



# Criminal law pedagogy

Daniel Pascoe\*

City University of Hong Kong

Correspondence email: [dcpascoe@cityu.edu.hk](mailto:dcpascoe@cityu.edu.hk)

*The Teaching of Criminal Law: The Pedagogical Imperatives*, Kris Gledhill and Ben Livings (eds) (Routledge 2017) 212pp; paperback £31.99/hardback £100.00

[H]ow we teach criminal law, or indeed any other subject within a law school curriculum, should be informed by reflective choices and research rather than by simply replicating what was done previously.<sup>1</sup>

Even before the COVID-19 pandemic, the pedagogical methods for teaching law in common law jurisdictions had come under renewed debate after a long period of stasis. As part of a broader movement toward approaching law professors' main area of professional competency in a more scientific and systematic manner,<sup>2</sup> several book-length publications during the 2000s and 2010s sought to explore the content of the syllabus, methods of disseminating information to and assessing students, the use of technology in the classroom, and the links between research and teaching.<sup>3</sup> Although such research still stands to impact criminal law teaching as much as any other area (given that criminal law is invariably a compulsory subject in the first law degree in common law jurisdictions), criminal law may also demand a subtly

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\* Associate Professor, School of Law, City University of Hong Kong.

1 K Gledhill and B Livings, 'Conclusion: looking to the future' in K Gledhill and B Livings (eds), *The Teaching of Criminal Law: The Pedagogical Imperatives* (Routledge 2017) 208.

2 B Livings, 'Context and connection' in Gledhill and Livings (eds) (n 1 above) 139.

3 Including the following works: P Maharg, *Transforming Legal Education: Learning and Teaching the Law in the Early Twenty-First Century* (Routledge 2007); G Hess, S Friedland, M Schwartz and S Sparrow, *Techniques for Teaching Law 2* (Carolina Academic Press 2011); E Jones and F Cownie (eds), *Key Directions in Legal Education* (Routledge 2020); C Gane and R H Huang (eds), *Legal Education in the Global Context: Opportunities and Challenges* (Routledge 2017); B Golder, M Nehme, A Steel and P Vines (eds), *Imperatives for Legal Education Research: Then, Now and Tomorrow* (Routledge 2019); C Sampford and H Breakey, *Law, Lawyering and Legal Education: Building an Ethical Profession in a Globalizing World* (Routledge 2016); R Grimes (ed), *Rethinking Legal Education under the Civil and Common Law: A Road Map for Constructive Change* (Routledge 2018). The latter volume is part of the same Routledge series on Legal Pedagogy, as with Gledhill and Livings (eds) (n 1 above).

different approach from legal educators. What makes criminal law different? Among other aspects, its visibility within popular culture (shaping the prior expectations of students studying it for the first time),<sup>4</sup> its focus on litigation and courtroom decision-making rather than outcomes negotiated away from courts ‘in the shadow of the law’,<sup>5</sup> its engagement with the most malevolent aspects of human nature, and its direct reflection of the social and political values of the day<sup>6</sup> separate crime from other subjects within the first law degree.

Given such distinct features, is the typical way that criminal law is taught fit for purpose?<sup>7</sup> Kris Gledhill and Ben Livings’ 2017 edited collection, entitled *The Teaching of Criminal Law: The Pedagogical Imperatives*, provides a plethora of new perspectives addressing this issue. Of course, whether current teaching methods should be maintained or changed will depend not only on the pedagogical literature, but also on the views of various stakeholders. The individual teacher, the student cohort, the professed goals of the institution and programme, the legal profession, and the society of which the university is a part, each deserve their say.<sup>8</sup> There will be no one ‘right’ answer. Yet, rather than being prescriptive, Gledhill and Livings’ 18-chapter collection, featuring contributions from leading scholars from the UK, Australia, the Republic of Ireland and New Zealand, provides criminal law teachers with a uniquely useful resource to aid pedagogical self-reflection and future conversations with these various stakeholders.

On to the book’s content. There is far from enough space here to do justice to all 18 chapters contained within Gledhill and Livings’ collection. Indeed, no criminal law educator could, or should,

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- 4 Eg A Jackson and K Kerrigan, ‘The challenges and benefits of integrating criminal law, litigation and evidence’ in Gledhill and Livings (eds) (n 1 above) 116; R A Fairfax, ‘Challenges and choices in criminal law course design’ (2013) 10 *Ohio State Journal of Criminal Law* 665, 665.
  - 5 W J Stuntz, ‘Plea bargaining and law’s disappearing shadow’ (2004) 117(8) *Harvard Law Review* 2548, 2548–2549.
  - 6 S Kilcommmins, S Leahy and E Spain, ‘The absence of regulatory crime from the criminal law curriculum’ in Gledhill and Livings (eds) (n 1 above) 201; K Amirthalingam, ‘The importance of criminal law’ (2017) 2 *Singapore Journal of Legal Studies* 318, 319.
  - 7 The typical course is summarised in ch 3, see B Fitzpatrick, ‘Using problem-based learning to enhance the study of criminal law’ in Gledhill and Livings (eds) (n 1 above) 61; and ch 18, see Gledhill and Livings, ‘Conclusion’ (n 1 above) 206: ‘a black-letter course of lectures structured around several weeks of general principles followed by several weeks of the details of offences of violence and property’.
  - 8 See K Gledhill and B Livings, ‘Introduction’ in Gledhill and Livings (eds) (n 1 above) 6. See generally F Cownie (ed), *Stakeholders in the Law School* (Hart 2010).

incorporate *all* of the approaches advocated for.<sup>9</sup> Yet, within the volume, several pedagogical themes stand out for their clarity and novelty. Most obvious is the distinction between what substantive offences the typical curriculum covers and the offences most frequently encountered in criminal practice. The former group often begins and ends with violent, sexual and property offences, whereas the latter group tends to be dominated by statutory drugs, driving and other regulatory ‘quasi-criminal’ offences.<sup>10</sup>

A second recurring theme is the utility of enquiry-based or problem-based learning in criminal law teaching. Here, counterintuitively, students begin their learning with a hypothetical fact-pattern problem, and then proceed to search for the applicable law with only minimal prompting from the instructor.<sup>11</sup> Other chapters deal with novel pedagogical approaches such as inculcating the ‘basic principles’ of criminal liability (if such a notion indeed exists)<sup>12</sup> exclusively via the teaching of substantive offences, rather than separately at the beginning of a criminal law module;<sup>13</sup> shifting the focus away from criminal liability toward more important areas for practice, such as prosecutorial discretion, pre-trial processes, the laws of evidence and sentencing;<sup>14</sup> and finally, challenging the definitions of ‘criminal law’ and ‘sentencing’ within teaching, by considering restorative justice processes, the regulation of anti-social behaviour, state victim compensation schemes and, at the more serious end of the spectrum, state responses to terrorism and international crimes.<sup>15</sup> What each of these approaches have in common is that they seemingly better inculcate the skills and knowledge required for criminal practice, when compared with more traditional teaching models. At a time when

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9 See Gledhill and Livings, ‘Conclusion’ (n 1 above) 207.

10 K Gledhill, ‘Choice’ in Gledhill and Livings (eds) (n 1 above) 185, 187; F Donson and C O’Sullivan, ‘Building block or stumbling block? Teaching *actus reus* and *mens rea* in criminal law’ in Gledhill and Livings (eds) (n 1 above) 21; Fitzpatrick (n 7 above) 61; J Gans, ‘Teaching criminal law as statutory interpretation’ in Gledhill and Livings (eds) (n 1 above) 93, 95; A Steel, ‘Shaking the foundations: criminal law as a means of critiquing the assumptions of the centrality of doctrine in law’ in Gledhill and Livings (eds) (n 1 above) 110–111; Kilcommmins et al (n 6 above) 194–195, 201.

11 J Boylan-Kemp and R Huxley-Binns, ‘Turning criminal law upside down’ in Gledhill and Livings (eds) (n 1 above) 73–75; see Fitzpatrick (n 7 above) 63–70.

12 See Gledhill (n 10 above) 192; Steel (n 10 above) 107–108.

13 See Donson and O’Sullivan (n 10 above) 22, 27; Gans (n 10 above) 96; J Child, ‘Teaching the elements of crimes’ in Gledhill and Livings (eds) (n 1 above) 37, 44.

14 See Fitzpatrick (n 7 above) 61–62; Steel (n 10 above) 107; Jackson and Kerrigan (n 4 above) 119–122; P Scranton and J Stannard, ‘“Crime and the criminal process”: challenging traditions, breaking boundaries’ in Gledhill and Livings (eds) (n 1 above) 134–135.

15 See Fitzpatrick (n 7 above) 62–63.

several scholars have questioned whether law schools are producing enough 'practice ready' graduates for criminal litigation,<sup>16</sup> this is a laudable goal.

In my view, there are two notable shortcomings relating to the book's content, although these are more a reflection of the fact that it is impossible to cover all examples of pedagogical innovation within a volume limited to roughly 200 pages. The first area of weakness is the book's limited coverage of the role of technology in the classroom, which was a major source of legal literature even before the changes brought by COVID-19.<sup>17</sup> The only two chapters that engage substantively with digital methods of course delivery and assessment are chapter 4 ('Enhancing interactivity in the teaching of criminal law: using response technology in the lecture theatre'), discussing instantaneous polling in the lecture theatre as a means of maintaining student engagement,<sup>18</sup> and chapter 6 ('Turning criminal law upside down'), which advocates for a 'flipped classroom' model, in addition to real-time internet-based research by students.<sup>19</sup> Aside from influencing content delivery and assessment, technology also continues to shape substantive criminal law and procedural norms, via topics like algorithmic sentencing and risk-assessment tools, the increasing importance of computer crimes, and crimes committed by autonomous actors. In both respects, technology will play a crucial role in criminal law teaching moving forward.

A second shortcoming is the relatively narrow range of jurisdictions that have been sampled within the volume. Although ideas developed in one common law context are often adaptable in another, the book might have benefitted from a broader focus on the common law world and further afield, perhaps incorporating chapters from common law Asia, Canada, the English-speaking Caribbean and even from several civil law jurisdictions. Surely the same kinds of pedagogical issues (how

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16 A Walker, 'The anti-case method: Herbert Wechsler and the political history of the criminal law course' (2009) 7 *Ohio State Journal of Criminal Law* 217, 219; see Amirthalingam (n 6 above) 322; A Milner, 'On the university teaching of criminal law' (1963) 7 *Journal of the Society of Public Teachers of Law* 192, 197.

17 Eg C Denvir (ed), *Modernising Legal Education* (Cambridge University Press 2019). See Fairfax (n 4 above) 666; F Ryan and H McFaul, 'Innovative technologies in UK legal education' in Jones and Cownie (n 3 above); E Rubin (ed), *Legal Education in the Digital Age* (Cambridge University Press 2012); J Vivien-Wilksch, 'Making use of new technology' in W Swain and D Campbell, *Reimagining Contract Law Pedagogy: A New Agenda for Teaching* (Routledge 2019).

18 K J Brown and C R G Murray, 'Enhancing interactivity in the teaching of criminal law: using response technology in the lecture theatre' in Gledhill and Livings (eds) (n 1 above) 49–56.

19 See Boylan-Kemp and Huxley-Binns (n 11 above) 75–76.

to teach general principles, which substantive crimes to include and exclude, which stage of criminal proceedings should be the focus, and whether the approach should be doctrinal, socio-legal, comparativist or critical)<sup>20</sup> arise equally in civil law or mixed common law–civil law jurisdictions. Relatively recent single-authored or edited volumes on clinical legal education, legal education in the global context and the future of the law school have each managed to incorporate a combination of chapters on common law and civil law jurisdictions, thereby facilitating a cross-pollination of ideas.<sup>21</sup>

The good news for the increasing number of criminal law scholars interested in this area is that there remain many more perspectives to take account of, Gledhill and Livings' 2017 text serving as an important catalyst to take the legal pedagogy agenda forward. Reform of syllabus content and teaching methods may even become an existential issue. As the editors note in their concluding chapter, the continued place of criminal law within the undergraduate law curriculum may depend on such pedagogical innovation.<sup>22</sup>

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20 See Amirthalingam (n 6 above) 322. On critical approaches discussed in the volume, see eg K Quince, 'Teaching indigenous and minority students and perspectives in criminal law' in Gledhill and Livings (eds) (n 1 above) 164–166 and J Tolmie, 'Introducing feminist legal jurisprudence through the teaching of criminal law' in Gledhill and Livings (eds) (n 1 above) 173–175. On socio-legal approaches, see eg Livings (n 2 above) 139–148 and A Loughnan, 'Teaching and learning criminal law "in context": taking "context" seriously' in Gledhill and Livings (eds) (n 1 above) 155–157.

21 See Gane and Huang (n 3 above); Grimes (n 3 above); Jones and Cowrie (n 3 above); R J Wilson, *The Global Evolution of Clinical Legal Education* (Cambridge University Press 2018); C Stolker, *Rethinking the Law School: Education, Research, Outreach and Governance* (Cambridge University Press 2014); S P Sarker (ed), *Clinical Legal Education in Asia: Accessing Justice for the Underprivileged* (Palgrave Macmillan 2015).

22 See Gledhill and Livings, 'Conclusion' (n 1 above) 209.