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# Critique-Inspired Pedagogies in Canadian Criminal Law Casebooks: Challenging "Doctrine First, Critique Second" Approaches to First-Year Law Teaching

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# Critique-Inspired Pedagogies in Canadian Criminal Law Casebooks: Challenging "Doctrine First, Critique Second" Approaches to First-Year Law Teaching

*This article is a critical evaluation of Canadian criminal law casebooks. The author explores the aims, practices, and challenges of these teaching texts by examining their relationship to critique-inspired pedagogical methods. A number of English-language Canadian criminal law casebooks add a welcome feature to the Canadian common law teaching landscape: all but one of six recently published casebooks teach doctrine and critique together. The research builds on an emerging scholarship of Canadian legal education by demonstrating evidence of critical political commitments* and critique-inspired teaching methods *within Canadian criminal law education. Yet casebook editors and other professors who utilize critical methods acknowledge challenges of teaching doctrine from critical standpoints. These discoveries lead the author to suggest that emphasizing the goals of teaching critique, including producing more effective lawyers and creating learning environments that value student diversity, will be helpful for moving forward with critique-inspired teaching.*

*Dans le présent article, l'auteure présente une évaluation critique des recueils de jurisprudence en droit pénal canadien. Elle explore les objectifs, les pratiques et les défis que comportent ces textes d'enseignement en examinant leur relation avec les méthodes pédagogiques inspirées de la critique. Un certain nombre de recueils de jurisprudence en droit pénal canadien de langue anglaise ajoutent une caractéristique bienvenue au paysage de l'enseignement de la common law au Canada : tous les recueils de jurisprudence récemment publiés, sauf un, enseignent la doctrine et la critique ensemble. La recherche s'appuie sur une nouvelle étude de l'enseignement du droit au Canada en démontrant l'existence d'engagements politiques critiques et* de méthodes d'enseignement inspirées de la critique dans l'enseignement *du droit pénal au Canada. Pourtant, les éditeurs de recueils de jurisprudence et d'autres professeurs qui utilisent des méthodes critiques reconnaissent les défis de l'enseignement de la doctrine à partir de points de vue critiques. Ces découvertes amènent l'auteure à suggérer que l'accent mis sur les objectifs de l'enseignement de la critique, y compris la production d'avocats plus efficaces et la création de milieux d'apprentissage qui valorisent la diversité des étudiants, sera utile pour aller de l'avant avec un enseignement inspiré de la critique.*

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## *Introduction*

> "A tension exists between the need to deliver an understanding of legal doctrine and theory, along with traditional lawyering skills, and the parallel obligation to engage students in the critical analysis of those rules and skills." – Julia Tolmie[1]

In common-law law schools, professors portray law teaching as involving two competing demands—teaching doctrine and teaching critique.[2] Teaching doctrine has come to stand for the practice of teaching a narrow conception of law by focusing on the legal rules and reasoning that emanate

1. Julia Tolmie, "Introducing Feminist Legal Jurisprudence Through the Teaching of Criminal Law" in Kris Gledhill & Ben Livings, eds, *The Teaching of Criminal Law: The Pedagogical Imperatives* (New York: Routledge, 2017) 173 at 175.
2. See e.g. *ibid*; Okianer Christian Dark, "Incorporating Issues of Race, Gender, Class, Sexual Orientation, and Disability into Law School Teaching" (1996) 32:3 Willamette L Rev 541 at 551; David Sandomierski, *Aspiration and Reality in Legal Education* (Toronto: University of Toronto Press, 2020) [Sandomierski, *Aspiration and Reality*].

from case law. Scholars describe doctrine-focused teaching as formalist and affiliate it with Harvard Law School professor and dean, Christopher Columbus Langdell.[3] Langdell is regarded as having written the first casebook, *A Selection of Cases on the Law of Contracts*, in 1871.[4] In it, Langdell claims that using cases is the most effective way "of mastering the doctrine":

> Law, considered as a science, consists of certain principles or doctrines… Each of these doctrines has arrived at its present state by slow degrees; in other words, it is a growth, extending in many cases through centuries. This growth is to be traced in the main through a series of cases; and much the shortest and best, if not the only way of mastering the doctrine effectually is by studying the cases in which it is embodied.[5]

The formalist, or case method, approach to teaching doctrine captures the idea that judicial cases contain rules that can be studied and applied on their own, without concern for the social contexts from which they emerge or for their broader social consequences.[6]

By comparison, teaching critique is the practice of teaching perspectives and skills that challenge doctrine's claims to logic and justice. Teaching critique recognizes that: judicial analysis leaves out lots of perspectives, experiences and other laws and often further marginalizes people who live in contexts of oppression. Judicial analysis thus does not always provide sufficient or appropriate resources for dealing with the problems that law confronts. Teaching critique can identify, emphasize, and contest the violence and oppression that doctrine (re)produces. Scholars align these practices with teaching students how to promote the needs and interests of vulnerable, marginalized, and oppressed communities and individuals.[7] These approaches reflect the political and academic commitments of

3. See e.g. Elizabeth Mertz, *The Language of Law School: Learning to "Think Like a Lawyer"* (Oxford: Oxford University Press, 2007) at 26; Sandomierski, *Aspiration and Reality*, *supra* note 2 at 44.

4. Christopher Columbus Langdell, *A Selection of Cases on the Law of Contracts: With References and Citations, prepared for Use as a Text-Book in Harvard Law School* (Boston: Little, Brown & Co, 1871).

5. *Ibid* at vi.

6. Sandomierski, *Aspiration and Reality*, *supra* note 2 at 45.

7. See generally e.g. Dark, *supra* note 2; Deborah Zalesne, "Racial Inequality in Contracting: Teaching Race as a Core Value" (2013) 3:1 Colum J of Race & L 23; Kimberlé Williams Crenshaw, "Foreword: Toward a Race-Conscious Pedagogy in Legal Education" (1994) 4:1 S Cal Rev L & Women's Stud 33; Arlene S Kanter, "The Law: What's Disability Studies Got to Do With It or an Introduction to Disability Legal Studies" (2011) 42:2 Colum HRLR 403; Khylee Quince, "Teaching Indigenous and Minority Students and Perspectives in Criminal Law" in Kris Gledhill & Ben Livings, eds, *The Teaching of Criminal Law: The Pedagogical Imperatives* (New York: Routledge, 2017) 162; Tolmie, *supra* note 1.

critical legal studies, which seeks to unveil the political nature of law and transform it for the betterment of oppressed individuals and groups,[8] of law and society, or sociolegal, studies, which brings methodologies and insights from the social sciences into the study of law,[9] and of scholars who seek to respond to calls to Indigenize the law school curriculum.[10]

This article is a critical evaluation of Canadian criminal law casebooks. I explore the aims, practices, and challenges of these teaching texts by examining their relationship to doctrinal and critical methods. The article is rooted in the idea that casebooks provide insight into how law students are taught to "think…about law and legal practice."[11] The research also builds on an emerging scholarship of Canadian legal education. In particular, it expands on the insights in David Sandomierski's recent book, which shows that Canadian common law contracts professors demonstrate a preference for teaching "doctrine first, critique second"[12]—specifically, a preference for teaching judicial reasoning first and critiques of that reasoning second.[13] As Sandomierski argues, these approaches convey the ideas that judicial reasoning "has a comprehensible, identifiable, distinctive core" and "that subjecting the core to critique is not particularly important, or at least not of equal importance to communicating that core."[14] Yet, despite the overwhelming practice of teaching doctrine before critique, Sandomierski also found that many contract law professors nevertheless identified value in teaching critique and aspired to do so.[15] In particular, Sandomierski found that most contract law professors do not teach much critique in practice. However, their reasons for nonetheless desiring to teach theory and critical perspectives are generally "instrumental and practical" in nature: teaching theory and critical perspectives equips students to become "'better lawyers.'"[16]

In this article, I illuminate the ways in which English-language criminal law casebook editors in Canada have taken up the challenge of working

8. See Sandomierski, *Aspiration and Reality*, *supra* note 2 at 60-61.
9. See Kanter, *supra* note 7 at 442.
10. On the meanings of, and differences between, Indigenizing and decolonizing law schools, see Jeffery G Hewitt, "Decolonizing and Indigenizing: Some Considerations for Law Schools" (2016) 33:1 Windsor YB Access Just 65.
11. Janet Ainsworth, "Law in (Case)books, Law (School) in Action: The Case for Casebook Reviews" (1997) 20:2 Seattle UL Rev 271 at 275. See also David Sandomierski, "Tension and Reconciliation in Canadian Contract Law Casebooks" (2017) 54:4 Osgoode Hall LJ 1181 [Sandomierski, "Canadian Contract Law Casebooks"].
12. Sandomierski, *Aspiration and Reality*, *supra* note 2 at 240.
13. *Ibid* at 240-244.
14. *Ibid* at 240.
15. *Ibid*, ch 4, 5.
16. *Ibid* at 38.

against the grain as all but one[17] of six recently published casebooks teach doctrine and critique together.[18] I use the term critique-inspired pedagogies to capture the alternative teaching method—engaging with doctrine from critical standpoints.

I take the position that critique-inspired approaches are preferable to doctrine-first approaches, drawing on the arguments presented in scholarship on teaching minority, feminist, Indigenous, class, disability, and critical race perspectives in legal education. Specifically, this body of literature identifies two compelling overarching objectives of critique-inspired teaching. First, consistent with Sandomierski's findings, critique-inspired teaching aims to equip law students with skills to be "better lawyers"[19]—to be aware of, and responsive towards, diverse experiences and oppressive legal structures. Critique-inspired approaches are intimately connected with social justice goals that aim to teach students about eradicating inequalities and oppression and about the challenges of, and possible pathways for, working towards those goals. Second, critique-inspired teaching aims to create learning environments that value student diversity.[20]

I turn first to the goals of critique-inspired teaching and then conduct a textual analysis of English-language Canadian criminal law casebooks.[21] My main interest lies in studying 21st century casebooks. However, I

17. Don Stuart & Steve Coughlan, *Learning Canadian Criminal Law*, 14th ed (Toronto: Thomson Reuters Canada, 2018) [Stuart]. When this article was already at the proof stage, a new edition of Stuart was published (Don Stuart & Steve Coughlan, *Learning Canadian Criminal Law*, 15th ed (Toronto: Thomson Reuters Canada, 2021)). Regrettably, I have not had the opportunity to incorporate the 2021 edition into this article.

18. See Kent Roach et al, *Criminal Law and Procedure: Cases and Materials*, 11th ed (Toronto: Emond, 2020) [Roach]; RP Saunders & Rebecca Bromwich, *Criminal Law in Canada: An Introduction to the Theoretical, Social and Legal Contexts*, 5th ed (Toronto: Thomson Reuters, 2016) [Saunders]; Toni Pickard et al, *Dimensions of Criminal Law*, 3d ed (Toronto: Emond Montgomery, 2002) [Pickard]; Jennie Abell, Elizabeth Sheehy & Natasha Bakht, *Criminal Law & Procedure: Cases, Context, Critique*, 5th ed (Concord: Captus Press, 2012) [Abell, *Volume I*]; Jennie Abell, Elizabeth Sheehy & Natasha Bakht, *Criminal Law & Procedure: Proof, Defences, and Beyond*, 5th ed (Concord: Captus Press, 2014) [Abell, *Volume II*].

19. Zalesne, *supra* note 7 at 27; Kanter, *supra* note 7 at 405.

20. Crenshaw, *supra* note 7; Quince, *supra* note 7; Zalesne, *supra* note 7 at 46-47; Charles R Calleros, "Training a Diverse Student Body for a Multicultural Society" (1995) 8 La Raza LJ 140 at 144-45; Alice K Dueker, "Diversity and Learning: Imagining a Pedagogy of Difference" (1991) 19:1 NYU Rev L & Soc Change 101 at 111-120; Susan Bisom-Rapp, "Contextualizing the Debate: How Feminist and Critical Race Scholarship Can Inform the Teaching of Employment Discrimination Law" (1994) 44:3 J Leg Educ 366 at 369.

21. I focus on published English-language Canadian criminal law casebooks. Excluded from my study are textbooks that exclusively aim to teach criminal law to students who do not plan to become lawyers: see for example, Simon N Verdun-Jones, *Criminal Law in Canada: Cases, Questions, and the Code*, 5th ed (Toronto: Nelson Education, 2011) at x. I also excluded criminal law textbooks and bound course materials.

provide historical context by examining the first English-language criminal law casebooks that were published in Canada in the 1960s: Douglas Schmeiser's *Cases and Comments on Criminal Law* (*Schmeiser*)[22]; and Martin Friedland's *Cases and Materials on Criminal Law and Procedure* (*Friedland*).[23] These two casebooks fall into different categories, with *Schmeiser* representing a doctrine-first pedagogy and *Friedland* moving towards critique-inspired teaching. The books demonstrate that both doctrine-first and critique-inspired pedagogies have been part of English-language Canadian criminal law casebooks since their introduction in the 1960s. For the remaining casebooks, I focus primarily on their most recent editions.

My casebook analysis begins with casebooks that have adopted "doctrine first, critique second" approaches to criminal law teaching: *Schmeiser* and Don Stuart and Steve Coughlan's *Learning Canadian Criminal Law*, most recently published in 2018 (*Stuart*).[24] I then consider casebooks that have moved towards and employed critique-inspired approaches: *Friedland* and the most recent version of *Friedland*, published in 2020 and now under the editorship of Kent Roach, Benjamin Berger, Emma Cunliffe, and Asad Kiyani (*Roach*)[25]; RP Saunders and Rebecca Bromwich's *Criminal Law in Canada: An Introduction to the Theoretical, Social and Legal Contexts*, most recently published in 2016 (*Saunders*)[26]; Toni Pickard, Phil Goldman, Renate Mohr, and Rosemary Cairns-Way's *Dimensions of Criminal Law*, most recently published in 2002 (*Pickard*)[27]; and Jennie Abell, Elizabeth Sheehy, and Natasha Bakht's two-volume casebook collection, *Criminal Law & Procedure*, most recently published in 2012 (*Abell Volume 1*)[28] and 2014 (*Abell Volume 2*).[29]

I analyze each casebook's conception of the relationship between doctrine and critique in teaching criminal law. I do so by discussing the books' prefaces or introductions, materials that are particularly emblematic of each book's approach to teaching doctrine and critique, and each book's section on the law surrounding the defence of not criminally responsible

22. Douglas A Schmeiser, *Cases and Comments on Criminal Law* (Toronto: Butterworths, 1966) [Schmeiser].
23. See Martin Friedland, *Cases and Materials on Criminal Law and Procedure*, 2d ed (Toronto: University of Toronto Press, 1968) [Friedland].
24. Stuart, *supra* note 17.
25. Roach, *supra* note 18.
26. Saunders, *supra* note 18.
27. Pickard, *supra* note 18. Cairns-Way was the primary editor of the third edition (see *ibid* at v). However, for consistency with its earlier editions, I refer to the casebook as Pickard throughout.
28. Abell, *Volume I, supra* note 18.
29. Abell, *Volume II, supra* note 18.

on account of mental disorder. I chose to use the mental disorder defence as a point of comparison between casebooks because the defence is an area of criminal law doctrine that illuminates "foundational issues—concerning criminal responsibility and subjectivity—which go to the core of criminal law."[30] Casebooks that place a priority on teaching critique alongside doctrine employ critique-inspired pedagogies including: teaching criminal law within its political, institutional, and social contexts; demonstrating the relevance of lived experience to criminal law; illuminating the power relations embedded within criminal law; and showing both the possibilities and substantial limitations of achieving social justice goals (such as gender equality, anti-racism, and equality for people living with disabilities) through Canadian criminal law.

My findings are modest. The prevalence of critique-inspired approaches in English-language Canadian criminal law casebooks does not tell us which books are used most frequently in classrooms, and, perhaps more importantly, my research does not tell us how these books are, or have been, used or what messages students take from them. Instead, my research makes the more preliminary point that further inquiry into these types of questions would be well warranted. The criminal law casebooks show that several English-language Canadian criminal law casebook editors have endeavoured to achieve the aspiration, which many contract law professors also share, of creating better lawyers. However, despite the availability of critique-inspired approaches, they nonetheless appear to occupy the margins of Canadian common law teaching. Casebook editors and other scholars have acknowledged the challenge of adopting teaching methods and philosophies that go against students', colleagues', and lawyers' expectations for doctrine-first teaching. This challenge leads me to suggest that emphasizing and further exploring the goals of teaching critique will be helpful for moving forward with critique-inspired pedagogies.

## I. *Critique-inspired pedagogies: Aiming to enhance and broaden legal skills and aiming to effectively teach diverse students*

Critique-inspired pedagogies involve inserting considerations of identities, oppression, and power relations into doctrinal legal education on a continuous basis. Scholars compare this practice to approaches that involve addressing such considerations only in "specialty or seminar courses,"[31]

30. Arlie Loughnan, *Manifest Madness: Mental Incapacity in Criminal Law* (Oxford: Oxford University Press, 2012) at 3.

31. Zelesne, *supra* note 7 at 26. See also Bisom-Rapp, *supra* note 20 at 368.

raising them only in relation to discrete topics,[32] or bringing them into play only as part of "policy" discussions that are distinctly separated from "doctrinal" analyses.[33] Legal scholars who advocate for incorporating minority, sexual orientation, feminist, Indigenous, disability, race, and class perspectives into doctrinal law teaching demonstrate that such practices provide tools for teaching legal skills and for teaching diverse classrooms. The pieces of literature that I review share an underlying commitment to developing both a learning space and a world where the apparent objectivity, neutrality, and centrality of judicial reasoning is challenged. The scholars aim to show their students that the assumptions and biases that permeate judicial reasoning can be rendered visible, contestable, and representative of ways of knowing and being,—which can privilege some groups and oppress others. Relatedly, the scholars seek to treat the experiences, knowledges, and laws of marginalized, vulnerable, and minority individuals and communities as valid and relevant. The literature in this section represents of critique-inspired teaching as the authors teach judicial reasoning while employing critical political commitments both to shape the framing of that reasoning and to show its alternatives.

Scholars advancing critique-inspired pedagogies identify several interrelated educational goals. One overarching goal is that critique-inspired pedagogies will contribute to students' skills, including their abilities to identify, understand, and value difference. Scholars relate such skills to enriching students' learning outcomes and to enhancing students' capacities to respectfully inquire into and appreciate their clients' experiences, knowledges, backgrounds, and needs in practice.

Critique-inspired pedagogies aim to equip students to see the effects of the legal system's treatment of some identities—for example, Indigenous, woman, queer, disabled, poor—as "deviation[s]"[34] from "unstated norms."[35] Arlene Kanter writes that, like feminist legal studies and critical race theory, "Disability Studies…offers the law and legal education the opportunity to critically examine the role of 'normalcy' within the law and within society, generally. It challenges us to examine our unstated assumptions and requires us to recognize, appreciate, and most importantly, value differences among us."[36] The practices of learning about and valuing differences should help students to see the ways in which law creates,

32. Zelesne, *supra* note 7 at 27.
33. Crenshaw, *supra* note 7 at 41.
34. Kanter, *supra* note 7 at 406.
35. *Ibid*, quoting Martha Minow, *Making all the Difference: Inclusion, Exclusion and the American Law* (Ithaca: Cornell University Press, 1990) at 51.
36. Kanter, *supra* note 7 at 406.

legitimizes, and allots differences.[37] Disability Studies, Kanter argues, will enhance these skills, thus "help[ing] our students to *become better lawyers*, and perhaps more importantly, help[ing] to promote fairness and justice in society."[38]

Writing from a critical race perspective, Deborah Zalesne similarly proposes that teachers should affirm that oppression is a regular, systemic occurrence—that it is built into the foundations of state law—rather than an isolated, unusual event.[39] Like Kanter, Zalesne expressly aims to create "better lawyers"—lawyers "who are more capable of practicing law holistically."[40] Zelesne conceptualizes a "holistic" law practice as one in which students and lawyers "understand the law, how it operates in our society, and most importantly, how to use it on behalf of clients and society."[41] She also views new law students as already being equipped "with values and beliefs about how the law can impact social and political issues."[42] Rather than stifling these knowledges and capacities, critique-inspired teaching aims to "get students to bring what they already know about social mores, cultural values, and historical perspectives to bear in the class discussion, making cases more 'real' and students more passionate, more analytic, and more confident."[43] Zalesne further places a responsibility to develop holistic lawyers on *all* law professors: "Law professors have a great deal of power because we teach students what to include and what to exclude in their analysis of the law. It is incumbent upon law professors to make people of color visible in contracting."[44]

Okianer Christian Dark similarly argues that all law professors must address issues relating to diversity and oppression: "[s]tudents need to hear all professors address diversity issues…Everyone…is responsible for changing society so that it is far more inclusive and fair to all members of the community."[45] With respect to the purposes of critique-inspired pedagogies, Dark argues that discussions relating to "race, gender, class, sexual orientation, and disability in law school education" can "aid… substantially in the intellectual depth and breadth of the law student."[46] Dark maintains that by engaging in these discussions, students will be

37. *Ibid*.
38. *Ibid* at 405 [emphasis added].
39. Zalesne, *supra* note 7 at 24.
40. *Ibid* at 27.
41. *Ibid* at 46.
42. *Ibid* at 27.
43. *Ibid* at 28.
44. *Ibid* at 46.
45. Dark, *supra* note 2 at 556.
46. *Ibid* at 544 [footnotes omitted].

better equipped to construct legal arguments and to recognize doctrine's assumptions and subjectivities, which will in turn enable them to identify its unequal applications.[47] Dark is also committed to developing students' abilities to draw on their own diverse experiences—she sees connections between legal problem-solving skills and other problem-solving skills. In particular, Dark argues that teaching students to make those connections will make them not only better lawyers but also better citizens: students "should be shown how they might build a bridge between the legal problem-resolving system and their own so that they can be *effective* lawyers and citizens."[48] Furthermore, Dark views legal skills as including a student's capacity to care for others. She suggests that "[a]n analysis of legal materials with an explicit consideration of diversity issues will strengthen and expand a student's intellectual capacity, *as well as her capacity for passion and compassion*."[49]

Angela Harris and Cynthia Lee similarly argue that teaching students how to critique judicial reasoning, how to seek policy change through legislation, and how to gain an understanding of the theoretical underpinnings of criminal law serve the aim of producing better lawyers.[50] Harris and Lee argue that their commitments "enhance" the law school "project of professional training."[51] They edit an American criminal law casebook that is premised on the claim "that substantive criminal law is an expressive enterprise: Legislatures pass criminal laws in large part to reflect their constituents' moral outrage at certain kinds of behavior. Moreover…substantive criminal law is inevitably entwined with culture, and American culture is shot through with subordination on the bases of race, gender, sexuality, and class."[52] Harris and Lee explain that their goal is to produce students who do "not just learn what the law is, but [learn] to think critically about whether it should be the way it is, and if not, how it ought to be changed."[53]

Critique-inspired pedagogies can also involve teaching Indigenous law in addition to teaching state law and critical perspectives for understanding state law. For example, Khylee Quince argues that teaching Indigenous law and legal values can develop students' abilities to see people in context and to avoid framing groups of people through their

47. *Ibid* at 544-551.
48. *Ibid* at 552.
49. *Ibid* at 544 [footnote omitted, emphasis added]. See also Bisom-Rapp, *supra* note 20 at 370.
50. Angela P Harris & Cynthia Lee, "Teaching Criminal Law from a Critical Perspective" (2009) 7:1 Ohio St J of Crim L 261.
51. *Ibid* at 266.
52. *Ibid* at 265.
53. *Ibid* at 265-266.

representations in state law and state legal processes.[54] Quince strives to achieve these objectives by incorporating Māori law and legal theory into her first-year criminal law teaching: "[a]s I inform our students, we are more than a criminogenic profile, which presents us as people with issues with violence, addictions, and victimisation. Those behaviours are not who we *are*—those are symptoms of our marginalisation and colonisation."[55] Similar to Kanter, Zalesne, and Dark, Quince regards her teaching practices as being intimately connected with developing better students and lawyers. She writes that her "strategies…are part of a broader attempt to mould students into legal thinkers and practitioners who are mindful and respectful…In respect of legal education and the practice of law, I view the goal of mindfulness as reflecting the human focus of law as a discipline centred upon communication and problem-solving."[56]

A second, and related, goal of critique-inspired pedagogies is to foster a classroom environment where diversity is respected, legitimized, and valued.[57] These pedagogies call upon students from privileged backgrounds to question their assumptions and to recognize multiple ways of understanding and experiencing the world. As Julia Tolmie writes, "[m]any of our students will be from backgrounds of relative privilege and will in their careers be called upon to advocate for, and pass judgment on, those who occupy social positions and lives that they will never experience. We are failing these students if we allow them to imagine that their own values reflect a neutral set of norms that can be non-reflexively applied."[58]

At the same time, critique-inspired teaching aims to ease the burdens carried by minority students and to enhance minority students' educational experiences.[59] Because white, male, heteronormative, economically stable, and physically and mentally able experiences and perspectives dominate law, those experiences and perspectives can easily be cast as objective, uncontestable norms.[60] At the same time, minority experiences and perspectives can be framed as biased and subjective.[61]

54. Quince, *supra* note 7.
55. *Ibid* at 166.
56. *Ibid* at 171.
57. See e.g. Frances Lee Ansley, "Race and the Core Curriculum in Legal Education" (1991) 79:6 Cal L Rev 1511 at 1528-1530.
58. Tolmie, *supra* note 1 at 174.
59. See e.g. Crenshaw, *supra* note 7; Quince, *supra* note 7; Calleros, *supra* note 20; Dueker, *supra* note 20; Bisom-Rapp, *supra* note 20; Zalesne, *supra* note 7 at 46-47.
60. See Crenshaw, *supra* note 7 at 35, 48.
61. *Ibid* at 35-36.

Kimberlé Crenshaw aims to shift these practices: she writes about the importance of bringing multiple perspectives into the classroom[62] and about "plac[ing] an entire legal framework at issue."[63] When teachers introduce multiple, contrasting perspectives, they can "destabilize" the "apparent objectivity" of legal reasoning.[64] "[M]ore importantly," teachers "can loosen the constraints upon those who have been forced to adopt a perspective which is often at odds with their reality."[65] Relatedly, asking students to question a legal framework can contribute to students' development of legal skills by "illuminat[ing] better the racial consequences of dominant values, concepts, and rules."[66] Additionally, and "[m]ore importantly," the practice values the knowledges and experiences of minority students.[67] In particular, Crenshaw argues that teaching about, and questioning the law's structural generation of power imbalances "revalues distinct minority experiences; no longer are they cultural handicaps that either must be overcome or made the subject of occasional observation. Such experiences are instead, sources of knowledge that can be legitimately and powerfully utilized in legal analysis."[68] As Crenshaw continues, "[m]inority students can gain the advantage that their majority colleagues share: *their* vision of the world, *their* experiences and values and the things that *they* take for granted can be legitimately included."[69]

In the next section, I carry out a textual analysis of English-language Canadian criminal law casebooks to examine the relationship between doctrine and critique within the books. Strikingly, several Canadian criminal law casebooks utilize critique-inspired approaches that pursue the objective of producing better, or more effective, lawyers. The abundance of critique-inspired approaches within 21st century Canadian criminal law casebooks stands in marked contrast to Canadian contract law casebooks, where only one casebook has pursued an approach of teaching contract law in its policy context.[70] In what follows, I turn first to the English-language Canadian criminal law casebooks that have adopted "doctrine

62. *Ibid* at 48.
63. *Ibid* at 43.
64. *Ibid* at 48.
65. *Ibid*.
66. *Ibid* at 43.
67. *Ibid* at 44.
68. *Ibid*.
69. *Ibid* [emphasis in original].
70. Angela Swan, Nicholas C Bala & Jakub Adamski, eds, *Contracts: Cases, Notes & Materials*, 9th ed (Toronto: LexisNexis Canada, 2015). See David Sandomierski, "Canadian Contract Law Casebooks," *supra* note 12 at 1191-1199.

first, critique second" approaches, and then consider the casebooks that move towards and embrace critique-inspired pedagogies.

## II. *Doctrine-first teaching in English-language Canadian criminal law casebooks*

### 1. *"This casebook deals primarily with general principles of criminal law and with defences": Schmeiser*

The first English-language Canadian criminal law casebook, *Cases and Comments on Criminal Law*, was published in 1966 and edited by Douglas Schmeiser. Schmeiser intended for the book to fill what he described as nearly a vacuum in Canadian criminal law material.[71] While the book was "compiled as a teaching aid," Schmeiser added that "practitioners may find it a convenient reference to leading cases."[72]

*Schmeiser* contains case excerpts along with references to, and a few excerpts from, legislative provisions, comments (including questions), and a few excerpts from secondary sources.[73] The questions are generally geared towards testing and sharpening readers' understanding what the law is, revealing a commitment to teaching judicial reasoning without teaching critique. For example, following an excerpt from the *Canadian Encyclopedic Digest* concerning "Lack of Criminal Intent," *Schmeiser* asks: "[i]s the formulation of the doctrine of *mens rea* by the *Canadian Encyclopedic Digest* correct?"[74] Moreover, *Schmeiser* guides students in gaining an understanding of the law by reading cases. For instance, in one comment, *Schmeiser* asks readers to consider the following questions: "Is *R.* v. *Ping Yuen* rightly decided? Is it reconcilable with *R.* v. *Regina Cold Storage*, *infra*? Is it consistent with *Beaver* v. *R.*, *infra*? Would the case be decided the same way today?"[75] Given that the tools for analysis are cases, judicial reasoning is meant to guide students in these evaluations. The materials and questions are in keeping with *Schmeiser*'s introductory statement that "[t]his casebook deals primarily with general principles of criminal law and with defences."[76] *Schmeiser* is thus illustrative of Langdell's casebook method—a method which implies a belief that law can (and should) be learned by reading multiple cases on particular points of law.

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71. Schmeiser, *supra* note 22 at vii.
72. *Ibid* at vii.
73. See e.g. CED (West, 2nd ed) vol 7 at 328, reproduced in Schmeiser, *supra* note 23 at 176; Canada, *Report of the Royal Commission on the Law of Insanity* (Canada: Queen's Printer, 1956), reproduced in Schmeiser, *supra* note 23 at 476 [McRuer Report].
74. Schmeiser, *supra* note 22 at 176.
75. *Ibid* at 228.
76. *Ibid* at vii.

A close look at the "Insanity" section reveals, nonetheless, that Schmeiser saw some limited room for critique. The section reproduces section 16 of the *Criminal Code*,[77] which provides the statutory framework for the defence and sets out a list of 13 problems.[78] Only two questions call upon students to exercise their own evaluative judgment: "[a]re you satisfied with our insanity rules? Can you propose any worthwhile amendments?"[79] These questions represent a small step in the direction of envisioning students as future law reformers and legislators rather than as practicing criminal lawyers. Such a vision of criminal law students was prominent in the American legal academy by this time.[80] The approach also manifests strongly in *Friedland*, which was a Canadian criminal law casebook that was published shortly after *Schmeiser*.[81]

The comments surrounding case law from other jurisdictions similarly include reform-oriented questions. For example, one of the cases is from the United States and sets out a different approach to the defence than that followed in Canada.[82] *Schmeiser* asks, "[d]o you think the *Durham* test is superior to s. 16 of the Criminal Code? Do you think that the result would be much different in practice?"[83] These types of questions not only ask readers to compare different judicial analyses in different jurisdictions but also to consider whether changes would make a difference in practice. Again, these questions suggest that *Schmeiser* saw some room for critique in criminal law learning—if only a small and secondary role.

In a review of *Schmeiser*, Mary Virginia MacLean explains that the book emerged at a time when the merits of doctrine-centred law teaching were being debated.[84] MacLean observes that "[t]he teaching of law has been, and still is, an area of turmoil."[85] Criticisms of the case method included views that students would become "cloud[ed]" by the plethora of judgments, and thus would not learn to "understand…the basic principles."[86] While a casebook might eliminate this "cloudiness" through

77. *Ibid* at 458, citing *Criminal Code*, SC 1953-54, c 51, s 16. For the most recent statutory framework, see *Criminal Code*, RSC 1985, c C-46, s 16.
78. *Ibid* at 458-59.
79. *Ibid* at 459.
80. See Anders Walker, "The Anti-Case Method: Herbert Wechsler and the Political History of the Criminal Law Course" (2009) 7:1 Ohio St J of Crim L 217 at 218, 239-240.
81. Further discussion will be found at 24-26, below.
82. *Durham v US*, 214 Fed (2d) 862 (App Ct DC Cir 1954), reproduced in Schmeiser, *supra* note 22 at 480.
83. Schmeiser, *supra* note 22 at 483.
84. Mary Virginia MacLean, Book Review of *Cases and Comments on Criminal Law* by DA Schmeiser, (1967) 5:2 Osgoode Hall LJ 327 at 327.
85. *Ibid.*
86. *Ibid*.

its use of short excerpts from judgments, it can also be regarded as "too one-sided; that is, the extracts represent the personal choice of the author."[87] Another criticism of the case method is that the practice inhibits students from learning how to "think"—from understanding "why" judgments say what they say.[88] The "Insanity" chapter demonstrates that Schmeiser was likely alive to these debates. He likely chose to favour the case method but was aware of a need to ensure that students grasped "the basic issues"[89] and also to devote some time to developing students' abilities to think about law reform.

*Schmeiser* was last published in 1985.[90] Despite the debates surrounding the case method, another Canadian criminal law casebook—*Stuart*—has continued to favour a doctrinal introduction to criminal law. I turn to *Stuart* next, showing that the casebook illustrates the extension of doctrine-first teaching in Canadian criminal law and includes a more explicit claim of the importance of teaching critique *after* students have learned to read cases and legislation.

### 2. *"Our students need to be informed before they can be truly critical".*[91] *Stuart*

A doctrinal introduction to criminal law was evident in the first edition of *Stuart*, published in 1982.[92] By this time, there was "a growing literature on Canadian substantive law."[93] In the preface to the first edition, Don Stuart and Ronald Delisle explain that their aim is to "develop a sound, basic approach to the subject."[94] They viewed their book as constituting a source of teaching materials rather than a resource for practitioners.[95] This approach is reminiscent of Langdell's casebook approach, which involved "preparing and publishing…a selection of cases as would be *adapted to my purpose as a teacher*."[96]

Additionally, Stuart and Delisle aimed to adopt a neutral approach: "[w]e kept our questions and notes to a minimum as we believe criminal

87. *Ibid*.
88. *Ibid*.
89. Schmeiser, *supra* note 22 at vii.
90. Douglas A Schmeiser, *Canadian Criminal Law: Cases and Comments* (Toronto: Butterworths, 1985).
91. Stuart, *supra* note 17 at v.
92. Don Stuart & Ronald Joseph Delisle, *Learning Canadian Criminal Law* (Toronto: Carswell, 1982).
93. *Ibid* at iii.
94. *Ibid*.
95. "The book is not intended to do double duty and act as a portable library of leading cases for the practitioner." (*Ibid*).
96. Langdell, *supra* note 4 at vi [emphasis added].

law teachers who use these materials will wish to be free of our prejudices in a very controversial subject."[97] Of course, though, as MacLean notes in her review of *Schmeiser*, an editor's choice of materials can still reflect an editor's prejudices: choosing to include cases as the primary material for teaching law, choosing to include particular cases and topics, and choosing to limit the written comments around cases are necessarily editorial choices that embed particular presuppositions about the nature of law. In this case, the editorial choices convey views that appellate reasoning is (or can be) logical and that criminal law's controversies can be identified and studied primarily through a review of cases.

In the 2018 edition of *Stuart*, Stuart and Coughlan maintain the commitment to teaching criminal law through substantive criminal law doctrine. In the introduction, Stuart and Coughlan defend their choice to focus on doctrine rather than on critique. Their introduction prepares students for an immersion into criminal law's doctrinal worldview from the start, indicating that doctrinal analysis is the cornerstone for becoming "informed":

> Although the development of a critical perspective is key to any university environment, we believe it essential to ensure that we provide a full and complete analysis of the existing laws before we turn to critical analysis. *Our students need to be informed before they can be truly critical*…Our approach throughout has been to concentrate on the major sources: the *Criminal Code* itself, key judicial decisions and critical review.[98]

These same passages can first be found in the fourth edition of *Stuart*, edited by Stuart and Delisle and published in 1993.[99] In the introduction to the fourth edition, Stuart and Coughlan specify that the structure of the "Fault" chapter exemplifies their approach of teaching doctrine and then critique: "[o]ur students need to be informed before they can be truly critical. For example, in teaching fault we study the subjective awareness of risk approach, the extent to which the law presently recognizes absolute liability and objective standards, types of negligence and Charter standards, and *only then do we consider normative and other critical approaches*."[100]

The chapter on fault in the 2018 edition maintains the overall format of doctrine and then critique. Moreover, the secondary source excerpts in the "Normative Theories" section have remained the same. One of

97. Stuart, *supra* note 92 at iii.
98. Stuart, *supra* note 17 at v. See also Sandomierski, *Aspiration and Reality*, *supra* note 2 at 240-244.
99. Don Stuart & Ronald Joseph Delisle, *Learning Canadian Criminal Law*, 4th ed (Scarborough: Carswell, 1993) at v.
100. *Ibid* [emphasis added].

the excerpts comes from Rosemary Cairns Way's LLM thesis.[101] Cairns Way encourages "a multidimensional, contextualized approach to fault… Decisions about responsibility should invoke a rich and multifaceted debate about the nature and appropriate allocation of blame, the assumption of free will and the efficacy of the criminal law as a mechanism of social control."[102] This comment considers Canadian criminal law's purposes and claims about people and relationships. The "Normative Theories" section thus demonstrates that *Stuart* includes non-judicial frameworks for understanding and evaluating case law. Yet the inclusion of these critical accounts at the very end of the fault chapter suggests these perspectives are an afterthought rather than the main material to be learned. Such a message would be consistent with *Stuart*'s objectives.

In the introduction to the 2018 edition, Stuart and Coughlan also tell readers that "the major focus for studying criminal law in first-year law school should be on the tools that lawyers and judges must know and use in the daily business of the conduct of a criminal trial."[103] Stuart and Coughlan acknowledge "that law students, teachers and lawyers can better understand law if they seek help from the many disciplines that now offer insights into the criminal justice system."[104] However, they decide to devote their "time and energy" to teaching readers about "substantive principles and the trial context: the adversary system, how the elements of crime are proved, defences, and sentencing issues."[105]

*Stuart*'s approach takes a *particular* lawyer-centred perspective as its starting-point—one that sees judicial reasoning as nearly definitive of criminal law practice. This approach runs the risk of omitting other significant aspects of criminal law practice and study. For example, in notable contrast, Quince offers a frank acknowledgment of the practical, personal, and emotional difficulties that are faced by criminal law practitioners and of the importance of teaching students about these realities:

> Alongside the necessary emphasis on doctrinal education should be some commitment to acknowledging how difficult it can be to work in the criminal justice field. Criminal practitioners are exposed to evidence, information, and accounts of extreme human behaviour. We establish

101. Rosemary Cairns Way, *The Charter, the Supreme Court and the Invisible Politics of Fault* (LLM Thesis, Queen's University Faculty of Law, 1992) [unpublished], reproduced in *Stuart*, *supra* note 17 at 581.
102. *Ibid* at 582-583.
103. Stuart, *supra* note 17 at v.
104. *Ibid*.
105. *Ibid*.

> rapport and relationships with wrongdoers and their victims…Criminal law educators have a responsibility to discuss this openly.[106]

When the focal point is judicial analysis rather than the impacts that judicial analysis has and the oppression it generates, teaching materials have the potential to miss out on (or to acknowledge but cast to the sidelines) diverse perspectives, values, and experiences that might matter to people represented in cases, to people with whom students might engage, and to students and teachers themselves. In terms of professional practice, Eduardo Capulong argues that teaching methods that leave out clients' needs can lead to modes of practice that ultimately do not serve clients:

> As lawyers, we can be as skilled, devoted, and intrepid as we want. But without understanding, knowing how to work with, and finding common cause with our clients—as individuals, organizations, coalitions, communities, and social movements—and without attending to the political, social, economic, and historical circumstances in which we, together, find ourselves, we do our clients a disservice and accomplish nothing long-term.[107]

We can see an illustrative example of the limited view of people that *Stuart*'s doctrine-first approach generates in the section on "Insanity (Mental Disorder)." *Stuart*'s contents in this section epitomize the practice of viewing people through the lens of appellate courts' representations of people, reflecting that "human identity and circumstance are defined by legal doctrine and formal institutions."[108]

In Canadian criminal law doctrine, the image of the rational and independent individual is especially present in case law relating to the defence of not criminally responsible on account of mental disorder.[109] This legal subject can be seen in *Stuart*'s introduction and excerpt from *Cooper v R.*,[110] decided by the Supreme Court of Canada in 1979. In their introduction to *Cooper*, Stuart and Coughlan comment that "[t]he accused was charged with the murder of a patient at a psychiatric hospital (the detailed facts and the accused's psychiatric history are considered

106. Quince, *supra* note 7 at 171.
107. Eduardo RC Capulong, "Client as Subject: Humanizing the Legal Curriculum" (2016) 23:1 Clinical L Rev 37 at 37.
108. *Ibid* at 39, citing Ann Shalleck, "Constructions of the Client Within Legal Education" (1993) 45:6 Stan L Rev 1731 at 1737.
109. See e.g. Benjamin L Berger, "Mental Disorder and the Instability of Blame in Criminal Law" in François Tanguay-Renaud & James Stribopoulos, eds, *Rethinking Criminal Law Theory: New Canadian Perspectives in the Philosophy of Domestic, Transnational, and International Criminal Law* (Oxford: Hart, 2012) 117.
110. *Cooper v R* (1979), [1980] 1 SCR 1149, 13 CR (3d) 97, reproduced in *Stuart*, *supra* note 17 at 789 [*Cooper*].

below)…[T]he Court discussed the meaning of the term 'disease of the mind' and explained what is entailed by 'appreciating' the nature and quality of an act or omission."[111] Immediately, the editors introduce Gary Cooper without referring to his first-hand personal experiences and identities. They instead refer to his identity only as an accused person in a murder trial. Because this case involves the defence of mental disorder, it specifically brings into question whether Gary Cooper fits within the law's presumed depiction of someone who can be held responsible—a depiction that involves human capacities for understanding one's actions and the consequences resulting from them. In particular, Justice Dickson quoted with approval the following passage from the *McRuer Report*: "The true test necessarily is, was the accused person at the very time of the offence—not before or after, but at the moment of the offence—by reason of disease of the mind, unable…to appreciate not only the nature of the act but the natural consequences that would flow from it?"[112] The person with whom criminal law claims to be concerned is thus an individual who has, among other features, the "ability to perceive the consequences, impact and results of a physical act."[113]

In addition to case excerpts and comments, *Stuart*'s section on mental disorder contains a few critical commentaries on psychiatry. For instance, Stuart and Coughlan write that, "[w]ith any psychiatric label, and ['psychopathic syndrome'] in particular, lawyers should request that psychiatrists be as precise as possible in their descriptions of the actual behaviour of the individual before the court rather than hide behind their imperfect abstractions. Clearly they are too imprecise for use as legal criteria of responsibility."[114] Similarly, they note, "[m]odern critics complain that the [*Diagnostic and Statistical Manual of Mental Disorders*] categories are still not the subject of scientifically verified research, that they have grown exponentially, that psychiatrists too often tend to blindly rely on them to prescribe psychoactive drugs, and that psychiatrists have become too beholden to the pharmaceutical industry."[115] This latter comment follows an excerpt from TS Szasz's "Psychiatry, Ethics and the Criminal Law."[116]

111. Stuart, *supra* note 17 at 789.
112. *Cooper* in Stuart, *supra* note 110 at 793, quoting *McRuer Report*, *supra* note 73 at 13.
113. *Cooper* in Stuart, *supra* note 110 at 793.
114. Stuart, *supra* note 17 at 781.
115. *Ibid* at 782, citing Marcia Angell, "The Illusions of Psychiatry", *The New York Review of Books* (14 July 2011). The *Diagnostic and Statistical Manual of Mental Disorders* is currently in its fifth edition: American Psychiatric Association, *Diagnostic and Statistical Manual of Mental Disorders*, 5th ed (Arlington: American Psychiatric Association, 2013).
116. TS Szasz, "Psychiatry, Ethics and the Criminal Law" (1958) 58:2 Colum L Rev 183, reproduced in Stuart, *supra* note 17 at 781.

In this excerpt, Szasz criticizes the idea that psychiatrists and jurors can make factual findings of mental illness, arguing instead that these findings are actually theories of illness: "if the notion of 'mental illness' means anything, it means that it is the theory by means of which we 'explain' how the events in question might have occurred."[117]

These critiques helpfully highlight the law's practice of making determinations with respect to the mental disorder defence by considering, but not solely relying upon, psychiatrists' diagnoses. Unfortunately, the discussion stops short of questioning readers about their own perceptions of connections between mental disabilities and criminal responsibility. Similarly, the discussion excludes comments about the discrimination faced by people living with mental disabilities, both within and outside the legal system.

Given that Stuart and Coughlan explicitly decide, in their preface, to take a doctrine-first approach to teaching criminal law, teaching criminal law in the way they do is fitting. In identifying some critiques of this approach, I do not mean to isolate *Stuart*. Indeed, most contract law casebooks take a similar approach.[118] And, as other Canadian criminal law casebook editors also seem to indicate, I also think that learning how to read judicial reasoning, and how to communicate within it, is an important skill.[119] I have identified some critiques as part of my effort to illustrate that when evaluated from a critique-inspired perspective a "doctrine first, critique second" approach leaves out, or casts to the sidelines, much of people's varied experiences and values (including those of students themselves and of people whom students read about in cases) and of criminal law's actual impacts.

## III. *Critique-inspired teaching in English-language Canadian Criminal Law casebooks*

### 1. *Towards a critique-inspired approach: Criminal Law's contexts in Friedland/Roach*

Martin Friedland first published *Cases and Materials on Criminal Law and Procedure* in 1967—one year after Schmeiser first published *Cases and Comments on Criminal Law*.[120] As MacLean notes in her review of

117. *Ibid* at 782.
118. See generally Sandomierski, "Canadian Contract Law Casebooks," *supra* note 11; Sandomierski, *Aspiration and Reality*, *supra* note 2.
119. See also Dark, *supra* note 2.
120. The first edition of Friedland was a temporary version. See Friedland, *supra* note 24 at v. See also RS Mackay, Book Review of *Cases and Materials on Criminal Law and Procedure*, by ML Friedland,

*Schmeiser*, this was a time when debates about the case method were taking place.[121] A 1965 study similarly documents that the casebook method was still in use in the United States.[122] However, adaptations of the method had emerged.[123] With respect to criminal law, Anders Walker argues that a shift in teaching method took place in the United States beginning in the 1930s.[124] Walker argues this shift was apparent in Jerome Michael and Herbert Wechsler's preparation of a new kind of criminal law casebook, *Criminal Law and its Administration: Cases, Statutes, and Commentaries*[125] in the 1930s.[126] While traces of this shift are evident in *Schmeiser*, the shift appears to have had a stronger influence on *Friedland*.

According to Walker's research, Wechsler and Michael aimed to "open students' eyes to law's interrelationship with society,"[127] incorporating a smaller number of cases than a leading 1894 criminal law casebook[128] and an assortment of materials coming from sources such as law review articles, scholarly books, commission reports, and legislation from jurisdictions outside the United States.[129] Notes in the casebook ask probing questions, encouraging students to consider, for example, whether they agree with the argument presented by a scholar.[130] Walker further maintains that Wechsler and Michael's approach has continued to influence criminal law teaching throughout the United States. Drawing on Laura Kalman's research, which identified the book as "the first law school casebook to successfully synthesize social science materials with cases,"[131] Walker argues that the book proceeded to "inspir[e] a generation of criminal law teachers to organize their courses along similar lines."[132]

The move away from including only (or primarily) appellate case law in criminal law casebooks took place in the United States and

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2d ed, (1969) 19:3 UTLJ 445 at 445-446.

121. See generally MacLean, *supra* note 84.

122. Arthur D Austin, "Is the Casebook Method Obsolete?" (1965) 6:2 Wm & Mary L Rev 157.

123. *Ibid*.

124. Walker, *supra* note 80.

125. Jerome Michael & Herbert Wechsler, *Criminal Law and Its Administration: Cases, Statutes, and Commentaries* (Chicago: Foundation Press, 1940).

126. Walker, *supra* note 80 at 228, 218, n 5. The first edition was officially published in 1940.

127. Walker, *supra* note 80 at 219, citing interview by Norman Silber and Geoffrey Miller with Herbert Wechsler, Professor, Columbia University School of Law, in New York City, NY (11 August 1978; 23 February 1979; 12 & 13 March 1982).

128. Walker, *supra* note 80 at 220, citing Joseph Henry Beale, Jr, *A Selection of Cases and Other Authorities upon Criminal Law* (Cambridge: Harvard Law Review Publication Association, 1894).

129. Walker, *supra* note 80 at 229.

130. *Ibid* at 230.

131. *Ibid* at 218, citing Laura Kalman, *Legal Realism at Yale, 1927–1960* (Chapel Hill: University of North Carolina Press, 1986) at 90, 97.

132. Walker, *supra* note 80 at 218.

Australia.[133] In both places criminal law was a subject area that came to serve as a site for teaching the criminal process, criminal law's moral and philosophical questions, and legislative reform, in addition to appellate case law. The approach has been aligned with legal realism, which, as a school of thought, had influences on both critical legal studies and the law and society movement.[134] Moreover, Wechsler and Michael's "anti-case method"[135] has been connected with reimagining the role of the law student. The shift in the United States involved a vision of the law student as a future legislator and law reformer, rather than as a criminal defence lawyer or prosecutor.[136] The introduction of a criminal law textbook in Australia in 1962 imagined the law student as a morally aware, "serious, reform-orientated, critical" future lawyer.[137]

Similar to these developments, *Friedland* contains traces of Wechsler and Michael's "anti-case method."[138] Notably, *Friedland* bears particular resemblance to one American criminal law casebook that followed in Wechsler and Friedland's footsteps—Monrad Paulsen and Sanford Kadish's *Criminal Law and Its Processes: Cases and Materials*, first published in 1962 (*Kadish*).[139] *Kadish* and *Friedland* are similar in that they both bring together criminal procedure and substantive criminal law. Additionally, they both include a discussion of the relationship between criminal law and morality early on, including excerpts from the *Report of the Committee on Homosexual Offences and Prostitution*[140] and from Devlin's "The Enforcement of Morals."[141]

*Friedland* aimed to integrate the various components of the criminal law process and to incorporate discussion and reflection on criminal law's scope and aims.[142] An emphasis on teaching criminal law in its

133. On the United States, see generally Walker, *supra* note 80. On Australia, see Susan Bartie, *Free Hands and Minds: Pioneering Australian Legal Scholars* (Oxford: Hart Publishing, 2019) at ch 4.
134. Harris & Lee, *supra* note 50 at 264-66.
135. See generally Walker, *supra* note 80.
136. *Ibid* at 217-18. But see Harris & Lee, *supra* note 50 (arguing that policy and practice could be viewed as more connected than Walker presents them) at 263-264.
137. Bartie, *supra* note 133 at 65, 71.
138. Walker, *supra* note 80.
139. Monrad G Paulsen & Sanford H Kadish, *Criminal Law and Its Processes: Cases and Materials* (Boston: Little, Brown & Co, 1962) [Kadish]. On Kadish, see Walker, *supra* note 80 at 218-219, 238-244.
140. UK, *The Report of the Committee on Homosexual Offences and Prostitution* (1957), reprinted in Kadish, *supra* note 139 at 5, and in Friedland, *supra* note 23 at 64.
141. Patrick Devlin, "The Enforcement of Morals" (Maccabaean Lecture in Jurisprudence of the British Academy, 1959), reprinted in Kadish, *supra* note 139 at 8, and in Friedland, *supra* note 23 at 66.
142. "Such areas as the relationship between law and morality, criminal procedure, and sentencing—formerly reserved for an optional course in the third year—are examined here." (Friedland, *supra* note 23 at v.)

context appears in the second chapter, which deals with pre-arraignment procedures. The chapter begins with a description of the process in Toronto: "[a]n arrested accused is taken to one of the many police division stations in Toronto, 'booked,' lodged in a cell, and, for indictable offences, fingerprinted and photographed. He is liable to be questioned at any time while in police custody."[143] The explanation focuses on practical aspects of the criminal process that would be important to people who are arrested and charged.

*Friedland's* chapter on "Insanity" begins with the "stages of criminal process in which insanity may be relevant."[144] Similar to the chapter on pre-arraignment procedures, the procedural content highlights some of the practical experiences faced by accused persons and offenders. Additionally, by drawing readers' attention to procedural practices and legal rules that exist in other jurisdictions, *Friedland*, like *Schmeiser*, demonstrates that law and law's procedures constitute choices about how to depict, treat, and respond to people. For instance, the sentencing section in the insanity chapter includes a discussion of law reform that took place in England around the *Mental Health Act, 1959*,[145] which enabled courts to make hospital orders, leading to offenders "being compulsorily admitted to hospital."[146] In introducing this excerpt, *Friedland* commented that this English procedure "has no counterpart in Canada."[147]

*Friedland's* contextual approach to criminal law teaching has carried on with the continued publication of *Cases and Materials in Criminal Law and Procedure*. The 2020 edition (*Roach*) shows that judicial analysis exists within broader social, political, institutional, procedural, and historical contexts. In the preface the editors write that this edition "include[s] fuller extracts of leading cases" along with "more secondary and contextual readings, giving students access to scholarly and policy literature on the criminal law while enriching the text's attention to issues of Indigenous justice, racial and ethnic bias, gender in the criminal law, and other matters of deep social importance to the criminal justice system."[148] The editors also note that "[t]he years have…confirmed the wisdom of

143. *Ibid* at 14.
144. *Ibid* at 278.
145. *Mental Health Act, 1959* (UK), 7 & 8 Eliz II, c 72.
146. RM Jackson, *Enforcing the Law* (London: Macmillan & Co, 1967), reprinted in Friedland, *supra* note 23 at 285-286.
147. *Ibid* at 285.
148. Roach, *supra* note 18 at ix.

Professor Friedland's original decision to teach criminal law in its broader procedural, theoretical, social, and institutional context."[149]

*Roach*'s contextualized approach to criminal law teaching is demonstrated in the book's case study of the wrongful conviction of Donald Marshall Jr. This case study depicts people who have different forms of involvement with criminal law—for example, defendants, witnesses, police officers, judges, lawyers—as interrelated with one another and as embedded within the procedural, institutional, professional-ethical, and social practices surrounding, and constituting part of, criminal law.[150]

Donald Marshall Jr.'s "case is examined both as a case study of a wrongful conviction of an innocent person; the importance and difficulty of fact-finding in the criminal process; and issues of racism, including the treatment of Indigenous people in the justice system."[151] The case study includes the report of the Royal Commission on the Donald Marshall Jr. Prosecution.[152] The excerpts from the Royal Commission's report focus on the practices and actions of the various professional people involved in the process, identifying their racially biased actions and situating the existence of racialized bias within social and institutional settings. With respect to police officers, for example, the Commission found that "Sergeant of Detectives John MacIntyre […] discounted Marshall's version of events partly because he considered Marshall a troublemaker and partly because, in our view, he shared what we believe was a general sense in Sydney White's community at the time that Indians were not 'worth' as much as Whites."[153]

In a section of the report devoted to "Visible Minorities and the Criminal Justice System," the Commission reiterated its finding "that racism played a part in Donald Marshall Jr.'s wrongful conviction."[154] The Commission "recognize[d] that many of the causes of discrimination are rooted in institutions and social structures outside the criminal justice system" and identified "steps" that could, and should, be adopted "to reduce discrimination in the justice system itself."[155] This acknowledgement of the pervasiveness of racism demonstrates that the criminal justice system and the people living within it are affected by, and part of, wider patterns

149. *Ibid*.
150. The practice of using a case study can also be found in the second edition of Friedland. See Friedland, *supra* note 23 at ch 17.
151. Roach, *supra* note 18 at 232.
152. *Royal Commission on the Donald Marshall Jr Prosecution* (Halifax: Nova Scotia, 1989), reprinted in Roach, *supra* note 18 at 244.
153. *Ibid* at 245-246.
154. *Ibid* at 252.
155. *Ibid*.

of inequality and discrimination. The book's inclusion of this analysis represents a teaching practice that Crenshaw calls upon law teachers to adopt. In particular, she argues that "the frame should be shifted so as to illuminate the connection between racial subordination and the values and interests that appear to be race-neutral or that are simply being taken for granted."[156]

The case study also includes an excerpt from Mary Ellen Turpel's "On the Question of Adapting the Canadian Criminal Justice System for Aboriginal Peoples: Don't Fence Me In."[157] Turpel draws out conceptions of people and relationships in Canadian criminal law's worldview that do not resonate with those in Indigenous justice systems. For instance, "professionally trained classes of persons…are deeply distrusted in Aboriginal cultures because of the experiences with various experts—experts on education, experts on child welfare, etc."[158] The idea of involving "stranger[s]," including unknown lawyers, judges, and jurors, in dealing with a particular event, "is alien and terrifying."[159] Taken together, the materials in the case study demonstrate that Canadian criminal law's representations of people are not created in a vacuum—they come from and contribute to a wider context, and they miss out on perspectives, experiences, and laws that also exist within that wider context.

*Roach* addresses the defence of not criminally responsible on account of mental disorder in chapter 15, which deals with "Mental Disorder and Automatism." Consistent with *Roach*'s goals of covering criminal law doctrines in context, the chapter begins with an excerpt from Benjamin Berger's piece, "Mental Disorder and the Instability of Blame in Criminal Law."[160] In this excerpt, Berger discusses the theory of the individual that underpins the defence of not criminally responsible on account of mental disorder, that is, the idea that people are depicted in terms of their abilities in exercising "the capacity for practical reasoning and cognition."[161] Berger further tells readers that, as applied in current legal practice, the defence is inconsistent with its own claims about the types of conditions that implicate criminal responsibility. Berger argues that conditions that call into question people's cognitive and reasoning abilities

156. Crenshaw, *supra* note 7 at 43.
157. Mary Ellen Turpel, "On the Question of Adapting the Canadian Criminal Justice System for Aboriginal Peoples: Don't Fence Me In" in Royal Commission on Aboriginal Peoples, *Aboriginal Peoples and the Justice System: Report of the National Round Table on Aboriginal Justice Issues* (Ottawa: Supply and Services, 1993), reprinted in Roach, *supra* note 18 at 263.
158. *Ibid* at 265.
159. *Ibid*.
160. Berger, *supra* note 109, reprinted in Roach, *supra* note 18 at 782.
161. *Ibid*.

are regularly excluded from the scope of the defence.[162] As Berger writes, "[t]he picture painted is of a criminal law chronically detached from or comfortably ignorant of situations that raise serious concerns within the best accounts of the conditions for criminal responsibility."[163] Following the excerpt, the editors summarize Berger's closing argument as follows: "Berger ultimately suggests that 'the under-inclusive doctrine of mental disorder serves as a mechanism for the elision of collective blame for a complex social problem'…, allowing us to disregard the difficult issues of collective, social, and political responsibility that arise at the meeting of mental health, social disadvantage, and crime."[164] The editors then call upon readers to "[c]onsider these claims as you study the cases in this chapter."[165]

The excerpt from Berger's writing and the editors' surrounding comments introduce readers to the claims about the human condition that both characterize the defence of mental disorder and that are not embraced in its application. *Roach* helpfully places this excerpt at the start of the chapter, before the case law. Through this organization, Roach has the potential to assist readers in seeing that judicial depictions of people are just that—depictions created by judges. These portrayals might demonstrate inconsistencies in practice and might not align with what we otherwise know about people (in this case, knowledge of the number of people in Canadian prisons and correctional centres who live with mental health conditions that appear to fit within, but are nonetheless excluded from, the boundaries of the defence). The editors' comment about Berger's final argument reminds readers that criminal law engages not only in a practice of depicting the *individual* appearing before the court, but also in a practice of depicting the surrounding *communities*. The defence of mental disorder is one example of criminal law's tendency to concentrate on attributing blame to an individual to the exclusion of identifying ways in which broader communities could also be held to account.

*Roach*'s contextualized portrayals of judicial reasoning and of people involved in criminal law's processes move strongly in the direction of showing criminal law's shortcomings in achieving social justice. Examples such as the case study of Donald Marshall Jr.'s wrongful conviction and the early discussion of the narrowness of the mental disorder defence demonstrate that *Roach* shows the limits of judicial analysis in dismantling

162. *Ibid* at 782-783.
163. *Ibid* at 783.
164. Roach, *supra* note 18 at 783, citing Berger, *supra* note 109 at 136.
165. Roach, *supra* note 18 at 783.

power relations. This type of commitment is similarly pursued in another casebook that was most recently published in 2016—*Saunders*.

### 2. *"Critically examining the traditional approach to criminal law": Saunders*

Similar to *Roach*, *Saunders* aims to "contextualize…the study of criminal law in a Canadian setting."[166] *Saunders* was first published in 1989[167] and most recently published in 2016. Like *Roach*, *Saunders* "explores the historical, theoretical, sociological and political contexts of the criminal law and its administration."[168] Yet *Saunders* is more critique-oriented than *Roach*. In particular, *Saunders* "critically examin[es] the traditional approach to criminal law found in the Criminal Code and the common law."[169] The editors claim to teach doctrine *through* critical examination of it.

*Saunders*' critical view of doctrine is exemplified in the chapter, "Perspectives on Criminal Law." The introduction to this chapter is written by Saunders, and he articulates his vision of criminal law as follows:

> Criminal law…is a reflection of the views and perspectives of policy makers on what they want the law, and specifically criminal law, to accomplish. It is also a reflection of their views on human nature and human activity, as well as a statement about the potential of the state to interfere in social conflicts and to control human behaviour in a meaningful and effective manner.[170]

Saunders views criminal law as a human-made and human-operated enterprise. He specifically critiques formalistic approaches to law in the section on "Traditional Legal Perspectives," writing that "[t]he essential criticism of traditional legal approaches is that they are overarchingly oriented toward the formal manifestations of law and the institutions and processes that surround those manifestations."[171]

*Saunders* also shows that traditional, formalistic approaches are embedded in Canada's legal educational practices: "Law school study is still focused on the courts, the cases, and the formal rules, in spite of the calls in the last two decades for more interdisciplinary and socialized approaches to the study of law."[172] *Saunders* demonstrates that law

166. Saunders, *supra* note 18, back cover.
167. Ron P Saunders & Chet N Mitchell, *An Introduction to Criminal Law in Context* (North York: Captus Press, 1989).
168. Saunders, *supra* note 18, back cover.
169. *Ibid*.
170. *Ibid* at 51.
171. *Ibid* at 55.
172. *Ibid*, citing Consultative Group on Research and Education in Law, *Law and Learning: Report*

schools continue to teach with a Langdellian approach: "It is a technical, professional training which teaches students how to argue, manipulate, and use the rules, and not necessarily to understand the reality and impact of the rules in their social setting."[173] *Saunders* urges readers to instead learn about the actual manifestations of law within social life:

> We have to understand that the dilemmas and contradictions in the law and its stated ideals are very real; that equality is often there in rhetoric but not in practice; that who you are, the colour of your skin, your income, your class background and other social, gender and ethnic factors can all combine to play an important part in the nature and outcome of one's interaction with the criminal justice system.[174]

Saunders regards the impacts of law on people's lives as being more important than what formal legal rules *claim* to be doing. Saunders thus pursues the critique-inspired objective of creating better lawyers—here, lawyers who inquire into policy and lived experiences. Additionally, by offering insight into his own perspectives, he makes it convenient for readers to hop on board with his views, to feel validated by them, or to disagree and identify particular points of divergence.

In the "Defence of Mental Disorder" section, Mitchell and Bromwich briefly comment on the impact of mental disorder law on people's lived experiences, noting that "[i]nsanity matters much less now in Canada because the plea's outcome most just affects the place and style of incarceration."[175] They also identify criticisms of "[t]he supposed link between mental illness and anti-social behaviour."[176] Rather than diving into the details of these criticisms, Mitchell and Bromwich refer readers to further readings.

*Saunders*' critical approach is similarly pursued in the *Pickard* and *Abell* casebooks. These casebooks also employ interdisciplinary perspectives—particularly those that point out law's injustices and power imbalances—and teach criminal law in its social, political, institutional, and historical contexts. Like the editors of *Saunders*, the editors of these casebooks are also candid about their critical political commitments.

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*to the Social Sciences and Humanities Research Council of Canada* (Ottawa: Social Science and Humanities Research Council of Canada, 1983).

173. Saunders, *supra* note 18 at 55.

174. *Ibid*.

175. *Ibid* at 725.

176. *Ibid* at 726.

3. *Beginning with "people's lives": Pickard*

*Pickard* was first published in 1992 and most recently published in 2002. The casebook shows that lived experience is relevant to studying criminal law. *Pickard*'s approach is distinctive among Canadian criminal law casebooks in its engagement with the multiplicity of first-hand perspectives that are relevant to the study and practice of criminal law, particularly a study and practice that aspires "to imagine a good criminal justice system—one that can be, despite its coercive nature, effective and humane."[177] The book seems to aim to pay heightened attention to lived experience in order to work towards social justice through criminal law.

*Pickard* uses both doctrine and critique to develop better students and future lawyers. The editors' conception of "better" involves the ability to think reflectively:

> In the end, it is enough if students are better able to think reflectively about the legal arguments they are learning to fashion…[P]rofessional training requires the ability to handle the future with intelligence rooted in a full grasp of essential doctrine and sensitivity toward those features of our legal and political culture that are driving forces for change in that doctrine.[178]

With respect to their social justice commitment, *Pickard*'s editors expressly set out to teach students how to make politically informed use of doctrine and how to understand the doctrine's political context. The editors explain in their preface:

> We want these materials to help people learn three things: (1) how to make criminal law arguments from within the self-enclosed world of doctrinal logic; (2) how to recognize the ways those arguments speak both from and into a complex political context; and (3) how to articulate politically informed legal arguments that have communicative power in legal culture as well as the possibility of contributing to social justice in this country.[179]

Toni Pickard and Phil Goldman first articulated these goals in the preface to the first edition.[180] In the preface to the first edition, Pickard and Goldman explain that they bring together doctrine and materials from popular culture,[181] empirical analysis,[182] and the academic fields of

177. Pickard, *supra* note 18 at xxi.
178. *Ibid* at xxii-xxiii. See also Toni Pickard & Phil Goldman, *Dimensions of Criminal Law* (Toronto: Emond Montgomery, 1992) at xxiii-xxiv.
179. Pickard, *supra* note 18 at xxi.
180. *Ibid*.
181. *Ibid*.
182. *Ibid* at xxiii.

"sociology, criminology, political science, feminist jurisprudence, and social theory."[183] By including a range of interdisciplinary materials, Pickard and Goldman pursue a critique-inspired approach that involves teaching readers to be aware of, to appreciate, and to potentially work with the multiple perspectives that are relevant to criminal law.

In the most recent edition, the first part of the book, "Human Dimensions," deals with people whom the law labels as offenders and victims and then with sentencing. The editors' exploration of "human dimensions" at the beginning of the casebook reveals a vision of students (and of lawyering) that is in marked contrast to the vision that *Stuart* embraces. Rather than viewing students as having no critical voice before they have mastered judicial analysis, and rather than regarding judicial analysis and statutory interpretation as the primary tools of criminal lawyers, *Pickard* regards students as coming to law school with a rich variety of experiences and knowledges on which they can draw and as future lawyers who will need to pay attention to the experiences of the people with whom they will work. *Pickard* thus values *non-professionalized* perspectives, including those of students themselves and those of people whom the law categorizes as victims and offenders.

The first chapter offers glimpses into some of the possible emotional, physical, and social experiences of survivors and criminalized people. Readers encounter, for example, Bruce Shapiro's reflective article on being "a victim of random violence,"[184] in which he observes that rather than operating as individualized "fight-or-flight" agents, "in the confusion and panic of life-threatening attack, *people reached out to one another*."[185]

The second chapter of the casebook, and the final chapter within the "Human Dimensions" part, deals with sentencing rules, practices, and issues. The editors' decision to use sentencing as the casebook's first doctrinal component seems to be informed by their vision of lawyers as professionals who work not simply with legal rules but also—and importantly—with people. The editors focus on sentencing at the beginning of the casebook because sentencing "represents the sole experience of the process for most people who come into conflict with the law."[186]

183. *Ibid* at xxii.
184. Bruce Shapiro, "Anatomy of an Assault: A Victim of Random Violence Ponders Our Culture of Crime" (July-August 1995), *Utne Reader* 51-57, adapted from (April 3, 1995), *The Nation*, reprinted in Pickard, *supra* note 18 at 49.
185. *Ibid* at 52 [emphasis in original].
186. *Ibid* at xxi.

Readers learn about "[t]he reality of sentencing law" by reading case law.[187] Yet the editors are careful to show that people's experiences extend beyond the sentencing hearing. For instance, readers learn about an incarcerated person's experience in solitary confinement through an excerpt from *McCann et al v The Queen et al*.[188] The excerpt relays the evidence given by Andrew Bruce, who had spent time in the British Columbia Penitentiary's solitary confinement unit. Readers learn about the size and contents of Bruce's cell—an 11'2" by 6'6" space containing plywood, a thin foam mattress, two blankets and sheets, a foam pillow and a pillowcase, a combination toilet/washbowl, an air vent, and a radio outlet.[189] When describing his time in solitary confinement, Bruce said, "You get twisted about it. Your frustration turns to hate towards the guards and all the people who keep you there."[190]

*Pickard* covers the defence of not criminally responsible on account of mental disorder in its second part, "Doctrinal Dimensions." In the "Mental Disorder" section, the editors appeal to the reader's own intuitions and perspectives. For example, the editors follow up on cases with the following types of questions: "Put yourself in the position of a jury member in either the *Abbey* or *Chaulk* trial. What questions would you ask with respect to the evidence if you were instructed pursuant to each of these alternative formulations? Would your decision change? Which do you find most appropriate in terms of your *personal view* of the relationship between mental disease and responsibility?"[191] The questions continue: "Now put yourself in the position of defence counsel. What differences do the various tests make in the evidence you would try to develop and present?"[192] These questions resonate with reflective practice, which Michele Leering has conceptualized as "reflection on practice or technique (skills), critical (knowledge), and self-reflection (values)," along with "reflecting in community" and "becoming an integrated reflective practitioner."[193] While an in-depth analysis of reflective practice is beyond the scope of this paper, *Pickard*'s reflective prompts demonstrate that reflection is one of the learning outcomes and legal skills that critique-inspired pedagogies might aim to foster. The method of envisioning the

187. Pickard, *supra* note 18 at 130.
188. *McCann et al v The Queen et al* [1976] 1 FC 570, reprinted in Pickard, *supra* note 18 at 210.
189. *Ibid* at 210.
190. *Ibid*.
191. Pickard, *supra* note 18 at 617 [emphasis added].
192. *Ibid*.
193. Michele Leering, "Conceptualizing Reflective Practice for Legal Professionals" (2014) 23 J L & Soc Pol'y 83 at 94.

student as a reflective practitioner is at odds with a vision of the lawyer as someone who primarily works with and learns from judicial analysis. Reflective practice recognizes that students (and law professionals) bring with them an array of knowledges and perspectives and will need to find ways to sort through connections and tensions between personal values, professional values and practices, norms and rules contained within judicial reasons (and conflicts among judicial reasons), and clients' needs, values, and experiences.

*Pickard* makes a distinct contribution to Canadian criminal law casebooks through its attention to lived experience. Pickard, Goldman, Mohr, and Cairns-Way demonstrate that criminal law is normative—it constitutes one perspective that can be significantly at odds with individuals' senses of justice and with individuals' lived experiences. The alignment of criminal law's normativity with power relations is further explored in Abell.

### 4. *"Relations of power": Abell*

In 1993—one year after *Pickard* entered the market—another critical criminal law casebook was published: Jennie Abell and Elizabeth Sheehy's *Criminal Law and Procedure: Cases, Context, Critique*.[194] In their introduction to the book, Abell and Sheehy write that the "materials have been years in the making, having their impetus…in our political commitments and experience as activists and lawyers, our research and scholarship, and from five years of interactive teaching with these materials at the University of Ottawa, Faculty of Law."[195]

In a book review, Constance Backhouse writes that *Abell Volume 1* "holds the distinction, along with Toni Pickard's and Phil Goldman's *Dimensions of Criminal Law*…of belonging to a new genre of criminal casebooks."[196] This is a genre committed to teaching criminal law in a critical manner by exposing the ways in which criminal law generates and reproduces social injustices and inequalities.[197] These values have carried on through the most recent versions of the two volumes of *Abell*, published in 2012 and 2014.

In the introduction to the first edition of the first volume, Abell and Sheehy discuss current events in order to illustrate the "tension between critical legal education and the dominant understanding of the practice

194. Jennie Abell & Elizabeth Sheehy, *Criminal Law & Procedure: Cases, Context, Critique* (North York: Captus Press, 1993).
195. *Ibid* at 2.
196. Constance Backhouse, Book Review of *Criminal Law & Procedure: Cases, Context, Critique* by Jennie Abell & Elizabeth Sheehy, (1995) 10:1 CJLS 213 at 213.
197. Backhouse, *supra* note 196.

of law."[198] They describe, in particular, a conflict between the Student Legal Aid Society and the criminal defence bar in Ottawa. The Student Legal Aid Society had "formed a Women's Division to address issues for women who are victims of violence, and then implemented a policy declining representation of men charged with offences of violence against their mates."[199] The criminal defence bar was critical of "the policy itself, the clinic, the law school and its 'feminist' agenda, and the individual students," and carried out measures including:

> …withdrawal of their services from the law school, barring of students from remand court, news accounts denouncing the clinic as violating the *Charter* itself, threats that students who had taken 'Women and the Law' courses would never secure employment with local firms, and petitions to the University, the Ontario Legal Aid Plan, and the Law Society of Upper Canada to censure the policy or de-fund the clinic.[200]

Abell and Sheehy thus illustrate some of the lived experiences facing law students, law professors, and lawyers in dealing with the systemic problem of violence against women.

As articulated in the most recent edition, *Abell Volume 1* aims to develop students' "broad understanding of the context, nature, and impact of the criminal law process in Canada," while the second volume covers "issues of 'substantive' criminal law."[201] The two volumes are designed to be used together for teaching a first-year criminal law course or to be used separately.[202] The practices of identifying and critiquing power relations lie at the heart of both volumes, with the two volumes demonstrating both the limitations and the potential of doctrine for effecting social change.

In the introduction to the most recent edition of the first volume, the editors specifically target a particular group of legal educators and students—those ready to engage with criminal law's systemic problems, as well as academics and students who think critically about criminal law and practice from outside the lawyer-professional mode.[203] Abell, Sheehy, and Bakht further describe the first volume as both "a law casebook" and "a critique of law." The book "is…a law casebook, in that it draws on traditional legal materials, cases, and legislation to illustrate the theoretical points," and it is also "a critique of law, in that it examines the impact of

198. Abell & Sheehy, *supra* note 194 at 2.
199. *Ibid*.
200. *Ibid* at 2-3.
201. Abell *Volume 1*, *supra* note 18 at 10.
202. Abell *Volume 2*, *supra* note 18 at 1.
203. Abell *Volume 1*, *supra* note 18 at 2.

traditional legal doctrine and law-in-practice."[204] The editors employ "the themes of feminist analysis, inquiry into colonization, colonialism, and racism, and a class-based critique of law to explore the impact of criminal law upon women, lesbians, gays, Aboriginal peoples, African-Canadians and other racialized people, and the poor, and to probe the interlocking relations of power."[205]

The editors write that they "remain sceptical about whether it is possible to shift relations of power by invoking criminal prosecution or liberal notions of 'rights' through litigation."[206] They recognize that the "*The Canadian Charter of Rights and Freedoms*…has at least contributed to the growing body of jurisprudence exposing inequalities perpetuated through law,"[207] but they nonetheless seem to refrain from viewing their study of criminal law's systemic biases as serving the primary purpose of leading towards a more just internal reworking of criminal law. Such a position is in line with the findings of a number of commissions and inquiries relating to the criminal justice system's impacts on Indigenous people, which have found that allowing for independent Indigenous legal systems to fully exercise their authority will be necessary for bringing an end to the mass imprisonment of Indigenous people in Canada.[208]

In *Abell Volume 2*, the editors again rely on a number of themes for the purpose of demonstrating criminal law's effects on marginalized groups of people, addressing not only "the themes of feminism, colonization, racism, and class-based critique," but also "issues about the impact of criminal law and the criminal justice system upon persons with disabilities and upon the LGBT community."[209] In comparison to *Volume 1*, an effort to develop meaningful social change "through law" is expressly indicated. In the introduction to *Volume 2*, the editors write, "[w]e hope this book will prove useful for those who are committing to seeking social justice *through law*, whether law students, lawyers, or researchers."[210] The book asks students to contemplate questions geared towards honing professionalized legal strategies, such as identifying whether cases are

204. *Ibid*.
205. *Ibid* [bold omitted].
206. *Ibid*.
207. *Ibid*, citing *Canadian Charter of Rights and Freedoms*, Part 1 of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 [*Charter*].
208. Jonathan Rudin, *Indigenous People and the Criminal Justice System: A Practitioner's Handbook* (Toronto: Emond, 2019) at 6. For an analysis of the term "mass imprisonment," see Efrat Arbel, "Rethinking the 'Crisis' of Indigenous Mass Imprisonment" (2019) 34:3 CJLS 437 at 440.
209. Abell *Volume 2*, *supra* note 18 at 2.
210. *Ibid* at 6 [emphasis added].

consistent with one another,[211] and how they might utilize the *Charter* to make legal arguments.[212]

While I have pointed out this difference in orientation between the two *Abell* volumes, I do not mean to suggest that the lines are sharply drawn. For instance, *Abell Volume 1* teaches its readers about criminal procedure through the aid of cases involving *Charter* challenges, and *Abell Volume 2* targets not only law professors and students but also "those who work and teach in law-related disciplines such as criminology or sociology."[213] My impression is that they each have a slightly different emphasis. *Abell Volume 1* includes doctrinal documents and topics but primarily views such contents from a somewhat removed perspective, one that is wary of the ability of legal arguments to effect change. *Abell Volume 2*, while applying critical lenses to doctrinal topics, emphasizes how those critical lenses can be used to develop a reader's ability to use the law to carry out social change. Together, both volumes demonstrate the difficult balance that critique-inspired pedagogies aim to strike between teaching about both law's injustices and law's potential for remedying injustices.

A novel feature of the *Abell* collection is its inclusion of a chapter on "Colonization and the Imposition of Criminal Law" close to the beginning of *Volume 1*—as chapter two. The chapter addresses "[t]he imposition of Canadian criminal law on Aboriginal peoples."[214] Through this organization, *Abell* distinguishes itself from other Canadian criminal law casebooks and sets the stage for readers to see criminal law as a form of social control that is intimately connected with colonialism. The chapter illustrates that the very categories of a crime and of a criminal are constructed by Canadian criminal law within a context laden with colonial violence against Indigenous people, cultures, and laws.[215]

The chapter includes an excerpt from Forrest LaViolette's *The Struggle for Survival: Indian Cultures and the Protestant Ethic in British Columbia*.[216] This excerpt includes the Proclamation that Prime Minister John A MacDonald made in 1883, which describes the potlatch as "the

211. *Ibid* at 176.
212. *Ibid* at 42.
213. *Ibid* at 1.
214. Abell *Volume 1*, *supra* note 18 at 45.
215. Quince advocates for a similar approach, see Quince, *supra* note 7 at 165. In its newest edition, Roach now includes a brief discussion of "Treaties, Aboriginal Rights, and Indigenous Law" in its first chapter, see Roach *supra* note 18 at 17-23.
216. Forrest LaViolette, *The Struggle for Survival: Indian Cultures and the Protestant Ethic in British Columbia* (Toronto: University of Toronto Press, 1973), reprinted in Abell *Volume 1*, *supra* note 18 at 47.

parent of numerous vices which eat out the heart of the people."[217] LaViolette also includes a petition sent to the Prime Minister from members of the Cowichan agency, calling for the repeal of the *Indian Act*'s clause forbidding the Potlatch and explaining the meaning of the dance and its lack of harm to others.[218]

The petition reveals that people participating in activities that the Canadian state has decided to label as criminal are also political beings.[219] Here, the signatories vividly asserted their collective social and political agency by appealing to the Prime Minister in an effort to reverse the criminal law's encroachment into political activities that "do not injure anyone."[220] In their notes, Abell, Sheehy, and Bakht emphasize that Canadian law constitutes only one system of law: "[o]utlawing the Potlatch did more than drive a ceremonial and cultural practice underground. It effectively destroyed the people's traditional government—they used the Potlatch to make law, confer responsibilities and judge wrongdoing, and make amends for crimes against the community."[221] Individuals may thus be political and legal beings existing within multiple systems of law—subjected to, creating, and seeking change within them.

*Abell* addresses the defence of not criminally responsible on account of mental disorder in *Volume 2*. The "Mental Disorder" section opens with a discussion of the legal experiences faced by accused persons living with Fetal Alcohol Syndrome (FAS) or Fetal Alcohol Spectrum Disorder (FASD). The focus is on the individuals living with FAS/FASD and their families and communities. This is different from *Stuart*, which is more fully organized according to doctrinal concepts, regardless of disproportionate impacts on particular groups of people.

The editors explain that "the issues raised by the…significant limits on cognitive capacity [resulting from FAS or FASD] have mainly been addressed by the courts in sentencing."[222] Abell, Sheehy, and Bakht further teach students that judges can adapt their reasoning to address people's experiences with racialization, colonialism, disability, and discrimination. For example, they provide a sentencing case example in which the judge refers to an accused's mother's testimony with respect to the prevalence of FAS in a community:

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217. *Ibid*, quoting John A MacDonald, Proclamation, 1883.
218. *Ibid* at 48, quoting Petition to John A Macdonald, 1887.
219. See also Capulong, *supra* note 107 (discussing the "Client as Political Agent") at 50.
220. LaViolette, *supra* note 216 at 48, quoting Petition to John A Macdonald, 1887.
221. Abell *Volume 1*, *supra* note 18 at 55.
222. Abell *Volume 2*, *supra* note 18 at 303.

> "In *R v Charlie*, 2012 YKTC 5 (a sentencing decision in which the accused had pled guilty), Judge Lilles describes the "indisputable link between his Aboriginal status and his disability" as revealed by the *Gladue* Report filed in the case…The accused's mother, now sober, suggested that an astounding '90 percent of the second generation of residential school survivors in Ross River have been impacted with FAS'"[223]

This excerpt provides a lived-experience counterpoint to the more dominant reliance on psychiatric evidence that appears in mental disorder discussions in the other casebooks.

Consistent with the theme of contesting entrenched power relations, the editors of *Abell* demonstrate that the prominent constructions of mental disorder have been influenced by social, political, and institutional power dynamics, and they give significant space to perspectives that challenge these dynamics.

*Conclusions: The challenge of pursuing critique-inspired teaching instead of doctrine-first teaching*

A number of English-language Canadian criminal law casebooks add a welcome feature to the Canadian common law teaching landscape: all but one of six recently published casebooks integrate doctrine and critique. This flourishing of critique-inspired pedagogies is particularly notable when compared to Sandomierski's study of Canadian contract law casebooks, which demonstrate a more entrenched adherence to doctrine-first teaching.

The *Charter*, the systemic injustices that continue to mark criminal justice practices, and the human suffering involved in criminal law have all likely contributed to fostering this rich collection of critique-inspired texts. The texts allude to the *Charter*'s impact on criminal law, with lawyers and judges turning to the expertise of social science scholars.[224] Yet, as the texts also caution that systemic injustices continue and activism and political dialogue continue to serve as important mechanisms for pursuing social change.[225] Additionally, as an area of law, criminal law attempts to respond to immense physical, emotional, relational, and psychological harms, while at the same time imposing such harms. For instance, the editors of *Roach* write that when a judge imposes a sentence, "the state is inflicting some measure of suffering on an individual in response to wrongdoing."[226]

223. *Ibid*, citing *R v Charlie*, 2012 YKTC 5 at paras 37, 8.
224. See e.g. Pickard, *supra* note 178 at xxiii; Abell *Volume 1*, *supra* note 18 at 2.
225. See e.g. Abell *Volume 1*, *supra* note 18 at 2; Pickard & Goldman, *supra* note 178 at xxiii; Pickard, *supra* note 18 at xxiii.
226. Roach, *supra* note 18 at 973.

This "extraordinary…act"[227] of inflicting suffering constitutes a clear, visible act of state violence.[228] Human suffering is thus at the forefront of both criminal law's subject matter and practices. Moreover, inequalities, injustices, and the human suffering involved in other areas of law and social policy, such as child protection, often culminate in, or are exacerbated by, criminal justice processes.[229] This combination of human suffering, the invitation to challenge the law through the *Charter*, and the continued oppression of marginalized individuals and groups are likely some of the factors that have led editors to reimagine the structure and contents of casebooks.

Despite the prevalence of critique-inspired approaches within criminal law casebooks, critique-inspired teaching does not necessarily constitute a norm in Canadian criminal law teaching. To the contrary, three of the books that most strongly favour critical perspectives—*Abell Volume 1*, *Abell Volume 2*, and *Pickard*—have not been published since 2012, 2014, and 2002, respectively. Relatedly, in a review of *Abell Volume 1*, Constance Backhouse writes that, although she would have "love[d] to teach with [*Abell Volume 1*]" at the University of Western Ontario's Faculty of Law, she did not.[230] After having taught with *Pickard* for two to three years—and experiencing significant resistance from students—Backhouse and her colleague, Winifred Holland, decided to teach with one of the more "traditional casebooks."[231] In their introduction to the first edition of *Abell Volume 1*, Abell and Sheehy similarly describe in detail the challenge of incorporating critique into law teaching:

> Critical feminist teaching is…challenging because the law school community resists a curriculum that challenges antifeminism, racism, the centrality of law, and legal education as training for hierarchy. Some students engage in racial, sexual, and homophobic harassment in and outside of classrooms, and other professors, by eschewing "political content" in their courses, reinforce, whether intentionally or inadvertently, the notion that a critical curriculum is biased and non-legal. Similar responses are faced by feminist, critical race theorist, and socialist professors in academe generally, but they are exacerbated by the context of a "professional school" where the overt agenda is the preparation of students to enter the practice of law as it is currently

227. *Ibid*.
228. On punishment as state violence, see Alice Ristroph, "Just Violence" (2014) 56:4 Ariz L Rev 1017.
229. See e.g. Elizabeth Comack, *Coming Back to Jail: Women, Trauma, and Criminalization* (Winnipeg: Fernwood Publishing, 2018) at 29.
230. Backhouse, *supra* note 196 at 214.
231. *Ibid*.

rigidly defined.[232]

Perhaps, then, the most significant challenge in adopting critique-inspired teaching is overcoming the expectations of students, colleagues, and the legal profession for doctrine-first teaching.

I am inspired by the extent to which criminal law casebook editors have accepted the challenge of working against the grain by incorporating critique into first-year criminal law teaching. The critique-inspired casebooks complicate the image of first-year common law education as they offer evidence of critical political commitments *and pedagogical methods* within Canadian criminal law education. Given the challenge of employing these methods, the books might also provide adaptable tools and perspectives for instructors to use. For instance, even if criminal law professors choose to use *Stuart*—the 2018 doctrine-first casebook—the sources and perspectives offered in the critique-inspired books provide material and reflections that professors might wish to use as further reading, questions, or guidance for organizing the structure of their courses. Indeed, Backhouse's teaching approach illustrates one of the possibilities for blending doctrine-first materials with critique-inspired teaching practices. Specifically, when Backhouse encountered "the unprecedented wave of backlash generated by students resistant to critical legal textbooks," she dealt with the resistance not by abandoning critique-inspired teaching altogether but by instead using one of the "traditional" casebooks: "I decided that I could do more to provide a critical learning environment in the classroom if I conceded the point, and taught with the more traditional text uniformly adopted by my other four criminal law colleagues."[233] At the very least, the existence of critique-inspired criminal law casebooks has contributed to throwing into question the legitimacy and stability of doctrine-first teaching. The casebooks show that teaching with critical perspectives does not have to simply be an aspiration among first-year common law teachers.

In light of the pushback imposed by doctrine-first expectations, I propose that one path towards building a stronger foundation for critique-inspired teaching involves emphasizing and further exploring the goals of critique-inspired teaching—developing better lawyers and valuing student diversity. First, the clear articulation of these goals establishes why critique-inspired pedagogies are valuable. Second, the identification of such goals lays the groundwork for further research into whether critique-

232. Abell & Sheehy, *supra* note 194 at 2.
233. Backhouse, *supra* note 196 at 214.

inspired pedagogies relate, in practice, to the student learning outcomes, future lawyering skills, and student experiences that the pedagogies aim to foster.[234] Third, an emphasis on the goals of critique-inspired teaching assists in finding common ground among legal academics. As Sandomierski demonstrates, many common law contracts professors who adopt doctrine-first teaching nonetheless aspire to achieve the goal of using critique to enhance and broaden students' skills. This shared aim suggests that there may be extensive interest in shifting more resolutely towards critique-inspired teaching, despite the broader pressures to maintain doctrine-first approaches. If professors capitalize on this seemingly pervasive aspiration to instill critical capacities in students, they might be able to dismantle some of the doctrine-first pressures.

The goal of valuing student diversity is less expressly articulated in the casebooks in my study. However, Abell and Sheehy offer a glimpse of this aim in their above description of the dilemma facing professors who aspire to teach critical feminist perspectives. In detailing the obstacles facing those who choose to teach critical perspectives, Abell and Sheehy indirectly illuminate the marginalized experiences of students, professors, lawyers, and clients whose values and knowledges fall outside the dominant legal and law school discourses. At the same time as people express pejorative remarks, there will be students, professors, and clients who feel unwelcome and disregarded. And at the same time as judicial analyses are presented as neutral and objective, worldviews and experiences that land outside those frameworks will be regarded as biased.

The aims of listening to and valuing diverse experiences inside and outside the classroom are mutually constitutive—they both involve a vision of students and lawyers who are respectful of difference, who recognize colonial violence in Canadian law, and who identify spaces to argue for social justice within and outside of Canadian law. The factors that create pressures against critique-inspired pedagogies thus simultaneously reflect reasons for pursuing them, and the critique-inspired criminal law casebooks helpfully contribute to showing that critique-inspired pedagogies can be pursued in law school classrooms.

234. For anecdotal and observational research, see generally Calleros, *supra* note 20, and Crenshaw, *supra* note 7. For empirical research on the learning outcomes of critical pedagogy outside the law school context, see Biren (Ratnesh) A Nagda, Patricia Gurin & Gretchen E Lopez, "Transformative Pedagogy for Democracy and Social Justice" (2003) 6:2 Race Ethnicity & Education 165.