

Is There a Remedy for the Irrelevance of Academic Criminal Law?

Franklin E. Zimring

The required course in substantive criminal law that is provided in most first-year law programs has been, in the half century since the completion of the Model Penal Code, a relatively stable march through the general part of the law of criminal liability, actus reus, mens rea, causation, accessorial liability, conspiracy, and defenses, followed by a long tour through homicide liability as a case study in considering the factors which influence the degree of criminal guilt and of punishment. The beautifully articulated language and commentary of the model code provides introductory students with an almost statutory presentation of the doctrines. It is a rich and challenging curriculum for teachers and students.

But there are two missing pieces in current offerings on the substantive law of crime which not only limit the teaching mission of academic criminal law but have also hampered the capacity of criminal law scholars to participate in the important policy discourses of the modern age. The two substantive gaps in the modern criminal law course reflect two of the three massive shifts in punishment policy in the United States since the 1970s, the sevenfold growth in the incarcerated population that happened after 1972, the reintroduction and reinvention of capital punishment as a criminal sanction after 1976 and the massive “war on drugs” that exploded in the United States between 1985 and 1995. Only the question of capital punishment is considered in the basic criminal law course.

The fact that a topic is not covered in an introductory law course would be easy to fix in theory—just expand the curriculum and introduce important issues that the basic course misses in an advanced course or two. But the problem here is that for most students and for all too many law school course offerings, the first course in substantive criminal law is also the last such course in law school. So two of the three major changes in punishment policy in a volatile half-century of recent history are not part of the criminal law for most law students and most law schools. Further, for two of the three massive shifts in American punishment policy, those law professors who aren’t teaching their

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students about mass incarceration and the American “war on drugs” also have not contributed significantly to research on drug policy and imprisonment or sophisticated policy analysis. Over a thousand of the best and the brightest criminal minds in America have been missing in action from two of the key debates of their field. How did this happen? How can we create closer links between legal education and scholarship and the critical policy turns in American criminal justice?

This essay will proceed in three installments. I will first briefly outline the dimensions and the timing of three massive and “only in America” changes in punishment policy since the 1970s. A brief second section will then consider the one set of changes—the death penalty—where law professors did involve themselves in teaching and research efforts. I speculate about why that topic and the case-driven discourse on capital punishment in the United States generated more teaching and research interest than the changes in imprisonment and in drug policy. A brief concluding section discusses how imprisonment and drug policy might be better represented in the legal academy.

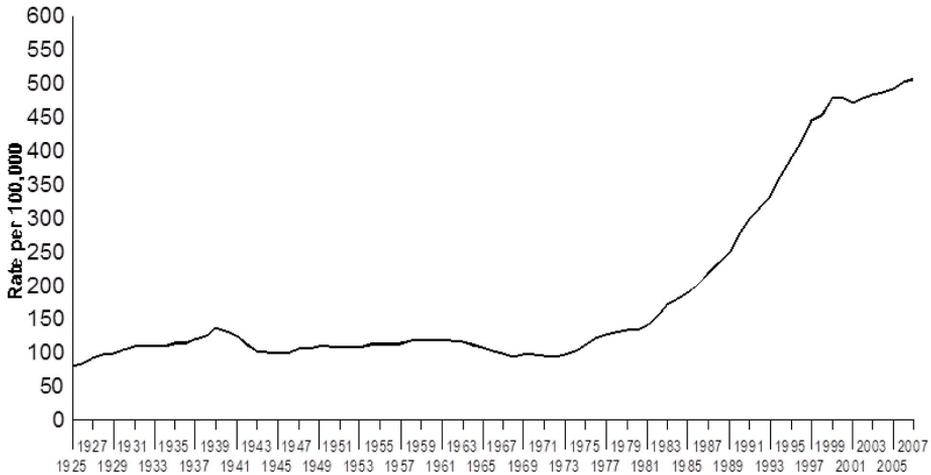
I. The Dynamics of Punishment Changes in the United States Since 1970

In the four decades after 1970, three explosive changes in American punishment policy changed both the scale and the character of American criminal law. All three changes were unique to the United States rather than alterations also found in a number of other developed nations. This section outlines these three major trends in the temporal order that they started.

A. Mass Imprisonment

Figure 1 shows the U.S. rate of imprisonment per 100,000 citizens by year from 1930 to 2007. This figure excludes rates of local jails (which hold persons pretrial and for shorter sentences than prisons) and aggregates the reported data for the 51 different authorities that maintain prisons, the federal government and the 50 states.

Figure 1. Imprisonment Rate per 100,000 Population, United States, 1925-2007¹



The 77 years depicted in Figure 1 divide clearly into two eras with sharply different trends. Between 1930 and just after 1970, rates of imprisonment did not vary much over time and had no clear trend over the decades. Using this data, three prominent criminologists published an article titled, “The Dynamics of a Homeostatic Punishment Process.”² For the 35 years after 1972, however, rates of imprisonment were anything but “homeostatic.” National rates of imprisonment increased every year and the average rate of imprisonment at the end of this period was five times the rate at the beginning.³ Until the early 1970s, the average rate of imprisonment in the United States was on the high side for developed Western nations but not a statistical “outlier.” But none of the other developed nations had anything like the exponential growth of American imprisonment. By the end of the century, rates of imprisonment in the United States were more than triple the rates of any other major developed nation.

1. U.S. Census Bureau, *Social Statistics Series H: 1135-1143, Federal and State Institutions—Prisoners: 1926 to 1970*, BICENTENNIAL ED.: HISTORICAL STAT. OF THE U.S., COLONIAL TIMES TO 1970 420 (1975), available at http://www.census.gov/prod/www/statistical_abstract.html; U.S. Census Bureau, *Section 5. No. 349. Federal and State Prisoners: 1970 to 1993*, STAT. ABSTRACTS OF THE U.S. 1995 217 (1995), available at <http://www.census.gov/prod/1/gen/95statab/law.pdf>; U.S. Census Bureau, *Section 5. Table 347. Prisoners Under Federal or State Jurisdiction by Sex: 1980-2008*, STAT. ABSTRACTS OF THE U.S. 2011 216 (2011), available at <http://www.census.gov/prod/2011pubs/11statab/law.pdf>.
2. Alfred Blumstein, Jacqueline Cohen & Daniel Nagin, *The Dynamics of a Homeostatic Punishment Process*, 67 J. CRIM. L. & CRIMINOLOGY 317 (1976).
3. Franklin E. Zimring, *The Scale of Imprisonment in the United States: 20th Century Patterns and 21st Century Prospects*, 100 J. CRIM. L. & CRIMINOLOGY 1225, 1228 (2010).

The impact of this increase in imprisonment on the punishments administered by the criminal law was stunning. Incarceration, either in prison or jail, was always the most punitive option available for the vast majority of serious crimes. After a felony conviction the typical choice at criminal sentencing was between prison or jail on the one hand, and a lesser disposition such as probation or conditional discharge which the system understood as primarily “not prison.” The explosive growth of imprisonment thus altered the balance between penal confinement and lesser deprivations on a drastic basis. But this change was incremental, the cumulative impact of more than 30 years of upward momentum, and was not tied to particular legislation or discrete shifts in the methods of criminal sentencing. So the multiplicity of shifts in attitude and outcome that pushed 50 states and the federal government into an era of mass imprisonment were not closely linked to a major court case or a defining piece of legislative change. For at least the first two decades of the modern penal expansion, it was not noticed or much discussed in the legal academy. At no time in the era of fivefold expansion in the rate of imprisonment did the central punishment in the American criminal process become an important topic in the criminal law course.

B. The Revival of Execution in the United States

The use of state execution as a criminal sanction is probably as old as the criminal law but has been in decline in Western nations for two centuries. Since the end of World War II, what began as a march toward abolition of capital punishment in Western Europe and some Commonwealth nations has expanded to a global campaign with Western European leadership. This campaign has accelerated in the last years of the 20th century, with the number of nations formally abolishing the death penalty increasing from 37 in 1980 to 105 in 2012 and 35 other nations not conducting any executions for a decade (which Amnesty International calls *de facto* abolition).⁴

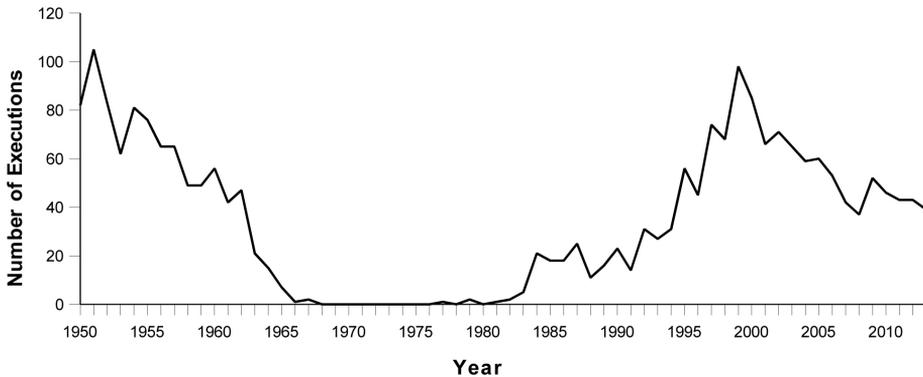
The death penalty was always rather different in the United States because our federal system made state governments rather than the national government the place where policy was made and executions either happened or did not. For the first quarter-century after 1950, however, the trends in the United States appeared to parallel the downward trajectory in the rest of the developed world with declining executions leading to a 10-year moratorium while the U.S. Supreme Court considered constitutional challenges to state death penalties. In 1972, a sharply divided Supreme Court ruled that state laws that left the decision to juries to choose between life in prison and death sentences for first degree murders could not be tolerated.⁵ In 1976, however,

4. For 1980 totals, see FRANKLIN ZIMRING, *THE CONTRADICTIONS OF AMERICAN CAPITAL PUNISHMENT* 35 fig.6 (2004). For 2012, see AMNESTY INT’L, *Annex II: Abolitionist and Retentionist Countries as of 31 December 2012*, in *DEATH SENTENCES & EXECUTIONS 2012* 50, 50 (2013), <http://www.amnesty.org/en/library/asset/ACT50/001/2013/en/bbfea0d6-39b2-4e5f-a1ad-885a8eb5c607/act500012013en.pdf>.

5. *Furman v. Georgia*, 408 U.S. 238 (1972).

the court approved a series of statutes that created aggravating and mitigating circumstances for juries to consider and later court judgments also allowed “structured” discretion with larger judicial participation.⁶ Soon most of the states that had death penalties prior to 1972 adopted the approved forms of its governance and executions started in some American states in the 1970s and early 1980s. Figure 2 shows the annual totals in the United States from 1950 to 2009.

Figure 2. U.S. Executions by Year, 1950-2013⁷



By 1999 the aggregate number of executions had risen to the highest level found at midcentury. In the mid-1990s, however, executions were more concentrated in southern states, with more than 80 percent of all executions in the south. The drop in executions after 1999 was paralleled by a large drop in new death sentences. In the years after 2004, six states that had death penalty statutes rejected them, either by failure to write new laws after older versions were declared invalid (Massachusetts and New York) or by legislative abolition (New Jersey, Connecticut, Illinois and New Mexico). None of these abolition jurisdictions were in the south, but execution numbers are down as well in high execution states.

The judicial career of capital punishment in the Supreme Court, unlike the explosive growth of imprisonment, created substantial reaction by law professors in the classroom and was a central focus of legal scholarship for a number of prominent legal scholars. Anthony Amsterdam (of Pennsylvania, Stanford and New York University) was the central figure in the litigation campaign to end capital punishment for half a century. Prominent capital punishment scholarship involved many of the best and brightest in the legal

6. *Gregg v. Georgia*, 428 U.S. 153, 189 (1976).
7. University at Albany, School of Criminal Justice, *Table 6.86.2010: Prisoners Executed Under Civil Authority by Race, Hispanic origin, and Offense, United States, 1930-2010*, THE SOURCEBOOK OF CRIM. JUST. STAT. ONLINE (2013), available at <http://www.albany.edu/sourcebook/pdf/t6862010.pdf>.

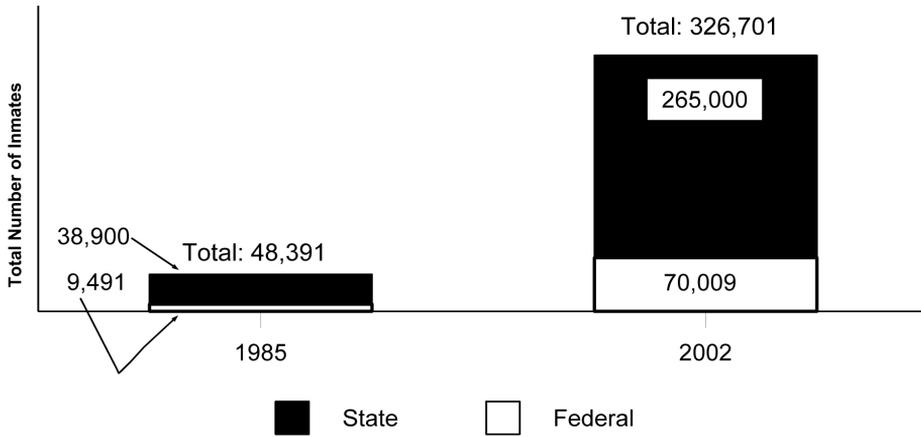
academy—David Baldus, Stuart Banner, John Donohue, Jeffrey Fagan, Sam Gross, Randy Hertz, James Liebman, Carol and Jordan Steiker—and major death penalty decisions were discussed in the basic criminal law course as well as in advanced courses in death penalty law and practice. This was the only one of three major changes in American punishment policy that involved legal academics and penetrated legal education in the half-century after 1960.

C. The American War on Drugs

The third massive installment in the American penal expansion is universally known as the “war on drugs” and had its primary impact during the decade and a half after 1985. The focus of public concern in the mid-1980s was the availability and urban use of cocaine, but more particularly an inexpensive and fast-acting preparation of smokable cocaine that became known as “crack.” Crack cocaine was by reputation a ghetto drug, associated with highly violent public drug markets. In a very short period of the mid-1980s, the United States experienced what sociologists call a “moral panic” about the dangers of urban crack cocaine—concern about crack violence and “crack houses” was augmented by worry about an epidemic of “crack babies” born addicted because of the drug use of their mothers during pregnancy and assured to be dangerous and disabled for life. These public concerns were quickly reflected in a series of legislative, budgeting, and punishment escalations at every level of government. A new office was generated in the White House to preside over an annual “national drug control strategy.” The first director of this office, William Bennett, was popularly known as “the drug czar” without any evident levity, and the national effort was estimated to cost about 30 billion dollars.⁸

What the effects of this drug war demonstrated with brutal energy was the fabulous elasticity of criminal enforcement of drug laws in a very short time. The huge changes produced after 1985 in drug law enforcement and punishment are all the more remarkable because of what did not change. There were no formerly tolerated drugs newly prohibited during the drug war—and the period after 1985 was not even a peak period for cocaine use in the United States (that was probably 1979).

8. FRANKLIN ZIMRING & GORDON HAWKINS, *THE SEARCH FOR RATIONAL DRUG CONTROL* 4-21 (1992).

Figure 3. The Growth of Drug Imprisonment⁹

The number of drug offenders in federal prisons was under 10,000 in 1985. By 2005, the volume of federal drug prisoners was 85,579, an increase of 800 percent.¹⁰ The increase in the number of state prisoners was 545 percent during the same period. The number of state and federal drug prisoners in 2002 was 340,801, a number larger than the total volume of state and federal prisoners incarcerated for all crimes in 1980!¹¹

One last comparison illustrates the special character of drug crime imprisonment. After 1985, the population of state and federal drug prisoners increased 604 percent in 17 years, while the non-drug prison population grew “only” 140 percent, so the difference in growth rate for drugs exceeded four to one.

This huge elasticity without major changes in the list of prohibited drugs is an object lesson of how much drug policy and punishment rely on aggressive law enforcement. Those who buy and sell drugs do not report their crimes to the police, so the amount of effort that police and other drug authorities

9. University at Albany, School of Criminal Justice, *Table 6.57: Federal Prison Population, United States, 1970-2004*, THE SOURCEBOOK OF CRIM. JUST. STAT. 2003 519 (2003), available at <http://www.albany.edu/sourcebook/pdf/t657.pdf> (federal statistics); U.S. Dep’t of Justice, Bureau of Justice Statistics, *Prisoners in 1994*, BUREAU OF JUST. STAT. BULL. 11 (1995); available at <http://www.bjs.gov/content/pub/pdf/Pi94.pdf>; U.S. Dep’t of Justice, Bureau of Justice Statistics, *Prisoners in 2004*, BUREAU OF JUST. STAT. BULL. 9 (2005), available at <http://www.bjs.gov/content/pub/pdf/po4.pdf> (state statistics).
10. THE SENTENCING PROJECT, FACT SHEET: TRENDS IN U.S. CORRECTIONS 3 (2014), http://sentencingproject.org/doc/publications/inc_Trends_in_Corrections_Fact_sheet.pdf.
11. See ALLEN J. BECK & DARRELL K. GILLIARD, U.S. DEP’T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, BULLETIN: PRISONERS IN 1994 1 (1995), available at <http://www.bjs.gov/content/pub/pdf/Pi94.pdf>. The 1980 prison totals (329,821) were obtained by adding the ‘federal prisons’ and ‘state prisons’ total listed for 1980 in the first table reported in the 1994 report. The number of drug prisoners reported in Figure 3 for 2002, 335,009, exceeds the state and federal prisoners by over 5,000.

invest in finding drug offenders is a major determinant of the volume of drug crime arrests. The large role that federal criminal justice plays in apprehending and punishing drug offenders creates two very large and redundant systems. Simultaneous efforts to increase investigation and prosecutions at both the federal and state levels probably leads to much more rapid expansion than would be observed if any one level of government controlled drug policy.

So the redundancy and overlapping responsibilities that had long characterized U.S. drug law enforcement contributed importantly to the swift expansion of penal effort in the expanding war on drugs. To exploit a well-worn cliché, the American drug war campaign during the decade after 1985 was a perfect storm of the elasticity of penal response.

While fear of drugs and the rapid proliferation of drug counter measures dominated the law enforcement agenda for more than a decade, the drug war passed close to unnoticed in the criminal law classrooms of American law schools and the scholarly output of law professors. Drug possession and use were vastly more important in the American court rooms and prisons of 1995 than ever before, but not in the American law classroom and for the most part not in the American law review. Even as drug policy became a very important conversation in the United States, criminal law scholars were largely missing from the conversation. The drug war seems in this respect more similar to the rise in mass imprisonment as a non-event in the legal academy than either of these two changes resemble the academic treatment of the return of capital punishment.

A survey of the *Index to Legal Periodicals* provides evidence of the paucity of legal scholarships on drugs and prison. In the first decade of this century, 589 articles were published with terms like “death penalty,” “execution” and “death sentence” in their titles, just under 60 articles a year. But only a total of 85 articles appear with the terms “illicit drugs,” “cocaine,” “heroin,” “marijuana” and “drug control.” That’s fewer than ten articles or comments a year when the number of persons in prison for drug crimes was above 300,000. And the search for titles mentioning “imprisonment,” “prison conditions,” “prison over-crowding” and “medical care in prison” produced an even smaller cluster of 44 articles or comments in a decade; fewer than five titles a year can be found in more than 470 legal periodicals. The odds that a legal journal will produce an article on prisons in any one year are about one in a hundred.¹²

II. The Exception that Proves the Rule?

Three massive shifts in American punishment policy have happened in the past half-century but only one of these—the return of capital punishment—has received anything near the attention it deserves from legal academics in the classroom and in published scholarship. What were the characteristics of the death penalty that generated this attention and what changes in rhetoric or

12. Edna Lewis, a wonderful research librarian at the University of California, Berkeley Law Library, conducted the careful and tedious searches that produced these estimates.

method might produce similar attention to issues like mass imprisonment or the explosive increase in drug enforcement and punishment?

One obvious answer to this question is the severity of the punishment that sets capital punishment apart from more routine deprivations of liberty. The intentional killing of citizens is the most dramatic of punishments and for that reason alone would attract the attention of law professors and their students.

Another distinction concerns the perceptual properties of materials about the death penalty and the way that information needs to be processed on imprisonment and drug control. Both a court's decision in a death penalty litigation and the presence or absence of an execution are discrete and visible phenomena. The essence of a particular death penalty case or controversy often stands clear of complicated statistical patterns. But both the processes that generated the growth in imprisonment and the moving parts to the American war on drugs were incremental phenomena that often operated at low levels of visibility and produced cumulative impacts that are only easy to notice when obvious statistical or operational benchmarks are passed—the increase from 240,000 prisoners to 1.5 million prisoners will creep up on a policy audience unless the incarceration scoreboard has become an important policy instrument, something that statistical benchmarks rarely achieve.

But there is one other characteristic of modern death penalty law which welcomes it into the legal curriculum, a methodological consideration of great importance. Modern death penalty law in the United States is dominated by Supreme Court cases. If one imagines the legal structure of capital punishment in the United States as a building, 95 percent of the construction materials are decisions of the U.S. Supreme Court. And that is a perfect fit with law school courses where Supreme Court cases are the lingua franca of classroom teaching. The young graduates who will become law teachers are socialized into constitutional cases when they serve as law clerks to federal judges, usually at the appellate level. Criminal law teachers have received advanced training in the death penalty cases that they can teach when they serve clerkships.

This perfect fit between the composition of modern death penalty law and the experience of law teachers is missing in the prison policy and drug war stories. Constitutional decisions are few and rarely of central importance. Drug and prison policy is the stuff of legislation and administrative action, of statistics and annual reports. These non-case materials also desperately need the critical analysis that law professors can bring to a wide variety of arguments about crime and punishment. But the young law professor of 2014 will not have been socialized to review this year's national drug control strategy in the same way that she attacks the advance sheets of federal court decisions.

III. Pathways to Relevance

I believe that professors of criminal law can much more effectively teach the issues and trade-offs in topics like the scale of imprisonment and punishment policy toward drug use and sale. For this reason, I regard the current holes in the

law curriculum and the shortage of scholarly contribution of the professorate to drug and imprisonment issues to be problems of at least middling severity in legal education.

A. Fixing the First Year Voids

Recognizing the time constraints and considerable pedagogic value of the current introductory criminal course, I would only impose 2.5 class hours of additional subject matter to profile prison and drug war issues and hope that casebook editors could provide the materials to give two separate teaching units value.

The first unit could be a collection of descriptions and statistics on “imprisonment and other criminal sanctions” to be presented early in the course, perhaps just after the usually useless verbal tour through the purposes of punishment. Prison, jail, probation, fines and other court dispositions could be defined and trends over time provided in a single class hour.

A second unit could be saved for the “special part” survey later in the course on drug use as a criminal act. It would typically come after a long section on homicide and a shorter segment on property crimes. The definitions of drug crimes, typical punishments and the justification for current policies could be covered in an hour and a half of class time.

B. Creating Advanced Classes

The brief introductions provided in the basic substantive crime course will not require major expansion in the materials and methods of law teaching. The design and execution of advanced courses that provide exposure to the new frontiers of crime policy will be more challenging, however, because both instructor and students will need to read historical, statistical, and policy analysis materials to supplement the steady diet of appellate cases they now consume.

One advanced class could combine an analysis of types of criminal sanctions with detailed consideration of the institutions and methods of criminal sentencing. Perhaps a third of the materials for this course could be Supreme Court and appellate cases with the other two-thirds including legislative descriptions of sentencing commissions and amendments to standard sentencing processes like “truth in sentencing” and abolition of parole release. These would need to be supplemented with statistical studies of how such innovations influence who goes to prison and the length of prison sentences.

The mix of materials for this course has not yet been constructed and the task is anything but easy. The starting point for a class on the causes and prevention of mass imprisonment is probably the very few courses and materials which consider the institutions and principles of criminal sentencing. What needs to be added are consideration of the dominant purposes and causes of the prison boom after the 1970s, the impact of imprisonment rates on crime and on

social welfare, and the relationship between changes in sentencing laws and institutions and rates of imprisonment.

The war on drugs is another rich set of issues that demands materials and methods well beyond the boundaries of appellate cases. The available historical and statistical materials on drug use, its effects on users and society, and on varieties of drug policy are vast, and the range of different drugs to be considered is substantial.

But how best to achieve perspective on 2014's issues in regulating cocaine, heroin, marijuana and ecstasy? The course materials that Bernard Harcourt and I have constructed provide comparative histories of control of many other traditional "vice" crimes including gambling, prostitution, pornography, sodomy and the regulation of alcohol. Each traditional vice behavior has its own rich history, but the contrast in the recent penal history of adult sexual behavior and gambling on the one hand and illicit drugs on the other is astonishing. And the recent history of penal treatment of child versus other pornography is also an inconsistency that requires analysis. So the history and current status of other traditional vice behaviors provides one method of thinking about drug policy.

The comparative histories and impacts of different vice policies thus provide a framework for selecting the issues, data, and arguments that can inform choices in drug control, and serve as a way of organizing the rhetorical and empirical materials on drugs. The problem has always been finding a framework to assure that the second and seventeenth class hours weren't just a repetition of the rhetorical generalizations of the first day of class.

Of course, any course on drug policy worth teaching in a law school will provoke puzzlement and resistance from many students. The materials are not familiar ground to the 2L and the 3L. But here and in the comprehension of the advent of mass imprisonment, the choice is between expanding the materials and methods of teaching criminal law or failing to confront the most important changes in American crime policy.