

THE CHILDREN LEFT BEHIND: HOW YOUNG PEOPLE ARE EXCLUDED FROM THE SOCIAL CONTRACT OF CRIMINAL LAW

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ABSTRACT

The Criminal Law classroom functions as a vacuum—a near-perfect, theoretical world where age, race, and other social determinants are irrelevant to the analysis. In other words, criminal legal pedagogy’s obsession with morality, punishment, and social contract theory ignores a basic fact: age and crime are inextricably linked, and the law should be taught as such. Young people experience the highest rates of arrest for violent crime, yet future lawyers—the next generation of prosecutors and defenders—leave the classroom without confronting how profoundly criminal law affects them.

This Note highlights the gap between how criminal law is taught in the classroom and the disproportionate impact it has on young people. Young people bear the brunt of the invisible social contract and are denied opportunities to simply be young. By reconsidering punishment and social contract theory in light of these consequences, this Note seeks to shift the conversation in the classroom and better equip future lawyers to understand the law’s impact on young people.

TABLE OF CONTENTS

INTRODUCTION	614
I. A HISTORY OF CRIMINAL LEGAL PEDAGOGY	618
A. <i>Social Contract Theory</i>	619
B. <i>From Case Method to Wechsler</i>	620
C. <i>Wechsler’s Legacy: Sanford Kadish</i>	624

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	D. <i>The Modern Canon</i>	625
II.	THE PEDAGOGICAL DETACHMENT OF CRIMINAL LAW	627
III.	THE IMPACT ON YOUTH	631
	A. <i>History of the Juvenile System</i>	632
	B. <i>Youth Charged as Adults</i>	634
	C. <i>Young People and the Social Contract</i>	638

INTRODUCTION

Young people are an afterthought within Criminal Law pedagogy. Few, if any, cases in the Criminal Law curriculum focus on the impact of the criminal legal system on young people. If we examine young people's experience in the criminal legal system, it becomes clear that the way we learn about the social contract created by criminal law is inherently harmful. People who are in contact with the criminal legal system are set up to fail.

The doctrinal course of Criminal Law perpetuates a criminal law system marked by “racial and social control with a genealogy tied to slavery.”¹ Rather than as a course focused on practical skill development, Criminal Law is taught as a moral philosophy class on the role of the state and of punishment in social contract enforcement. It leads students to prosecution, criminal defense, or far away from any career involving crime at all. Arguably, all of these outcomes, regardless of one's proximity to an actual jail cell, perpetuate the carceral state and help churn the system of violence so ingrained in our society. It leaves dormant the stirring questions of “*Why?*,” “*How?*,” and most importantly, “*What now?*” Several authors have explored this topic, and while it is necessary and worthwhile, I ask a more specific question: *Who are we leaving behind?*

As many scholars on juvenile justice have written, the incarceration of youth is a societal epidemic.² The United States is the only country that sentences young people to die in prison, and in 2020, nearly 430,000 young people were arrested across the country.³ Doctrinal Criminal Law does not teach students to challenge the system or to take the tools they learn and use them to effect change. It does not create the space to ask

1. Rachel Reed, *If You Don't Name It and Fight for It, You Won't Get There*, HARV. L. TODAY (Mar. 27, 2024), <https://hls.harvard.edu/today/andrew-crespo-explores-the-origins-of-mass-incarceration-and-how-lawyers-can-fight-back/> [https://perma.cc/7XZE-8B9N].

2. See Samantha Melamed, *Locked Up, Left Behind*, PHILA. INQUIRER (Jan. 16, 2025, at 14:40 ET), <https://www.inquirer.com/news/philadelphia/a/highest-juvenile-incarceration-rates-philadelphia-pennsylvania-abuse-20250114.html> (on file with the Rutgers University Law Review).

3. *Youth in the Justice System*, JUV. L. CTR., <https://jlc.org/youth-justice> [https://perma.cc/QE33-6ZDU] (last visited Nov. 9, 2025).

questions about *who is left behind*. This Note argues for the young people we leave behind in the classroom.

Law school is the most traditional—and, in most jurisdictions, the only—path to becoming a lawyer in the United States. Most law students will have studied the doctrinal Criminal Law course by the end of their first year.⁴ Although many former students may argue that the substantive course of Criminal Law “has relatively little to do with preparing students for criminal practice,”⁵ it is through this course that students are first exposed to the law in the criminal, rather than the civil, context.⁶ Doctrinally, the broad category of criminal law, which teaches students about crimes, how they are defined, and how they are interpreted, is almost always separated into two major categories: the *substantive*, or Criminal Law, and the *procedural*, or Criminal Procedure.⁷ Criminal Law introduces students to theories of punishment and the state’s role to enact that punishment, whereas Criminal Procedure focuses more on the constitutional rights of the accused and the rules that apply to the individual adjudication of criminal cases.⁸ This Note focuses on the former. Furthermore, this Note builds on Alice Ristroph’s idea that “American law schools, through the required course on substantive criminal law, have contributed affirmatively to the collection of phenomena commonly labeled as mass incarceration.”⁹

Mass incarceration in the United States is shocking. In 2023, there were 5,492,544 people under correctional control in the United States,¹⁰ more than in any other country in the world.¹¹ Black and Latinx people

4. Alice Ristroph, *The Curriculum of the Carceral State*, 120 COLUM. L. REV. 1631, 1634 (2020) [hereinafter Ristroph, *The Curriculum of the Carceral State*].

5. Anders Walker, *The Anti-Case Method: Herbert Wechsler and the Political History of the Criminal Law Course*, 7 OHIO ST. J. CRIM. L. 217, 217 (2009).

6. Of course, there are students who had previous work experience in the criminal legal field, or students who have direct experience within the criminal legal system itself. Here, I refer to the first time in the law school context that students learn about “crime.”

7. See Ristroph, *The Curriculum of the Carceral State*, *supra* note 4, at 1642. See generally Shaun Ossei-Owusu, *Criminal Legal Education*, 58 AM. CRIM. L. REV. 413 (2021) (discussing the need for reform in Criminal Law pedagogy, especially in the context of the 2020 murder of George Floyd and subsequent Black Lives Matter protests).

8. Ristroph, *The Curriculum of the Carceral State*, *supra* note 4, at 1642.

9. *Id.* at 1635.

10. *Punishment Beyond Prisons 2023: Incarceration and Supervision by State*, Appendix, PRISON POL’Y INITIATIVE, https://www.prisonpolicy.org/reports/correctionalcontrol2023_data_appendix.html [https://perma.cc/M6G7-FYQP] (last visited Nov. 11, 2025). This includes people incarcerated in state prisons, federal prisons, jails, youth facilities, involuntary commitment, and under probation or parole supervision.

11. Helen Fair & Roy Walmsley, *World Prison Population List*, 14 WORLD PRISON BRIEF, INST. CRIME & JUST. POL’Y RSCH., at 3–16 (2024),

are one-third of the U.S. population, but are nearly two-thirds of the incarcerated population.¹² As of 2021, Black people are incarcerated five times more frequently than white people.¹³ The incarceration rate of Native Americans relative to their white counterparts is not far behind.¹⁴ Finally, Latinx people are incarcerated more than twice as frequently as their white counterparts.¹⁵ The disparities are present across class lines, with 57% of incarcerated men aged twenty-seven to forty-two making less than \$22,500 per year prior to their incarceration, per data from 2004.¹⁶ These disparities are similarly reflected in the populations of incarcerated youth. Almost half of the young boys and over one-third of the young girls incarcerated in juvenile facilities are Black.¹⁷ Indigenous youth are similarly overrepresented within juvenile facilities, making up 3% of the incarcerated young girls and 2% of the incarcerated young boys.¹⁸

This did not happen by accident. Michelle Alexander, civil rights advocate and author of *The New Jim Crow*, warns us that “[t]he current system of control permanently locks a huge percentage of the African American community out of the mainstream society and economy.”¹⁹ Furthermore, “[t]he system operates *through our criminal justice institutions*, but it functions more like a caste system than a system of crime control.”²⁰ Furthermore, Ruth Wilson Gilmore argues that capitalism and capitalist systems incentivize the building and filling of

https://www.prisonstudies.org/sites/default/files/resources/downloads/world_prison_population_list_14th_edition.pdf [https://perma.cc/DD6B-W6CS].

12. HARV. L. SCH., Andrew Manuel Crespo, “Root and Branch: Lawyers, Movements, and The End of Mass Incarceration”, at 21:56–22:07 (YouTube, Mar. 27, 2024), <https://www.youtube.com/watch?v=jFWzTJs8f4k> (on file with the Rutgers University Law Review).

13. *Id.* at 21:34–21:48.

14. *Id.* at 21:48–21:50.

15. *Id.* at 21:51–22:56.

16. *Id.* at 22:13–22:48.

17. Brian Nam-Sonenstein & Wendy Sawyer, *Youth Confinement: The Whole Pie 2025*, PRISON POL’Y INITIATIVE (Aug. 25, 2025), <https://www.prisonpolicy.org/reports/youth2025.html> [https://perma.cc/UT43-26AV].

18. *Id.* Indigenous young people comprise less than 1% of all youth in the United States. *Id.*

19. MICHELLE ALEXANDER, *THE NEW JIM CROW* 13 (2010). *But see* James Forman, Jr., *Racial Critiques of Mass Incarceration: Beyond the New Jim Crow*, 87 N.Y.U. L. REV. 21, 34 (2012) (arguing that New Jim Crow scholars analogize the aspects of mass incarceration that most resemble Jim Crow and minimize or ignore many important dissimilarities).

20. ALEXANDER, *supra* note 19, at 13 (emphasis added). *See generally* ISABEL WILKERSON, *CASTE: THE ORIGINS OF OUR DISCONTENTS* (2020) (examining how the unspoken caste system that shaped our history still shapes our lives in the United States today by a hierarchy of human divisions).

prisons.²¹ It is through the combination of these theories that criminal law is justified. The doctrinal Criminal Law course is a brute form of racial capitalist social control, but the course uses the rationale that there are morally good and morally bad people, the latter of which need correction through punishment.

The exclusion of cases on the Criminal Law syllabus in which young people are prosecuted reinforces the adultification of young people, and results in these courses ignoring the canon of cases where science and the law intersect because they stray from the moral philosophy framework. I argue that the law school classroom is a criminal justice institution through which the carceral system operates. Therefore, the role of the lawyer within the system must be examined. Or, as Ristroph puts it, “[u]nless we are to characterize the legal profession as unthinking or malevolent, we need an account of why so many lawyers have chosen and still choose to pursue convictions and prison sentences on such a massive scale.”²² Even when cases in the Criminal Law curriculum discuss youth defendants, their inclusion is not to address how young people are directly impacted by the strict theories of punishment, but rather because their fact pattern represents the best way to analyze crime.²³

The structure of this Note is as follows: Part I paints the history in broad strokes. There are many key players and scholars behind Criminal Law pedagogy. I focus on trendsetters to illustrate the common theme of how Criminal Law has been taught in the past and how that may affect its future teaching. Part II zooms in ever so slightly on contemporary critical voices: Alice Ristroph, Shaun Ossei-Owusu, and Andrew Manuel Crespo. Each of their contributions forces lawyers and other legal professionals to grapple with the reality that law school—and criminal legal education—plays an integral part in perpetuating mass incarceration. Part III examines how young people, specifically, are regarded within pedagogical analysis. Most times, however, there is no distinction between how young people are treated compared to how adults are treated within the system, nor is there an acknowledgment of a longstanding preoccupation with youth as a special threat to social order in need of correction. I emphasize that young people are not ever viewed as having agency *until* they commit a crime, get arrested, or both. It is in the moment of a breach that we expect young people to understand

21. See RUTH WILSON GILMORE, *GOLDEN GULAG: PRISONS, SURPLUS, CRISIS, AND OPPOSITION IN GLOBALIZING CALIFORNIA* 28–29 (2007).

22. Ristroph, *The Curriculum of the Carceral State*, *supra* note 4, at 1636–37.

23. See, e.g., JOSHUA DRESSLER & STEPHEN P. GARVEY, *CRIMINAL LAW: CASES AND MATERIALS* 794–801 (9th ed. 2022) (analyzing whether a delinquent child’s action constitutes a “substantial step” toward the commission of attempted murder, ignoring the defendant’s circumstances).

the law as a social contract. The system responds as though the child has failed the state, when in reality the state has failed the child.

I. A HISTORY OF CRIMINAL LEGAL PEDAGOGY

Social movements impact how doctrinal courses are taught. Demonstrations in Standing Rock²⁴ and Ferguson, Missouri,²⁵ and the summer of 2020 sparked an institutional shift towards recognizing mass incarceration as a central issue within the legal curriculum.²⁶ However, these shifts still enforce a separation between what is taught in the classroom and its effect on the population. “Curricular attempts to address racialized mass incarceration have been additive rather than transformational.”²⁷ This additive method does little for any student’s criminal legal education. Furthermore, “[b]y mentioning racial disparities among those convicted and punished, while simultaneously emphasizing the legitimacy and neutrality of substantive criminal law, law schools may inadvertently reinforce conceptions of Black criminality.”²⁸ As Ristroph put it, “[i]ncarceration is a type of bureaucratic violence.”²⁹ This is especially true for young people whose brains have not yet fully developed. While scholars and academics debate whether criminal law and responsibility are true moral concepts,³⁰ young people suffer the consequences of these distractions.

24. See SEÁNNA HOWARD ET AL., UNIV. OF ARIZ. ROGERS COLL. OF L., INDIGENOUS PEOPLES L. & POL’Y PROGRAM, INDIGENOUS RESISTANCE TO THE DAKOTA ACCESS PIPELINE: CRIMINALIZATION OF DISSENT AND SUPPRESSION OF PROTEST 1 (2025), <https://law.arizona.edu/sites/default/files/Indigenous%20Resistance%20to%20the%20Dakota%20Access%20Pipeline%20Criminalization%20of%20Dissent%20and%20Suppression%20of%20Protest.pdf> [<https://perma.cc/UB6H-XJWM>].

25. See Harv. L. News Staff, *After Ferguson, Students and Faculty Seek Solutions in Law and Policy*, HARV. L. TODAY (Jan. 15, 2015), <https://hls.harvard.edu/today/ferguson-students-faculty-seek-solutions-law-policy/> [<https://perma.cc/9DZG-A7P3>].

26. See Ossei-Owusu, *supra* note 7, at 414 (“Although the protests of summer 2020 generated new kinds of reflections on the criminal justice system, it is unclear that it will prompt changes in the criminal justice curriculum. This seems particularly true for first-year criminal law, as well as for bar courses such as criminal procedure and evidence.”).

27. Ristroph, *The Curriculum of the Carceral State*, *supra* note 4, at 1636.

28. *Id.*

29. Alice Ristroph, *Responsibility for the Criminal Law*, in PHILOSOPHICAL FOUNDATIONS OF CRIMINAL LAW 107, 122 (R.A. Duff & Stuart Green eds., 2011) [hereinafter Ristroph, *Responsibility for the Criminal Law*].

30. See *id.* at 109 (“As neuroscientists and psychologists present new evidence about the factors that influence human decision making, some scholars argue that we must rethink criminal responsibility, while others maintain that criminal responsibility is a moral concept indifferent to medical science.”).

A. Social Contract Theory

Social contract theory, most associated with John Locke, is ingrained in Criminal Law pedagogy's commitment to teaching Criminal Law as a moral philosophy class. It perpetuates the autonomous-individual view of crime: when people do bad things, they alone breach the social contract and are no longer worthy of many of the benefits and freedoms that both society and the sovereign protect.³¹ Social contract theory also supports criminal law's social function: to punish those who breach the social contract and therefore bulwark the rational justification that social and moral rules of society are necessary to keep the status quo.³² Locke's version was about society implicitly agreeing to respect one another's property rights, and "[t]hose who violate this contract become outlaws, at war with society, and can be condemned to death."³³ It later morphed into a broader, more general understanding, interchangeable with the modern ideas of civility: "that everyone in a society, given their individual reasoning, would agree to a certain rule or principle is the critical justification for that rule or principle."³⁴ Ultimately, the goal of social contract theory is to show, generally, that "social . . . rules [and their sovereign enforcement] can be rationally justified"³⁵ and that this justification should demonstrate how society is capable of "establishing good government from reflection and choice."³⁶

Under the social contract theory, these justifications are also inherently tied to theories of criminal punishment.³⁷ Criminal correction and punishment are at the center of how our society operates and at the core of how citizens interact with one another. The ability to defend its persons and the property of its members fuels the state's existence, making the criminal law and punishment "the ultimate sanction" when

31. Bill Jordan, *Criminal Justice, Social Exclusion, and the Social Contract*, 50 PROB. J. 198, 200–01 (2003).

32. *See id.* at 199.

33. *Id.* at 200 (internal citations omitted).

34. Fred D'Agostino, Gerald Gaus & John Thrasher, *Contemporary Approaches to the Social Contract*, STAN. ENCYCLOPEDIA OF PHIL. (Sep. 27, 2021), <https://plato.stanford.edu/archives/spr2024/entries/contractarianism-contemporary/> [<https://perma.cc/2H9U-BP6M>].

35. *Id.*

36. *Id.* (quoting THE FEDERALIST NO. 1, at 9 (Alexander Hamilton) (George Stade ed., 2006)).

37. Jordan, *supra* note 31, at 201 ("The justifications of individual freedom, of government by consent, of the limits on the power of rulers, of the right to resistance, and of the rule of law . . . were thus, and largely remain, tied into the theory of property and the punishment of crime. . . . [C]riminals were to be treated as 'wild beasts.'" (internal citations omitted)).

any disruption occurs.³⁸ Indeed, this is the goal of social contract theory, too: to justify and promote society's rules and principles.³⁹ Social contract agreements operate outside of the legal standard typically applied to contract enforcement—there is no bargaining, explicit offer, acceptance, or obvious consideration. Rather, it operates more as an implied contract with no real option to take it or leave it. Instead, the options are to take it or be excised from society.⁴⁰ Social contract theory puts great emphasis on moral goodness, which therefore entitles the state to enact criminal retribution on the “deviants who reject the moral and material basis of this social contract.”⁴¹

The Criminal Law classroom is a foundational site for learning about the social contract, even if the words “social” or “contract” are absent from the syllabus. Criminal Law, taught as a moral philosophy class ingrains social contract theory into its students through two avenues: first, by primarily focusing on homicide and rape as the core crimes of our society; second, by presenting the idea of punishment for these morally bad actors—defendants of homicide and rape crimes—worthy of severe societal retribution. The Criminal Law classroom, of course, does not necessarily present punishment as an inherent good, but it explicitly or implicitly teaches the utility of punishment as a sanction for the harms caused by breaches of one's obligation to the state. Students learn through both avenues under the assumption that the “starting point is the reasonable individual who, already engaged in social cooperation, wants to find and live according to fair or just principles in reciprocity with others,” and that everyone else is an outlier.⁴²

B. *From Case Method to Wechsler*

Criminal Law, as it is commonly taught today, developed in part as a creative way to discourage law students from entering the field of criminal law.⁴³ The modern curriculum was developed in response to the governmental failures that led to the Great Depression by two prominent scholars at Columbia Law School, who actively sought to push other legal scholars towards more legislative and technocratic roles rather than into

38. *Id.* at 199.

39. D'Agostino, Gaus & Thrasher, *supra* note 34.

40. Jordan, *supra* note 31, at 205 (“[T]hey are forced to comply with the contract, under threat of long-term or permanent imprisonment, or death.”).

41. *Id.* (internal quotation marks omitted).

42. Richard Dagger, *Social Contracts, Fair Play, and the Justification of Punishment*, 8 OHIO ST. J. CRIM. L. 341, 345 (2011).

43. Walker, *supra* note 5, at 217.

private criminal law.⁴⁴ The hope was to use the Criminal Law class experience to help students understand the law as a philosophical tool, rather than a practical basis for learning how to be a criminal lawyer.⁴⁵ Furthermore, it aimed to educate students on the governmental role in social progress, especially after the New Deal.⁴⁶ What resulted was the development of a course on the intersection of social contract theory and punishment theory. Thus, the Criminal Law classroom took shape as a natural “supplement [to] the social controls of ordinary life,” further solidifying criminal law’s place within the functions of the social contract.⁴⁷

The movement was led by Herbert Wechsler,⁴⁸ a Columbia Law School graduate who later became a professor at his alma mater.⁴⁹ By 1934, Wechsler had joined his colleague Jerome Michael to draft a newly designed criminal law textbook that shifted the pedagogical approach of criminal law itself.⁵⁰ More specifically, Wechsler’s goal was to bridge the perceived gap between the “law’s political underpinnings and the apolitical nature of the case method”⁵¹ previously developed and adapted by Christopher Columbus Langdell and William Keener.⁵² Students, using a large packet of unedited cases, were expected to take the principles from the first case and then track the progression and transformation of these principles through the subsequent cases.⁵³

Both Langdell and Keener believed that law is a science worthy of rigorous academic inquiry.⁵⁴ Their Criminal Law courses were not lessons in social contract enforcement, but rather general workshops within a closed-system legal framework.⁵⁵ I do not argue that the Criminal Law classroom would benefit from a return to the case method; such a pedagogical framework still deserves critique. However, the inclination towards teaching practical, process-based analysis warrants

44. *Id.* at 218.

45. *Id.* at 220.

46. *See id.* at 218.

47. *See* DAVID GARLAND, THE CULTURE OF CONTROL: CRIME AND SOCIAL ORDER IN CONTEMPORARY SOCIETY 5–6 (2001).

48. Author of the Model Penal Code (“MPC”), which is almost unanimously studied in first-year criminal law classes as the generic “criminal law.” *See* Walker, *supra* note 5, at 236–38.

49. *Id.* at 218, 226.

50. *Id.* at 228.

51. *Id.*

52. *See* STAFF, FOUND. FOR RSCH. IN LEGAL HIST., HISTORY OF THE SCHOOL OF LAW: COLUMBIA UNIVERSITY 136 (1955).

53. *Id.*

54. *Id.*

55. Walker, *supra* note 5, at 219.

a comeback.⁵⁶ Teaching by the case method creates an “inevitable implication” where “the purpose of legal education as a whole is, not to impart legal knowledge, but to train the student in characteristically legal thinking.”⁵⁷ Each case introduces a new variable to be reconciled with the old ones, forming a “scientific” understanding of the law. Keener prioritized the practical over the theoretical and pushed for a system that modeled the skills actually required in the legal profession.⁵⁸

In the same way that Langdell’s case method aligned with the industrial revolution, Weschler and Michael’s departed from the case method aligned with the New Deal. Wechsler believed that the Great Depression resulted from a lack of governmental regulation and an overemphasis on private legal action.⁵⁹ Moreover, Wechsler and Michael were convinced that the Supreme Court’s rulings against New Deal social programs were in part due to most law students learning via the case method.⁶⁰ In their minds, the case method overemphasized the law as a closed system.⁶¹ Their goal, in turn, was to expose students to a version of criminal law that functioned as a moral guide rather than as a guide to the private practice of law. In other words, Wechsler and Michael, like other law school professors in the 1930s, worked to move law students away from private legal practice writ large and towards public service roles, and specifically “intentionally reconfigured their criminal law courses so that students would not become criminal lawyers” due to the perceived lesser prestige of criminal legal work.⁶²

Almost seventy years after Langdell compiled his first casebook, Wechsler and Michael worked together to redefine how the first-year Criminal Law class was taught.⁶³ There was institutional momentum to shift away from teaching as if society were a “hermetically sealed compartment” and towards a teaching style that essentially adopted social contract theory.⁶⁴ What developed was a framework for understanding how the controls of the criminal legal system interact with

56. See generally Santiago Mollis, *Toward a Victim-Oriented Response to Crimes 6–8* (May 2023) (J.S.D. dissertation, Cornell University) (on file with author) (describing the flaws inherent within the moralistic pedagogy of criminal law and contending that an approach taking into account the influence of the political process is methodologically superior).

57. STAFF, FOUND. FOR RSCH. IN LEGAL HIST., *supra* note 52, at 155.

58. *Id.* at 141.

59. Walker, *supra* note 5, at 226.

60. *Id.* at 219.

61. *Id.* at 217.

62. *Id.*

63. See STAFF, FOUND. FOR RSCH. IN LEGAL HIST., *supra* note 52, at 326–27.

64. Walker, *supra* note 5, at 225.

other civil controls of society.⁶⁵ His goal as a professor was to get students to ask questions about how and why the law reflected societal norms and whether that had its consequences.⁶⁶

Philosophically, Wechsler viewed the criminal law as distinguishing moral right from wrong. Describing the need for re-examination of the criminal law subject, he stated: "If penal law is weak or ineffective, basic human interests are in jeopardy. If it is harsh or arbitrary in its impact, it works a gross injustice on those caught within its toils."⁶⁷ John Locke similarly promoted the idea in his classroom that the individual who commits unjustified violence should lose their moral status in society.⁶⁸ Modern theorists, including Richard Dagger, promote in their teachings the idea that punishment and its justifications provide a philosophical framework for the already existing societal intuitions to sanction and correct bad moral actors.⁶⁹

Wechsler's intentional shift towards building a curriculum that highlighted the "social and economic forces which gave law its form and substance" further established the parameters of the social contract and how it is to be enforced.⁷⁰ Homicide and rape cases, while sometimes difficult to digest for first-year law students, present a more obvious contractual breach. It is easier to understand the theories of punishment, and even why retributive punishment exists at all, when they are applied to egregious crimes that most people readily accept as obvious moral wrongs and are therefore more obviously worthy of punishment.⁷¹ Furthermore, through criminal law textbooks and scholarly training manuals, social contract theory is "confidently transmit[ted] from one generation [of legal scholars and practitioners] to the next."⁷² "Too often our attention focuses on the state's institutions and neglects the informal social practices upon which state action depends,"⁷³ like the Criminal Law classroom.

Wechsler and Michael also failed to include materials that invited law students to think about how the social dynamics of race, class, and

65. GARLAND, *supra* note 47, at 5.

66. See Walker, *supra* note 5, at 217.

67. Herbert Wechsler, *The Challenge of the Model Penal Code*, 65 HARV. L. REV. 1097, 1098 (1952).

68. JOHN LOCKE, SECOND TREATISE OF GOVERNMENT 11 (C.B. Macpherson ed., Hackett Publishing Co. 1980) (1690).

69. See Dagger, *supra* note 42, at 348.

70. See Walker, *supra* note 5, at 225 (quoting Harlan Fiske Stone, *Some Phases of Legal Education in America*, 58 AM. L. REV. 747, 752-54 (1924) (internal quotation marks omitted)).

71. See Jordan, *supra* note 31, at 205.

72. GARLAND, *supra* note 47, at 4.

73. *Id.* at 6.

other demographic categories relate to the criminal legal system. Thus, legal education in the United States is “better designed to reproduce hierarchies, or ideologies, than to challenge them.”⁷⁴ Wechsler championed neutral principles, which in turn promoted a compulsory white identity.⁷⁵ Furthermore, this color-blind trend tells “a particular story [that is] limited in scope, careful in its operation, and uniquely morally necessary.”⁷⁶

This approach also endorses the social rules, principles, and norms established by social contract theory: every person in our society agrees to a set of obviously rational rules that, if broken, justify punishment.⁷⁷ Even more broadly, how we define “crime” itself is a social construct created “by the state’s labels and the state’s responses,” beginning with the Criminal Law classroom, rather than “a category that is limited to a particular kind of conduct.”⁷⁸

C. Weschler’s Legacy: Sanford Kadish

Even more than twenty years after Wechsler and Michael changed the trajectory of criminal law pedagogy, criminal law casebooks continued to model their structures after *Criminal Law and Its Administration*.⁷⁹ Sanford H. Kadish’s *Criminal Law and Its Processes*, for example, helped see Wechsler’s vision through the twentieth century.⁸⁰ A former student of Wechsler,⁸¹ Kadish brought “various concepts that continue to dominate the teaching and research of criminal law” into the classroom.⁸² Kadish’s goal was to help students grapple with social contract theory by focusing on the moral inconsistencies underlying the four theories of punishment, helping students understand the importance of the relationship between the social order and the penal system.⁸³ The baseline commonality between Kadish and Weschler’s respective casebooks lies in the adoption of social contract theory as fundamental to maintaining law and order. The case method remained

74. Ristroph, *The Curriculum of the Carceral State*, *supra* note 4, at 1638.

75. *See id.* at 1635.

76. *Id.* at 1636.

77. *See* D’Agostino, Gaus & Thrasher, *supra* note 34.

78. Alice Ristroph, *An Intellectual History of Mass Incarceration*, 60 B.C. L. REV. 1949, 1962 (2019) [hereinafter Ristroph, *An Intellectual History*].

79. Walker, *supra* note 5, at 218.

80. *See* SANFORD H. KADISH, STEPHEN J. SCHULHOFER & RACHEL E. BARKOW, *CRIMINAL LAW AND ITS PROCESSES: CASES AND MATERIALS* (11th ed. 2022).

81. Walker, *supra* note 5, at 239.

82. Jens David Ohlin, *The Changing Market for Criminal Law Casebooks*, 114 MICH. L. REV. 1155, 1156 (2016).

83. *Id.* at 1157.

decentralized through Kadish, and the effort to get students to think like legislators continued.⁸⁴ Taking after his predecessor, Kadish further infused criminal legal pedagogy with an individualistic take, rather than a systematic one.

Kadish discouraged students from building their criminal law foundation on theories of systemic power, instead emphasizing individualized incidents of moral deviance. In other words, to Kadish, crime exists because the individual failed to understand the law, which is also another form of breaching the social contract. To Kadish, Criminal Law was a “course in civil liberties” and that “[u]nderlying the great bulk of the doctrines of the criminal law is the conception of personal responsibility.”⁸⁵ He was committed to preserving morality as the central aspect of students’ understanding of criminal law, and he understood both corrective justice and distributive justice as key features of society’s morality.⁸⁶

The risk of teaching Criminal Law with such a neoliberal perspective is its failure to recognize state harms against individuals and its failure to explain how a young person, for example, could serve a life sentence for a crime they committed at twelve years old. Kadish’s response, however, would not be to deny the validity or existence of social injustices, but rather to deny the role criminal law played in producing them.⁸⁷ The result is a continuation of state failures and an inadequate approach to solving the social phenomenon that is mass incarceration. When the people with the most power to shrink the growing epidemic, like prosecutors and judges, are trained to see the individual as the issue and not the socially constructed legal doctrine, the state inevitably harms its most vulnerable people.

D. *The Modern Canon*

Criminal Law casebooks continue to trend towards a social justice-oriented lens. *Criminal Law: Cases and Materials* by Joshua Dressler and Stephen Garvey, now in its ninth edition, is a commonly assigned casebook for the first-year Criminal Law class.⁸⁸ Inspired by Kadish’s *Criminal Law and its Processes*, Dressler self-identified his own casebook as “a son of Kadish.”⁸⁹ Dressler’s book builds on Kadish’s philosophical

84. Walker, *supra* note 5, at 240.

85. Sanford H. Kadish, *Why Substantive Criminal Law – A Dialogue*, 29 CLEV. ST. L. REV. 1, 10 (1980).

86. *Id.* at 14–15.

87. *See id.* at 9.

88. *See* DRESSLER & GARVEY, *supra* note 23.

89. Walker, *supra* note 5, at 242.

foundation and incorporates materials beyond the basic doctrinal cases.⁹⁰ It is one of the only casebooks on the market that discusses the social implications of self-defense claims. For example, *Cases and Materials* includes commentary on the police killing of Tamir Rice, a twelve-year-old Black boy murdered by a police officer moments after the officer arrived at a park where Rice was playing.⁹¹ The second chapter of Dressler's casebook, *Principles of Punishment*, starts with a graph illustrating the trend of the growing population of people incarcerated in the United States from 1925 to 2015.⁹² Under the graph, Dressler lists a number of caveats: the numbers only reflect the prison populations, not the jail populations; the numbers represent an overall trend with no distinction between state and federal incarceration rates; and most importantly, the graph "also conceals important demographic differences."⁹³

Dressler's "by the way" approach, in which he offers key statistics on the racial makeup of the United States prison population, reinforces the supplemental and additive pedagogical approach of Criminal Law.⁹⁴ Furthermore, Dressler's attempt to address the issue still directs students to sources outside of the casebook. "Ending mass incarceration won't be easy," Dressler states before directing students and professors to toy around with a model published by a think-tank.⁹⁵ Lastly, Dressler states, "[t]houghtful reflection on the problem of mass incarceration requires thoughtful reflection on *why* we punish at all, which is the question addressed [in the subsequent section of the book]."⁹⁶

These sentiments are a start to an important conversation on the United States' obsession with punishment and retribution. However, they fall short by failing to identify the role the reader—presumably a law student—plays in perpetuating that obsession. If the Criminal Law classroom trains the newest prosecutors, it should be accountable to the reality that it trains the newest actors in state punishment.⁹⁷ There is an

90. See Ohlin, *supra* note 82, at 1157–58.

91. Robin Peterson, Note, *The Complicit Canon of Criminal Law: A Critical Survey of Syllabi, Casebooks, and Supplemental Materials*, 57 U. MICH. J.L. REFORM 565, 590 (2024).

92. DRESSLER & GARVEY, *supra* note 23, at 31.

93. *Id.*

94. See Ristroph, *The Curriculum of the Carceral State*, *supra* note 4, at 1636.

95. DRESSLER & GARVEY, *supra* note 23, at 32.

96. *Id.*; see also Peterson, *supra* note 91, at 569 ("[H]aving students read racist or otherwise problematic texts without assigning advanced reading with sufficient counternarratives could create inequities in how students participate in and learn from lectures.").

97. Ossei-Owusu, *supra* note 7, at 413 ("Faculty who teach criminal law, criminal procedure, and evidence—what I describe as criminal legal education—are unassuming but integral players in the American system of punishment. They are responsible for the early

opportunity here to facilitate a discussion on prison conditions, the overpopulation of city and county jails, the reality that most people serving federal and state sentences are incarcerated at facilities far away from their families, or even that young people can be prosecuted and punished as adults in the United States.

II. THE PEDAGOGICAL DETACHMENT OF CRIMINAL LAW

This Note does not contend with the disconnect between what is taught in law school and the actual practice of lawyering, but rather it assumes—as Shaun Ossei-Owusu paraphrases, recalling the argument first made by Duncan Kennedy—that “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.”⁹⁸ This is a dangerous approach for Criminal Law, specifically, because it does not accurately demonstrate the power dynamics built into being an agent of the criminal law.

The pedagogical detachment that Kennedy describes shows up in a few ways in the Criminal Law classroom. One glaring example is that most first-year Criminal Law classes focus primarily on homicide.⁹⁹ In fact, most casebooks use appellate opinions from homicide cases to break down elements, defenses, and excuses.¹⁰⁰ The detachment issue here is threefold. First, homicides comprise a small minority of criminal cases and convictions in the United States.¹⁰¹ It is impossible for a course that focuses on such a tiny sliver of the law to accurately represent the real-world application of the sorts of moral and philosophical principles espoused in the textbooks. Second, over 90% of both federal and state convictions are reached through plea deals, not trials.¹⁰² Again, even

legal training of prosecutors and public defenders.”); *see also* Ristroph, *The Curriculum of the Carceral State*, *supra* note 4, at 1636 (“Students educated in this model learn to trust and embrace criminal law, and thus law schools have helped to facilitate a carceral state by supplying it with willing agents, and more specifically, willing lawyers.”).

98. Ossei-Owusu, *supra* note 7, at 417 (citing Duncan Kennedy, *Legal Education and the Reproduction of Hierarchy*, 32 J. LEGAL EDUC. 591, 597–98 (1982)).

99. *See* Peterson, *supra* note 91, at 586–87.

100. *See id.* at 570–72.

101. *See* U.S. SENT’G COMM’N, 2024 SOURCEBOOK OF FEDERAL SENTENCING STATISTICS 19 tbl. 4 (2024), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/annual-reports-and-sourcebooks/2024/2024_Sourcebook.pdf [https://perma.cc/82TT-AGJ9].

102. Peterson, *supra* note 91, at 572 (“More than ninety-seven percent of federal criminal convictions and ninety-four percent of state court convictions are reached through plea deals. Plea bargaining has risen dramatically since the explosion of mandatory minimums and sentencing guidelines began in the 1980s, leading to a massive shift in discretion from judges to prosecutors.”).

where the Criminal Law curriculum relies on case law, the cases are primarily appeals from guilty verdicts—this promotes an ideology and fails to reflect the current state of criminal law. Third, the defendants who commit the most homicides are, in fact, young people.¹⁰³

In 2023, young people between the ages of twenty and twenty-four committed more homicides than any other age group.¹⁰⁴ Young people aged seventeen to nineteen were responsible for the third-highest number of homicides committed by any age range.¹⁰⁵ It is developmentally appropriate for young people to demonstrate impulsivity, take risks, have difficulty weighing long-term consequences, and show vulnerability to peer and adult pressure.¹⁰⁶ It is, of course, not developmentally appropriate for young people to commit murder, but the absence of discussion of such important background information about such a key group serves only to further the Criminal Law indoctrination factory. From a social impact perspective, however, these data are highly representative of the social harms that affect young people and the “effects of particular institutions, policies and systems on the social, psychological and existential aspects of [young people’s] lives — including their propensity to violence.”¹⁰⁷ These social harms reach far, and they are cyclical by nature: people between the ages of twelve and twenty-four made up 49% of the people victimized by serious violent crime.¹⁰⁸ Even a cursory analysis of these statistics will show how these social harms “can help to pierce through the myth that our society is a peaceful, cohesive, just and fair place, aside from anomalous eruptions of crime and violence.”¹⁰⁹

It is much easier to digest or justify the harsh reality of mass incarceration when it is understood as the result of rational punishment of several individual immoral acts. Similarly, without the push to teach the Criminal Law course as one about social contract enforcement, the

103. Statista Rsch. Dep’t, *Number of Murder Offenders in the United States in 2023, by Age*, STATISTA (Nov. 7, 2024), <https://www.statista.com/statistics/251884/murder-offenders-in-the-us-by-age/> [<https://perma.cc/A6ZP-XJLG>]. Note that, of the 21,504 murder offenders in this data set, 5,949 of their ages are unknown. *Id.* This data is therefore subject to a bit of a caveat, but this Note assumes that the unknowns likely track with the known data.

104. *Id.*

105. *Id.*

106. See Dustin Albert & Laurence Steinberg, *Judgment and Decisionmaking in Adolescence*, 21 J. RSCH. ON ADOLESC. 211, 212–14 (2011).

107. LUKE BILLINGHAM & KEIR IRWIN-ROGERS, AGAINST YOUTH VIOLENCE: A SOCIAL HARM PERSPECTIVE 76 (Christina Pantazis et al. eds., 2022).

108. U.S. DEP’T OF JUST., NCJ-162031, AGE PATTERNS OF VICTIMS OF SERIOUS VIOLENT CRIME 1 (1997), <https://bjs.ojp.gov/content/pub/pdf/apvsvc.pdf> [<https://perma.cc/AJ6Q-9Z8N>].

109. BILLINGHAM & IRWIN-ROGERS, *supra* note 107, at 76.

social function of the criminal law would be moot. Andrew Crespo says, “[i]f we understand [that mass incarceration] is not an accident, then I think we have to accept that ending mass incarceration requires more than just persuasion. . . . [I]t requires power.”¹¹⁰ Law students cannot confront the reality that the law is merely a document that outlines power dynamics solely within the classroom walls. Rather, if we understand the law as a set of rules outlining the power dynamics within a social hierarchy, there is more room to consider the social consequences of the law—namely, how it perpetuates cycles of mass incarceration—in how the law is written. We must begin to depend less on understanding the law as a moral philosophy and instead understand it as a reflection of the social groups or classes with the greatest ability to harness the law’s power.¹¹¹

Incremental shifts, at best, have been made in how Criminal Law is taught. Anything more dramatic would force law schools to confront their complacency within the system. But whether they confront their complacency, law schools deserve more recognition for their participation in mass incarceration.¹¹² Alice Ristroph aptly highlights the connection between the individualized nature through which we learn about the law and how millions of incarcerated individuals make up the carceral state, pointing out that we are taught that it is the work of the law itself that defines what a crime is, rather than the power and discretion of prosecutors.¹¹³ We did not arrive at a state of mass incarceration by accident, but rather by focusing on each individual defendant, in whose case and for whose crime “prosecution and punishment seemed like a good idea.”¹¹⁴

In a way, law schools reinforce their own complacency within the system of mass incarceration. Otherwise, the entire system would come into question. Even as Criminal Law courses have changed incrementally, these changes have always reflected a desire to preserve the existing social hierarchies and enforce the social contract.¹¹⁵ Shaun

110. HARV. L. SCH., *supra* note 12, at 33:38–33:55.

111. Mollis, *supra* note 56, at 7.

112. Ristroph, *The Curriculum of the Carceral State*, *supra* note 4, at 1637 (“Recognizing this responsibility makes evident the likely costs of complacency: By continuing to rely on the same canonical model of criminal law, we are likely to preserve the carceral state.”); *see also id.* at 1685–92 (expanding upon the claim that the standard law school curriculum contributes to mass incarceration).

113. *Id.* at 1687, 1687 n.268.

114. *Id.* at 1634; *see also* Ristroph, *An Intellectual History*, *supra* note 78, at 1955 (“The very belief that criminal law is exceptional—uniquely necessary, uniquely determinate, and uniquely circumscribed in its content—may have fueled the expansion of a system that is in fact none of those things.”).

115. Ristroph, *An Intellectual History*, *supra* note 78, at 1964.

Ossei-Owusu correctly argues that criminal legal education falls short when incorporating issues tied to race, gender, and poverty.¹¹⁶ As a result, the Criminal Law classroom endorses “pro-carceral messages” and provides an easy, logical pathway for law students who desire to become prosecutors.¹¹⁷ Furthermore, the societal conflation of punishment with justice for victims of crime is a pipe dream that will never be realized.¹¹⁸ As Ristroph puts it, “[w]e cling to the dream that criminal law will solve various social problems, even after decade upon decade of disappointment.”¹¹⁹

This approach comes at a cost to the people directly impacted by the criminal legal system. Unless a student takes it upon themselves to learn otherwise, one could go their entire law school career without confronting this pro-carceral reality, and in the end, choose to become a prosecutor with unchecked discretion. More than that, the role of a prosecutor is never removed from the systems of white supremacy and mass incarceration.¹²⁰ When we frame punishment as the result of fair rules, we understand suffering as the result of a fair process, without any interrogation into the process’s disproportionate effects.¹²¹ Naomi Murakawa and Katherine Beckett call this “the penology of racial innocence,” which describes a “study of punishment that obscures the operation of racial power in penal practices and institutions.”¹²²

There is potential to minimize the roles prosecutors play within the criminal legal system if law schools better confront the historical and social understanding of how social contract theory governs our legal

116. Ossei-Owusu, *supra* note 7, at 415.

117. *Id.* at 420.

118. See Ristroph, *An Intellectual History*, *supra* note 78, at 1972 (“But even if Americans are perpetually unhappy with criminal law in operation, they are also near-unanimous in their enthusiasm for the idea of criminal law—in their belief that a carefully crafted and properly administered criminal law is exactly what the word ‘justice’ means.”).

119. *Id.*; see also David Garland, *Penal Controls and Social Controls: Toward a Theory of American Penal Exceptionalism*, 22 PUNISHMENT & SOC’Y 321, 323 (2020) (“The punishment-political economy relationship—which observes an association between free market economies and high levels of punishment and conversely, between high levels of social and economic protection and low levels of punishment—would seem, therefore, to provide a promising analytic framework in which to explain the American case.”).

120. See generally Molly Sherwood, Note, *The Missing Link: How Prosecutors Contribute to the Carceral System and Why They Must be Included in the Abolition Movement*, 34 GEO. J. LEGAL ETHICS 1315 (2021) (discussing broadly the role of prosecutors in the carceral system and intertwining this with a discussion of the U.S. police system’s formation as a slave patrol).

121. See NAOMI MURAKAWA, *THE FIRST CIVIL RIGHT: HOW LIBERALS BUILT PRISON AMERICA* 23–24 (2014).

122. Naomi Murakawa & Katherine Beckett, *The Penology of Racial Innocence: The Erasure of Racism in the Study and Practice of Punishment*, 44 L. & SOC’Y REV. 695, 696 (2010).

system, particularly the harm that results from society's obsession with morally deviant individuals and our commitment to punishing those individuals for their bad acts while simultaneously ignoring other social factors. Law schools, and the Criminal Law classroom in particular, normalize the jarring statistics of the carceral state by haphazardly teaching students the law as a subject separate and apart from—and sometimes superior to—other social, political, and economic issues.¹²³ Additionally, these facially race-neutral positions fly under the radar due to the narrow “legal, political and social definitions of racism.”¹²⁴ Law schools, therefore, produce future criminal lawyers who are well-equipped to understand the law, but only understand it “in ways that do not approximate the practical world.”¹²⁵

III. THE IMPACT ON YOUTH

Cases within the juvenile justice system are seldom, if ever, read in a substantive criminal law class. So, most prosecutors learn about juvenile adjudications and convictions on the job with no prior context of their impact.¹²⁶ While this format is not unique to criminal prosecution—many lawyers learn their skills on the job—the stakes of incarcerating a young person are significant.¹²⁷ Collateral consequences become an afterthought, if thought of at all. Young people in the United States are incarcerated at a rate wildly out of step with any other nation, resulting in almost 50,000 young people being behind bars on any given day.¹²⁸ Similar to the adult incarcerated population, Black youth are

123. See Ossei-Owusu, *supra* note 7, at 422.

124. Murakawa & Beckett, *supra* note 122, at 698–99.

125. Ossei-Owusu, *supra* note 7, at 426.

126. Additionally, most district attorney's offices staff their newest prosecutors to their juvenile units because it is deemed less serious than the cases involving major crimes or homicide. Ronald F. Wright & Kay L. Levine, *The Cure for Young Prosecutors' Syndrome*, 56 ARIZ. L. REV. 1065, 1121–22 (2014). Practically speaking, some may consider this logical. However, given the role of collateral consequences for youth with a criminal record—and given that most cases that end up in the criminal legal system are actually misdemeanors—this practice essentially gives the greatest amount of discretion to the least experienced prosecutors. See *id.* See generally *America's Massive Misdemeanor System Deepens Inequality*, EQUAL JUST. INITIATIVE (Jan. 9, 2019), <https://eji.org/news/americas-massive-misdemeanor-system-deepens-inequality/> [<https://perma.cc/2RNN-JLH4>] (“Misdemeanors . . . account for about 80 percent of American criminal dockets.”).

127. This is potentially because “the United States has at least 51 different juvenile justice systems, not one.” NAT'L RSCH. COUNCIL & INST. MED., JUVENILE CRIME, JUVENILE JUSTICE 155 (Joan McCord et al. eds., 2001). Even within each state, “[h]ow juvenile courts operate may vary from county to county and municipality to municipality.” *Id.*

128. ALEXIS ANDINO ET AL., JUV. L. CTR., BROKEN PROMISES: FUTURES DENIED 17 (2nd ed. 2024).

overrepresented within the criminal legal system, and a Black young person is five times more likely to be detained or incarcerated than their white peers.¹²⁹

A. *History of the Juvenile System*

Juvenile court, as an institution, has formally existed for over 125 years.¹³⁰ Broadly defined, juvenile courts are those that hear only the trials of minors, separate from adults charged with crimes, and that ostensibly function to provide a pathway to rehabilitation for delinquent youths.¹³¹ When it first started to gain momentum as an alternative practice, scholars and reformers considered it the “first legal tribunal where law and science . . . work side by side.”¹³² Created as an alternative to the less dynamic and more traditionally punitive approach to justice, the new juvenile court system recognized the reality that punishment, by itself, was not an effective tool for deterring crime, especially when it came to young people.¹³³ The process of adjudicating young people dates back to eighteenth-century England,¹³⁴ but the alternative model that most courts in the United States use today for officially prosecuting young people began in 1899.¹³⁵ At its root, however, is the idea “that the state is the guardian of [a child’s] social interests,” or *parens patriae*.¹³⁶ This doctrine allows the court, as an arm of the state, to step in and serve as guardian to a child if their parents fail to meet the standard of care.¹³⁷ Interestingly, however, this doctrine does not apply to children who commit crimes because in those instances, they are not viewed as children, but rather as adults.¹³⁸

Before juvenile courts were established, “youth of all ages and genders were often indiscriminately confined with . . . adult criminals and the mentally ill in large overcrowded and decrepit penal institutions.”¹³⁹ Many of those young people were confined not due to

129. HARV. L. SCH., *supra* note 12, at 21:56–22:07; ANDINO ET AL., *supra* note 128, at 17.

130. See ANTHONY M. PLATT, *THE CHILD SAVERS: THE INVENTION OF DELINQUENCY* 9 (2d ed. 1977).

131. *Id.* at 9–10.

132. HERBERT H. LOU, *JUVENILE COURTS IN THE UNITED STATES* 2 (1927).

133. See *id.* at 4.

134. See *id.* at 3.

135. PLATT, *supra* note 130, at 9.

136. LOU, *supra* note 132, at 4.

137. *Id.*

138. See *infra* Section III.C.

139. *Juvenile Justice History*, CTR. ON JUV. & CRIM. JUST., <https://web.archive.org/web/20250119105814/https://www.cjcj.org/history-education/juvenile-justice-history> [<https://perma.cc/8PC3-QHXU>] (last visited Sep. 25, 2026).

criminal behavior but due to the state's lack of infrastructure to support poor children in any other way.¹⁴⁰ This led to the creation of the "House of Refuge," which was the "first institution designed to house poor, destitute and vagrant youth who were deemed by authorities to be on the path towards delinquency."¹⁴¹ Originally established by Thomas Eddy and John Griscom of the Society for the Prevention of Pauperism, the House of Refuge quickly spread to several major cities across the United States, becoming the primary institution responsible for housing the "poor and delinquent youths."¹⁴² This model eventually spawned several reformist iterations of youth-specific penal institutions throughout the mid- to late-1800s, leading directly to the creation of juvenile courts just before the turn of the century.¹⁴³

Young people who break the rules or exhibit "delinquent" behavior have always been disenfranchised and seen as worthy of criminal punishment. Even though the institution of juvenile court was created to remove adolescents from the criminal law process and create special programs for "delinquent, dependent, and neglected children," the origins of what has been named the "child saving movement" date back to middle-class philanthropists interested in reinforcing the social contract theory, especially among young people.¹⁴⁴ By bringing attention to, and even inventing, "new categories of youthful misbehavior," these so-called "child savers" created a new system under which to punish the most deviant of young people through rehabilitation.¹⁴⁵

When Locke introduced the social contract theory, he excluded children as their own social category.¹⁴⁶ Viewing children as "beneath reason," Locke promoted the dominant idea that children have no

140. *Id.*

141. *Id.* ("Houses of Refuge were large fortress-like congregate style institution [sic] located in urban areas for youth designated as abandoned, delinquent or incorrigible. The average number of youth in a house of refuge was 200, but some, like the New York House of Refuge, housed over 1,000 youth.").

142. *Id.*

143. *Id.*; see also Brianna Barrett et al., *Training and Industrial Schools*, DIMENSIONS OF CRIME: BLACK WOMEN AND CRIMINALITY IN U.S. HIST., <https://kaylajsmith.sandbox.library.columbia.edu/exhibits/show/about/about-the-project> [<https://perma.cc/3RJV-NYFY>] (describing the influence of these Houses of Refuge on the penal system).

144. PLATT, *supra* note 114, at 9–10 ("'Pathological' approaches to delinquency and crime neglect the possibility that deviance may play an important part in preserving social stability and reinforcing the status and prestige of the ruling classes.").

145. See *id.* at 3–4.

146. CAMILLE OWENS, *LIKE CHILDREN: BLACK PRODIGY AND THE MEASURE OF THE HUMAN IN AMERICA* 7 (2024) ("In making reason the source of democracy's possibility, however, Locke retracted democratic eligibility from a certain group—children—whose mind's [sic] he imagined as 'white [p]aper, void of all [c]haracters, without any [i]deas.'").

political power and should be seen as entirely separate from civic life.¹⁴⁷ The child-saving movement did the same thing when it created the deviant child subcategory. In doing so, the child-savers further supported their own existence and actually formally extended the social contract theory to include children.¹⁴⁸ By creating the child deviant category, they successfully created new rules around otherwise mildly disruptive behavior.¹⁴⁹ As a result, society—including the members with the power to punish—began to understand deviance as a *fait accompli*. Deviance was an inherent character flaw of the children who committed crimes, as opposed to a systemic definition to further justify the social contract.¹⁵⁰

B. *Youth Charged as Adults*

Under the social contract theory, children are viewed as lacking the capacity to participate in the system of rules set up around them.¹⁵¹ Until, of course, they break the rules. Similar to the *superpredator* slander, it is the social contract that further targets young people and casts them as outliers of an “otherwise pristine social order.”¹⁵² While the number of incarcerated youth is low relative to the overall incarcerated population in the United States, they reflect a national trend towards mass incarceration. Even with federal incentives to limit the number of incarcerated youth, there are still 2,000 young people under the age of eighteen incarcerated across the country.¹⁵³ As of 2023, 85% of those two

147. *Id.* (“Defining children beneath reason not only precipitated children’s loss of political power. . . . [C]hildren’s separation from ‘civic life’ inversely helped ‘constitute and buttress’ the meaning of civic life, the civic subject, and the state.”). Locke’s conception of the social contract was also about framing “man’s rights” as a reward for entering “civic life.” *Id.* So long as children are separate and apart from society at large, there was incentive for “men” to formally buy into the idea of the social contract. *See id.*

148. PLATT, *supra* note 130, at 3.

149. *Id.*

150. *Id.* at 8–9 (“We must see deviance . . . as a consequence of a process of interaction between people, some of whom in the service of their own interests make and enforce rules which catch others who . . . have committed acts which are labeled deviant.”).

151. Tamar Ezer, *A Positive Right to Protection for Children*, 7 YALE HUM. RTS. & DEV. L.J. 1, 2 (2004). John Locke intentionally excluded children when he developed the social contract theory of reason as a precondition to consent. *Id.* Children were viewed as ineligible to consent to the rules of the social contract. OWENS, *supra* note 146, at 7.

152. BILLINGHAM & IRWIN-ROGERS, *supra* note 107, at 76.

153. *Youth Justice*, CHILD’S DEF. FUND: 2023 STATE OF AM.’S CHILD. REP., <https://www.childrensdefense.org/tools-and-resources/the-state-of-americas-children/soac-youth-justice/> [<https://perma.cc/J54G-M2NL>] (last visited Nov. 12, 2025); *see also* Joshua Rovner, *Youth Justice by the Numbers*, SENT’G PROJECT (Nov. 20, 2025), <https://www.sentencingproject.org/policy-brief/youth-justice-by-the-numbers/> [<https://perma.cc/SVZ6-YMBZ>] (“In 2023, 2,000 people under 18-years-old were held in an adult jail and 513 were serving sentences in an adult prison . . . Between 2021 and 2022,

thousand were held as adults.¹⁵⁴ “It’s like a judicial magic trick. According to the law, teens automatically turn into adults as soon as they commit the worst crimes.”¹⁵⁵ In other words, 85% of young people who were charged with a crime were legally converted into adults so they could be charged in the adult system and incarcerated alongside adults. Through a process known as “direct file,” some states give district attorneys discretion to decide whether to prosecute a young person under eighteen directly in the adult system.¹⁵⁶ States with a direct file process typically limit the eligibility to specific felonies like homicide, aggravated assault, robbery, and various related inchoate offenses, and the minimum age for eligibility varies by state.¹⁵⁷

Most youth who are charged as adults have little or no prior history of delinquency, have not committed a felony, and do not score as high risk to reoffend.¹⁵⁸ Furthermore, mass incarceration has shortened the overall life expectancy in the United States by almost two years.¹⁵⁹ Prisons are also sites of extreme violence. For example, the Department of Justice’s Civil Rights Division in 2019 found that prisons in Alabama failed to protect prisoners from “astounding levels of homicide and rape.”¹⁶⁰ So much so, the Division reported “four stabbings (one that involved a death), three sexual assaults, several beatings, and one person’s bed set

there was a notable rise in the number of youth in adult prisons, reflecting a 50% increase in only one year, a trend that continued in 2023. Though this population is small in number, this rise represented a reversal of a 25-year trend.”).

154. CHILD.’S DEF. FUND, *supra* note 153; see also *Number of Youth Younger than Age 18 Confined in Local Jails*, OFF. JUV. JUST. & DELINQ. PREVENTION, <https://ojjdp.ojp.gov/statistical-briefing-book/corrections/faqs/qa08700> [<https://perma.cc/4D67-XKYJ>] (last visited Nov. 11, 2025) (“Between 1993 and 2023, the proportion of jail inmates younger than 18 who were held as adults ranged between 70% and 91%.”).

155. Joel D. Smith, *When Are Teens, or Even 10-Year-Olds, Charged as Adults in PA?*, LOC. 21 NEWS (Oct. 8, 2024, at 7:10 ET), <https://local21news.com/news/local/when-are-teens-or-even-10-year-olds-charged-as-adults-in-pa> [<https://perma.cc/C4M9-X8HR>].

156. See, e.g., *HB 1551 | Prohibiting Prosecuting Children as Adults*, ACLU PA. (Sep. 22, 2023), <https://www.aclupa.org/en/legislation/hb-1551-prohibiting-prosecuting-children-adults> [<https://perma.cc/2E2Z-YLMX>].

157. See, e.g., 42 PA. CONS. STAT. ANN. § 6302 (2025); N.Y. FAM. CT. ACT § 301.2(1)(a)(iii) (McKinney 2025); N.J. STAT. ANN. § 2A:4A-34 (West 2025).

158. PA. JUV. JUST. TASK FORCE, REPORT & RECOMMENDATIONS 4 (2021), https://www.pacourts.us/Storage/media/pdfs/20210622/152647-pajuvenilejusticetaskforcereportandrecommendations_final.pdf [<https://perma.cc/5HXA-XYXU>].

159. Christopher Wildeman, *Incarceration and Population Health in Wealthy Democracies*, 54 CRIMINOLOGY 360, 374 (2016).

160. Shon Hopwood, *How Atrocious Prisons Conditions Make Us All Less Safe*, BRENNAN CTR. FOR JUST. (Aug. 9, 2021), <https://www.brennancenter.org/our-work/analysis-opinion/how-atrocious-prisons-conditions-make-us-all-less-safe> [<https://perma.cc/JM4S-PZVS>].

on fire as he slept.”¹⁶¹ Young people, in particular, are subject to these harsh realities when they are incarcerated. Many young people who are currently or were previously incarcerated report physical or sexual abuse by the facility staff or their peers while incarcerated.¹⁶²

While the criminal law has not remained entirely static, it maintains its status as a tool “to preserve existing social hierarchies and helps the movements working to resist broad social change.”¹⁶³ Under Locke’s theory, society deeply relied on stripping children of political power and separating them from civic life.¹⁶⁴ Doing so was necessary to maintain and preserve the existing social hierarchies. Yet, young people are left out of the conversation when the topic of violent crime and its elements come up in the Criminal Law classroom. Given that the Criminal Law course treats itself like a class about social contract enforcement, some discussion on who can and cannot participate, and the large portion of the population excluded from the conversation, youth, for example, would be appropriate.

In the mid-1970s, the United States saw a shift in how it understood these long-standing social hierarchies. The Juvenile Justice and Delinquency Prevention Act of 1974 (“JJDPA”) was enacted under the guise that young people and their families involved in the criminal justice system should be “guarded by federal standards for care and custody.”¹⁶⁵ No federal standard was created; however, the closest equivalent is the creation of a new federal agency devoted to JJDPA oversight.¹⁶⁶ On its face, the efforts to create the JJDPA—and the subsequent effort to create the Juvenile Justice Reform Act (“JJRA”)—displaced Locke’s general theory that children were to have no political or social power. As of December 2018, with the passing of the JJRA,¹⁶⁷ the process by which young people are filed into the adult system had changed only superficially. In reality, the JJRA only *incentivized* states to find alternatives to direct file prosecution.¹⁶⁸ In practice, this incentive-based

161. *Id.*

162. RICHARD MENDEL, SENT’G PROJECT, WHY YOUTH INCARCERATION FAILS: AN UPDATED REVIEW OF THE EVIDENCE 5 (2022), <https://www.sentencingproject.org/app/uploads/2023/03/Why-Youth-Incarceration-Fails.pdf> [<https://perma.cc/WS8N-X2AA>].

163. Ristroph, *An Intellectual History*, *supra* note 78, at 1964.

164. OWENS, *supra* note 146, at 7.

165. *Juvenile Justice and Delinquency Prevention Act*, COAL. FOR JUV. JUST., <https://juvjustice.org/policy/juvenile-justice-and-delinquency-prevent-act/> [<https://perma.cc/NG8J-9J3C>] (last visited Nov. 15, 2025).

166. *See id.*

167. *Id.*

168. *See Core Requirements: Compliance with the Core Requirements of the Juvenile Justice and Delinquency Prevention Act*, OFF. JUV. JUST. & DELINQ. PREVENTION,

structure reflects the general understanding that state sovereignty is at its height when it enacts its police power.¹⁶⁹ The incentive is geared towards law enforcement officials who have historically viewed young people who commit crimes as inherently deviant. It did not ultimately prohibit prosecutors from using their discretion to charge a young person in the adult system, as evidenced by the number of young people currently incarcerated in the United States. Rather, it merely made states that complied with the recommendations eligible for federal grants.¹⁷⁰

Charging youth as adults is a harmful practice. Still, the criminal legal system relies on the *superpredator* myth to impose harsher penalties, believing they will both deter violent crime and make our society safer by removing the “teen predators who would terrorize our communities.”¹⁷¹ Even the Supreme Court of the United States acknowledged that evidence supports the idea that young people are not incapable of rehabilitation, even when they commit the most heinous crimes.¹⁷² Justice Kennedy, writing for the majority in *Roper v. Simmons*, noted that “[f]rom a moral standpoint it would be misguided to equate the failings of a minor with those of an adult, for a greater possibility exists that a minor’s character deficiencies will be reformed.”¹⁷³

The domino effect of the *Roper* decision meant record numbers of young people were either released from death row, newly eligible for

<https://ojjdp.ojp.gov/about/core-requirements#3-0> [<https://perma.cc/K3BJ-3JYL>] (last visited Nov. 18, 2025).

169. See D. Benjamin Barros, *The Police Power and Takings Clause*, 58 UNIV. MIA. L. REV. 471, 477 (2004) (“[T]he police power and state sovereignty are synonymous.”).

170. OFF. JUV. JUST. & DELINQ. PREVENTION, *supra* note 168. The requirements provide that “[t]o receive an award . . . states must, each year, satisfy 33 state plan requirements. If a state does not meet these requirements, it is not eligible to receive its Formula Grants program allocation for that year.” *Id.* The core requirements include: “[d]einstitutionalization of status,” “[s]eparation of juveniles from adult inmates,” “[r]emoval of juveniles from adult jails and lockups,” and “[a]ddressing racial and ethnic disparities.” *Id.*

171. Marsha Levick, *Roper v. Simmons Understood Kids Are Different, Paving the Way for a More Humane Approach to Sentencing Young People*, JUV. L. CTR. (Mar. 1, 2025), <https://jlc.org/news/roper-v-simmons-understood-kids-are-different-paving-way-more-humane-approach-sentencing-young> [<https://perma.cc/R8UZ-Z7Z5>]; see also CAMPAIGN FOR THE FAIR SENT’G OF YOUTH, THE ORIGINS OF THE SUPERPREDATOR: THE CHILD CUSTODY MOVEMENT TO TODAY (2021), <https://cfsy.org/wp-content/uploads/Superpredator-Origins-CFSY.pdf> [<https://perma.cc/8BC5-SGPU>] (explaining that after the popularization of the superpredator myth of the 1990s, harsher penalties were imposed on children of color: specifically, 70% of all kids sentenced to life without parole were children of color).

172. See *Roper v. Simmons*, 543 U.S. 551, 570 (2005).

173. *Id.*

parole, or able to avoid adult conviction altogether.¹⁷⁴ The Supreme Court began to rely on psychology and science to reach profound legal conclusions about how young people should be treated in the criminal justice system and whether they could even be similarly culpable under this moral-philosophy lens.¹⁷⁵ Even legislative interventions, like the JJDPa, were based on scientific evidence that young people are capable of rehabilitation and should not be harshly punished for bad acts committed at such young ages.¹⁷⁶ Even still, none of these cases or legal developments appear on the criminal law syllabus. Given that most Criminal Law classrooms emphasize the four theories of punishment to some degree, it is an anomaly that somehow those discussions come to a full stop before including their impact on incarcerated youth. To a Criminal Law professor, the choice to exclude these cases from the course may seem neutral. In reality, it further emphasizes the idea that young people are undeserving of political power in society and perpetuates the enforcement of the social contract.

C. *Young People and the Social Contract*

By recognizing that youth are most likely to both commit and be victimized by the crimes that are most studied in Criminal Law, there is potential for an impactful shift away from a pedagogical obsession with individual morality and choice as the only drivers of our punishment system. Incorporating not just an analysis of the elements of a crime, but also an analysis of the effects of social harms on young people, could “help to pierce through the myth that our society is a peaceful, cohesive, just and fair place, aside from anomalous eruptions of crime and violence.”¹⁷⁷ Without this intentional analysis, young people continue to be targeted by the social contract myth as deviants and are therefore cast “as the sole disruptors of an otherwise pristine social order.”¹⁷⁸ I do not argue that

174. See, e.g., *Graham v. Florida*, 560 U.S. 48, 79 (2010); *Miller v. Alabama*, 567 U.S. 460, 465 (2012); *Montgomery v. Louisiana*, 577 U.S. 190, 212 (2016).

175. See, e.g., *Roper*, 543 U.S. at 570 (citing research regarding juveniles’ diminished control over their environment); *Miller*, 567 U.S. at 471–72 (describing the Court’s reliance on science and social science in its decisions).

176. *Juvenile Justice and Delinquency Prevention Act: Overview and Perspectives: Joint Hearing on S.3155 Before the Subcomm. on Healthy Fams. & Cmty., Comm. on Educ. & Lab., Subcomm. on Crime, Terrorism, & Homeland Sec., H. Comm. on the Judiciary*, 110th Cong. (2007) (statement of Robert C. Scott, Chairman, H. Comm. on Judiciary Subcomm. on Crime, Terrorism and Homeland Security) (“[The JJDPa’s] shift towards prevention and rehabilitation would be in line with research-driven crime prevention strategies. Research has consistently shown that a continuum of services can significantly reduce crime.”).

177. BILLINGHAM & IRWIN-ROGERS, *supra* note 107, at 76.

178. *Id.*

young people are always or inherently innocent of the crimes they commit, but rather that youth are an already disenfranchised social group who are not viewed as having agency *until* they commit a crime. This disrupts the Criminal Law classroom's most basic assumptions. Especially for young people under the age of eighteen, the law still recognizes them as property of their parents, guardians, or the state.¹⁷⁹ Social contract theory eliminates the reality that certain communities of young people experience a significant concentration of these social harms, which inevitably and significantly shape a young person's life through their collective impact.¹⁸⁰

For the first time, the law formally recognized a scientific justification for imposing a rehabilitative rather than a retributive punishment.¹⁸¹ Deemed "the greatest advance in judicial history since the Magna Charta [sic]" by legal experts, the child saving movement created a new principle: "that law violators, the antisocial and maladjusted, especially among children, should be treated individually through social and protective processes, for their own protection and that of society, instead of by the punitive and retaliatory methods of the criminal law, which always have failed to repress crime."¹⁸² To be clear, the child saving movement relied on eugenics and social Darwinist theories "in order to emphasize the urgent need for confronting the problem of crime before it got out of hand."¹⁸³ The child savers believed that "criminal children 'come into the world frightened down with evil propensities and vicious tendencies [and] start out handicapped in the race of life.'"¹⁸⁴

179. See TRISHA ZELLER, 3 FAMILY LAW AND PRACTICE § 32.01 (2025). In other areas of the law, courts assume the role of *parens patriae*. *Id.* For example, in family court, during child custody hearings, judges are held to a "best interest of the child" standard. *Id.* By contrast, when a young person is charged in adult court, there is no longer an assumption of *parens patriae*, and the "best interest" standard does not apply. See Tiara Greene, *Should Youth Be Charged as Adults in the Criminal Justice System?*, A.B.A. (Oct. 21, 2025), [https://www.americanbar.org/groups/litigation/resources/newsletters/childrens-rights/should-juveniles-be-charged-adults-criminal-justice-system/\[https://perma.cc/6FLJ-HLWW\]](https://www.americanbar.org/groups/litigation/resources/newsletters/childrens-rights/should-juveniles-be-charged-adults-criminal-justice-system/[https://perma.cc/6FLJ-HLWW]). It is assumed, rather, that children who commit adult crimes are no longer worthy of this judicial intervention, even if their behavior is clearly the result of external and systemic social harms.

180. See BILLINGHAM & IRWIN-ROGERS, *supra* note 107, at 77.

181. See Charles L. Chute, *The Juvenile Court in Retrospect*, 13 FED. PROB. 3, 3 (1949).

182. *Id.* Whether the juvenile court system *actually* rehabilitates youth and repressed crime is the topic for another paper. My emphasis on it here is to show how deeply rooted social contract theory is within the criminal legal system, even in rehabilitative contexts, and even when young people are involved.

183. PLATT, *supra* note 130, at 27.

184. *Id.*

Even fifty years later, legal scholars argued that the establishment of the juvenile court system could eventually serve as a model for more effective, individualized criminal punishment.¹⁸⁵ However, the child savers, operating under a social contract framework, deliberately ignored the prevalent social harms that affect young people who commit delinquent acts.¹⁸⁶ Effective rehabilitation is not about “designing the right programmatic interventions for the right individual young people, as if they can be lifted from their socio-historical context into some kind of petri dish” but rather it is a matter of confronting the social harms “and present condition[s] of those who are structurally belittled.”¹⁸⁷

The Criminal Law classroom is an ideal setting to confront this reality.¹⁸⁸ As evidenced by the development of the juvenile court, it is clear that the Criminal Law is capable of change. However, these changes refuse to burst the social contract theory bubble and continue to “preserve existing social hierarchies” immune to fundamental shifts in how society understands the power dynamics of the law.¹⁸⁹ This refusal perpetuates the notion that it is the law itself, “rather than raw power or discretion,” that keeps our society safe.¹⁹⁰ Instead, the criminal law classroom could provide the building blocks for these foundational changes.

185. See Gustav L. Schramm, *The Juvenile Court Idea*, 13 FED. PROB. 19, 19 (1949) (“[T]his . . . new and . . . powerful idea in human justice . . . is destined to affect not only its original field of the juvenile before the law but also the whole scope of human relationships under the law.”).

186. See generally Mollis, *supra* note 56, at 7 (“As some scholars also highlight, the final decision on whether to criminalize certain conduct or not ultimately depends on principles of political evaluation and collective determination, and not on an abstracted and absolute sense of right or wrong.”).

187. BILLINGHAM & IRWIN-ROGERS, *supra* note 107, at 77.

188. In fact, failing to use the criminal law classroom as a site of confrontation is harmful and unsustainable. See Ristroph, *The Curriculum of the Carceral State*, *supra* note 4, at 1637 (“[L]aw schools bear more responsibility for mass incarceration than we have so far acknowledged. Recognizing this responsibility makes evident the likely costs of complacency: By continuing to rely on the same canonical model of criminal law, we are likely to preserve the carceral state.”).

189. See Ristroph, *An Intellectual History of Mass Incarceration*, *supra* note 78, at 1964; see also PLATT, *supra* note 130, at 12 (“The ‘rehabilitative ideal’ has so dominated American criminology that research is generally undertaken in order to fix the origins of criminal and delinquent behavior within particular individuals or environments rather than in the officially constituted agencies of the criminal law.”).

190. See Ristroph, *The Curriculum of the Carceral State*, *supra* note 4, at 1633–34. What we actually end up with is a gross reliance on incarceration. The law “defines what is criminal, and the due process [clause] ensures the fair treatment of each individual defendant.” *Id.* at 1634. Additionally, “[t]o get to mass incarceration, we needed a way of thinking about criminal law that would mean that in each individual case . . . prosecution and punishment seemed like a good idea.” See *id.*

Some of the less traditional classroom models do attempt to peek behind the curtain of these systemic forces.¹⁹¹ But, similar to Wechsler's complete overhaul of the case method, the criminal law classroom must start honestly teaching its students the distinction between claiming that "wrongdoers should be punished and the claim that the state should punish them."¹⁹² Explicitly teaching cases in which a young person is a defendant and centralizing their youth will extend the legacy of the youth justice movement by recognizing that young people are worth saving and potentially prevent the law student-to-prosecutor pipeline from becoming inevitable. As Camille Owens put it, "considering the child fundamentally changes how we understand the more global power of Man and the episteme of humanism,"¹⁹³ the criminal law classroom should be no exception to that standard.

191. See, e.g., *id.* at 1683 (describing Amna Akbar and Jocelyn Simonson's suggestions for the Criminal Law classroom, such as "expanding the discussion of punishment theory to include more information that could enable skepticism about the wisdom and justice of criminal sanctions; giving greater attention to race, gender, and class; and 'shortening or eliminating some traditional areas of the course and replac[ing] them with criminal law subjects that affect the lives of more people,' such as misdemeanors and drug laws.").

192. Ristroph, *Responsibility for the Criminal Law*, *supra* note 29, at 108.

193. OWENS, *supra* note 145, at 6.