

Statutory Analysis: Using Criminal Law to Highlight Issues in Statutory Interpretation

Jennifer M. Chacón*

Part I. Rethinking the First-Year Curriculum.....	133
Part II. Statutory Analysis: Course Design	136
Part III. Making Do With Statutory Analysis.....	140
Shrinking the Criminal Law.....	140
Shrinking Legislation and Regulation	142
Part IV. Conclusions.....	144

In the fall semester of 2009, I taught a course called Statutory Analysis to half of the students in the inaugural first-year class at the University of California, Irvine, School of Law. I had never taught the course before. The idea for the course arose out of a series of meetings that took place among the law school's founding faculty members in the 2008–2009 academic year, before I joined the faculty.¹ Although I had not been a part of these discussions, when I joined the faculty in July 2009, I was asked to teach the newly conceived Statutory Analysis class. I understood that the founding faculty had envisioned the course as one that I could implement as a variation on the traditional criminal law course: one that would place an emphasis on statutory interpretation. For the next two months, I worked to put together a course that would meet the ambitious dual goals of teaching substantive criminal law and statutory analysis. This essay is a tale of my adventures.

Perhaps more precisely, what follows is my attempt to dissect and analyze the Statutory Analysis class that I created, and to make some preliminary assessments of its strengths and weaknesses. Part I offers an explanation of the ambitions and intentions of the founding faculty members who decided to include

* Professor of Law, University of California, Irvine School of Law. A.B., Stanford University, 1994. J.D., Yale Law School, 1998. I would like to thank Dean Chemerinsky for his support of my research. I would also like to thank the UC Irvine Class of 2012 for road-testing my first statutory analysis class.

1. The UC Irvine School of Law's founding faculty were Dean Erwin Chemerinsky, Associate Dean Carrie Hempel, Associate Dean Beatrice Tice, Associate Dean Grace Tonner, Dan Burk, Linda Cohen, Joseph DiMento, Catherine Fisk, Trina Jones, Elizabeth Loftus, Carrie Menkel-Meadow, Rachel Moran, Ann Southworth, Kerry Vandell, and Henry Weinstein. *Faculty*, UC IRVINE SCH. LAW, <http://law.uci.edu/faculty/index.html> (last visited Sept. 25, 2010).

the course in the first-year curriculum and who settled on the basic parameters of the course. Succinctly put, the founding faculty of UC Irvine made a decision to emphasize the development of a set of analytical skills, largely in the context of traditional first-year subject areas. One result of this decision was that my traditional criminal law class was converted into “Statutory Analysis.” The goal of this class is to provide students with an introduction to the tools of statutory analysis within the context of a substantive criminal law course.

Having explained the intentions of the founding faculty members, I then turn to my own efforts to put those intentions into practice. Part II of this essay sets forth the basic parameters of my Statutory Analysis class.² In this section, I describe the coverage choices that I made and I highlight the many trade-offs involved in the process of designing this course. The charge to create a Statutory Analysis class prompted me to design a class that introduces students to theories of statutory interpretation and basic canons of construction early in the course, and then uses those concepts to frame discussions about the substantive criminal law provisions examined throughout the class.

In Part III of the essay, I explore the benefits and limitations of this particular Statutory Analysis course. The primary advantage to this course design is that it exposes students to the basic doctrines and tools of statutory interpretation in their first semester. As a result, I believe that my students are now much more focused on the criminal law statutes that lie at the heart of modern criminal law, have a bit more knowledge about competing theories of statutory interpretation, and are much better equipped to read and interpret statutes than were the students completing my traditional criminal law course. They spend a lot less time asking “What is the rule?” and a lot more time asking “What does the statute say?” and “How did (and how should) the court interpret the statute?” Presumably, the skills of statutory analysis acquired in the first semester will follow these students into their other courses and throughout their legal careers.

However, there are also a number of drawbacks to this course design. Perhaps this is unsurprising, since the design of my course reflects a compromise between offering a course on statutes in the first year and offering students all of the coverage of a traditional criminal law course. As a result of this compromise, certain aspects of both substantive criminal law and statutory analysis are missing from my course syllabus. Therefore, I spend the bulk of Part III analyzing what I view as the two main drawbacks of this course design. In Part III, Section A, I discuss the compromises I made in terms of the coverage of criminal law. Part III,

2. The law school offered two sections of Statutory Analysis during the fall of 2009. I taught one section; the other section was taught by Professor Mario Barnes. Because we each had our own syllabus and used different textbooks, I do not purport to speak for Professor Barnes in describing the specific parameters of my course, although I believe that we were generally in agreement regarding our overall approach to the course structure.

Section B focuses on the cost this course design exacts from efforts to teach the history, theories, and tools of statutory interpretation. The course, by necessity, treats statutory analysis more as a skill to be learned than as a substantive area to be mastered. It does not fully develop discussions concerning legislative and administrative context. In short, it does not provide a substitute for a full course on legislation or regulation.

Ultimately, I believe that the course I designed has expanded first-year students' understanding of and attention to issues of statutory interpretation without exacting a significant cost in terms of their knowledge of substantive criminal law. In that sense, the course is a success. However, I believe that the faculty ultimately will need to revisit the question of whether this is the best vehicle for teaching statutory analysis, or whether such efforts would benefit from bolder experimentation in the first-year curriculum, including the inclusion of a first-year course on legislation or regulation.³

PART I. RETHINKING THE FIRST-YEAR CURRICULUM

Dean Erwin Chemerinsky frequently has stated that the new law school at UC Irvine must be “sufficiently traditional to be credible, and sufficiently innovative to justify its existence.”⁴ The first-year curriculum at UC Irvine reflects this notion of blending tradition with innovation. The traditional first-year subjects of criminal law, civil procedure, contracts, torts and constitutional law all have their place in UC Irvine's first-year curriculum.⁵ Even though a number of law schools have undertaken high-profile redesigns of the first-year curriculum,⁶ most of these courses still remain at the core of the redesigned first-year

3. See Ethan Leib, *Adding Legislation Courses to the First-Year Curriculum*, 58 J. LEGAL EDUC. 166 (2008) (for a vigorous argument in favor of such a first-year requirement). See also Elizabeth Garret, *Teaching Law and Politics*, 7 N.Y.U. J. LEGIS. & PUB. POL'Y 11, 11 (2003) (“Including courses on the legislative, regulatory, and political processes in the first-year law school curriculum is vital”); Richard B. Stewart, *On the “Administrative and Regulatory State” Course at N.Y.U. Law*, 7 N.Y.U. J. LEGIS. & PUB. POL'Y 39, 40 (2003) (describing NYU's administrative and regulatory state course “not only as a basic building block for a legal career, but also as an important precursor to upper-year courses”).

4. Erwin Chemerinsky, *The Ideal Law School for the 21st Century*, 1 U.C. IRVINE L. REV. 1, 17 (discussing general objectives of faculty meetings in forming the first-year curriculum).

5. *Curriculum*, UC IRVINE SCH. LAW, <http://www.law.uci.edu/registrar/curriculum.html> (last visited Sept. 17, 2010) (presenting first-year course listings, which include coverage of criminal law, civil procedure, contracts, torts, and constitutional law, in addition to innovative course offerings such as a rigorous, year-long lawyering skills course, a year-long course on the legal profession, and a course on international law).

6. See, e.g., Jonathan D. Glater, *Harvard Law Decides to Steep Students in 21st-Century Issues*, N.Y. TIMES, Oct. 7, 2006, at A10 (discussing the redesign of Harvard's curriculum); Michael Robinson-Dorn, *Teaching Environmental Law in the Era of Climate Change: A Few Whats, Whys, and Hows*, 82 WASH. L. REV. 619, 621 (2007) (discussing the University of Washington's curricular reform efforts); Katharina Pistor, *Lawyering Across Multiple Legal Orders—Rethinking Legal Education in Comparative and International Law*, 24 PENN ST. INT'L L. REV. 809, 809–10 (2005) (discussing reforms to Columbia Law School's first-year curriculum).

programs.⁷ They constitute a sort of general education for lawyers.⁸ Not only do these courses give law school graduates a common language, but they also provide a background for a great deal of subject matter covered on most bar exams.⁹

The founding faculty was fully aware of the strong tradition behind these first-year course offerings. At the same time, however, the faculty was cognizant of the ongoing law reform dialogue that has raised questions about the adequacy of the traditional law school curriculum. The Carnegie Report on Educating Lawyers, for example, cautioned that “the dramatic results of the first year of law school’s emphasis on well-honed skills of legal analysis should be matched by similarly strong skills in serving clients and a solid ethical grounding.”¹⁰ This call for greater skills and ethics training is hardly a new one; it is at the root of earlier calls for law school reform.¹¹

The faculty therefore sought to marry traditional substantive analysis with curricular components that would emphasize practice skills; designed a rigorous first-year “Lawyering Skills” program to develop students’ drafting, interviewing, and counseling skills;¹² and added a year-long Legal Profession course to the

7. See Glater, *supra* note 6 (recording Professor Martha Minow’s statement that attention to the traditional courses would shrink); Pistor, *supra* note 6 (describing the traditional first-year courses as a significant part of the revised first-year curriculum).

8. Arguably, this is the product of inertia rather than the result of a pedagogical decision-making. See, e.g., Judith Welch Wegner, *Reframing Legal Education’s “Wicked Problems,”* 61 RUTGERS L. REV. 867, 943 (2009) (“Reforms to the first-year curriculum have proved challenging, often because schools are hesitant to depart from national norms and because faculty members teaching in first-year subjects tend to resist reductions in the hours assigned to foundational courses that involve both content instruction and development of critical thinking”); Rena I. Steinzor & Alan D. Hornstein, *The Unplanned Obsolescence of American Legal Education,* 75 TEMP. L. REV. 447, 447 (2002) (“For most law schools, curricular reform is tortuous, disruptive, and occurs roughly on the schedule of a 50-year flood”).

9. Indeed, some law professors have posited that the outmoded bar exam structure poses an impediment to law school reform. See, e.g., Kristen Booth Glen, *Thinking Out of the Bar Exam Box: A Proposal to “MacCrate” Entry to the Profession,* 23 PACE L. REV. 343, 359–60 (2003) (“[A]lthough the faculty may design and determine the curriculum, the decision by bar examiners as to which subjects to test has a huge impact upon the choices made by students in their course selection.”); Joan Howarth, *Teaching in the Shadow of the Bar,* 31 U.S.F. L. REV. 927 (1997). But see John Henry Schelgel, *A Damn Hard Thing to Do,* 60 VAND. L. REV. 371, 372 (2007) (“One might argue that the primary obstacle to curricular change is the bar exam, though I suspect the bar examiners would jump on board were the bar supportive of a significant change.”).

10. William M. Sullivan et al., *Summary, Educating Lawyers: Preparation for the Profession of Law,* THE CARNEGIE FOUNDATION FOR THE ADVANCEMENT OF TEACHING, 4 (2007)[hereinafter CARNEGIE REPORT SUMMARY], available at http://www.carnegiefoundation.org/sites/default/files/publications/elibrary_pdf_632.pdf.

11. See, e.g., ABA, COMMITTEE ON LEGAL EDUCATION, LEGAL EDUCATION AND PROFESSIONAL DEVELOPMENT: AN EDUCATIONAL CONTINUUM: REPORT OF THE TASK FORCE ON LAW SCHOOLS AND THE PROFESSION—NARROWING THE GAP 233–60, 330–34 (1992), available at <http://www.abanet.org/legaled/publications/onlinepubs/maccrate.html> (advocating increased focus on skills training in law schools).

12. *Curriculum*, UC IRVINE SCH. LAW, <http://www.law.uci.edu/registrar/curriculum.html> (last visited Sept. 17, 2010).

curriculum to better educate students about ethical and professional issues related to the practice of law.¹³ The latter two developments are addressed elsewhere in this issue.¹⁴ My focus here is on my own effort to integrate a particular set of skills into the traditional criminal law course.

The founding faculty felt that the first-year curriculum ought to do more than simply teach the substantive law in traditional first-year courses. Instead, they envisioned that substantive law courses could also be vehicles for developing certain skills that are necessary for the practice of law. The faculty brainstormed ways in which traditional first-year subject matter could be used to emphasize a set of skills that would complement but transcend areas of substantive law. The decision most relevant to me was the founders' decision to replace first-year criminal law—a course that I taught for five years at UC Davis prior to my arrival at Irvine—with Statutory Analysis.

One of the founders' visions for the Statutory Analysis course was that the instructor could create a course that would convey traditional substantive law materials in a context that would emphasize the skill of statutory analysis. The course description I received at the outset of my time at UC Irvine explained to me, and to the incoming students, that the three-unit course would "use criminal law as a basis for teaching students the methods employed in all areas of law for analyzing statutes."¹⁵ Similar decisions were made with regard to other courses, resulting in a constellation of courses that was unique in emphasis but familiar in its general parameters. In fall 2009, the incoming students took five courses. In addition to the Lawyering Skills and Legal Profession courses previously mentioned, the curriculum included a four-unit course entitled "Common Law Analysis: Private Ordering," which focused primarily on contracts to teach methods of common law analysis; a four-unit course entitled "Procedural Analysis," which used civil procedure as the foundation for teaching students about the analysis of procedural rules; and the three-unit Statutory Analysis course.¹⁶ In the spring, students continued the Lawyering Skills and Legal Profession courses and also took courses on "Constitutional Analysis," "International Legal Analysis,"¹⁷ and "Common Law Analysis: Public Ordering,"

13. *Id.* For a discussion of the need for this type of innovation in the first-year curriculum, see, for example, Deborah L. Rhode, *The Professional Responsibilities of Professional Schools*, 49 J. LEGAL EDUC. 24, 30 (1999).

14. See Ann Southworth & Catherine Fisk, *Our Institutional Commitment to Teach about the Legal Profession*, 1 U.C. IRVINE L. REV. 73 (2011).

15. *Curriculum Overview*, UC IRVINE SCH. LAW, <http://www.law.uci.edu/registrar/curriculum.html> (last visited Sept. 17, 2010).

16. *Id.*

17. As with many other curricular reform efforts, the decision to include an international law course among the mandatory first-year offerings was perhaps the most controversial of the choices made. *E.g.* Leib, *supra* note 3, at 169, n. 13 (noting that Harvard's inclusion of an international law component in their first-year curriculum was controversial and criticized as motivated by politics rather than pedagogy). For a discussion of the merits and methods of incorporating international and

which covers the substantive law of torts.¹⁸

The founders intended this reorienting of the curriculum to better prepare students to apply the theoretical components of the first-year curriculum to the tasks that they would face as lawyers in the field. Rather than foregrounding the subject matter, these course titles reflect an emphasis on forms and methods of legal reasoning. The substantive law serves as a vehicle for conveying this knowledge. Yet, while the addition of the Legal Profession and Lawyering Skills courses marks an important reorienting of the law school curriculum toward the outside world, so far the rethinking of the remainder of the first-year curriculum has reflected less of a break with tradition than a conscientious effort to integrate new practices into a traditional framework. Teachers of first-year courses have the opportunity to use their courses to actually achieve in practice one of the long-stated theoretical goals of the first year of law school: training students to “think like lawyers.”¹⁹ Each individual classroom teacher therefore faced the question of the degree to which he or she wanted to restructure his or her courses to address the skill set that the founders hoped to have these courses convey. I opted to implement some fairly significant changes to my syllabus.

PART II. STATUTORY ANALYSIS: COURSE DESIGN

For five years prior to teaching my Statutory Analysis class last fall, I taught a first-year, three-unit criminal law course. The primary textbook for my criminal law course was Joshua Dressler’s *Criminal Law* textbook, which is currently in its fifth edition.²⁰ I have supplemented that text with readings from Cynthia Lee and Angela Harris’s *Criminal Law* textbook²¹ and with a series of articles and cases that highlight current developments in the criminal law, particularly in the State of California where I teach (and where the vast majority of my students go on to practice).

The trajectory of my criminal law course closely followed the sequence of the materials in the Dressler casebook.²² The course began with a general introduction to the sources, distinguishing features and procedural context of the criminal law, followed by a lengthy discussion on punishment in theory and

transnational legal perspectives into the first-year curriculum, see Symposium, *Integrating Transnational Legal Perspectives into the First Year Curriculum*, 24 PENN. ST. INT’L L. REV. 735 (2006).

18. *Curriculum*, UC IRVINE SCH. LAW, <http://www.law.uci.edu/registrar/curriculum.html> (last visited Sept. 17, 2010).

19. See, e.g., Susan Sturm & Lani Guinier, *The Law School Matrix: Reforming Legal Education in a Culture of Competition and Conformity*, 60 VAND. L. REV. 515, 516 (2007) (identifying the goal of most recent legal reform efforts as “updating how law schools prepare students to think like a lawyer”); see also CARNEGIE REPORT SUMMARY, *supra* note 10, at 5 (observing that most law schools are good at teaching students to “think like lawyers”).

20. JOSHUA DRESSLER, *CASES AND MATERIALS ON CRIMINAL LAW* (5th ed. 2009).

21. CYNTHIA LEE & ANGELA HARRIS, *CRIMINAL LAW: CASES AND MATERIALS* (2d ed. 2009).

22. See generally, DRESSLER, *supra* note 20.

practice. After a brief segment on the modern role of the criminal statutes, including a brief statutory analysis discussion that focused primarily on due process issues, the course would segue into the elements of a crime, and then deal with specific substantive offenses under the headings of homicide, rape, and sexual assault. The course then included a unit on general defenses to crimes and one on inchoate offenses (attempt, assault, solicitation, and conspiracy) and related defenses. The course briefly forayed into a segment on accomplice liability before concluding with a relatively straightforward section on theft and related offenses.²³

The course discussion was framed by and often reverted to the introductory literature concerning theories of punishment. Throughout the course, discussions of specific offenses—not to mention the discussions concerning the outcomes in particular cases—were tethered to a broader discussion of the ends that are served (or not served) by the imposition of criminal punishment upon certain actors for certain acts. This discussion was frequently enriched and enlivened by critical perspectives that explore the role of race and culture in creating paradigms of crime and punishment.²⁴ Although I have relied upon scaffolding provided by Dressler²⁵ and Harris and Lee²⁶ to structure my own classroom discussions, the same general topics are covered in many of the leading criminal law casebooks.²⁷ The order of the presentation sometimes varies, but these texts also tend to lead off with discussions on what makes the criminal law unique and why (and how) society determines the appropriate criminal punishment for wrongdoers.²⁸

The challenge for me in creating a Statutory Analysis class was that I was still expected to convey the basic substantive doctrines of criminal law in the same three units I had always had, while adding a component that emphasized statutory analysis. To achieve this goal, I had to sacrifice certain elements of the traditional criminal law class and integrate some (arguably excessively rudimentary) introductory materials on statutory interpretation. The course that I designed represented a compromise, one that is ongoing as I redesign the course for future classes.

I began by rethinking the traditional introductory materials for the criminal law class. In keeping with what I took to be the intention of the founding faculty, I decided to foreground materials on the interpretation of statutes, with the idea

23. In some years, I taught the unit on theft immediately after the unit on rape and sexual assault rather than at the end of class.

24. *See, e.g.*, LEE & HARRIS, *supra* note 21, at 897–984.

25. DRESSLER, *supra* note 20, at 30–91.

26. LEE & HARRIS, *supra* note 21, at 1–36.

27. *See, e.g.*, SANFORD H. KADISH, STEPHEN J. SCHULHOFER, & CAROL S. STEIKER, CRIMINAL LAW AND ITS PROCESSES: CASES AND MATERIALS (8th ed. 2007); JOHN KAPLAN, ROBERT WEISBURG, GUYORA BINDER, CRIMINAL LAW: CASES AND MATERIALS (6th ed. 2008).

28. *See, e.g.*, KADISH ET AL., *supra* note 27, at 67–132; KAPLAN ET AL., *supra* note 27, at 29–103.

that I could use this framework throughout the course. The first challenge I encountered was that of finding materials on statutory interpretation that would be well-suited to first-year, first-semester law students. Some of the finest materials that appear in casebooks on legislation and statutory interpretation are clearly geared toward an audience that has already acquired some familiarity with the law.²⁹ This makes sense since most such courses are taught in the second and third year, and even in schools that include a first-year legislation course, such courses are generally offered in the second semester.³⁰ Nevertheless, a large quantity of high-quality materials does exist, and these materials can be delivered in ways that are completely comprehensible even to the uninitiated.

Last year, to provide the students with a rudimentary introduction to issues in statutory interpretation, I relied primarily on excerpted materials in chapter 8 of Eskridge, Frickey, and Garrett's textbook on legislation.³¹ This chapter provides a concise overview of doctrines of statutory interpretation. The first section of the chapter introduces students to the rules, presumptions, and canons of statutory interpretation.³² This includes explanations of textual canons;³³ a brief introductory overview of the multiplicity of substantive canons employed by courts (with particular attention to the rule of lenity and the avoidance of constitutional problems);³⁴ and an introduction to the various extrinsic sources that can be used in interpreting statutes (including legislative history and the common law).³⁵ The materials also highlight controversies surrounding various methods of statutory analysis.

Having introduced these concepts, we turned to the substantive criminal law. Using the same textbook I have always used, I found a host of opportunities to deploy and discuss previously introduced concepts over the remainder of the course. Textual canons came into play many times in interpreting provisions of the California Penal Code, as did the doctrine of giving traditional meaning to common law terms. The Model Penal Code (and Commentary) provides a useful tool for discussing plain meaning, the proper interpretation of the whole act, and some lessons in reading "legislative history," which the Commentary provides, albeit in very simplified form. With regard to substantive canons, the rule of lenity

29. See, e.g., WILLIAM N. ESKRIDGE, PHILIP P. FRICKEY, & ELIZABETH GARRETT, LEGISLATION: STATES AND THE CREATION OF PUBLIC POLICY (4th ed. 2007); ABNER J. MIKVA & ERIC LANE, LEGISLATIVE PROCESS (3d ed. 2009). But see, e.g., JOHN F. MANNING & MATTHEW C. STEPHENSON, LEGISLATION AND REGULATION (2010).

30. See, e.g., *Required First Year Courses*, NYU SCH. LAW, <http://www.law.nyu.edu/academics/courses/requiredfirstyearcourses/index.htm> (last visited Sept. 18, 2010) (listing the Administrative and Regulatory State Course as offered in the spring semester).

31. See ESKRIDGE ET AL., *supra* note 29.

32. *Id.* at 847–941.

33. *Id.* at 849–856.

34. *Id.* at 880–941.

35. *Id.* at 955–1100. Unfortunately, very little of this material was covered in detail in my first syllabus, which only allowed the class to skim the surface of these concepts.

obviously receives the bulk of the attention.³⁶ Cases arising in states that have adopted modified versions of the Model Penal Code provide for particularly interesting discussions of legislative intent. All of this is to say that once the students become familiar with the basic doctrines of statutory analysis, an understanding of those doctrines becomes an integral part of the discussion of almost every case that follows. I actually found this framing device just as useful as the traditional scaffolding created by the literature on theories of punishment,³⁷ although it accomplished a different set of goals.

In preparation for teaching the course a second year, I wanted to expand on this very basic introduction to doctrines of statutory interpretation. My second syllabus tried to introduce the students more systematically to *theories* of statutory interpretation, because I was concerned that my first set of students may have come away with a hodgepodge of doctrines and no theoretical or historical framework in which to contextualize them. Theories of statutory interpretation are covered beautifully in chapter 7 of the Eskridge, Frickey, and Garrett materials.³⁸ The materials on statutory analysis compiled by Linda Jellum and Charles Hricik in their *Modern Statutory Interpretation* book cover some of the same ground at a slower pace and with more simplified explanations and exercises, so I have drawn from some of their materials in my second version of the course.³⁹ The scope of Jellum and Hricik's book is much smaller than that of the *Legislation* text by Eskridge, Frickey and Garrett. Indeed, most of the book is dedicated to materials that are covered in chapters 7 and 8 of the Eskridge materials.⁴⁰ The slower pacing hopefully has made the materials more accessible to my first-year students. I also continue to include some of the Eskridge, Frickey, and Garrett materials that I relied upon last year.

As a whole, the materials on statutory analysis that I have offered to my first-year students provide them with an overview of various theories of statutory interpretation and an introduction to the doctrines of statutory interpretation. Once the students begin to work their way through the substantive criminal law materials, these issues are reinforced and refined. I supplement the criminal law text with statutory material from the California Penal Code. I spend a significant amount of time pointing to structural and historical differences between that code and codes based on the Model Penal Code, and highlighting the different analytical tools that are brought to bear by the courts interpreting specific provisions of criminal codes. California law also gives me the opportunity to

36. The rule of lenity receives treatment in the traditional criminal law texts and is a staple of any criminal law course. *See, e.g.*, DRESSLER, *supra* note 20, at 119–126.

37. There are some important drawbacks to losing this scaffolding. *See infra* Part III.A.

38. ESKRIDGE ET AL., *supra* note 29, at 689–846.

39. *See* LINDA D. JELLUMS & DAVID CHARLES HRICIK, *MODERN STATUTORY INTERPRETATION: PROBLEMS, THEORIES, AND LAWYERING STRATEGIES* (2d ed. 2009).

40. *Compare generally* JELLUMS & HRICIK, *supra* note 42, *with* ESKRIDGE ET AL., *supra* note 29.

explore the mixed blessing of statutes enacted by popular initiative.⁴¹ The overall result is a criminal law course that provides students with a context in which to understand the cases that they read and a much more complete set of tools for analyzing the statutes that they confront.

But already I can feel the disapproval of many readers. There are those who will find the reorientation of the criminal law course utterly disorienting. Perhaps even more disapproving will be the reader who would like to see the introduction of legislation courses in the first year of law school.⁴² It is clear to that reader—and to me—that my course is not such a course. Indeed, I think the course has several important drawbacks and limitations that are worthy of discussion.

PART III. MAKING DO WITH STATUTORY ANALYSIS

The changes that I have made to my former criminal law syllabus have produced some tangible benefits. The foregrounding of materials on statutory interpretation highlights for the students the centrality of the criminal code in any discussion of the substantive criminal law. Students are much better attuned to the relationship between common law criminal doctrines and modern criminal statutes. The California Penal Code provides particularly fruitful ground for exploring the legislative intent behind the written criminal code, since it is an amalgam of codified common law doctrines, modern statutory crimes crafted by the legislature, and popularly enacted statutory provisions. The Model Penal Code, a coherent statutory scheme with a clear “legislative history” of sorts provides a framework for discussion concerning defined terms and the proper application of law in light of the whole act. Last year, for the first time in my six years of teaching the criminal law, I did not sense that students were frustrated by the time spent on the Model Penal Code. Instead of viewing it as a pointless, academic approach to learning the criminal law, they approached it as an example of a criminal statute upon which to practice their newly acquired skills.

Nevertheless, the Statutory Analysis/Criminal Law hybrid has important limitations and deficiencies. First, there are costs to the teaching of substantive criminal law. Second, this course cannot hope to operate as a comprehensive course on legislation and it offers virtually no insight into the regulatory process. I think these two drawbacks are worthy of elaboration.

Shrinking the Criminal Law

The changes in my syllabus did no harm to my ability to impart the basic

41. For a discussion of the interpretational difficulties posed by direct referenda see, for example, Jane S. Schacter, *The Pursuit of Popular Intent: Interpretive Dilemmas in Direct Democracy*, 105 YALE L.J. 107 (1995); Philip P. Frickey, *Interpretation on the Borderline: Constitution, Canons and Direct Democracy*, 1996 ANN. SURV. AM. L. 477 (1996). *But see* Jack L. Landau, *Interpreting Statutes Enacted by Initiative: An Assessment of Proposals to Apply Specialized Interpretive Rules*, 34 WILLAMETTE L. REV. 487 (1998).

42. *See generally* Leib, *supra* note 3.

doctrines of substantive criminal law. Even after adding materials on statutory analysis, I was still able to cover all of the introductory materials concerning the elements of a crime, and I also covered the same substantive crimes and defenses that I had covered in previous criminal law classes.⁴³ In short, I do not think that my students lost out on the “black letter” criminal law, and I think they are equally, if not better, prepared for the criminal law section of the bar exam than my previous criminal law students.

This is not to say, however, that nothing has been lost. As I mentioned at the outset, I have replaced the traditional introductory materials of criminal law with introductory materials on statutory interpretation. The large section on theories of punishment contained in Dressler’s introductory chapter (and that of many other criminal law texts)⁴⁴ is a casualty of this approach. I do not spend more than a few minutes discussing consequentialist⁴⁵ and deontological⁴⁶ theories of punishment. I do not spend any time reading cases on proportionality—whether in capital⁴⁷ or noncapital⁴⁸ cases—or on sentencing theory. I do not spend any time on the rich literature, now available even in casebooks, on the culture of crime and punishment.⁴⁹ And I spend very little time talking about the current realities of mass incarceration and the historical forces that gave rise to these modern realities.⁵⁰

Intellectually, I can justify some of these shortcuts. It seems to me, for example, that discussions on “how much to punish” and on constitutional questions of proportionality, not to mention sentencing theory, are perhaps more properly contextualized in an upper-division course on sentencing. All of the materials I have listed among my omissions are also the subject of upper-division seminars on punishment. But many students will not take such upper-division courses. For some students, my course is the first and last opportunity to think about the philosophical and social issues raised by the laws governing crime and punishment. Although I certainly discuss these issues throughout the course, passing references are not a substitute for lengthy and substantial reading

43. Some of this may be due to the fact that, for the past two years, UC Irvine requires an unusually high number of minutes per credit hour: 795 at UC Irvine, compared to the 700 minutes per credit hour required by the ABA. ABA REPORT OF THE AD HOC COMMITTEE ON MINUTES, HOURS, DAYS, AND WEEKS (June 11, 2010) (on file with the author).

44. See *supra* notes 25–27 (identifying sections on theories of punishment in several of the leading criminal law textbooks).

45. See, e.g., JEREMY BENTHAM, AN INTRODUCTION TO THE PRINCIPLES OF MORALS AND LEGISLATION (J.H. Burns & H.L.A. Hart eds., 1996) (1823).

46. See, e.g., IMMANUEL KANT, THE PHILOSOPHY OF LAW (W. Hastie trans., T. & T. Clark 1887) (1796).

47. See, e.g., *Coker v. Georgia*, 433 U.S. 584 (1977).

48. See, e.g., *Ewing v. California*, 538 U.S. 11 (2003).

49. See, e.g., LEE & HARRIS, *supra* note 21, at 897–984.

50. See generally MASS IMPRISONMENT: SOCIAL CAUSES AND CONSEQUENCES (David Garland ed., 2001).

assignments. One of the most significant challenges to course design that I have confronted is trying to figure out how to keep these aspects of the discussion vibrant when the syllabus fails to lead off with them, and the reading fails to cover them in any significant way.

Shrinking Legislation and Regulation

As previously mentioned, the statutory analysis class that I teach also is not, nor can it be, a legislation course.⁵¹ There is, of course, no consensus on what the contents of a first-year legislation course ought to be. In recent years, a few scholars have ventured to identify the various forms that such a class might take, and these descriptions include the following six course structures (or combinations thereof):⁵²

1. A statutory interpretation course focusing on theories, canons, and practice of statutory interpretation, including related political theory.⁵³
2. An introductory course focusing particular attention on administrative law, which would present an overview of the administrative state, the procedures of agencies and the oversight of agencies by the legislature and the judiciary.⁵⁴
3. A regulation course that uses an area of substantive law—such as labor law or anti-discrimination law—to examine the making and implementing of laws.⁵⁵
4. A legal methods skills course that focuses on the interpretation of statutes in introducing the principles of legal reasoning.⁵⁶

51. Indeed, in discussing NYU's Legislation and Regulation course, Professor Richard B. Stewart lamented that "[t]he excruciating problem, of course, is how, within the context of a four-credit course, to cover all [the necessary legislation and regulation] material without being too superficial and too general." Stewart, *supra* note 3, at 40. If it is difficult in a four-unit course, it goes without saying that it is absolutely impossible in a three-unit course that shares the stage with substantive criminal law.

52. In his article on first-year legislation courses, Ethan Leib broke the courses down into five categories. Leib, *supra* note 3, at 182–187. In an earlier article, William Eskridge identified seven different variants. William N. Eskridge, *Teaching Legislation: A Conversation: The Three Ages of Legislation Pedagogy*, 7 N.Y.U. J. LEGIS. & PUB. POL'Y 3, 7–9 (2003). This list represents an amalgamation and revision of these two lists.

53. This is perhaps the most useful model for a first-year legislation course. See, e.g., Leib, *supra* note 3, at 182–183 (endorsing the use of this model in the first-year curriculum).

54. Such a course is offered at NYU, for example. My thanks to Cristina Rodríguez for sharing this insight—and her syllabus—with me.

55. ESKRIDGE ET AL., *supra* note 29, at 8 (listing examples of such courses).

56. *Id.*

5. A political and legislative process course that focuses on the political process, including issues such as election laws, lobbying and its regulation, the legislative drafting and budgeting processes, and legislation by popular initiative.⁵⁷
6. A legislation course focused on state or local government legislation and regulation.⁵⁸

While consensus may be lacking on the appropriate parameters of a first-year legislation course, it should be obvious from the description of my own course that it does not qualify as one. The closest model for my class is the brand of legislation courses that teach statutory interpretation. In a recent article, Ethan Leib laid out a statutory interpretation course that would be, in his view, the most suitable form of legislation course for the first-year curriculum. He writes:

This version of the course focuses student attention on the mechanics of statutory interpretation, introducing them to linguistic and substantive canons in varied legal contexts. It usually involves substantial exposure to theoretical debates about intentionalism, textualism, the “legal process” family of theories, and dynamic or purposive statutory interpretation. Ultimately, these theories and their viability simply cannot be understood without some sensitivity to separation of powers concerns; and the course is generally rounded out with some basic details about administrative law and deference to agency interpretations of statutes.⁵⁹

Having given this matter a great deal of thought over the past year (and, admittedly, having given the matter insufficient thought before that), I have come to see the potential value of including a legislation course in the first-year curriculum. A statutory interpretation course, structured as suggested above, probably would be the “best candidate[] for inclusion as a first-year requirement” at many law schools.⁶⁰

However, as Part II of this article makes abundantly clear, the course that I teach is not such a course. Rather, my course represents an effort to teach the canons of interpretation with some theoretical framework to assist the students in applying those canons. It does not provide students with an opportunity to engage deeply with the theories of statutory interpretation.⁶¹ Nor does it offer students a guide to the political and constitutional contexts in which these theories often play

57. Leib, *supra* note 3, at 183–184.

58. ESKRIDGE ET AL., *supra* note 29, at 9.

59. Leib, *supra* note 3, at 182.

60. *Id.* at 182.

61. *Id.*

out.⁶²

Not only do I not have very little space in my very crowded syllabus to tackle issues of administrative law and judicial deference to agency interpretations,⁶³ but the criminal statutes that form the backbone of the substantive criminal law class often do not provide a robust context for exploring those issues. Finally, although it clearly emphasized the role of the legislature in shaping the modern criminal law, my course is still somewhat judge-centric in its approach, ultimately asking how judges have interpreted or should interpret particular criminal statutes. In this sense, it fails to deliver what Professor Garrett has identified as one of the primary benefits of a statutory analysis course: introducing students to the reality that law on the ground is shaped much more by legislators, regulators, and agency actors (at all levels of government) than by judges.⁶⁴

PART IV. CONCLUSIONS

The UC Irvine School of Law has a class of fifty-nine second-year students and eighty-three first-year students. The most pressing curricular challenge for the faculty at the moment is to find ways to provide a meaningful and useful set of upper-division courses for these students.⁶⁵ In addition to a mandatory clinical requirement, this may also include developing problem-based third-year courses that are co-taught by faculty members who can help students synthesize subjects (such as tax, antitrust, and corporations; or immigration, criminal procedure, and national security law) that are often taught in isolation, but that frequently interact in practice.

Nevertheless, at some point in the near future, the faculty will revisit its redesigned first-year curriculum and the question will be raised as to whether the Statutory Analysis class is a good innovation. Although my course is still a work in progress, at this point in time I think that my Statutory Analysis class is a good innovation, but perhaps not the best possible innovation.

62. *Id.*

63. *Id.*

64. See Garrett, *supra* note 3, at 11 (noting that offering legislation classes in the first year is an antidote to what is otherwise an excessively judicially focused curriculum).

65. In some ways, this will likely prove even more daunting than first-year curricular reform. See Wegner, *supra* note 8, at 941–1006 (discussing the difficulties of reforming the upper-division curriculum). See also Gerald E. Lynch, *Revising the Model Penal Code: Keeping It Real*, 1 OHIO ST. J. CRIM. L. 219, 238 (2003) (“Somehow, despite a general consensus that the most unsatisfying part of the law school program is in the latter years, curricular reform discussions bog down in yet another revision of the part of the curriculum that works best.”). Nevertheless, many schools have at least tried to revise the upper-division curriculum in recent years. Stanford Law School recently implemented one of the most high-profile sets of reforms to the upper-division curriculum. See *A “3D” JD: Stanford Law School Announces New Model for Legal Education*, STANFORD LAW SCH. (Nov. 28, 2006), available at <http://www.law.stanford.edu/news/pr/47/> (noting that the revisions to the first-year curriculum followed and “complement[ed] a reform of the upper-level curriculum adopted by the faculty [the previous] spring”).

I have concluded that offering this course improves upon the traditional first-year curriculum—which generally offers no instruction on the substance and theories of statutory interpretation—and it does so in a way that does not diminish the students’ exposure to substantive criminal law issues that they will encounter on the bar exam. If there is general satisfaction with the content and structure of the first-year curriculum, I would not be averse to leaving things as they are.

But if asked whether this is the best possible structure for the first-year curriculum, I think that my answer might be “no.” Perhaps a first-year course dedicated entirely to the substantive study of statutory interpretation is desirable for students in a twenty-first century law school. Alternatively, subject matter other than criminal law might provide a more robust vehicle for teaching students about statutory interpretation. This raises the question: would I support cutting criminal law out of the first year curriculum in favor of another vehicle for statutory analysis?⁶⁶ Or would I propose cutting another course? Rather than risk the wrath of any of my colleagues who teach first-year courses, I will leave this problem for another day.

66. Some law schools have already eliminated the criminal law requirement in the first-year curriculum. *See, e.g., First Year Courses*, U. ARIZ. JAMES E. ROGERS COLLEGE L., http://www.law.arizona.edu/current_students/academic_programs/courses.cfm (last visited Sept. 25, 2010) (requiring Criminal Procedure in the first year—as well as a course on the Regulatory State—but not Criminal Law); *About the First Term*, YALE LAW SCH., <http://www.law.yale.edu/academics/jdfirstterm.htm> (last visited Sept. 25, 2010) (requiring Torts, Contracts, Civil Procedure, and Constitutional Law in the first year).