.”) (footnotes omitted).

in an attempt to recast the scholarly discussion on lawyers who work in the penal bureaucracy.

A. *Generational Change in the Legal Profession*

Generational changes are reshaping how people think about our criminal justice system and have consequences for the legal profession despite being relatively under-thematized. To the extent that criminal justice discourse and legal scholarship focus on demographic markers of identity, race, class, and gender are the primary emphasis, whereas citizenship and sexual orientation have increasingly figured into these conversations.¹³³ Scholars typically analyze age through the lenses of juvenile justice, the aging prison population, and/or the life-cycle of criminal offending.¹³⁴ Unfortunately, meaningful interrogations about age are particularly tricky because they can quickly devolve into crude ageism. Young people, sometimes labeled “Generation Me, Me, Me,” get stereotyped as coddled, safe-space-needing social media addicts who have never had to engage in palpable political protest.¹³⁵ On the other end, older cohorts get caricatured as boomer-splaining conservatives (irrespective of actual political party affiliation)¹³⁶ who are responsible for our penal crisis as well as a host of other issues facing the country (e.g., the student loan crisis, climate change, and income inequality).¹³⁷ These popular

¹³³ For scholarship on sexual orientation and criminal justice, see generally KEVIN LEO YABUT NADAL, *QUEERING LAW AND ORDER: LGBTQ COMMUNITIES AND THE CRIMINAL JUSTICE SYSTEM* (2020); DEAN SPADE, *NORMAL LIFE: ADMINISTRATIVE VIOLENCE, CRITICAL TRANS POLITICS, & THE LIMITS OF LAW* (2015). For scholarship on immigration and criminal justice, see generally ROUTLEDGE HANDBOOK ON IMMIGRATION AND CRIME (Holly Ventura Miller & Anthony Peguero eds., 2019) and CÉSAR CUAUHTÉMOC GARCÍA HERNÁNDEZ, *CRIMMIGRATION LAW* (2d ed. 2021).

¹³⁴ For some instructive takes, see generally MARTHA H. HURLEY, *AGING IN PRISON: THE INTEGRATION OF RESEARCH AND PRACTICE* (2d ed. 2018); BARRY C. FELD, *THE EVOLUTION OF THE JUVENILE COURT: RACE, POLITICS, AND THE CRIMINALIZING OF JUVENILE JUSTICE* (2017); CATHERINE Y. KIM, DANIEL J. LOSEN & DAMON T. HEWITT, *THE SCHOOL-TO-PRISON PIPELINE: STRUCTURING LEGAL REFORM* (2010); RONALD H. ADAY & JENNIFER J. KRABILL, *WOMEN AGING IN PRISON: A NEGLECTED POPULATION IN THE CORRECTIONAL SYSTEM* (2011); BERNARD E. HARCOURT, *LANGUAGE OF THE GUN: YOUTH, CRIME, AND PUBLIC POLICY* (2006); JOHN H. LAUB & ROBERT J. SAMPSON, *SHARED BEGINNINGS, DIVERGENT LIVES: DELINQUENT BOYS TO AGE 70* (2003).

¹³⁵ JAMES CAIRNS, *THE MYTH OF THE AGE OF ENTITLEMENT: MILLENNIALS, AUSTERITY, AND HOPE 1-5* (2017); Jill Filipovic & Paul Callan, *OK Boomer, OK Millennial, We Need to Talk*, CNN (Nov. 8, 2019), <https://www.cnn.com/2019/11/08/opinions/ok-boomer-callan-filipovic/index.html> [perma.cc/XZ5C-Q6QY] (last updated Nov. 8, 2019, 11:17 AM).

¹³⁶ For a take on how “boomer-splaining” works in context, see CCBOOhio, *Let’s Just Stop Boomersplaining Politics to Millennials*, DAILYKOS (Feb. 6, 2016, 2:45 PM), <https://www.dailykos.com/stories/2016/2/6/1480395/-Let-s-just-stop-boomersplaining-politics-to-millennials>.

¹³⁷ Filipovic & Callan, *supra* note 135; Lyman Stone, *The Boomers Ruined Everything*, ATLANTIC (June 24, 2019), www.theatlantic.com/ideas/archive/2019/06/boomers-are-blame-aging-america/592336 [https://perma.cc/9DDG-29GP]; Ben White, *How the Baby Boomers Broke America*, POLITICO (Oct. 26,

framings of age cohorts are unhelpful. The analysis offered in this subsection seeks to critically examine how generational change and intergenerational differences might have bearings on our criminal justice system.

Some descriptions of the different cohorts are in order. Baby Boomers were born between 1946 and 1964, and members of Generation X were born between 1965 and 1980.¹³⁸ Generation Y, who are considered “Millennials,” follows: they were born between 1981 and 1996.¹³⁹ Finally, people in Generation Z, also called “post-Millennials,” were born after 1997.¹⁴⁰ Demographic data on law professors is notoriously challenging to get,¹⁴¹ but available studies suggest that most professors are either baby boomers or members of Generation X.¹⁴² Thus, it is relatively uncontroversial to say that most law professors who teach in the core criminal justice curriculum, save for early tenure-track instructors, are typically older than forty, with many in their fifties and sixties.¹⁴³ On the other side of the classroom podium,

2019, 6:36 AM), <https://www.politico.com/news/2019/10/26/how-the-baby-boomers-broke-america-058122> [<https://perma.cc/W2RU-53DK>].

¹³⁸ Richard Fry, *Millennials Overtake Baby Boomers as America's Largest Generation*, PEW RSCH. CTR. (Apr. 28, 2020), <https://www.pewresearch.org/fact-tank/2020/04/28/millennials-overtake-baby-boomers-as-americas-largest-generation> [<https://perma.cc/95AF-BEUW>].

¹³⁹ See *id.*; see also *Boomers, Gen X, Gen Y, Gen Z, and Gen A Explained*, KASASA (July 6, 2021), <https://www.kasasa.com/exchange/articles/generations/gen-x-gen-y-gen-z> [<https://perma.cc/HN67-N6A7>] (breaking down the differences between the age groups).

¹⁴⁰ Michael Dimock, *Defining Generations: Where Millennials End and Generation Z Begins*, PEW RSCH. CTR. (Jan. 17, 2019), <https://www.pewresearch.org/fact-tank/2019/01/17/where-millennials-end-and-generation-z-begins> [<https://perma.cc/ANV3-6MRH>].

¹⁴¹ Meera E. Deo, *The Ugly Truth About Legal Academia*, 80 BROOK. L. REV. 943, 947 n.12 (2015) [hereinafter Deo, *The Ugly Truth*] (describing AALS' 2014 removal of basic statistical data on law faculty members and the organization's disinterest in offering an explanation or reinstating the data); Meera E. Deo, *Trajectory of a Law Professor*, 20 MICH. J. RACE & L. 441, 451 (2015) [hereinafter Deo, *Trajectory*] (“[A] systematic analysis of legal academia is long overdue.”).

¹⁴² Elizabeth Mertz and her colleagues conducted a study of tenured law professors where approximately 90% of those sampled were in the age range of 40-69 (about 22% percent were age 40-49, nearly 40% were age 50-59, about 27% were age 60-69). ELIZABETH MERTZ, FRANCES TUNG, KATHERINE BARNES, WAMUCII NJOGU, MOLLY HEILER & JOANNE MARTIN, *AFTER TENURE: POST-TENURE LAW PROFESSORS IN THE U.S.* 16 (2011); Colleen Flaherty, *The Aging Faculty*, INSIDE HIGHER ED (Jan. 27, 2020), <https://www.insidehighered.com/quicktakes/2020/01/27/aging-faculty> [<https://perma.cc/F62R-H8DM>] (noting that the average age of tenure-track professors across universities is 49 and that 37% of academia is over the age of 55 compared to 23% of the general working population); Lynn Safranek & Marsha Ferziger Nagorsky, *The Law School's Young Faculty: Letting Their Ideas Do the Talking*, U. CHI. L. SCH. (Mar. 18, 2010), <https://www.law.uchicago.edu/news/law-schools-young-faculty-letting-their-ideas-do-talking> [[Error! Hyperlink reference not valid.https://perma.cc/KMP2-ADF5](https://perma.cc/KMP2-ADF5)] (describing the now unavailable AALS statistical report on law faculty and noting that only 15% of the legal professoriate is forty or younger).

¹⁴³ Oluchi Mbonu, Anne McDonough & Daniel E. Ho, *Budgeting Diversity*, BOS. REV. (Aug. 5, 2020), www.bostonreview.net/class-inequality-race-gender-sexuality/daniel-e-ho-oluchi-mbonu-anne-mcdonough-budgeting-diversity [<https://perma.cc/5F96-77D3>] (describing how amendments to the Age Discrimination in Employment Act, which eliminated mandatory retirement in higher education, have hampered diversity efforts in the professoriate and increased the percentage of

Millennials and post-Millennials comprise the bulk of students entering law schools on a yearly basis.¹⁴⁴ Why might generational differences between professors and students matter for the criminal justice system? The observations of demographer William Frey are helpful here and worth quoting at length. Discussing the summer 2020 protests, Frey writes:

Even in the face of a dangerous pandemic, this brutal event prompted millions of young people from all racial groups to protest against not just the racist aspects of the criminal justice system, but the many dimensions of structural racism that have kept Black Americans from achieving the education, jobs, housing, and wealth that whites have long enjoyed. The fact that nearly two-fifths of millennials and Gen Z are Black and brown makes these issues deeply personal for them. The broad coalition of all races—including whites—in this movement suggests a joining of disparate interests toward making fundamental changes in racial justice.¹⁴⁵

Millennials and post-Millennials have different perspectives than their predecessors that influence how they think about punishment and inequality.¹⁴⁶ These younger generations are more diverse than their predecessors.¹⁴⁷ These cohorts came of age during a time where anti-discrimination principles—embodied in statutes like the Civil Rights Act, Fair Housing Act, Americans with Disability Act—were features of American life (even if contested).¹⁴⁸ In addition to having been more likely to experience arrest (a finding that is exacerbated by race),¹⁴⁹ Millennials uniquely support drug policy reform and decriminalizing sex work.¹⁵⁰

faculty over the age of seventy); Daniel E. Ho, Oluchi Mbonu & Anne McDonough, *Mandatory Retirement and Age, Race, and Gender Diversity of University Faculties*, 23 AM. L. ECON. REV. 100 (2021)..

¹⁴⁴ Christopher J. Ryan, Jr., *Analyzing Law School Choice*, 2020 U. ILL. L. REV. 583, 611 (explaining data from the Law School Choice Survey where respondents' mean age ranged from 24 to 29 years old).

¹⁴⁵ William H. Frey, *Now, More Than Half of Americans Are Millennials or Younger*, INVESBRAIN (July 30, 2020), <https://invesbrain.com/now-more-than-half-of-americans-are-millennials-or-younger> [Error! Hyperlink reference not valid.https://perma.cc/5F44-VWDJ].

¹⁴⁶ See Jonathan Simon, *For a Human Rights Approach to Reforming the American Penal State*, 11 J. HUM. RTS. PRAC. 346, 352 (2019) (describing the “political emergence of [Millennial] voters who have come of age” during the crime decline of 1990s “and who appear to have quite different political responses to crime and to the penal state than their baby boomer elders”).

¹⁴⁷ Fry & Parker, *supra* note 8.

¹⁴⁸ COREY SEEMILLER & MEGHAN GRACE, *GENERATION Z GOES TO COLLEGE* 38 (2016).

¹⁴⁹ Weaver et al., *supra* note 9, at 89 (“First, the members of the late-1990s cohort were much more likely to have contact with legal authorities than the 1979 cohort, even though the earlier cohort reported engaging in substantially more offending.”).

¹⁵⁰ NINA LUO, DATA FOR PROGRESS, *DECRIMINALIZING SURVIVAL: POLICY PLATFORM AND POLLING ON THE DECRIMINALIZATION OF SEX WORK* 23 (2020) (providing data regarding the support for the decriminalization of sex work); DAVID CAHN & JACK CAHN, *WHEN*

Ironically, those are two of the many issues that they support that are often missing from the criminal justice curriculum. They are less supportive of the national security apparatus that has influenced the penal state and more supportive of progressive domestic social agendas than any other generation.¹⁵¹ These views, amongst others,¹⁵² point to a certain kind of sensitivity to social inequality that is absent from criminal legal education.

Gender also crosscuts with age in ways that are relevant to criminal legal education. The #MeToo Movement has drawn attention to the law's failure to address sexual violence while highlighting the shortcomings of disciplinary processes and workplace complaint structures that often act as substitutes for criminal law.¹⁵³ #MeToo is supported by women across generations.¹⁵⁴ The movement also occurs at a time when there are questions about the criminal justice system's legitimacy and raises pressing questions that are relevant for Millennials and post-Millennials entering the penal bureaucracy.¹⁵⁵ Importantly, younger cohorts also have more capacious feminist frameworks available to them due to the political work of second and third-wave feminists. Aya Gruber's analysis of carceral feminism details how late-twentieth-century activists, who sought in earnest to punish domestic violence, have been in tension with a feminist uneasiness around deploying the state to address gender violence.¹⁵⁶ That disquiet has only grown in the

MILLENNIALS RULE: THE RESHAPING OF AMERICA 210 (2016) (describing Millennials' distinct support for drug policy reform).

¹⁵¹ BARBARA J. RISMAN, *WHERE THE MILLENNIALS WILL TAKE US* 54 (2018).

¹⁵² Andrew Van Dam, *The Unluckiest Generation in U.S. History*, WASH. POST (Jun. 5, 2020), <https://www.washingtonpost.com/business/2020/05/27/millennial-recession-covid> [<https://perma.cc/ZUM2-WMAA>] (noting that Millennials "never recovered from the Great Recession" and have experienced slower economic growth since entering the workforce than any other generation in American history).

¹⁵³ See Margo Kaplan, *Reconciling #MeToo and Criminal Justice*, 17 OHIO ST. J. CRIM. L. 361, 364 (2020); Jamillah Bowman Williams, Lisa Singh & Naomi Mezey, *#MeToo as Catalyst: A Glimpse into 21st Century Activism*, 2019 U. CHI. LEGAL F. 371, 373 (2019); Deborah Tuerkheimer, *Beyond #MeToo*, 94 N.Y.U. L. REV. 1146, 1151 (2019); Deborah L. Rhode, *#MeToo: Why Now? What Next?*, 69 DUKE L.J. 377, 380 (2019).

¹⁵⁴ Anna North, *The #MeToo Generation Gap is a Myth*, VOX (Mar. 20, 2018, 5:45 AM), <https://www.vox.com/2018/3/20/17115620/me-too-sexual-harassment-sex-abuse-poll> [<https://perma.cc/J9KN-95MN>].

¹⁵⁵ Compare Megan Twohey & Jodi Kantor, *With Weinstein Conviction, Jury Delivers a Verdict on #MeToo*, N.Y. TIMES (Feb. 24, 2020), www.nytimes.com/2020/02/24/us/harvey-weinstein-verdict-metoo.html [[Error! Hyperlink reference not valid.https://perma.cc/GG79-GFX4](https://perma.cc/GG79-GFX4)] ("[B]y pushing the boundaries of sex-crimes prosecutions, the Manhattan prosecutors delivered what many people declared a victory for the global movement against sexual misconduct that Mr. Weinstein's actions had helped ignite."), with Lara Bazelon & Aya Gruber, *#MeToo Doesn't Always Have to Mean Prison*, N.Y. TIMES (Mar. 2, 2020) <https://www.nytimes.com/2020/03/02/opinion/metoo-doesnt-always-have-to-mean-prison.html> [<https://perma.cc/PWL5-RRLP>] (suggesting that restorative justice should be an alternative to carceral solutions).

¹⁵⁶ AYA GRUBER, *THE FEMINIST WAR ON CRIME: THE UNEXPECTED ROLE OF WOMEN'S LIBERATION IN MASS INCARCERATION* 5 (2020) (discussing how "[m]illennial feminists came of

last decade.¹⁵⁷ Of course, pro-defendant and pro-victim viewpoints are par for the course in the criminal justice curriculum. But the critique of carceral feminism presents a uniquely modern entry point for legal conversations about gender, generation, and punishment that are often missing in legal education, or are relatively simplistic. Meanwhile, intersectionality, a term previously reserved for scholarly and activist spaces and coined by baby boomers, is now a word that is part of mainstream political discourse.¹⁵⁸ Intersectionality is also part of some young people's lexicon and ways of seeing the world.¹⁵⁹ The mismatch between their understanding of intersectionality, and criminal legal education's inattention to such issues, is a lost opportunity for budding attorneys.

These observations are not a slur to older cohorts or an attempt to romanticize young people. Boomers and members of Generation X created some of the political spaces and intellectual frameworks currently available to Millennials and post-Millennials.¹⁶⁰ Members of Generation X are increasingly obtaining leadership positions in the indigent defense and reform prosecutor offices described in the next two subsections. In addition to witnessing everything described in this subsection thus far, baby boomers and members of Generation X lived through and participated in their own era of "unprecedented political and social unrest" that was rife with protests, riots, economic downturns, assassinations, and political scandals.¹⁶¹ The key difference and relevant concern here is that Millennials and post-Millennials are at the beginning of their legal careers. Members of both groups are entering the penal bureaucracy every year. This annual development, and their unique backgrounds, are often overlooked in scholarly journals and the classroom, raising the strong possibility of a mismatch between the professors who teach and the kind of robust legal training students might desire and

age during a period of political engagement, sexual liberation, and mass incarceration" and are uncomfortably situated between a "Black Lives Matter-informed belief" that the criminal justice system is racist and a "#MeToo-informed preoccupation" with punishing "men's out-of-control sexuality and abuse of power").

¹⁵⁷ *Id.* at 16-17.

¹⁵⁸ See Jane Coaston, *The Intersectionality Wars*, VOX (May 28th, 2019, 9:09 AM), <https://www.vox.com/the-highlight/2019/5/20/18542843/intersectionality-conservatism-law-race-gender-discrimination> [https://perma.cc/R63A-5ND2].

¹⁵⁹ ANGE-MARIE HANCOCK, *SOLIDARITY POLITICS FOR MILLENNIALS: A GUIDE TO ENDING THE OPPRESSION OLYMPICS*, 26 (2011) ("Millennials are far more tolerant in their attitudes about race, gender, class, and sexual orientation than their older counterparts because they have been raised in a far different society . . .").

¹⁶⁰ *Id.* at 26 ("Millennials often fail to recognize that gains taken for granted today were hard-fought victories that can and do disappear regularly if no one is watching, deeply affecting citizens' lives.").

¹⁶¹ Praveen Kosuri, *Clinical Legal Education at a Generational Crossroads: X Marks the Spot*, 17 CLINICAL L. REV. 205, 206-07 (2010).

need. Law professors are, of course, entitled to teach their courses in whatever manner they see fit. But the result of more traditional, strictly legalistic forms of instruction is this: a form of professional education that strips criminal justice courses of their policy implications and possibly undermines the social justice concerns that lead young people to enter law school.¹⁶² Promisingly, there are developments in the penal bureaucracy that seem partially responsive to younger generations' perspectives and the need for massive changes in the criminal justice system.

B. Prosecution Reimagined

Progressive prosecutors or “reform prosecutors”¹⁶³ sit on the other side reform developments in the penal bureaucracy. They are the focus of this subsection. Both terms refer to what Rachel Barkow has described as a “new kind of prosecutor who pledges to change the failed tough-on-crime approaches of the past.”¹⁶⁴ Many of their elections were successful because they articulated positions on how to address problems tied to pre-trial detention, lethal police killings, unnecessarily lengthy sentences, and wrongful convictions.¹⁶⁵ Per Emily Bazelon’s account, forty million people, or about twelve percent of the population, live in a city or county with a prosecutor who might be considered a reformer.¹⁶⁶ These district attorneys have garnered increasing scholarly and media attention, but the proliferation of these lawyer types has not come without criticism.

People across the ideological aisle have described the label of “progressive prosecution” as misleading and unhelpful. One conservative commentator

162 The Association of American Law Schools’ *Before the JD* is a study investigating the views of more than 20,000 Millennial undergraduates at 25 colleges and universities. ASS’N AM. L. SCHS. & GALLUP, HIGHLIGHTS FROM BEFORE THE JD: UNDERGRADUATE VIEWS ON LAW SCHOOL 1 (2018). The study found that 44% of undergraduates believe law schools would be an important step toward political, government or public service work whereas 32% believed legal education would help them be an advocate for social change. *Id.* at 3. While all of these students do not make it to law school, and some of their beliefs change, these public-spirited motivations have meaning for how this particular cohort (and their predecessors) are trained in legal education.

163 Kay L. Levine, *Should Consistency Be Part of the Reform Prosecutor’s Playbook?*, 1 HASTINGS J. CRIME & PUNISHMENT 169, 170 n.2 (2020) (using the reformer label instead of the “progressive” label “to embrace those prosecutors who do not identify as politically progressive but who do support reducing the size of the carceral state and exercising fiscal responsibility in criminal justice”); Maybell Romero, *Rural Spaces, Communities of Color, and the Progressive Prosecutor*, 110 J. CRIM. L. & CRIMINOLOGY 803, 815 (2020) (“Perhaps a better label for a prosecutor who makes a greater investment in decriminalization, decarceration, and police accountability is ‘reform-minded.’”).

164 Rachel E. Barkow, *Three Lessons for Criminal Law Reformers from Locking Up Our Own*, 107 CALIF. L. REV. 1967, 1969 (2019) [hereinafter Barkow, *Three Lessons*].

165 *Id.*; BARKOW, PRISONERS OF POLITICS, *supra* note 4, at 155-60; Sklansky, *Handbook*, *supra* note 7, at 26.

166 EMILY BAZELON, CHARGED: THE NEW MOVEMENT TO TRANSFORM AMERICAN PROSECUTION AND END MASS INCARCERATION 290 (2019).

argues that “progressive prosecution” is simply a byproduct of clever branding and outsized, left-leaning personalities.¹⁶⁷ Much of the progressive prosecution agenda (e.g., diverting the mentally ill out of the penal system, not prosecuting substance abusers, deprioritizing low level crimes to save taxpayer dollars) could be plausibly associated with right-leaning principles of government efficiency and fiscal conservatism.¹⁶⁸ On the left, there is contestation in scholarly and activist spaces about whether progressivism is ideologically possible in the U.S. system of punishment. Critics have suggested that these penal bureaucrats fail to live up to the hype,¹⁶⁹ or inappropriately put their efforts in “better prosecution” as opposed to disinvesting in an incorrigible system of punishment.¹⁷⁰ Some of this criticism traces its roots to debates of the 1990s and the early twentieth-first century when intellectuals grappled with whether minority attorneys with social justice impulses should enter the prosecutorial ranks.¹⁷¹ The analysis here does

¹⁶⁷ Lars Trautman, *The Criminal Justice Reforms Pushed by ‘Progressive Prosecutors’ are Surprisingly Conservative*, WASH. EXAM’R (Nov. 26, 2019, 6:00 AM), <https://www.washingtonexaminer.com/opinion/the-criminal-justice-reforms-pushed-by-progressive-prosecutors-are-surprisingly-conservative> [https://perma.cc/8ZXS-RAWP].

¹⁶⁸ *Id.*

¹⁶⁹ Abbe Smith, *The Prosecutors I Like: A Very Short Essay*, 16 OHIO ST. J. CRIM. L. 411, 416-17 (2019) (“Manhattan DA Cyrus Vance Jr., Los Angeles DA Jackie Lacey, and New Orleans DA Leon Cannizzaro all ran for office as aggressive reformers, but continued a range of harsh prosecutorial practices, like zealously prosecuting panhandlers (especially in fancy neighborhoods).”).

¹⁷⁰ See Benjamin Levin, Essay, *Imagining the Progressive Prosecutor*, 105 MINN L. REV 1415, 1444-45 (2021) (juxtaposing the progressive prosecutors with the “anti-carceral prosecutor” whose progressivism is not tied to electoral politics but to a critical stance toward the criminal justice system and who would not argue “for more investment in DAs offices so that they can do their jobs better” but instead advocates for a divestment from prosecution and the criminal system); Karakatsanis, *supra* note 23, at 925 (“[Progressive prosecutors are not] calling for smaller prosecutor offices or fewer police. None of them are seeking a massive shift in investigative resources away from investigating the crimes of the poor to investigating the crimes of the rich. None of them have prosecuted a single one of their own employees for withholding evidence or obstruction of justice. None of them have announced a policy of declining to prosecute all drug possession. None of them have stopped prosecuting children as adults.”); Romero, *supra* note 163, at 815 (“I was a prosecutor for about five years. I genuinely thought I could be one of these progressive prosecutors. After working in exurban and rural counties where line prosecutors were flagrantly micromanaged, though, it became clear to me that it is impossible to be a good prosecutor in a bad system, let alone one who is truly progressive.” (footnote omitted)); *Abolitionist Principles & Campaign Strategies for Prosecutor Organizing*, CMTY JUST. EXCH. (Jan. 22, 2020), <https://www.communityjusticeexchange.org/en/abolitionist-principles> [https://perma.cc/K9QS-RSLM] (“Just like electing any elected official, electing a new prosecutor, even as a part of a larger strategy, is never the end goal because it does not disrupt the existence of the prosecuting office or end the violence of criminalization . . . Discussions of ‘good’, ‘bad’, ‘progressive’, or ‘regressive’ prosecutors keep the focus on individuals and are a distraction that impedes the need for structural and systemic change . . . The best thing prosecutors can do for people who need services is get out of the way.”).

¹⁷¹ See, e.g., PAUL BUTLER, LET’S GET FREE: A HIP-HOP THEORY OF JUSTICE 101-22 (2009) (arguing that people who go into prosecution with a progressive agenda eventually gets derailed because of structural reasons); ELLIS COSE, THE DARDEN DILEMMA: 12 BLACK WRITERS ON JUSTICE, RACE, AND CONFLICTING LOYALTIES 5-11 (1997); Lenese C. Herbert, Et in Arcadia Ego: *A Perspective on Black Prosecutors’ Loyalty Within the American Criminal Justice System*, 49 HOW. L.J.

not get mired in the ongoing, weighty debate about the ideological virtues of these reform prosecutors. My purpose here is to describe how developments in prosecutorial practice have the potential to alter penal outcomes, and more importantly, have a bearing on students interested in the criminal practice of law (particularly future prosecutors). Two aspects of this reform approach to prosecution are noteworthy: how these bureaucrats rethink aspects of substantive criminal law and criminal adjudication.

Reform-minded prosecutors have taken decided stances on a host of issues that challenge criminal justice conventions. The first and most spectacular is related to their decision to not pursue the death penalty in the cases where the defendant would be eligible. In some ways, the relative rarity of executions makes this unremarkable. What is distinctive is these prosecutors' stated rationale. These district attorneys echo scholarly critiques of capital punishment's racial disproportionality as well as criticisms that likely come up in criminal law classrooms across the country if/when the Supreme Court's notorious decision in *McCleskey v. Kemp* is discussed.¹⁷² Larry Krasner, the face of progressive prosecution, has not only said that capital punishment "really is about poverty" and "really is about race";¹⁷³ he has taken the unprecedented step, as a *prosecutor*, to argue to the Supreme Court of Pennsylvania that the death penalty, as applied, is unconstitutional.¹⁷⁴ Parisa Dehghani-Tafti, the Attorney for Arlington County and the City of Falls Church, Virginia, similarly campaigned on not seeking the death penalty and

495, 551 (2006) ("Redemption is possible within the Black prosecutor's justice-seeking performance. There can be no other loyalty."); Kenneth B. Nunn, *The "Darden Dilemma": Should African Americans Prosecute Crimes?*, 68 *FORDHAM L. REV.* 1473, 1473-74 (2000) (stating that Darden's dedication to his role as a prosecutor made some members of the African American community view him as a sell-out); Margaret M. Russell, *Beyond "Sellouts" and "Race Cards": Black Attorneys and the Straitjacket of Legal Practice*, 95 *MICH. L. REV.* 766, 771 (1997) (arguing that black attorneys are unduly burdened when issues of race are relevant factors in a case); Jennifer A. Cabranes & William A. Candelaria, Note, *Ending the Reign of the Latin Kings: A Latino Communitarian Response to Gang Violence*, 1 *HARV. LATINO L. REV.* 191, 222 (1994) (arguing that minority police officers can serve as role models for troubled youths).

¹⁷² 481 U.S. 279 (1987); see, e.g., Reva B. Siegel, Opening Address, *Blind Justice: Why the Court Refused to Accept Statistical Evidence of Discriminatory Purpose in McCleskey v. Kemp—And Some Pathways for Change*, 112 *NW. U. L. REV.* 1269, 1270 (2018) ("[T]he Supreme Court refused to accept statistical evidence of discrimination in an equal protection challenge to the death penalty."); Randall L. Kennedy, *McCleskey v. Kemp: Race, Capital Punishment, and the Supreme Court*, 101 *HARV. L. REV.* 1388, 1388 (1988) ("The Court's decision in *McCleskey v. Kemp* was immediately beset by sharp criticism and . . . outright denunciation.")

¹⁷³ Elizabeth Weill-Greenberg, *Philadelphia D.A. Asks Court to Declare Death Penalty System Unconstitutional*, *THE APPEAL* (Jul. 15, 2019), <https://theappeal.org/philadelphia-d-a-asks-court-to-declare-death-penalty-system-unconstitutional> [<https://perma.cc/5TZ8-95S3>].

¹⁷⁴ C.J. Ciaramella, *Philadelphia D.A. Larry Krasner Argues PA Death Penalty Is Unconstitutional*, *REASON* (July 15, 2019, 10:00 PM), <https://reason.com/2019/07/15/philadelphia-d-a-larry-krasner-argues-pa-death-penalty-is-unconstitutional/> [<https://perma.cc/SPP4-M2W6>].

described it as “inhumane, expensive, and racially-biased.”¹⁷⁵ On the other end of the offense spectrum, reform-minded district attorneys have rejected the view that they need to prosecute low-level, misdemeanor crimes that populate the criminal justice system but rarely show up in criminal law courses. Many have declined to prosecute marijuana crimes, disorderly conduct charges brought against summer 2020 protestors,¹⁷⁶ and—in a sharp rebuke of broken windows policing—various “quality of life” crimes.¹⁷⁷ Somewhere between the death penalty and low-level offenses, a prosecutor like Chicago’s Kim Foxx, has implemented a policy of only prosecuting felony shoplifting for thefts involving stolen material worth \$1000 or more—a policy that has come under criticism but is framed as an attempt to conserve prosecutorial resources for gun violence.¹⁷⁸ Questions of political sensibility aside, these approaches to penal governance strike at core issues in substantive criminal law theory that are drilled into students during their first year of law school. Some of these include criminal law’s function as an expression of moral condemnation, underlying theories of punishment, and what kinds of behavior warrant legal sanction.

Reform-minded prosecutors have also rethought criminal adjudication in ways that may have implications for criminal procedure and evidence law.

¹⁷⁵ *On the Issues*, PARISA FOR JUST., <https://parisaforjustice.com/on-the-issues> [https://perma.cc/9DGN-D7C9].

¹⁷⁶ See Katie Shepherd & Mark Guarino, *Liberal Prosecutors Face Backlash Over Lenient Charges Following Civil Unrest and Looting*, WASH. POST (Aug. 12, 2020), <https://www.washingtonpost.com/nation/2020/08/12/chicago-portland-protester-charges> [https://perma.cc/29LA-GEH8] (“The newly seated top prosecutor in Portland’s Multnomah County said his office will not prosecute cases of disorderly conduct, interfering with a peace officer or rioting . . .”). But see Katie Meyer, *Activists Spar with Krasner Over Protest-Related Charges, Boo Him Into His Office*, WHY-FM (July 13, 2020), <https://why.org/articles/activists-spar-with-krasner-over-protest-related-charges-boo-him-into-his-office/> [https://perma.cc/K9KC-SANE] (stating that Larry Krasner’s office levied charges against protesters).

¹⁷⁷ Matt Charnock, *Boudin Will Not Prosecute Prostitution, Public Camping, and Other ‘Quality-Of-Life Crimes’ Once Sworn In*, SFIST (Nov. 16, 2019), <https://sfist.com/2019/11/16/boudin-will-not-prosecute-prostitution-public-camping-and-other-quality-of-life-crimes-once-sworn-in> [https://perma.cc/UWB3-VPBP]; Taylor Pettaway, *Incoming Top Prosecutor Rachael Rollins Firm but Flexible on ‘No-prosecute’ Offenses*, BOS. HERALD, <https://www.bostonherald.com/2018/11/29/incoming-top-prosecutor-rachael-rollins-firm-but-flexible-on-no-prosecute-offenses> [https://perma.cc/Q5ZW-TTHY] (last updated Dec. 3, 2018, 4:59 PM); Eoin Higgins, *Progressive DA Rachael Rollins Hasn’t Stopped Prosecuting Petty Crimes, Despite Pledge. Police Are Still Furious*, THE INTERCEPT (Mar. 24, 2019, 6:00 AM), <https://theintercept.com/2019/03/24/rachael-rollins-da-petty-crime> [https://perma.cc/4C95-MDEU]. See generally John E. Foster, Note, *Charges to be Declined: Legal Challenges and Policy Debates Surrounding Non-Prosecution Initiatives in Massachusetts*, 60 B.C. L. REV. 2511, 2514 (2019) (arguing that non-violent crimes relating to quality-of-life should not be punished with jail time); Jessica A. Roth, *Prosecutorial Declination Statements*, 110 J. CRIM. L. & CRIMINOLOGY 477 (2020) (same); Roger A. Fairfax, Jr., *Prosecutorial Nullification*, 52 B.C. L. REV. 1243 (2011) (same).

¹⁷⁸ Mari Cohen, *Kim Foxx Aims to Rewrite an ‘Inequitable’ Legal Justice System as Challengers Fight to Topple Her*, THE APPEAL (Mar. 16, 2020), <https://theappeal.org/kim-foxx-aims-to-rewrite-an-inequitable-legal-justice-system-as-challengers-fight-to-topple-her> [https://perma.cc/XD8G-KS8W].

The most publicized shift concerns pretrial detention and bail. Between 2000 and 2015, the growth of pretrial detainees—people who are still considered legally innocent—accounted for ninety-five percent of the overall jail population growth.¹⁷⁹ This new cohort of prosecutors appear to be more mindful about the social, economic, and communal costs of a pretrial detention regime that has drifted away from its original purpose of ensuring appearance at trial to a system that superficially assesses whether people accused of crimes are actually dangerous.¹⁸⁰ Whereas bail reform has had mixed success in courts and legislative arenas, prosecutors are taking bold steps to reign in reliance on money bail in places like Durham¹⁸¹ and Philadelphia¹⁸² and have outright ceased the use of the practice in jurisdictions like Prince George's County¹⁸³ and San Francisco.¹⁸⁴ This side of bail reform, like the larger project, is rejiggering basic legal assumptions about pretrial liberty.¹⁸⁵ Moving into the adjudicative process, prosecutors in

179 CHRISTINE S. SCOTT-HAYWARD & HENRY F. FRADELLA, PUNISHING POVERTY: HOW BAIL AND PRETRIAL DETENTION FUEL INEQUALITIES IN THE CRIMINAL JUSTICE SYSTEM 129 (2019). See generally SHIMA BARADARAN BAUGHMAN, THE BAIL BOOK: A COMPREHENSIVE LOOK AT BAIL IN AMERICA'S CRIMINAL JUSTICE SYSTEM (2017).

180 See, e.g., *Stack v. Boyle*, 342 U.S. 1, 9 (1951) (“The question when application for bail is made relates to each one’s trustworthiness to appear for trial and what security will supply reasonable assurance of his appearance.”); Sandra G. Mayson, *Dangerous Defendants*, 127 YALE L.J. 490, 506 (2017) (describing the waves of bail reform and noting how lower courts regularly find that federal pretrial detention is warranted without rigorous analysis of whether detention is an excessive response to the threat at issue); Hon. Eric T. Washington, *Brennan Lecture, State Courts and the Promise of Pretrial Justice in Criminal Cases*, 91 N.Y.U. L. REV. 1087, 1089 (2016) (suggesting that one reason why bail reform is necessary may be “because judges—uneasy about the presumption of innocence and the limited authority and resources at their disposal to otherwise address issues of dangerousness—decided to use the authority they did have in a way that was inconsistent with the purpose of money bail”); Kimberly Kessler Ferzan, *Preventive Justice and the Presumption of Innocence*, 8 CRIM. L. & PHIL. 505, 523 (2014) (“We have every reason to fear that our current security fetishism leads to overreaction and the improper sacrifice of individual liberties.”).

181 *Statement from Durham County District Attorney Satana Deberry on Recent Protests*, DURHAM DISTRICT ATT’Y’S OFF. (June 2, 2020), <https://medium.com/durham-district-attorneys-office/statement-from-durham-county-district-attorney-satana-deberry-on-recent-protests-36dbd312d2cb> [<https://perma.cc/7FHZ-54EW>].

182 *But see generally* PHILA. BAIL FUND, RHETORIC VS. REALITY: THE UNACCEPTABLE USE OF CASH BAIL BY THE PHILADELPHIA DISTRICT ATTORNEY’S OFFICE DURING THE COVID-19 PANDEMIC (2020) (arguing that bail practices in Philadelphia have not changed).

183 Lynh Bui, *Prosecutors in Prince George’s Will no Longer Recommend Cash Bail for Defendants*, WASH. POST (Sept. 15, 2019), https://www.washingtonpost.com/local/public-safety/prosecutors-in-prince-georges-will-no-longer-recommend-cash-bail-for-defendants/2019/09/15/27a1f274-d4bf-11e9-9343-40db57cf6abd_story.html [<https://perma.cc/NN86-YU69>].

184 Evan Sernoffsky, *San Francisco DA Chesa Boudin Ends Cash Bail for All Criminal Cases*, S.F. CHRON., <https://www.sfchronicle.com/crime/article/San-Francisco-DA-Chesa-Boudin-ends-cash-bail-for-14996400.php> [<https://perma.cc/5XEV-L65M>] (Jan. 29, 2020, 8:43 AM).

185 See, e.g., Jocelyn Simonson, *Bail Nullification*, 115 MICH. L. REV. 585, 590 (2017) (discussing the development of community bail funds “call[] into question the widespread assumption that the

Mississippi and Kansas have warmed to the legislative trend toward open-file discovery policies, which should, in theory, address the longstanding issue¹⁸⁶ of prosecutors failing to disclose exculpatory evidence.¹⁸⁷ Open-file policies are no panacea.¹⁸⁸ But if implemented correctly, they have the potential to shift discovery norms.¹⁸⁹ As such, these policies are great fodder for classroom discussions on professional development since the norm of prosecutorial misconduct is underdiscussed in law school.¹⁹⁰

A few developments in the world of progressive prosecution sit at the intersection of evidence and criminal procedure. Some of these prosecutors grapple more publicly with the empirical fact that some police officers lie,¹⁹¹ and have refused to bring cases brought by cops with documented histories

community and the defendant sit on opposite sides of a scale of justice” and “undermine the bedrock assumptions” of money bail’s constitutionality).

¹⁸⁶ See also KATHLEEN RIDOLFI & MAURICE POSSLEY, NORTHERN CAL. INNOCENCE PROJECT, PREVENTABLE ERROR: A REPORT ON PROSECUTORIAL MISCONDUCT IN CALIFORNIA 1997–2009 37 (2010) (cataloguing dozens of cases in which prosecutors failed to turn over exculpatory evidence over a ten-year period in California).

¹⁸⁷ See generally FAIR & JUST PROSECUTION, 21 PRINCIPLES FOR THE 21ST CENTURY PROSECUTOR 18 (2018), https://www.brennancenter.org/sites/default/files/publications/FJP_21Principles_FINAL.pdf [<https://perma.cc/25MB-G4G4>].

¹⁸⁸ See generally Ben Grunwald, *The Fragile Promise of Open-File Discovery*, 49 CONN. L. REV. 771 (2017) (empirically contesting the efficacy of open-file discovery regimes and arguing that such policies would be more effective if combined with funding for indigent defense and are attentive to adaptive behavior by police and prosecutors).

¹⁸⁹ *Id.*; see also Sklansky, *Handbook*, *supra* note 7, at 35 (suggesting that “the devil is in the details” when it comes to open-file discovery and noting that such policies need to minimally include “all potentially relevant evidence and all information that might lead to potentially relevant evidence” and be provided to all defendants, and not just defendants who request it or decline to plead guilty).

¹⁹⁰ Lara A. Bazelon, *Hard Lessons: The Role of Law Schools in Addressing Prosecutorial Misconduct*, 16 BERKELEY J. CRIM. L. 391, 407 (2011) (arguing that law students who seek to be future prosecutors and criminal defense attorneys need to learn about prosecutorial misconduct before they enter practice and proposing an approach that blends black letter instruction with clinical skills development); Adam M. Gershowitz, *Prosecutorial Shaming: Naming Attorneys to Reduce Prosecutorial Misconduct*, 42 U.C. DAVIS L. REV. 1059, 1063–64 (2009) (observing that “district attorney’s offices hire many junior prosecutors straight out of law school where they learn a considerable amount of doctrinal law but very little about how to make ethical decisions in everyday situations,” and going on to note that once these students are hired, “district attorneys’ offices offer insufficient training to avoid the potential for misconduct that lurks around every corner”).

¹⁹¹ See Steven Zeidman, *From Dropsy to Testilying: Prosecutorial Apathy, Ennui, or Complicity?*, 16 Ohio St. J. Crim. L. 423, 425 (2019) (“Commentators, scholars, and practitioners—judges and prosecutors, as well as defense attorneys—have long acknowledged that police perjury is an ever-present reality.”); I. Bennett Capers, *Crime, Legitimacy, and Testilying*, 83 IND. L.J. 835, 836 (2008) (describing how under-enforcement of officer lying impacts defendants of color). Lying by police officers isn’t limited to in-court testimony; it is a pervasive feature throughout the process of investigations and interrogations. RICHARD A LEO, *POLICE INTERROGATION AND AMERICAN JUSTICE* 34–35 (2009) (describing the ways in which contemporary police interrogations are “steeped in artifice, deception, and fraud”).

of lying on the stand and in their police reports.¹⁹² “Brady lists” are not new, but some district attorneys, like those in Orlando and Philadelphia, are making lists of these unreliable officers public,¹⁹³ while San Francisco’s lead prosecutor had a policy of declination for cases that relied solely on uncorroborated reports from officers with prior serious misconduct.¹⁹⁴ Despite the imperfection of “Brady lists,”¹⁹⁵ these policies challenge uncritical public assumptions about police credibility and slightly shift very lopsided evidentiary scales toward defendants.¹⁹⁶ Most generally, conviction integrity units (CIUs) are slowly emerging in “progressive” and more “standard” offices across the country. Such units seek to “prevent, identify, and remedy” false convictions.¹⁹⁷

In their best iterations, these backward-looking accountability measures look broadly at criminal justice errors, with a particular focus on police and prosecutorial misconduct, and identify the “causes of, and remedies for, wrongful convictions.”¹⁹⁸ Effective conviction integrity units break from the

¹⁹² Eli Hager & Justin George, *One Way to Deal With Cops Who Lie? Blacklist Them, Some DAs Say*, THE MARSHALL PROJ. (Jan. 17, 2019, 6:00 AM), <https://www.themarshallproject.org/2019/01/17/one-way-to-deal-with-cops-who-lie-blacklist-them-some-das-say> [<https://perma.cc/KT6M-AFZF>].

¹⁹³ Tess Sheets & Jeff Weiner, *State Attorney Aramis Ayala Releases List of Central Florida Cops with Questionable Credibility as Witnesses*, ORLANDO SENTINEL (July 14, 2020, 6:14 PM), <https://www.orlandosentinel.com/news/breaking-news/os-ne-orange-osceola-brady-list-aramis-ayala-20200714-rt0j6cmfynd5rpiqsuvtt3g4u-story.html> [<https://perma.cc/TC63-LL95>]; Julie Shaw & Chris Palmer, *Here are the 29 Philly Cops on the DA’s ‘Do Not Call’ List*, PHILA. INQUIRER (Mar. 6, 2018), www.inquirer.com/philly/news/crime/29-philly-officers-do-not-call-list-krasner-20180306.html [<https://perma.cc/TC63-LL95>].

¹⁹⁴ Matt Kawahara, *Boudin Bans Prosecutions Based on Sole Testimony of Untrustworthy Police Officers*, S.F. CHRON., <https://www.sfchronicle.com/bayarea/article/Boudin-bans-prosecutions-based-on-sole-testimony-15342242.php> [<https://perma.cc/4BHD-RDXG>] (June 16, 2020, 11:23 AM).

¹⁹⁵ See Bert, *The Trouble with Brady Lists*, PROSECUTORIAL MISCONDUCT AND ACCOUNTABILITY: THE OPEN FILE (Jan. 23, 2019), <https://www.prosecutorialaccountability.com/2019/01/23/the-trouble-with-brady-lists/> [<https://perma.cc/PQP6-UM3A>] (noting that Brady lists do not exist in every jurisdiction, information about an officer’s wrongdoing may not travel if he or she moves to another jurisdiction, and of course sometimes prosecutors do not disclose relevant information).

¹⁹⁶ See Rachel Moran, *Contesting Police Credibility*, 93 WASH. L. REV. 1339, 1343-44 (2018) (arguing that the law creates evidentiary imbalances in the government’s favor by making police misconduct records confidential and sometimes inaccessible, while prosecutors have easy access to a defendant’s criminal history and many ways to introduce that history into the record). See generally Jonathan Abel, *Brady’s Blind Spot: Impeachment Evidence in Police Personnel Files and the Battle Splitting the Prosecution Team*, 67 STAN. L. REV. 743 (2015) (describing how state statutes, local policies, and police union obstructionism prevent Brady disclosure of police misconduct evidence which leads to defendants being deprived of critical impeachment evidence).

¹⁹⁷ *Conviction Integrity Units*, THE NAT’L REGISTRY OF EXONERATIONS, <https://www.law.umich.edu/special/exoneration/Pages/Conviction-Integrity-Units.aspx> [<https://perma.cc/82FD-TMLA>] (listing jurisdictions with active conviction integrity units).

¹⁹⁸ Bruce Green & Ellen Yaroshfsky, *Prosecutorial Accountability 2.0*, 92 NOTRE DAME L. REV. 51, 84-85 (2016) (describing conviction integrity units as “the most significant internal prosecutorial reform at the state level” and suggesting prosecutors’ creation of these units is an implicit acknowledgement of the need to address prosecutorial conduct systematically). See generally JOHN

trend of innocence-denying prosecutors who disregard evidence of convicted people's innocence.¹⁹⁹ Ultimately, politics overlay all of these developments. The backlash that many of these attorneys are receiving—hate speech, a noose in the mail, stripped authority from the executive branch, ethical complaints from police unions—all belie the depoliticized representation of prosecution in criminal legal education and signal the stakes for future penal bureaucrats.²⁰⁰

Reform-minded prosecutors are shifting practices of punishment and corresponding criminal justice discourse. Their approaches to criminal justice have the potential to jumpstart different approaches to the criminal justice curriculum. The jury is still out on *how* this new brand of lawyering will impact people's lives—whether it represents a meaningful step forward or serves as an illusory of reform.²⁰¹ But since many of these reforms are explicitly about race and poverty, and in other instances tacitly implicate of these concerns, they are productive entry points for conversations that scholars have recognized are lacking in criminal legal education.

C. Indigent Defense Rebooted

Legal aid has long been concerned with issues tied to race, poverty, gender, and inequality, but the past two decades have witnessed some critical changes in indigent defense. Two, in particular, are noteworthy. The first is the shift toward holistic defense—a form of legal representation that focuses on the ways ensnarement in the criminal justice system can impact other areas

HOLLWAY, QUATTRONE CTR. FOR THE FAIR ADMIN. OF JUST., CONVICTION REVIEW UNITS: A NATIONAL PERSPECTIVE (2016) (surveying CIUs nationwide and identifying twenty-three best practices for effectiveness).

¹⁹⁹ See Lara Bazelon, *Ending Innocence Denying*, 47 HOFSTRA L. REV. 393, 439-43 (2018) (describing the rise of CIUs, a shift in some jurisdictions toward independent investigations of claims of innocence, and increased public admissions of mistakes and misconduct).

²⁰⁰ See Nicole Lewis & Eli Hager, *Facing Intimidation, Black Women Prosecutors Say: "Enough"*, THE MARSHALL PROJECT (Jan. 16, 2020, 2:00 PM), <https://www.themarshallproject.org/2020/01/16/facing-intimidation-black-women-prosecutors-say-enough> [<https://perma.cc/LG5F-CUGD>] (discussing the resistance, threats, and abuse faced by reform-minded prosecutors); Rashad Robinson, *The People Who Undermine Progressive Prosecutors*, N.Y. TIMES (June 11, 2020), <https://www.nytimes.com/2020/06/11/opinion/george-floyd-prosecutors.html> [<https://perma.cc/FGC5-QTFJ>] (highlighting the efforts of police unions, judges, and elected officials to obstruct criminal justice reform efforts).

²⁰¹ See Note, *The Paradox of "Progressive Prosecution"*, 132 HARV. L. REV. 748, 759 (2018) ("Mainstream progressive prosecution is silent on the project of redistributing power, and instead focuses on encouraging highly empowered individuals to usher in fairer policies."). But see David Jackson, Todd Lighty, Gary Marx, & Alex Richards, *Kim Foxx Drops More Felony Cases As Cook County State's Attorney Than Her Predecessor, Tribune Analysis Shows*, CHI. TRIB. (Aug. 10, 2020, 5:00 AM), <https://www.chicagotribune.com/investigations/ct-kim-foxx-felony-charges-cook-county-2020081-o-ldvrmqv6bd3hpsuqha4duehmu-story.html> [<https://perma.cc/F9FP-A4BF>] (noting how, during her first three years in office, reform prosecutor Kim Foxx dropped all charges against approximately thirty percent of felony defendants).

of social life (e.g., housing, family relations, employment, receipt of public benefits). The other trend is a more institution-wide recognition of racial inequality in the criminal justice system. This recognition of racial inequality looks beyond individual bias and acknowledges the ways defense attorneys can be implicated in racial subjugation. Interestingly, these trends reflect issues that are often glossed over in the criminal justice curriculum but can potentially shape how future attorneys approach their provision of legal services to people accused of crimes.

Holistic defense takes a more aggressive approach to the interlocking problems of poverty and mass incarceration by addressing the underlying criminal charge the defendant is faced with and focusing on preventing future involvement with the criminal justice system.²⁰² The approach is interdisciplinary, calling for “collaboration with other professionals—social workers, job counselors, housing advocates and the like—in helping the client advance a goal of noninvolvement in the system.”²⁰³ Holistic defense also includes teams of lawyers who work across practice areas (e.g., public benefits, family law, housing, immigration) in an attempt to address the potential collateral consequences that may flow from criminal justice contact or a conviction.²⁰⁴ These consequences can include termination of parental rights, deportation, loss of a job, or eviction from public housing.²⁰⁵ For example, if an undocumented immigrant is charged with a misdemeanor, the defense attorney would work with an in-house immigration attorney and social worker to represent the defendant in the criminal proceeding while helping stave off potential deportation. The emergence of a holistic defense model is a response to the rise of collateral consequences and the attendant demands that have been placed on indigent defense providers.²⁰⁶

The holistic model has gained traction across the country and has the potential to address our penal status quo. Although this form of advocacy was

²⁰² Kim Taylor-Thompson, *Tuning Up Gideon's Trumpet*, 71 *FORDHAM L. REV.* 1461, 1505 (2003) (“Holistic advocacy means working with the client to find ways to prevent future involvement with the criminal justice system as well as working to disentangle her from her current criminal charge.”).

²⁰³ *Id.*

²⁰⁴ Robin Steinberg, *Heeding Gideon's Call in the Twenty-First Century: Holistic Defense and the New Public Defense Paradigm*, 70 *WASH. & LEE L. REV.* 961, 963 (2013) (“[H]olistic defense relies on an interdisciplinary team of experts . . . providing *seamless access* to legal services and non-legal services under one roof.”).

²⁰⁵ *Id.* at 988.

²⁰⁶ Alexandra Natapoff, *Gideon's Servants and the Criminalization of Poverty*, 12 *OHIO ST. J. CRIM. L.* 445, 459-60 (2015) (describing the “expansive caretaking function” of public defenders that has only expanded with “the vast array of collateral consequences that the criminal system now imposes on offenders”).

popularized by legal services organizations in New York City,²⁰⁷ it has made its way to organizations in Wisconsin, Texas, Tennessee, California, and other jurisdictions.²⁰⁸ More importantly, holistic defense works. One empirical study found that it reduced “custodial sentence[s] by 16% and reduced “expected sentence length by 24%.”²⁰⁹ Michael Pinard compellingly argues that legal education should include holistic representation in its conception of lawyering.²¹⁰ Including the holistic perspective into legal education might get law students to analyze legal problems broadly, encourage them to “explor[e] possible connections to other legal and non-legal issues” facing criminal defendants, and get students to understand “that focusing solely on the criminal charge may not address the underlying issues that confront the client.”²¹¹ Holistic defense presents an alternative way to address problems in the criminal justice system and can broaden traditional conceptions of “defense” in the core criminal justice curriculum.

The other significant development in indigent defense has been the explicit recognition of and attention to racial subordination in the criminal justice system. Since poverty is a necessary condition to indigent defense, and because indigence has longstanding association with race, racial subordination has long been a concern for indigent defense.²¹² However, two things are particularly unique: the more detailed institutional recognition of race’s role in the criminal justice system and the increased recognition of the ways indigent defense can be complicit in racialized mass incarceration.

Individual and national organizations have become more assertive about infusing racial justice principles into their work. In California, Jeff Adachi led the San Francisco Public Defender’s Office for most of the twenty-first century until his death in 2019. The office is considered one of the best in the country. Adachi helped develop a committee that focused explicitly on racial justice issues and collaborated with other Bay Area organizations to conduct

207 Cara Tabachnick, *Can the ‘Holistic Approach’ Solve the Crisis in Public Defense?*, CRIME REP. (Mar. 8, 2011), <https://thecrimereport.org/2011/03/08/2011-03-can-the-holistic-approach-solve-the-crisis-in-public> [<https://perma.cc/3LGJ-Q4FY>].

208 See, e.g., Shelby Cnty. Pub. Def., *The Jericho Project*, MEDIUM (June 3, 2015), <https://medium.com/@defendshelbyco/the-jericho-project-2c1c8e23dbe> [<https://perma.cc/CG8K-H9J9>] (Tennessee and Wisconsin); *Holistic Defense*, HARRIS CNTY. PUB. DEF. OFF., <http://harriscountypublicdefender.org/holistic-defense-2> [<https://perma.cc/4DLG-L92B>] (Texas); Tracey Kaplan, *‘Holistic’ Criminal Defense Gains Footing in Bay Area*, JUV. JUST. (Mar. 27, 2014), <https://jjie.org/2014/03/27/holistic-criminal-defense-gains-footing-in-bay-area> [<https://perma.cc/LJ27-W4ZH>] (California).

209 James M. Anderson, Maya Buenaventura & Paul Heaton, *The Effects of Holistic Defense on Criminal Justice Outcomes*, 132 HARV. L. REV. 819, 883 (2019).

210 Michael Pinard, *Teaching Justice-Connectivity*, 80 LA. L. REV. 95, 102-04 (2019).

211 *Id.* at 103-04.

212 See Ossei-Owusu, *supra* note 82, at 1167 (“[D]ifferent concerns about race surfaced for the key protagonists in indigent defense history.”).

litigation trainings that prepared attorneys on how to address race “in the context of voir dire, police misconduct, and search and seizure.”²¹³ ArchCity Defenders in St. Louis describes itself as a “holistic legal advocacy organization that combats the criminalization of poverty and state violence, especially in communities of color.”²¹⁴ The organization also “envisions a society liberated from systems of oppression where the promise of justice and racial equity is realized”²¹⁵ The Legal Aid Society in New York City, one of the oldest and largest public defender offices in the country, established a Racial Justice Unit that works with all of its practice areas “to ensure that racial justice and equity [principles] are fully integrated . . . [into the organization’s] work.”²¹⁶ In 2016, the National Association for Public Defense developed a Racial Justice Committee whose goal was to address “racial bias at every step of the criminal justice system” by working with community organizations, developing litigation strategies for defenders across the country, and collaborating with empirical researchers (which has produced some of the available empirical scholarship on indigent defense).²¹⁷ These efforts sit within a long history of racial justice organizing; they also represent institutionally specific attempts to address issues that are not robustly addressed in the traditional education of public defenders despite being consequential to their practice.²¹⁸

Indigent defense providers have also been more introspective about how their attorneys can be complicit in racial subordination. Spawned by a growing body of implicit bias scholarship that turned its attention to defense attorneys, many organizations have begun to interrogate their taken-for-granted assumptions about their racial politics. This recognition is important for indigent defense attorneys of all racial groups since “confidence in one’s own egalitarianism” can serve as an obstacle to identifying racial bias, “meaning that individuals who became [public defenders] in order to fight racial injustice may be just as susceptible to the effects of [implicit biases] as

213 JEFF ADACHI, JAMES WILLIAMS, AMY CAMPANELLI, KEIR BRADFORD-GREY & DERWYN BUNTON, BLUEPRINT FOR RACIAL JUSTICE 4, https://sflawlibrary.org/sites/default/files/Racial%20Justice%20Blueprint_1.pdf [<https://perma.cc/BTM6-CG4S>].

214 *Mission, Vision, Values*, ARCHCITY DEFS., <https://www.archcitydefenders.org/about-us/mission-vision-values> [<https://perma.cc/93HC-P9MF>].

215 *Id.*

216 *Racial Justice Unit*, LEGAL AID SOC’Y, <https://www.legalaidnyc.org/programs-projects-units/racial-justice-unit> [<https://perma.cc/G7Q9-CYBM>].

217 *Racial Justice Committee*, NAT’L ASS’N FOR PUB. DEF., <https://www.publicdefenders.us/racialjusticecommittee> [<https://perma.cc/459R-LB9R>].

218 Sarah Lustbader & Vaidya Gullapalli, *This Work Is So Urgent: A New Association to Develop and Support Black Public Defenders*, THE APPEAL (Jan. 28, 2019), <https://theappeal.org/this-work-is-so-urgent-a-new-association-to-develop-and-support-black-public-defenders/> [<https://perma.cc/2UGB-M9FZ>].

those with less noble motives.”²¹⁹ The National Legal Aid and Defender Association, the largest umbrella organization for civil and criminal legal services, has also recognized the role of implicit bias in public interest law. Acknowledging that bias can structure legal aid organizations and interactions with clients, it has called on its member organizations to adopt implicit bias trainings, recruit diverse staff (lawyers and non-lawyers alike), and engage in periodic evaluations of racial justice strategies.²²⁰ Its Racial Justice Action Plan disentangles the conflation of poverty with racism that has allowed criminal legal aid attorneys to have unchecked assumptions about their racial politics and commitments.²²¹

The observations of John Rapping, a national indigent defense leader and 2014 MacArthur “Genius” Award recipient, are also instructive.²²² Gideon’s Promise, formerly the Southern Public Defender Training Center, is a non-profit organization that prepares new public defenders every summer and trains existing public defenders across the country.²²³ Speaking to defense attorneys, Rapping says this:

There is no reason to believe that those of us who choose criminal defense as a profession are immune to the influences of [implicit racial bias]. In fact, if our biases are shaped by the world around us, there is every reason to believe that those of us who spend our days immersed in such a racist criminal justice system develop even deeper [implicit racial bias].²²⁴

In an effort to generate more equitable forms of criminal justice lawyering, these interrogations of defender bias attempt to disabuse attorneys of the easy assumptions about the criminal defense function that legal education sometimes validates.

²¹⁹ Richardson & Goff, *supra* note 4, at 2634.

²²⁰ *The FAIR Pledge: We Commit to Fighting Against Implicit Bias and Racial Inequality*, NAT’L LEGAL AID & DEF. ASS’N, www.nlada.org/issues-and-initiatives/racial-justice/fair-pledge [https://perma.cc/ZZC8-UY7K].

²²¹ NAT’L LEGAL AID & DEF. ASS’N, RACIAL JUSTICE ACTION PLAN 1 (2018), https://www.nlada.org/sites/default/files/pictures/NLADA_Racial_Justice_Action_Plan_%28Oct%202018%29.pdf [https://perma.cc/8Q5T-DBCX] (“We do not conflate poverty with racism. To say that because the majority of our clients are persons of color, we necessarily perform racial justice work would be to simplify the difficult issues of poverty, racial injustice, and racial injustice that flows from poverty.” (footnotes omitted)).

²²² *Jonathan Rapping*, ATLANTA’S J. MARSHALL L. SCH., <https://www.johnmarshall.edu/faculty-staff/jonathan-rapping> [https://perma.cc/AAS5-8UJZ].

²²³ See Jonathan A. Rapping, *Implicitly Unjust: How Defenders Can Affect Systemic Racist Assumptions*, 16 N.Y.U. J. LEGIS. & PUB. POL’Y 999, 1045 (2013) (explaining the work of the Gideon’s Promise organization).

²²⁴ *Id.* at 1019-20; see also Richardson & Goff, *supra* note 4, at 2648 (“Despite the fact that many public defenders are committed to zealous and effective advocacy, there is abundant reason for concern that implicit racial biases may affect their decisions.”).

Indigent defense organizations' recognition of system-wide racial bias, and the trend toward holistic advocacy, are important for a few reasons. Both speak to dimensions of the legal system that have long been overlooked by defense attorneys: the poverty-exacerbating collateral consequences of criminal justice contact, and the ways defenders can be complicit in racial subordination. Attention to poverty and racial bias also provide additional entry points for law students who are interested in racial and economic justice, but who may not have considered indigent defense to be a professional mechanism to effectuate that commitment (opting instead for civil legal aid, appellate legal advocacy, or work in government). Finally, this growing recognition complicates the simplistic narrative that indigent defense automatically equals racial and economic justice. This assumption may be difficult for white and minority defenders to grasp. Many of them have committed their careers to social justice, and in some instances, sacrificed more lucrative careers. The ideas that they can harbor biases, are insufficiently attentive to poverty, and/or reproduce unequal outcomes—all of which are unusual propositions in their legal education—might be particularly difficult to accept, despite the practice reality. But the trends toward holistic, race-conscious indigent defense corrects some of the many oversights in legal education.

III. PROVOCATION AND CURRICULAR REFORM

Thus far, I have offered two strands of a larger story. The first points to the ways legal education socializes law students and underprepares them for the realities of the penal bureaucracy. The second highlights recent developments in the legal profession that are insufficiently attended to in the criminal justice curriculum. This Part weaves these two stories. I situate these threads against the exigent political circumstances showcased during the protests of summer 2020 and reorganization of education inaugurated by COVID-19. With all of this in mind, my normative inquiry is this: How can a legal industry that has long professed the ideals of equal justice, and recently condemned a racialized system of punishment, begin to harmonize criminal legal education with the practical realities of the penal bureaucracy? Here I focus on some potential strategies.

A. *Data-Collection Reform*

Embarrassingly, there is little information about the demographic profiles of prosecutors and indigent defense attorneys, and that needs to change immediately. This information gap is especially bizarre for a legal profession that emphasizes evidence-based practices and marvels at sophisticated,

empirically based research.²²⁵ We do not know enough about the prosecutors responsible for criminal justice governance or the indigent defense attorneys tasked with protecting cherished constitutional criminal procedure rights. Yet the various studies discussed in Part II of this Article demonstrate that this demographic information can be consequential for criminal defendants. I am not the first person to offer this lamentation. On the prosecutorial side, David Sklansky has regularly called attention to the need for more empirical information about who engages in the day-to-day work of being a line prosecutor.²²⁶ On the indigent defense side, Sandra Simkins has similarly pointed out the National Association for Law Placement's (NALP) disinterest in collecting information about women who practice in public interest law.²²⁷ Ultimately, the lack of consistent and public information about these parts of the penal bureaucracy is a statement about the legal profession's empirical commitments.

NALP and law schools are in the best positions to fill in the gaps of information about prosecutors and public defenders. On its website, NALP states that "it believes in fairness, facts and the power of a diverse community."²²⁸ In a summer 2020 protest inspired letter, the organization acknowledged that it "has long championed the fight for greater diversity, equity, and inclusion in the legal profession, but at this moment in time, we see that our historic efforts are not enough."²²⁹ There is no reason to doubt the organization's sincerity. It has served as a principal promoter of inclusion principles in pre-law school programs, legal education, judicial clerkships, and U.S. law firms. But the collection of data on indigent defense and prosecutors—which it has the organizational capacity to collect—is simply a weak spot that needs to be corrected.

²²⁵ Pamela Metzger & Andrew G. Ferguson, *Defending Data*, 88 S. CAL. L. REV. 1057, 1066 (2015) (describing the public defender systems as "largely data-less environments" and arguing that the information deficits mean "public defenders have no empirical evidence to guide them in prioritizing effective practices and avoiding common errors"); Theodore Eisenberg, *The Origins, Nature, and Promise of Empirical Legal Studies and a Response to Concerns*, 2011 U. ILL. L. REV. 1713, 1713-14 (discussing the emergence of empirical legal studies, law and society, and law and economics); M. ELAINE NUGENT-BORAKOVE, LISA M. BUDZILOWICZ & GERARD RAINVILLE, EXPLORING THE FEASIBILITY AND EFFICACY OF PERFORMANCE MEASURES IN PROSECUTION AND THEIR APPLICATION TO COMMUNITY PROSECUTION (2009) (describing an empirical study on community prosecution).

²²⁶ Sklansky, *Prosecutors and Democracy*, *supra* note 99, at 296; Sklansky, *Handbook*, *supra* note 7, at 40; BIES ET AL., *supra* note at 104, at 7.

²²⁷ Simkins, *supra* note 115, at 863.

²²⁸ *Homepage*, NAT'L ASS'N FOR L. PLACEMENT, <https://www.nalp.org> [<https://perma.cc/Z8M9-7NNX>].

²²⁹ Beth Moeller & James G. Leipold, *NALP Joins Its Members in Fighting Racism*, NALP (June 11, 2020), https://www.nalp.org/fighting_racism [<https://perma.cc/E3G7-7M83>].

Law schools should encourage NALP to collect data on their graduates who go into indigent defense and prosecution, and if the organization declines to do so, they have at least three potential options. First, they could withhold valuable information about their graduates who go into BigLaw. Considering the well-known rankings sensitivity of law schools, and the prisoner's dilemma that would be involved with such withholding, this may be unlikely. Second, they could encourage another organization such as the Law School Admission Council or the Association of American Law Schools to serve as a clearinghouse for this information. Third, they could band together in regional clusters (e.g., Chicagoland, Gulf States, California) and annually collate this information by themselves. This is not extraordinary since many law schools organize academic workshops locally, put together conferences annually, and have deans who collaborate to advocate for their collective interests.²³⁰ All of these approaches would scratch the demographic surface, as they only get at entry-level practitioners and would not be able to capture attrition, lateral movement, and the penal bureaucracy's real-time population. Still, getting this data is relatively low hanging fruit considering the available institutional infrastructures at law schools and legal education associations. Whether it be self-initiated, institutionally compelled, or geographically bounded collaboration, some form of multi-school collaboration could go a long way in getting a better snapshot of the profession.

Better data on public defenders and prosecutors matters. Even if data collection confirms what representative samples have found, and what we can intuit from the larger demographics of the legal profession, getting a better global perspective of who works in these offices is worthwhile. More demographic data will provide a better understanding of prosecutorial offices that already struggle with transparency and indigent defense offices that have gotten a pass because of assumptions about social justice. This information could lead to more quantitative and qualitative research on these areas and render more nuanced descriptions of these areas of criminal practice. Better data and studies can: inform how legal scholars teach in the criminal justice

²³⁰ See, e.g., Cheryl Miller, *Law School Deans Lobby California Court for Diploma Privilege in Virus Era*, LAW.COM (July 02, 2020, 6:47 PM), <https://www.law.com/therecorder/2020/07/02/law-school-deans-lobby-california-court-for-diploma-privilege-in-virus-era> [<https://perma.cc/2HPM-AX4D>] (describing California law deans collective effort to get the state Supreme Court to grant diploma privilege); Carissa Byrne Hessick, *CrimFest! 2019 at Brooklyn Law—Registration Still Open!*, PRAWFSBLOG (Apr. 2, 2019), <https://prawfsblawg.blogs.com/prawfsblawg/2019/04/crimfest-2019-at-brooklyn-law-registration-still-open.html> [<https://perma.cc/85W5-KH5S>] (describing the development of an annual criminal law conference held at Brooklyn Law School).

curriculum; generate more thought on professional development choices; and influence how the general public conceives of the penal bureaucracy.²³¹

B. Student Initiatives

Students are critical players in any attempt to modify criminal legal education and make it more proximate to the penal bureaucracy's practical realities. This is seemingly obvious, but it is also counterintuitive. Student primacy is straightforward because it fits nicely into consumerist frameworks of education that have become popular in the past few decades.²³² The centrality of students to criminal legal education reform is less evident because they are transient individuals. They typically spend three years in law school (sometimes two due to lack of engagement and four if they are part-time students).²³³ Students justifiably focus on grades and their career during law school, and are not optimally organized, which makes them less than desirable sponsors of curricular reform.²³⁴ However, students do have a place in reform efforts. The legacies of the 1980s offer some examples of how student organizing can shape the legal education landscape. The federal court-filing Federalist Society began not as a top-down initiative, but through the frustration of conservative and libertarian law students who believed there was little space for their views in legal education and the legal profession.²³⁵ Critical race theory—the school of thought that helped

231 Green & Yaroshesky, *supra* note 198, at 87 (discussing the shifting public perceptions of prosecutor's conduct, which they refer to as "The Great Criminal Justice Awakening"); JUST. PRO. OFF. OF AM. UNIV., AMERICANS' VIEWS ON PUBLIC DEFENDERS AND THE RIGHT TO COUNSEL: NATIONAL PUBLIC OPINION SURVEY CONDUCTED FOR THE RIGHT TO COUNSEL NATIONAL CAMPAIGN 25 (2017) (indicating, through a public opinion survey on indigent defense, that some people wanted more tax dollars spent on public defenders because of mass incarceration, reducing prison costs, and fighting racial injustice).

232 See Debra Moss Vollweiler, *Law School As A Consumer Product: Beat 'Em or Join 'Em?*, 40 PACE L. REV. 1, 2 (2019) (arguing that the "consumer mindset" can enhance the educational experience of law students).

233 Mitu Gulati, Richard Sander, & Robert Sockloskie, *The Happy Charade: An Empirical Examination of the Third Year of Law School*, 51 J. LEGAL EDUC. 235, 244 (2001) ("We estimate that third-year students at many schools attend only around 60 percent of their large classes. Among the third-year students who do attend class, there appears to be little engagement with course work").

234 N. William Hines, *Are Students A Dean's Primary Constituency?*, 31 U. TOL. L. REV. 629, 630 (2000) ("Students typically are poorly organized and their attempts at self-government are often so feeble that their leaders lack credibility, even on issues that vitally affect student welfare.").

235 See HOLLIS-BRUSKY, *supra* note 19, at 1 (discussing the emergence of the Federalist Society); Roger Pilon, *Cato at the Federalist Society Convention*, CATO (Nov. 19, 2013, 2:13 PM), <https://www.cato.org/blog/libertarians-federalist-society-convention> [<https://perma.cc/WV96-TGDA>] (same); see generally ANN SOUTHWORTH, *LAWYERS OF THE RIGHT: PROFESSIONALIZING THE CONSERVATIVE COALITION* (John M. Conley & Lynn Mather eds., 2008) (exploring the values and identities of conservative and libertarian lawyers); STEVEN M. TELES, *THE RISE OF THE CONSERVATIVE LEGAL MOVEMENT: THE BATTLE FOR CONTROL OF THE LAW* (Ira Katznelson,

diversify the general legal curriculum at the end of the twentieth century—was a partial byproduct of disenchanting law students at Harvard and Berkeley.²³⁶ Hailing these examples is not a call for replication but an attempt to signal the power of students.

Setting aside the more common tactics of student protests, engagement in faculty hiring, and making demands to the dean, students interested in criminal legal education reform have a few particularized strategies at their disposal—all of which involve work. The first involves student outlines. These documents are essential to legal education but often focus, quite reasonably, on the technical, test-based content of the course. Consider a modified practice of student outline generation. In one instance, students thoroughly outline for instructors and effectively fuse the core criminal justice content with more practical insights. Alternatively, outline creation could be an affinity-group specific endeavor (as is often the case now).²³⁷ In this instance, student groups might create outlines that address issues that surface in courses that are relevant to their group mission (e.g., a member of the Latinx Law Students Association – LALSA – pointing out how access to Spanish translators and interpretive difficulties can create due process problems for criminal defendants with limited English proficiency, or a member of OutLaw cataloging how basic conversations about hate crimes and interpersonal violence overlook the LGBTQ community).²³⁸ It is no secret students pass down outlines annually. Over time, these more granular outlines might give students the vocabulary (and confidence) to ask deeper questions about specific areas of law (and possibly force professors to be more rigorous).

Another strategy blends autodidactic approaches with student collaboration. There are some available templates. The National Lawyers Guild sponsors “Disorientation” every year, which includes a handbook on

Martin Shefter & Theda Skocpol eds., 2008) (chronicling the conservative legal movement’s growth from the 1970s to the present).

²³⁶ See Delgado, *supra* note 19, at 1510-14 (explaining that critical race theory may have originated either at Harvard or at Berkeley); Crenshaw et. al, *supra* note 19, at xxi (reinforcing the notion that Harvard was the birthplace of Critical Race Theory).

²³⁷ Meera E. Deo & Kimberly A. Griffin, *The Social Capital Benefits of Peer-Mentoring Relationships in Law School*, 38 OHIO N.U. L. REV. 305, 324 (2011) (describing how students benefit from having multiple outlines and offering the perspective of a member of the Asian Pacific American Law Students Association (APALSA) who received her outline from an outline bank).

²³⁸ See Jordan Blair Woods, *LGBTQ in the Courtroom: How Sexuality and Gender Identity Impact the Jury System*, in CRIMINAL JURIES IN THE 21ST CENTURY: CONTEMPORARY ISSUES, PSYCHOLOGICAL SCIENCE AND THE LAW 67 (Cynthia Najdowski & Margaret Stevenson eds., 2018) (“[I]f a case involves an anti-LGBTQ hate crime, then the prosecution may wish to ask prospective jurors about LGBTQ-related topics in order to expose possible biases against the victim.”); Laura K. Abel, *Language Access in the Federal Courts*, 61 DRAKE L. REV. 593, 602 (2013) (discussing interpreter access as being “a matter of due process”).

how a student can create their own progressive legal education.²³⁹ The handbook provides suggested readings on a variety of social justice issues and “concrete strategies to change the culture of law school using examples from other students who have successfully fought for improvements in their institutions.”²⁴⁰ Students at Boston College, Cornell, Harvard, the University of Miami, and Yale, amongst others, are part of a larger collective called the Law and Political Economy Project.²⁴¹ Students in these groups have developed reading groups, supplemental text for the 1L curriculum, and alternative readings for major courses throughout the law school curriculum.²⁴² These kinds of initiatives require work. But the self-possession that many law students have when it comes to their legal education, along with the fact that Millennials and post-Millennials populated much of the protests of 2020, suggest that students have an appetite both for criminal justice reform and curricular changes in criminal legal education.

C. Faculty Initiatives

Faculty are also crucial to reforming criminal legal education but are part of a larger group of professors that is understood as resistant to change. Law schools’ newfound (or potentially ephemeral) recognition of state-violence against racial minorities provides a unique opportunity to test the commitments of legal education. As Alice Ristroph explains, traditional criminal law courses contribute to racial inequality and injustice, but can be transformed by new pedagogical approaches.²⁴³ This observation applies with equal force to criminal procedure and evidence. Importantly, a few casebooks, scholarly networks, and supplements take mass incarceration, and its correlates seriously.²⁴⁴ There will be some faculty who are either recalcitrant

²³⁹ NAT’L LAWS. GUILD, *DISORIENTATION HANDBOOK: CREATING YOUR OWN PROGRESSIVE LEGAL EDUCATION* (2021 ed.).

²⁴⁰ *Id.* at 5.

²⁴¹ *Engage*, L. & POL. ECON. (LPE) PROJECT, <https://lpeproject.org/engage/> [<https://perma.cc/3AHN-FNZ9>].

²⁴² ALT. LEGAL EDUC., *ALTERNATIVE CURRICULUM SYLLABUS 2019–2020* (2019), https://docs.google.com/document/d/1-F3SHYaR200Iu7kwJtpcOtlws8y9sIbBFblDjYZQ_94/edit [<https://perma.cc/YWQ7-YDVM>].

²⁴³ See Ristroph, *Curriculum*, *supra* note 7, at 1636–38.

²⁴⁴ See generally MARGO SCHLANGER, SHEILA BEDI, DAVID M. SHAPIRO & LYNN S. BRANHAM, *INCARCERATION AND THE LAW: CASES AND MATERIALS* (10th ed. 2020) (developing new curricula for examining the carceral state); Amna Akbar, *Teaching Penal Abolition*, L. & POL. ECON. (July 15, 2019), <https://lpeblog.org/2019/07/15/teaching-abolition/#more-2640> [<https://perma.cc/9GL2-6RGL>] (discussing one account of how to broach the topic of penal abolition in the classroom); LEE & HARRIS, *supra* note 85 (casebook); CYNTHIA LEE, L. SONG RICHARDSON & TAMARA LAWSON, *CRIMINAL PROCEDURE: CASES AND MATERIALS* (2d ed. 2018) (same); NORA DEMLEITNER, DOUGLAS A. BERMAN, MARC L. MILLER & RONALD F. WRIGHT, *SENTENCING LAW AND POLICY: CASES, STATUTES, AND GUIDELINES* (4th ed. 2018) (same); DOROTHY BROWN, *CRITICAL RACE THEORY: CASES, MATERIALS, AND PROBLEMS* 123–

or disinterested in the project of reshaping criminal legal education. The suggestions offered here (and the analysis of this Article) will likely not be for them.

For curious and committed faculty, a few strategies are also at their disposal. For some law professors, the criminal justice system's practical realities are not novel, and some of these issues appear in their scholarship. Much of what I've described is apparent for them, and curricular reform is more of a question of implementation rather than knowledge acquisition. COVID-19 has drastically reordered legal education (and education more broadly) and is forcing teachers of all stripes to rethink their delivery of knowledge. Irrespective of how the pandemic unfolds, there is and will continue to be, a new educational landscape that provides an entry point for experimentation with interdisciplinary and practical approaches to criminal justice courses.

For other instructors, the penal bureaucracy's quotidian violence against marginalized groups may be more foreign or insufficiently understood. For them, the guidance is simply to read more and implement. Law professors who previously worked at firms and as judicial clerks likely had to learn general areas of law quickly. Professors can ascertain a decent grasp on subject matter areas to write scholarly articles, obtain summer funding from their institutions, and apply for large grants for new projects. Getting generally familiarized with scholarship on race, poverty, gender, sexuality, and immigration, amongst other areas, is no small task, but is doable and should be the price of teaching in the criminal justice curriculum.

Some faculty members may already be doing the work of integrating the practice-based realities of the penal bureaucracy with traditional teaching obligations in the criminal justice curriculum, but there is always more work to be done. Again, there are available templates. Consider the various commercial supplements on the market. One could imagine an expert in the field of criminal law, criminal procedure, and evidence, producing a supplement for some of the standard casebooks that provides a more practice-based human element. A version of this exists with the various "story" books that deeply interrogate the background of seminal cases.²⁴⁵ Others have been less market-driven and developed their alternative syllabi for the law school curriculum. Open source content like the "The Guerrilla Guides to Law Teaching"—authored by Amna Akbar, Sameer Ashar, Jocelyn Simonson, Bill

260 (3d ed. 2014) (same). There is also a faculty listserv, Decarcerationlawprofs, that helpfully circulates teaching materials, syllabi and pedagogical strategies for law professors interested in introducing social justice principles into the criminal justice curriculum.

²⁴⁵ See generally, e.g., CRIMINAL LAW STORIES (Donna Coker & Robert Weisberg eds., 2013); EVIDENCE STORIES (Richard Lempert ed., 2006); CRIMINAL PROCEDURE STORIES (Carol S. Steiker ed., 2006).

Quigley, and others—serve as an excellent open-source model for professors who either want to supplement or substitute standard legal materials for content that simultaneously gets at the policy implications as well as the traditional content of criminal justice courses (e.g., cases, doctrines, rules, tests, and exceptions).²⁴⁶ In an era where crowdsourcing and streamlining information is common, publicizing more robust lessons in the criminal justice curriculum would elevate the nature of conversations students have with professors inside and outside the classroom. Broadcasting this knowledge would provide insights for students who are interested in socially relevant criminal legal education, but precluded because they lack vocabulary. These efforts would also force professors to offer more updated, socially connected instruction *ex ante* or by way of informed, real-time student questions in class.

These suggestions may seem too audacious, but it is important to reiterate that professors in the criminal justice curriculum are training some law students who will incarcerate people and others who will work to prevent defendants from being put in what are now understood as virus-infested cages.²⁴⁷ The fact that only a small number of students actually go into criminal practice sometimes obscures this point, but the stakes are high.

D. *Employer Recruitment*

Finally, there is a role for reform-minded prosecutors and indigent defense offices that centers around recruitment. Scholars who write about public defenders and prosecutors have identified office culture as one of the critical problems that affect both sections of the penal bureaucracy.²⁴⁸ Accordingly, these employers should focus some of their hiring efforts on students who demonstrate a holistic understanding of the criminal justice

²⁴⁶ The guides cover criminal law, clinical law, evidence, immigration, administrative law, human rights. See Amna Akbar, Jocelyn Simonson & Sameer Ashar, *Teaching Guerrilla Style*, LAW & POL. ECON. (Oct. 23, 2018), <https://lpeproject.org/blog/teaching-guerrilla-style> [https://perma.cc/GF9D-6GDU] (offering an explanatory overview of the “Guerrilla Guides”).

²⁴⁷ Dara Lind, *The Prison Was Built to Hold 1,500 Inmates. It Had Over 2,000 Coronavirus Cases*, PROPUBLICA (June 18, 2020, 2:00 PM), <https://www.propublica.org/article/the-prison-was-built-to-hold-1500-inmates-it-had-over-2000-coronavirus-cases> [https://perma.cc/V8NC-9JS3]; German Lopez, *Why US Jails and Prisons Became Coronavirus Epicenters*, VOX (Apr. 22, 2020, 12:50 PM), <https://www.vox.com/2020/4/22/21228146/coronavirus-pandemic-jails-prisons-epicenters> [https://perma.cc/4GSB-LUAA].

²⁴⁸ See Primus, *supra* note 4, at 1769 (describing the negative effects of a “cultural problem” on the representation of indigent defendants); Stephanos Bibas, *Prosecutorial Regulation Versus Prosecutorial Accountability*, 157 U. PA. L. REV. 959, 997 (2009) (examining the role of the “professional culture of a prosecutor’s office” in shaping prosecutorial outcomes).

curriculum. Some offices likely hire summer interns with this intention,²⁴⁹ but I am calling for something more pronounced. On the prosecutor side, Angela Davis has recommended that the hiring process “should include questions about the applicants’ views on mass incarceration, racial disparities, cash bail, and other issues relevant to criminal justice reform.”²⁵⁰ In the context of indigent defense, Jonathan Rapping discusses how the recruiting process should focus on future “defenders who are motivated to address racial inequities,” who have the right attitude towards the marginalized populations they represent, and students who are more than just “practice-ready” but truly understand what a lawyer can do in a broken system.²⁵¹

Students’ broader understanding of the criminal justice system would emerge from their own experiences and extracurricular learning, but for our purposes, it would also derive from the kinds of courses they take, whom they take them with, and the schools in which they are enrolled. These employers would recruit from schools that have a reformist orientation in their core criminal justice curriculum. Over time, employers would gather information about specific schools and intentionally recruit from places that teach criminal justice courses in ways that conform with their organizational culture and objectives. In an ideal world, this could create the incentive structure for some schools to be more deliberate about curricular reform and develop niche areas for schools in ways that are similar to those in other areas of law.²⁵² But since

249 Rapping, *supra* note 223, at 1022 n.109 (“Transforming office culture through values-based recruitment, training, and mentoring is at the heart of the indigent defense reform movement being built through Gideon’s Promise (formerly The Southern Public Defender Training Center).”).

250 Angela J. Davis, *Reimagining Prosecution: A Growing Progressive Movement*, 3 UCLA CRIM. JUST. L. REV. 1, 27 (2019).

251 Rapping, *supra* note 223, at 1022; see also Jonathan A. Rapping, *You Can’t Build on Shaky Ground: Laying the Foundation for Indigent Defense Reform Through Values-Based Recruitment, Training, and Mentoring*, 3 HARV. L. & POL’Y REV. 161, 176 (2009); Jonathan A. Rapping, *Grooming Tomorrow’s Change Agents: The Role of Law Schools in Helping to Create a Just Society*, 12 OHIO ST. J. CRIM. L. 465, 491 (2015).

252 Some law schools have established reputations in subject matter areas because of their geography (for instance, New York schools and corporate law; San Francisco Bay Area schools and law and technology; Washington D.C. schools and regulatory law), because of their faculty strengths in a particular area, ideological orientations, or because they feed graduates into federal clerkships or academia. There is no reason why reform-oriented criminal justice could not fit into this reputational world. This is not to say that there are not informal reputations do not exist; they do. Reputational capital is important in the legal profession. Formal rankings exist too. U.S. News actually ranks the best Criminal Law programs, see *Best Criminal Law Programs*, U.S. NEWS, <https://www.usnews.com/best-graduate-schools/top-law-schools/criminal-law-rankings>, but this ranking system has a few problems. First, it is based on a survey of legal academics—the same group of scholars that are objects of criticism in this Article. Second, it includes criminal justice reform but also includes issues such as international criminal law and capital punishment. Third, this ranking system is subject to the larger critiques that have been levied against U.S. News. For a discussion on all of these issues, see WENDY NELSON ESPELAND & MICHAEL SAUDER ENGINES OF ANXIETY: ACADEMIC RANKINGS, REPUTATION, AND ACCOUNTABILITY (2016).

most law schools send a majority of their graduates into private practice, what is more likely is an adaptation by schools who already send a sizeable number of students into criminal practice.

This type of employment-based, social justice-oriented curricular reform might generate unease about partisanship and unintended consequences. The proposal offered in this Part might reek of a certain kind of political (i.e., liberal) bias that many law schools ostensibly disavow. But such anxiety understates liberals' implication in the status quo (i.e., the Democratic incumbents that reform-minded prosecutors replace and traditional forms of indigent defense that have come under critique).²⁵³ Moreover, this reasonable unease about politics overlooks the ideological flexibility of "reform-minded" prosecution as well as some versions of indigent defense reform.²⁵⁴

Defender and prosecutor-based emphases on criminal legal education as an employment consideration might also raise concerns about unintended consequences. Public interest law has been described as elitist for decades,²⁵⁵ and there may be a worry that the proposal offered here might benefit law schools (often elite themselves) that have the resources for curricular flexibility. Meanwhile, resource-deprived institutions and/or law schools that focus on technical "practice-readiness" may be at a disadvantage. This is also

²⁵³ See generally GRUBER, *supra* note 156, at 149 (describing the introduction of President Clinton's crime bill); ELIZABETH HINTON, *FROM THE WAR ON POVERTY TO THE WAR ON CRIME: THE MAKING OF MASS INCARCERATION IN AMERICA* (2016); NAOMI MURAKAWA, *THE FIRST CIVIL RIGHT: HOW LIBERALS BUILT PRISON AMERICA* (2014); Hadar Aviram, *Progressive Punitivism: Notes on the Use of Punitive Social Control to Advance Social Justice Ends*, 68 *BUFF. L. REV.* 199 (2020).

²⁵⁴ See Trautman, *supra* note 167 (discussing how even "progressive" prosecutorial reforms can be conservative); LARS TRAUTMAN, R. ST. HOW CONSERVATIVES CAN MAKE PROSECUTION MORE PRODUCTIVE 2 (2020), <https://www.rstreet.org/2020/01/30/how-conservatives-can-make-prosecution-more-productive> [<https://perma.cc/S57U-ZU6A>] (noting that grounding prosecutorial reform in conservative criminal justice values can be palatable for all parties involved); *Overcriminalization*, HERITAGE FOUND., <https://www.heritage.org/crime-and-justice/heritage-explains/overcriminalization> [<https://perma.cc/PNT3-L8KZ>] ("The criminal code should reflect common understandings of morality, rather than political opportunism (such as responding to crises to appease voters)."); Tim Lynch, *2015 Can be the Year of Criminal Justice Reform*, *CATO* (Feb. 9, 2015), <https://www.cato.org/publications/commentary/2015-can-be-year-criminal-justice-reform> [<https://perma.cc/Y9BF-XM99>] ("Unlike most other policy areas, . . . criminal justice reform holds much greater promise since both political parties seem to agree that there are festering problems that need to be addressed..

²⁵⁵ See, e.g., Erwin Chemerinsky, *A Response to Brian Tamanaha*, *BALKINIZATION* (Aug. 28, 2012), <https://balkin.blogspot.com/2012/08/a-response-to-brian-tamanaha.html> [<https://perma.cc/46Y6-4FL2>] ("Public interest places can be as elitist in their hiring as firms . . ."); Susan D. Carle, *Power As A Factor in Lawyers' Ethical Deliberation*, 35 *HOFSTRA L. REV.* 115, 127 (2006) ("Scholars of the history of public interest law have noted the ways in which elite public interest lawyers have stood in the way of their clients' wishes and desires, unreflective about the sometimes counterproductive effects of their own socially situated perspectives on the development of those movements."); David M. Trubek, *Complexity and Contradiction in the Legal Order: Balbus and the Challenge of Critical Social Thought About Law*, 11 *LAW & SOC'Y REV.* 529, 564 (1977) ("Public interest law is basically a movement in the legal elite.").

a legitimate concern, especially considering the profession's general elitism, but my responses are multi-fold. First, as noted in Section III.A, there is simply not enough empirical information about which schools penal bureaucrats graduate from. The claim of elitism is often attached to the most prestigious indigent defense and prosecutorial offices or appellate advocacy organizations outside the scope of this Article (e.g., the American Civil Liberties Union, the Center for Constitutional Rights). The best available data, which comes from the National Jurist, suggests that prosecutors and public defenders are culled from a variety of schools—some of which are comprised of scholars who are advocating precisely for the kinds of criminal legal education reform described in this Article.²⁵⁶

Most generally, the comments of Professors Davis and Rapping, and the argument of this Article, all point to the need for a more extensive understanding of what constitutes “practice-ready” across legal education. Preparedness for being a prosecutor or indigent defense attorney is not just about understanding foundational legal rules; it also involves working familiarity with the social, political, and economic conditions that structure criminal justice administration. Recent developments in indigent defense and prosecution reflect this idea. Accordingly, offices interested in reforming should recruit attorneys whose understanding and education reflect their practice's dynamism.

CONCLUSION

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

²⁵⁶ See Katie Thisdell, *Best Schools for Public Service*, PRELAW, Winter 2020, at 38-44. This information is collected by the National Jurist. The top five law schools for public defenders were Brooklyn, American, Albany, UC Hastings, and the University of Missouri. *Id.* at 44. The best schools for government, which included prosecution, government agencies, and clerkships were Florida State University, New York Law School, UDC, Albany, and American. *Id.* at 42. Rebecca Roiphe, a professor at New York Law School, noted that “practitioners of all sorts need practical skills, but they also need a theoretical understanding of the law. Successful lawyers need some version of history, jurisprudence, philosophy, economics, and political theory.” *Tilting at Stratification: Against A Divide in Legal Education*, 16 NEV. L.J. 227, 229 (2015). Jocelyn Simonson, one of the authors of the Guerilla Guides mentioned above, *supra* note 246, teaches at Brooklyn Law School. Alice Ristroph, the only scholar to produce an extensive analysis of how substantive criminal law courses contribute to mass incarceration, see Ristroph, *Curriculum*, *supra* note 7, also teaches at Brooklyn Law School.

occurring at a time where a global pandemic is making already squalid correctional facilities more dangerous.

Law professors are not the most obvious players in criminal justice reform, but they shape the educational landscape and policies of law schools.²⁵⁷ Law professors have the potential to shape the future entrants into the legal profession. Despite a new COVID-19 inspired educational landscape, some will continue business as usual and train future penal bureaucrats who reproduce the status quo. Others may make meaningful changes to how they teach in the criminal justice curriculum and map core legal lessons to the practical realities that have come under public scrutiny. These changes may slowly alter prosecution and defense norms and coincide with reform efforts occurring in legal practice. Teaching changes and educational choices are not foolproof. Nevertheless, the weight of anecdotal and empirical evidence demonstrates that professors who teach in the criminal justice curriculum cannot plead collective innocence when it comes to the status quo that people are increasingly rejecting.

²⁵⁷ ABA Standard 201(a) states, “The dean and the faculty shall have the primary responsibility and authority for planning, implementing, and administering the program of legal education of the law school, including curriculum, methods of instruction and evaluation, admissions policies and procedures, and academic standards.” AMERICAN BAR ASSOCIATION, *ABA STANDARDS AND RULES OF PROCEDURE FOR APPROVAL OF LAW SCHOOLS* 2020–2021, at 11 (2020).

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