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THE CRIMINAL LAW SYLLABUS AND THE REALITIES OF LEGAL PRACTICE IN HONG KONG

DANIEL PASCOE*

95% [of students' learning] from Law School will not be used in practice. 95% of practice is not covered by Law School.¹

Every year ... law students graduate thinking that they have been trained for criminal practice, when [in fact] they have not.²

I INTRODUCTION

As these two quotes suggest, criminal law teaching and practice greatly diverge in their scope. It is striking that criminal law syllabi throughout the common law world, including in Hong Kong, primarily focus on homicide, other violent offences, sexual offences, and theft – offences typically categorised as *mala in se* (evil in and of themselves), as opposed to *mala prohibita* (wrongful only due to statutory designation). Yet a predominance of *mala in se* offences is not what criminal law practice really looks like in Hong Kong, whether in the courtroom or in advising clients.

Is it possible to achieve comparable pedagogical goals within an undergraduate criminal law module by adopting a different set of offences that are more readily encountered in criminal law practice? If so, what offences might those be in the local context? This article utilises police data on crime prevalence in Hong Kong as well as a self-reporting survey of criminal law practitioners in an effort to more closely align the LLB/JD criminal law teaching syllabus with the present and future realities of legal practice in Hong Kong, at least in terms of the specific offences covered. The article concludes with a series of suggested amendments to the typical criminal law syllabus employed in the local jurisdiction. LLB and JD students at Hong Kong's three law schools stand to benefit from this research by becoming better prepared to practise criminal law upon graduation, by being more closely informed about the reality of criminal practice as they make decisions on their future careers, and in dealing with criminal

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¹ Criminal Defence Lawyer, response to the survey of Hong Kong legal practitioners discussed in the methodology section (part IV) of this article ('Survey Response').

² Anders Walker, 'The Anti-Case Method: Herbert Wechsler and the Political History of the Criminal Law Course' (2009) 7(1) *Ohio State Journal of Criminal Law* 217, 219.

law issues that arise in the course of their practice in other areas.³ Legal educators in other common law jurisdictions, including Australian jurisdictions, may likewise consider whether empirical research on criminal practice might prompt alterations to their own teaching syllabi. As this article suggests, pedagogical rigour need not be sacrificed to bring the fields of criminal law education and criminal law practice closer together in scope.

II WHAT IS THE CRIMINAL LAW MODULE FOR?

A criminal law module in a qualifying law degree (typically an LLB or a JD) must achieve certain pedagogical outcomes. While the aims of teaching criminal law to first-time learners are rightly contested by scholars and regulators,⁴ according to Gledhill, these are, at a very minimum, ‘to have students think like a criminal lawyer – namely, assessing whether the elements exist, whether the defendant is adequately linked to the elements, and whether a defence to liability exists’.⁵ To those essential skills, I add that teaching criminal law is also a normative exercise, training students to think critically about how the law has arrived at its present state and on what changes are required to ensure more just outcomes for defendants, greater confidence in the administration of justice, and enhanced public safety.⁶

Throughout the common law world, such pedagogical aims are typically achieved by teaching ‘a small body of recognisable offences to illustrate a rich set of principles which can be absorbed by students and applied independently to learn about other offences later in life’.⁷

³ Most Hong Kong law graduates entering the legal profession will not go on to practise criminal law, but rather commercial law and other areas of law (Civil Barrister #2, Survey Response, n 1; Employment Solicitor, Survey Response, n 1). The self-reporting survey of legal practitioners informing this article included examples of such individuals, who made themselves available on the Duty Lawyer Scheme list on a part-time basis (see Appendix B). While the 30 survey respondents may not be representative of Hong Kong law graduates as a whole, most of the respondents list on their websites predominant areas of practice other than criminal law. One respondent observed that, in his practice, he relied upon his criminal law knowledge to provide advice in personal injury and arbitration cases (Civil Barrister #2, Survey Response, n 1).

⁴ Amirthalingam K, ‘The Importance of Criminal Law’ (2017) *Singapore Journal of Legal Studies* 318, 322; Harris AP and Lee C, ‘Teaching Criminal Law from a Critical Perspective’ (2009) 7(1) *Ohio State Journal of Criminal Law* 261, 261. See generally American Bar Association, ‘Report and Recommendations: Task Force on the Future of Legal Education’ (*American Bar Association*, January 2014) 14 <https://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/report_and_recommendations_of_aba_task_force.pdf>.

⁵ Gledhill K, ‘Choice’ in Gledhill K and Livings B (eds), *The Teaching of Criminal Law: The Pedagogical Imperatives* (Routledge, 2017) 187.

⁶ Amirthalingam (n 4) 322; Steel A and Schwartz M, ‘Broader Social Context as a Lens for Learning: Teaching Criminal Law’ in Coleman K and Flood A (eds), *Disciplines: The Lenses of Learning* (Common Ground 2013) 20-21; Menis S, ‘Non-traditional students and critical pedagogy: transformative practice and the teaching of criminal law’ (2017) 22(2) *Teaching in Higher Education* 193, 199-200.

⁷ Academic Lawyer, Survey Response, n 1. Indeed, in some American law schools, the intense focus on general principles in criminal law teaching means that only two crimes are studied in any systematic way: rape and murder (Meares TL, Katyal N

Although the criminal law's 'general part' (ie the doctrines of *actus reus*, *mens rea*, strict/absolute liability, general defences, participation, and so forth) can be taught comprehensively within one or two semesters,⁸ clearly there is insufficient opportunity to cover the entire spectrum of potential offending within the accompanying 'special part' covering individual offences. Instead, according to Gledhill and Livings, an illustrative focus on *mala in se* offences in the common law criminal law syllabus is largely maintained for traditional reasons – because this is the way that it has always been done.⁹ Alldridge adds simplicity and universality as explanations for why such offences tend to dominate the syllabus, summarised by the creed: 'Be honest and don't touch people without their consent'.¹⁰ In other words, *mala in se* offences such as murder, rape and theft make intuitive moral sense to first-time learners, thereby speaking to the additional normative component of criminal law teaching. Whichever the historical justifications for the existing offence matrix, the present focus of appellate caselaw, textbooks, staff expertise, and students' expectations¹¹ means that altering the curriculum to incorporate new offences is difficult.

Nevertheless, as Gledhill has argued, 'the traditionally-taught offences do not have a monopoly' on achieving module outcomes.¹² Indeed, in the view of the Law Society of Hong Kong, an undergraduate criminal law course must aim to have students 'understand and have a

and Kahan DM, 'Updating the Study of Punishment' (2004) 56 *Stanford Law Review* 1171, 1197).

⁸ Aside from the general doctrine mentioned here, the common law criminal law syllabus also typically covers partial defences, capacity, inchoate offences, and vicarious/corporate liability. Future empirical research may enquire into the utility of teaching each of these general doctrines, in the same way that this article considers substantive offences and their links to legal practice. If homicide is removed from the syllabus, partial defences (provocation, diminished responsibility, suicide pact) should also logically be removed. For example, in the New South Wales context, Gibbon and Steel found that defences attracted considerable attention in that jurisdiction's criminal law syllabi, despite being one of the most infrequently litigated issues in the courts (Gibbon H and Steel A, 'Are we Reading Enough Crime? Examining the Content and Depth of Criminal Law Courses' (2019) 44(2) *Alternative Law Journal* 151, 154-155).

⁹ Gledhill K and Livings B, 'Introduction' in Gledhill K and Livings B (eds), *The Teaching of Criminal Law: The Pedagogical Imperatives* (Routledge, 2017) 5. See also Gledhill (n 5) 186, 191. Gibbon and Steel (n 8) 155 also suggest other advantages of teaching the traditional set of offences and defences: 'The rich history of some offences ... and that many of the defences have been the subject of considerable attention by law reform bodies and other legal commentary.' Alldridge observed a teaching bias towards offences which generate appellate caselaw, such as murder, manslaughter and theft, as opposed to the summary-only offences created by statute (Alldridge P, 'What's Wrong with the Traditional Criminal Law Course?' (1990) 10(1) *Legal Studies* 38-9, 54).

¹⁰ Alldridge (n 9) 54, corroborated by Academic Lawyer, Survey Response, n 1.

¹¹ Livings B, 'Context and Connection' in Gledhill K and Livings B (eds), *The Teaching of Criminal Law: The Pedagogical Imperatives* (Routledge, 2017) 140-141. See also n 108-110, and associated text, on the requirements imposed by professional bodies.

¹² Gledhill (n 5) 187. This point is reiterated by Gans J, 'Teaching criminal law as statutory interpretation' in Gledhill K and Livings B (eds), *The Teaching of Criminal Law: The Pedagogical Imperatives* (Routledge, 2017) 95 and Gibbon and Steel (n 8) 155.

sound working knowledge of *the main criminal offences common in Hong Kong*.¹³ It is possible to meet the pedagogical aims summarised above and prepare students to interpret, apply and critique whichever criminal offences they will encounter in the future, while still achieving a closer synchronicity with the present demands of criminal practice, in order to better meet the needs of prospective graduates and the legal profession.¹⁴ Importantly, there is a growing sense among individual practitioners and the professional bodies that local law graduates are inadequately prepared for the demands of practice.¹⁵ As stakeholders in the law school, both prospective graduates and the legal profession are particularly important in Hong Kong, a jurisdiction where the vast majority of students studying law for the first time aspire to become barristers or solicitors working locally, in contrast to the prevailing trend towards non-practising careers in England and Wales, the Australian jurisdictions and New Zealand.¹⁶ Criminal law teaching will

¹³ The Law Society of Hong Kong, 'Position on Legal Education and Training' (December 2008) 31 <http://www.hklawsoc.org.hk/pub_e/news/societyupdates/20081215.pdf>, emphasis added.

¹⁴ In the view of the following survey respondents: General Litigation Solicitor, Survey Response, n 1; Criminal Defence Lawyer, Survey Response, n 1; Criminal Defence Barrister #3, Survey Response, n 1.

As several respondents observed, enhancing preparation for criminal practice also includes training students in professional conduct and ethics, police powers, negotiating with the prosecution/defence counsel, client handling, bail hearings, other pre-trial decision-making, courtroom advocacy, evidence, criminal trial and appeal procedure, sentencing, and costs, among other areas. In this study, I focus only on substantive criminal offences, but at the same time acknowledge that this is a relatively minor component of criminal practice in Hong Kong and elsewhere in the common law world. In Hong Kong, the yearlong Postgraduate Certificate in Laws (PCLL) course explicitly focuses on *skills* training to prepare law graduates for practice and incorporates a Criminal Litigation module covering many of these topics. For further information, see eg City University of Hong Kong, 'PLE5019 Criminal Litigation Practice' (2010) <<http://www.cityu.edu.hk/catalogue/ug/201011/Course/PLE5019.htm>> and The Law Society of Hong Kong (n 13) 33. Undergraduate criminal law modules in other jurisdictions sometimes incorporate a selection of these issues into teaching (Gibbon and Steel (n 8) 156).

¹⁵ Mitchard P, 'Professional Training in Legal Education: the Case of Hong Kong', *Learning Matters: Teaching and Learning at CUHK Law* (Web Page, 6 July 2020) <<https://www.learning.law.cuhk.edu.hk/post/professional-training-in-legal-education-the-case-of-hong-kong>>; Standing Committee on Legal Education and Training, 'Comprehensive Review of Legal Education and Training in Hong Kong' (April 2018) 38, 77, 161 <<https://www.scler.gov.hk/eng/pdf/final2018.pdf>>; Academic Lawyer, Survey Response, n 1; Litigation Solicitor, Survey Response, n 1; Criminal Defence Barrister #2, Survey Response, n 1.

¹⁶ Standing Committee on Legal Education and Training (n 15) 37 (common law jurisdictions generally); Taylor L et al, 'The Making of Lawyers: Expectations and Experiences of Fifth-Year New Zealand Law Students and Recent New Zealand Law Graduates', *Ako Aotearoa* (Web Page, September 2019) 14-16 <<https://ako.ac.nz/assets/Knowledge-centre/RHPF-s1607-Developing-a-law-student-profile/RESEARCH-REPORT-The-Making-of-Lawyers-Expectations-and-Experiences-of-Fifth-Year-New-Zealand-Law-Students.pdf>> (New Zealand); Bradney A, *Conversations, Choices and Chances: The Liberal Law School in the Twenty-First Century* (Hart 2003) 16, 57; Scraton P and Stannard J, "'Crime and the Criminal Process": Challenging Traditions, Breaking Boundaries' in Gledhill K and Livings B (eds), *The Teaching of Criminal Law: The Pedagogical Imperatives*

never overlap completely with the realities of legal practice, but by making relatively minor adjustments to the syllabus, legal educators can help to narrow the gap, without sacrificing pedagogical rigour or artificially narrowing the range of uses to which a first law degree might be put.

III CONCEPTUAL BACKGROUND

The leading recent text on criminal law pedagogy in the common law world is entitled *The Teaching of Criminal Law: The Pedagogical Imperatives* (Routledge 2017), an 18 chapter collection edited by Kris Gledhill and Ben Livings.¹⁷ One of Gledhill and Livings' main observations in their introductory chapter, through a survey of criminal law syllabi in various common law jurisdictions (including Hong Kong), is that the content of the typical criminal law syllabus does not adequately reflect criminal law practice. Although far from new,¹⁸ this observation inspired the primary research question for this study. In Hong Kong, is it possible to align the criminal law teaching syllabus more closely with the realities of legal practice, without sacrificing pedagogical rigour? Answering this question involves, first, identifying the overall pedagogical aims of a criminal law module (as above); second, assessing which crimes lawyers most frequently encounter in practice, and third, determining whether an incorporation of those offences would compromise the stated pedagogical aims.¹⁹

In his later chapter in *The Teaching of Criminal Law* simply entitled 'Choice', Gledhill outlines an alternative approach towards the syllabus. He suggests that criminal law lecturers ought to consider whether *driving* offences and *drugs* offences, which form a large part of the archetypal modern criminal lawyer's work, should play a more prominent role within criminal law teaching.²⁰ Gledhill does not force upon the reader a particular model, but stresses that legal educators have a choice: they may stick to the current system, with its claimed

(Routledge, 2017) 130 (England and Wales); McNamara M, 'University Education and the Supply of Law Graduates: A Fresh Look at a Longstanding Issue' (2018) 20 *Flinders Law Journal* 223, 228-229 (Australia).

Compare the following: Standing Committee on Legal Education and Training (n 15) 81; Mitchard (n 15) (Hong Kong).

¹⁷ For other article-length examples of scholarship on criminal law pedagogy, see Allidridge (n 9); Brown D, 'Criminalisation and Normative Theory' (2013) 25(2) *Current Issues in Criminal Justice* 605; Meares, Katyal and Kahan (n 7); Steel and Schwartz (n 6) and a 2009 special edition of the *Ohio State Journal of Criminal Law* (Volume 7(1)) entitled 'Symposium: What Criminal Law and Procedure Can Learn From Criminology'.

¹⁸ See, for example, Milner A, 'On the University Teaching of Criminal Law' (1963) 7 *Journal of the Society of Public Teachers of Law* 192, 193, 197; Brown (n 17) 606; Walker (n 2) 7; Weinreb LL, 'Teaching Criminal Law' (2009) 7(1) *Ohio State Journal of Criminal Law* 279, 283; Zimring FE, 'Is There a Remedy for the Irrelevance of Academic Criminal Law?' (2014) 64(1) *Journal of Legal Education* 5, 5, 14; Scott S, 'Regulatory Crime: History, Functions, Problems, Solutions' in Kilcommins S and Kilkelly U (eds), *Regulatory Crime in Ireland* (First Law, 2010) 64.

¹⁹ Gledhill and Livings (n 9) 1.

²⁰ Gledhill (n 5) 188-191.

pedagogical advantages including the greater availability of appellate caselaw, textbooks and the ability to hold the interest of students, or they may switch to an approach emphasising closer connections with legal practice. Either approach provides students with a set of offences that sufficiently illustrate the general doctrinal principles of criminal law.²¹ And starting from a blank canvas, a real choice exists: undergraduate criminal law teaching can typically cover only 30 offences, of a potential ceiling of up to 10,000 in England and Wales, to cite but one jurisdictional example.²²

This argument makes sense intuitively, but so far lacks any empirical data as a basis. On updating the typical criminal law syllabus to better reflect the realities of legal practice, there are several potential limitations to Gledhill and Living's research that this study has sought to explore. First – as Gledhill notes in his chapter, drugs and driving offences are far more numerous than homicides and (reported) sexual offences in most common law jurisdictions.²³ However, he does not provide any empirical sense of how criminal lawyers, especially younger criminal lawyers, actually spend their time in practice. Nor has any previous scholarship on the topic sought to develop links between the time spent on particular offences in practice and their place in the criminal law syllabus.²⁴ Gledhill's assumption that driving offences and drug offences occupy a predominant share of contemporary criminal lawyers' working time is, presumably, largely drawn from his and his colleagues' anecdotal experiences of criminal law practice, rather than from systematically collected data. It may be that homicide and sexual offences, with more severe sentences, complicated chains of evidence and the potential to attract appeals, attract a disproportionate amount of criminal lawyers' time.²⁵

The second potential limitation is that, even if drugs and driving offences occur at a greater incidence and consume more of lawyers' time in New Zealand (where Kris Gledhill teaches) or in England (where he practised as a barrister),²⁶ it does not necessarily follow that the situation is the same in Hong Kong. Hong Kong's own culture, urban ecology, economic activity and governance all suggest the likelihood of distinct patterns of offending. It is an open question whether drugs and driving offences are as important, or are less important, for legal practitioners in Hong Kong. If they are less important in Hong Kong, is there a third group of offences (for example:

²¹ Gledhill (n 5) 191.

²² Boylan-Kemp J and Huxley-Binns R, 'Turning criminal law upside down' in Gledhill K and Livings B (eds), *The Teaching of Criminal Law: The Pedagogical Imperatives* (Routledge, 2017) 78. See Gans (n 12) 93 for an example of a criminal law course prioritising statutory offences that are typically prosecuted in the lower courts.

²³ Gledhill (n 5) 188-189. See also Gibbon and Steel (n 8) 153.

²⁴ See n 18.

²⁵ See Steel and Schwartz (n 6) 14.

²⁶ Auckland University of Technology, 'Kris Gledhill: Professor of Law', *AUT University* (Web Page, 2019) <<https://www.aut.ac.nz/research/professors-listing/kris-gledhill>>.

departmental summonses,²⁷ public order offences,²⁸ or organised crime²⁹) that takes up the balance of practitioners' time? Within a jurisdictional 'city state' with little variation in criminality from one district to the next,³⁰ which offences should *Hong Kong* law students be taught if they are to practise criminal law in the local courts?

The third potential limitation of Gledhill and Livings' research worth exploring further, albeit that this is a relatively minor issue, is that their multi-jurisdictional surveys of criminal law syllabi were conducted in 2010.³¹ There have undoubtedly been changes in the way criminal law is taught in Hong Kong's three law schools since then. Since 2014, drugs offences have been taught at both LLB and JD level at City University of Hong Kong (CityU), although so far, neither The Chinese University of Hong Kong (CUHK) nor The University of Hong Kong (HKU) have completely incorporated drugs offences into their LLB criminal law syllabi. In mid-2020, at the time of writing, the criminal law syllabi of all three law schools still focus primarily on homicide, sexual offences, non-fatal offences against the person and the basic property offences, to the notable exclusion of regulatory and driving offences. In this respect, Hong Kong's three law schools have largely failed to diverge from the traditional English model.

Above, I noted that the traditional set of offences taught in common law jurisdictions are largely maintained by virtue of inertia, the availability of teaching materials, student familiarity and moral clarity. While there need not be a purely mechanistic relationship between the offences encountered in practice and the offences listed in the syllabus, it is open to legal educators to select examples that are more relatable to barristers' and solicitors' real-world experience. In selecting offences through which to teach students how to think like lawyers, engage in critical analysis, and apply the most important general doctrine, legal educators in Hong Kong also retain a 'choice', as Gledhill suggests.³² The following two sections further delineate the precise pedagogical choices available in the local context.

IV EMPIRICAL METHODOLOGY AND RESULTS

Which crimes appear most frequently in the work of Hong Kong criminal lawyers? Which offences do senior criminal practitioners wish they had been taught at law school to prepare them for practice? In seeking to answer these questions, the empirical component of the research combined crime statistics from the Hong Kong Police Force

²⁷ *Magistrates Ordinance* (Hong Kong) cap 227, s 8A, sch 4.

²⁸ *Public Order Ordinance* (Hong Kong) cap 245.

²⁹ *Societies Ordinance* (Hong Kong) cap 151.

³⁰ Broadhurst R et al, 'Hong Kong United Nations International Crime Victim Survey: Final Report of the 2006 Hong Kong UNICVS', *HKU Social Sciences Research Centre* (Web Page, April 2010) 34-60
<<http://www.ssrc.hku.hk/files/reports/crime/SSRN-id2077438.pdf>>.

³¹ Gledhill and Livings (n 9) 1.

³² Gledhill (n 5) 188-191.

website,³³ together with a seven-page self-reporting survey sent by email and post to a cross-section of practitioners working in criminal law, at least on a part-time basis (Appendix A). The survey was accompanied by follow-up email correspondence clarifying the answers of some respondents (Appendix B). Both sources of data centred on an 18-month period from January 2018 to the beginning of June 2019, namely immediately before the anti-extradition bill protests began in Hong Kong in June 2019. It therefore reflects what the criminal justice caseload would ‘normally’ look like in Hong Kong, although later in this section I discuss how the protest movement has affected legal practice at the time of writing, and how it may affect the criminal justice system in the near future.

A *Police Crime Data*

The data from the police force website support the basic contention that there is a divergence between the content of the criminal law syllabus in Hong Kong, and the realities of life on the street, so to speak. First, traffic enforcement. Although there were about 2.6 million contraventions of traffic laws recorded by police in 2018, most of these (including obstruction and parking contraventions) were dealt with through fixed penalty notices, equivalent to civil penalties in Hong Kong. Here, if the offender pays the amount stipulated in the notice, liability is automatically discharged without necessitating a court appearance.³⁴

Leaving aside fixed penalty notices, there were 1030 taxi-related offences dealt with by arrest or summons, and more than 18,800 other driving offences dealt with in the courts, the vast majority of which (85 percent) were for careless driving,³⁵ which carries a maximum penalty of six months’ imprisonment and a fine of HK\$5000 (AUD\$827).³⁶ The pattern of traffic prosecutions was similar in 2017 and 2016.³⁷ In one sense, the continued prevalence of traffic prosecutions is surprising in a territory where a world-leading 90 percent of the population regularly commute using public transport services such as the Mass Transit Railway, buses and ferries.³⁸ The persistently high number of traffic offences committed by a minority of the population who drive, the raw

³³ Hong Kong Police Force, ‘Statistics’, *Hong Kong Police Force* (Web Page, 2020) <https://www.police.gov.hk/ppp_en/09_statistics/>.

³⁴ Hong Kong Police Force, ‘Traffic Report 2018’, *Hong Kong Police Force* (Web Page, 2019) <https://www.police.gov.hk/info/doc/statistics/traffic_report_2018_en.pdf>; *Fixed Penalty (Traffic Contraventions) Ordinance* (Hong Kong) cap 237.

³⁵ Hong Kong Police Force (n 34) 31-32.

³⁶ *Road Traffic Ordinance* (Hong Kong) cap 374, s 38.

³⁷ Hong Kong Police Force (n 34) 32.

³⁸ Research Office, Legislative Council Secretariat, ‘Transport: Statistical Highlights’, *Hong Kong Legislative Council* (Web Page, 2017) <<https://www.legco.gov.hk/research-publications/english/1617issh06-public-transport-20161028-e.pdf>>; Keegan M, ‘This City’s Transport Has Been Ranked Best In The World’, *Culture Trip* (Web Page, 11 July 2019) <<https://theculturetrip.com/asia/china/hong-kong/articles/this-citys-transport-has-been-ranked-best-in-the-world/>>.

total ten times more numerous than for all other index crimes recorded by police in 2018,³⁹ speaks to the tight regulation of and inherent danger associated with driving private vehicles. If driving offences (when dealt with by arrest and summons) remain an important part of the work of the Hong Kong Magistrates' Courts, they will surely continue to remain relevant in most common law jurisdictions long into the future, notwithstanding the advent of autonomous vehicles.

For offences other than driving offences, there were about 54,000 index crimes recorded by police in 2018,⁴⁰ of which only 8884 were classified as violent crimes, the most prominent of which were wounding and serious assault with 4593 incidents. The most serious offences included (only) 48 homicides, 147 robberies, and 63 rapes. Far more numerous were property offences, with more than 21,000 thefts, 8372 crimes of deception, and 4860 incidents of criminal damage (excluding arson) recorded. Interestingly, serious drug offences (1399),⁴¹ indecent (sexual) assault (1099), and triad-related crimes (1715) did not contribute to the overall total in a significant way. The non-driving offence figures were broadly similar in 2017.⁴² No statistics were available for regulatory crimes (eg industrial pollution or licensing contraventions),⁴³ minor assaults or lesser drug offences such as street-level dealing, possession or consumption, but in all likelihood, these occur (and are prosecuted) in significant numbers. Indeed, the police statistics incorporate minor incidents of theft (eg pickpocketing and shoplifting) and criminal damage (eg graffiti), but do not include common assault and drug possession.⁴⁴

Of course, there is a detailed literature on the problems inherent in collecting and interpreting crime statistics. The main conclusion from this literature is that official statistics, whether from police or the courts, will not reveal the true extent of criminality, for which victim surveys are generally considered a more accurate, albeit still-imperfect measure.⁴⁵ The last large-scale government-run victim survey in Hong Kong was carried out in 2005 (revealing approximately 360,000 index crimes from the perspective of victims, as opposed to approximately

³⁹ See Hong Kong Police Force (n 34) 29; Hong Kong Police Force, 'Crime Statistics Comparison', *Hong Kong Police Force* (Web Page, 2018) <https://www.police.gov.hk/ppp_en/09_statistics/csc_2017_2018.html>.

⁴⁰ Hong Kong Police Force (2018, n 39). Crimes are recorded on the Police Force website when they are 'reported or [become] known to police' (Hong Kong Police Force Administrator, Personal Communication (30 June 2020)).

⁴¹ Including major drug trafficking, importing, exporting, manufacturing and cultivation (Hong Kong Police, 'Hong Kong Police Anti-Drug Formations', *Hong Kong Police Force* (Web Page, December 2020) <https://www.police.gov.hk/ppp_en/04_crime_matters/drug/hkpdf.html>).

⁴² Hong Kong Police Force (n 39).

⁴³ See 'LCQ9: Recordable Offences', Hong Kong Government (Web Page, 13 April 2016) <<https://www.info.gov.hk/gia/general/201604/13/P201604130537.htm>>.

⁴⁴ Hong Kong Police Force (n 39).

⁴⁵ Eg Broadhurst R, Lee KW and Chan CY, 'Crime Trends' in Chui WH and Lo TW (eds), *Understanding Criminal Justice in Hong Kong* (Willan Publishing, 2008) 45-46; Schneider AL, 'Differences Between Survey and Police Information about Crime' in Lehnen RG and Skogan WG, *The National Crime Survey: Working Papers* (US Department of Justice, 1981) 39.

77,000 crimes recorded by police during the same year).⁴⁶ However, with this research, I am less concerned with the extent of such ‘hidden’ or ‘dark figure’ criminality, but rather with the extent of *reported* serious criminality which then draws in legal practitioners, most notably as prosecutors and criminal defence lawyers. These are the crimes with which LLB and JD students will later be dealing as advocates, although law students may also be concerned with ‘hidden’ criminality as future policy-makers.

B *Survey Results*

Through email and the post, I distributed surveys to all of the practitioners on the Duty Lawyer Scheme (DLS) list and to all law firms and barristers’ chambers in Hong Kong listing criminal law as a practice area. Lawyers on the DLS list are available to appear for free for defendants on a first appearance, and also for trials in the Magistrates Courts, subject to a means test.⁴⁷ However, I also distributed the survey to the Department of Justice, the Bar Association and the Law Society, although those bodies did not provide useful collective responses. The combined DLS and practitioners list produced only 23 responses (of 1162 identified criminal practitioners, namely a response rate of 2 percent). I also distributed the survey through a ‘snowballing’ or ‘convenience’ sample⁴⁸ to criminal practitioner contacts not appearing on the DLS/practitioners list, thereby returning a further 7 surveys, for a total of 30 – a sufficiently large sample through which to explore current trends in practice.

As noted above, not all of the respondents were practising exclusively in criminal law.⁴⁹ Instead, the DLS/practitioners list provided respondents working in a cross-section of practice areas, including family law, commercial practice, wills and probate, arbitration and mediation, employment law, intellectual property, public law, personal injuries and land law. The median amount of survey respondents’ time spent on criminal matters was approximately 60 percent (ranging from a stated minimum of 5 percent to a maximum of 100 percent).

⁴⁶ Social Surveys Section, Census and Statistics Department, ‘Thematic Household Survey Report No. 31: Crime and Its Victims in Hong Kong in 2005’, *Census and Statistics Department* (Report, October 2007) 10 <<https://www.statistics.gov.hk/pub/B11302312007XXXXB0100.pdf>>; Hong Kong Police Force, ‘Crime Statistics Comparison’, *Hong Kong Police Force* (Web Page, 2006) <https://www.police.gov.hk/ppp_en/09_statistics/csc_2001_2013.html>. The categories of crimes covered by these two data sources are slightly different, but here they are presented only to illustrate the potentially large gap between official (police) statistics and victim-reported measures of criminality.

⁴⁷ The Duty Lawyer Scheme, ‘Our Services in Magistrates’ Courts’, *Duty Lawyer Scheme* (Web Page, 2019) <<http://www.dutylawyer.org.hk/en/duty/magistrates.asp>>.

⁴⁸ Burton D, ‘Design Issues in Survey Research’ in Burton D (ed), *Research Training for Social Scientists: A Handbook for Postgraduate Researchers* (SAGE Publications, 2000) 313.

⁴⁹ See n 3.

The survey questions combined ranking exercises with open-ended answers for qualitative reflection, thereby enhancing the validity of the results.⁵⁰ The questions focused on the following four issues:

- How practitioners spent their working time, in terms of criminal practice as a whole and the types of crimes covered in criminal practice (Questions 3-6);
- What training in criminal law practitioners had received as part of their legal education, and their suggestions on what they might have missed out on during this training (Questions 7-8, 14);
- Practitioners' views on the desired content of the criminal law syllabus in Hong Kong (Questions 9-11);
- Practitioners' views on discovery-based learning and other non-traditional pedagogical models, and their links with legal practice (Questions 12-13).⁵¹ The responses to these latter questions have contributed to a separate publication, so I do not elaborate further on the results here.

The anonymised results from the survey are as follows.

1 *How Practitioners Spent their Time*

The survey asked practitioners to rank both the amount of time they spent on and the number of cases they worked on from 1-10 across 10 different crime categories, grouped by the type of harm inflicted or the nature of the *actus reus*.⁵² A ranking of 1 represented the highest number of cases or the most time. Not all practitioners ranked each of the 10 offence categories, thereby indicating that they did not practise in particular areas at all, so I have adjusted the data set accordingly.⁵³ In terms of time spent *and* number of cases, the most prominent offence categories were: theft/property offences (average rank 2.5 for time and 2.6 for caseload, appearing in 27/30 surveys); drugs offences (average rank 2.8 for time and 3.0 for caseload, appearing in 23/30 surveys), lesser offences against the person (average rank 3.2 for time and 3.4 for caseload, appearing in 23/30 surveys) and 'white collar' offences (average rank 3.9 for time and 4.0 for caseload, appearing in 27/30

⁵⁰ Burton (n 48) 299.

⁵¹ Based largely upon the findings presented in Daniel Pascoe, 'How Can Legal Education Speak to the Discovery-Enriched Curriculum?' (2017) 4(1) *Asian Journal of Legal Education* 17.

⁵² See Appendix A. The categories and listed examples were: homicide offences (eg murder, manslaughter); sexual offences (eg rape, indecent assault); other offences against the person (eg assault, grievous bodily harm, wounding, intimidation); theft and/or other property offences (eg burglary, robbery, criminal damage, blackmail); 'white collar' offences (eg fraud, tax offences, insider trading, money laundering); immigration offences; public order offences; triad-related offences; drugs offences; driving offences.

⁵³ On the other hand, several of the practitioners who ranked one or more offences last (tenth) may have meant that they did not practise *at all* in these offences. Nevertheless, I have included such preferences in the list of responses, ranking a response of '10' higher than no response at all.

surveys). Drug litigation therefore appeared to be a slightly more specialised area, given the large amount of time that practitioners spent on such cases, yet drug crimes' slightly lesser prevalence in survey responses compared with other crimes. Indeed, two respondents noted that drug offences are by far the most numerous type of crime tried in the Court of First Instance,⁵⁴ where all criminal trials are heard by a judge and jury.⁵⁵

Compared with theft/property offences, drugs, non-fatal offences against the person and 'white collar' crimes, the surveyed practitioners did not deal nearly as frequently with triad offences (average rank 5.7 for time and 5.8 for caseload, appearing in 18/30 surveys) and most noticeably, homicide cases (average rank 8.7 for time and 9.1 for caseload, appearing in only 12/30 surveys). Aside from those already mentioned, the remaining four offence categories (sexual offences, immigration offences, public order offences and driving offences) appeared at medium levels of prevalence and were similarly ranked to each other.

The middling role of driving offences in the respondents' criminal practice is, in particular, a surprising result. With almost as many driving and taxi offences (particularly careless driving, dangerous driving and taxi stand offences) dealt with by arrest or summons as there were theft cases recorded by police in 2018,⁵⁶ why were driving offences not an area of greater priority for survey respondents? Two possibilities are that a) that more persons accused of driving offences go unrepresented in court given the comparatively low potential sentences for careless driving and other offences,⁵⁷ and b) that the survey results did not sufficiently capture driving offence representation, as this is the domain of a relatively small number of practitioners, whose work is dominated by such offences.⁵⁸

Finally, it is also significant that, of the 30 respondents, a third (10) chose to mention other primary areas of practice not covered by the ten categories identified in the survey questions. The most common addition here was for regulatory offences (9 respondents), with practitioners listing a wide variety, but according most prominence to the Factories and Industrial Undertakings Ordinance (Cap. 59) and the Securities and Futures Ordinance (Cap. 571). Offences found within the latter legislation could also be regarded as 'white collar' crimes.

⁵⁴ Criminal Defence Barrister #3, Survey Response, n 1; Criminal Defence Solicitor #3, Survey Response, n 1.

⁵⁵ Other than selected Court of First Instance trials pursuant to the recently enacted National Security Law, art 46. See n 67.

⁵⁶ Hong Kong Police Force (n 34) 31-32.

⁵⁷ See n 36. For example, consider the following sentences for unrepresented defendants convicted at trial of careless driving: *HKSAR v Chan Chi Ho Lincoln* [2019] 1 HKC 275 (150 hours' community service); *HKSAR v Tsui Po Wan* [2017] HKCU 3129 (HKD\$2500/AUD\$410 fine); *The Queen v Fan Tsun Fai* [1990] HKCU 92 (HKD\$800/AUD\$132 fine).

⁵⁸ See, for example, Morley Chow Seto Solicitors, 'Driving/Road Traffic Offences', *Morley Chow Seto* (Web Page, 2014) <<http://www.mcs.com.hk/drivingoffences/>>.

2 *What Practitioners Wished to See in the Syllabus*

The survey contained both structured and open-ended questions eliciting practitioners' views on the criminal law syllabus in Hong Kong, in light of their own experiences. From the qualitative (open ended) responses, several trends were apparent. Although three-quarters of the respondents believed that homicide and sexual offences were more likely to hold students' attention in class, partly because of their 'sensationalist' value in popular culture, on the whole they did not believe that cases involving these offences contained more 'law' (as opposed to evidential or other procedural issues) or were superior illustrations of the general principles of criminal liability so as to aid teaching. Nevertheless, opinion was evenly split on whether the ubiquitous driving and regulatory offences should be learned 'on the job' as practitioners or else taught in law schools, as additions to the syllabus or as replacements for homicide and sexual offences. A clear majority (60 percent versus 30 percent) of respondents opined that, whatever combination of crimes that were chosen for the syllabus, these should be learned by the entire student cohort, rather than students possessing the option to choose different criminal law 'streams' based on their area of interest, such as 'urban crime', 'white collar crime', 'regulatory crime' and so forth. One repeated explanation for this view was the application of the 'cab rank rule' requiring barristers to accept briefs within their broad areas of expertise.⁵⁹ A plurality of respondents felt more comfortable with specialised knowledge being taught in an 'advanced criminal law' course or other such elective.

Turning to the ranking questions, the responses were to a certain extent ambivalent, possibly reflecting most practitioners' limited experience of teaching law at a university level. However, of the ten categories, there were two types of offences that the respondents clearly did *not* feel needed to be taught as part of a qualifying law degree in Hong Kong: immigration offences (48 percent opposed) and triad offences (59 percent opposed), although no individual respondent provided sufficiently detailed reasons why. For the other groups of offences, the responses were inconsistent, although there were noticeably more respondents willing to *exclude* homicide, theft/property offences, or non-fatal offences against the person when compared with their own experience during their qualifying law degree (12 versus 1), when almost all criminal law courses included these crimes, alongside sexual offences.

Other than the ten identified categories, regulatory offences were again mentioned several times in the respondents' further comments. A number of respondents felt that it was important to study the offences that one would most commonly confront in criminal practice, regulatory offences being among the most prominent categories here. Consistent with this observation, although the majority of respondents had not studied 'white collar', immigration, public order, triad or

⁵⁹ Semi-Retired Barrister, Survey Response, n 1; Criminal Defence Barrister #3, Survey Response, n 1.

driving offences in their qualifying degree, a similarly high proportion (70-80 percent for each crime) recommended that three of these novel categories: 'white collar', public order and driving offences, be taught as part of the syllabus. 'White collar' offence cases, in particular, were seen by respondents to contain an ample number of 'legal' (rather than evidential) issues through which the fundamental elements of *actus reus* and *mens rea* might be explored. In Part V, I proceed to consider whether such 'white collar' and regulatory offences can also aid critical reflection by students.

C *The Influence of the Anti-ELAB Protests: June 2019 to the Present*

The anti-extradition law and pro-democracy protests that shook Hong Kong's urban centres during the 2019 and 2020 will have many lasting effects on local society.⁶⁰ For the criminal justice system, the most relevant influence of the protests will be a big rise in the number of individuals tried for public order offences, criminal damage, and offences against the police, and an associated increase in the amount of time that criminal practitioners spend on these crimes. This is reflected in both the police statistics from 2019,⁶¹ and from several comments from survey respondents. One criminal defence barrister, albeit without explanation, provided in his response to the question about legal education that *only* public order offences ought to be taught in Hong Kong law schools, to the exclusion of other crimes,⁶² presumably because the anti-government protests were raging at their peak at the time he drafted his response!

Although the survey questions focused on the period mid-2018 to mid-2019 (in part to deliberately avoid the distorting effect of the protest movement on 'normal' criminal practice in Hong Kong), three other respondents predicted that, in the near future, public order offences will become a more important part of the work of the criminal practitioner,⁶³ a forecast which is supported by the latest arrest data at

⁶⁰ For two overviews up to the time of writing, see Kirby J, 'China's New National Security Law and What It Means for Hong Kong's Future, Explained', *Vox* (online, 2 July 2020) <<https://www.vox.com/2020/7/2/21309902/china-national-security-law-hong-kong-protests-us-sanctions>> and Albert E, 'Democracy in Hong Kong', Council on Foreign Relations (Webpage, 22 May 2020) <<https://www.cfr.org/backgrounder/democracy-hong-kong>>.

⁶¹ Hong Kong Police Force, 'Crime Statistics Comparison', *Hong Kong Police Force* (Webpage, 2019) <https://www.police.gov.hk/ppp_en/09_statistics/csc_2018_2019.html>. For example, from 2018 to 2019, there was a 220 percent increase in arson cases recorded by police, a 54 percent increase in other criminal damage incidents, and a 52 percent increase in burglary. In 2019, there were 70 percent more arrests of 16-20-year-olds than in 2018 (*ibid*).

⁶² Barrister-at-Law, Survey Response, n 1.

⁶³ In House Counsel, Survey Response, n 1; Mixed Practice Barrister #2, Survey Response, n 1; Criminal Defence Solicitor #4, Survey Response, n 1; In House Counsel, Personal Communication.

the time of writing.⁶⁴ If, as a general principle, the offences taught in the syllabus should more closely reflect what criminal lawyers encounter in practice, then public order offences, criminal damage, arson and offences against the police ought to become more prominent components of Hong Kong legal education.⁶⁵

How long will such cases take to be processed through the system, following the biggest civil unrest in Hong Kong's recent history? If the cases of the Umbrella Movement (September-December 2014) protesters and organisers are any guide, they could take up to five years to resolve, including appeals.⁶⁶ Yet in (re)designing the criminal law curriculum, legal educators should look at long-term, rather than merely at short-term trends. The recently-enacted National Security Law⁶⁷ also provides a source of potential change, although if statements by the Hong Kong government are to be believed, this law will only be used for the prosecutions of a small number of individuals⁶⁸ (albeit that these cases retain crucial political importance and visibility). Below, I discuss the possibility of an elective course incorporating protest-related offences, to reflect their current yet potentially transient importance to criminal law litigation in Hong Kong.

V DISCUSSION AND CONCLUSION

The purpose of the first law degree (with its wider variety of graduate employment possibilities) is necessarily different to the

⁶⁴ Arranz A, 'Arrested Hong Kong Protesters: How the Numbers Look One Year On', South China Morning Post (online, 11 June 2020) <<https://multimedia.scmp.com/infographics/news/hong-kong/article/3088009/one-year-protest/index.html>>.

⁶⁵ Another 'growth area' in criminal practice, although this was not reflected in the survey responses received in late 2019 and early 2020, incorporates regulatory offences aiming to contain the Covid-19 pandemic through social distancing or quarantine (Prevention and Control of Disease (Requirements and Directions) (Business and Premises) Regulation, Cap. 599F; Prevention and Control of Disease (Prohibition on Group Gathering) Regulation, Cap. 599G; Compulsory Quarantine of Persons Arriving at Hong Kong from Foreign Places Regulation, Cap. 599E). However, most violations of these offences have to date been dealt with via fixed penalty notices, rather than through arrests or summonses.

⁶⁶ Cheng K, 'Jailed Hong Kong Umbrella Movement Leader Benny Tai Released on Bail Pending Appeal', Hong Kong Free Press (online, 15 August 2019) <<https://hongkongfp.com/2019/08/15/jailed-hong-kong-umbrella-movement-leader-benny-tai-released-bail-pending-appeal/>>.

⁶⁷ Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China, Annex III, incorporating Law of the People's Republic of China on Safeguarding National Security in the Hong Kong Special Administrative Region (30 June 2020).

⁶⁸ Cheung G and Lau C, 'Hong Kong's Justice Department will Make all Decisions to Prosecute Suspects under New National Security Law: Minister', South China Morning Post (online, 1 June 2020) <<https://www.scmp.com/news/hong-kong/politics/article/3087053/hong-kongs-justice-department-will-make-all-decisions>>. For a recent update on case numbers, see Ho K, 'Hong Kong Police Have Arrested 97 under National Security Law, as Commissioner Rejects Complaints of "White Terror"', Hong Kong Free Press (online, 2 February 2021) <<https://hongkongfp.com/2021/02/02/hong-kong-police-have-arrested-97-under-national-security-law-as-commissioner-rejects-complaints-of-white-terror/>>.

practice-oriented Postgraduate Certificate in Laws (PCLL) in Hong Kong and the subsequent pupillage or training contract.⁶⁹ An LLB/JD education will never precisely equate with the realities of legal practice, whether in criminal law or in other modules. The degree is instead designed to develop skills relating to ethics; language; analytical and critical thinking, as well as knowledge of substantive legal doctrine, among other competencies.⁷⁰ However, with the increasing pressure on the PCLL programme to turn out ‘practice ready’ graduates, the qualifying law degree can ease some of the burden, by inculcating knowledge that, at least to a certain extent, closes the theory-practice gap.⁷¹ To that end, the empirical work described above has sought to find areas of consensus between police crime statistics, criminal lawyers’ current areas of practice and criminal lawyers’ views on the content of the syllabus, so as to enhance the practical relevance of criminal law teaching in Hong Kong.

Nevertheless, in redesigning the syllabus, there are several important caveats relating to pedagogy: the offences taught must sufficiently illustrate the main forms of *actus reus* (eg acts, omissions, circumstances, results and causation, states of affairs) and *mens rea* (eg direct and oblique intent, recklessness, negligence, dishonesty) in order to equip students for changes in the criminal law after graduation and to help students interpret the many thousands of statutory offences as they encounter them.⁷² The offences taught must also facilitate critical reflection by students on the underlying values of the criminal law and on the direction of law reform in the future.⁷³ The final caveat is one of time: only a few offence categories can be covered in a two-semester course, let alone a one-semester course, a limitation which several of the survey respondents identified.⁷⁴ In his chapter in *The Teaching of Criminal Law*, Ben Livings acknowledges the danger of trying to teach

⁶⁹ Standing Committee on Legal Education and Training (n 15); Chan JMM, ‘Legal Education in the Global Context: The Case of Hong Kong’ in Gane C and Huang RH (eds), *Legal Education in the Global Context: Opportunities and Challenges* (Routledge, 2016) 283. The PCLL is the equivalent to the Graduate Diploma in Legal Practice offered in some Australian states. See further n 14.

⁷⁰ The Law Society of Hong Kong (n 13) 2-4, 6-7; Stolker C, *Rethinking the Law School: Education, Research, Outreach and Governance* (Cambridge University Press, 2014) 142-149, 385; Chesterman S, ‘Doctrine, Perspectives, and Skills for Global Practice’ in Gane C and Huang RH (eds), *Legal Education in the Global Context: Opportunities and Challenges* (Routledge, 2016) 79.

⁷¹ Standing Committee on Legal Education and Training (n 15) v, 38, 66; The Law Society of Hong Kong (n 13) 7. See also The Law Society of New South Wales, ‘The Future of Law and Innovation in the Profession’ *The Law Society of New South Wales* (Web Page, March 2017) <<https://www.lawsociety.com.au/about-us/law-society-initiatives/flip>>.

⁷² Child J, ‘Teaching the Elements of Crimes’ in Gledhill K and Livings B (eds), *The Teaching of Criminal Law: The Pedagogical Imperatives* (Routledge, 2017) 34; Alldridge (n 9) 38; Donson F and O’Sullivan C, ‘Building Block or Sumbling Block? Teaching *Actus Reus* and *Mens Rea* in Criminal Law’ in Gledhill K and Livings B (eds), *The Teaching of Criminal Law: The Pedagogical Imperatives* (Routledge, 2017) 27.

⁷³ See n 6.

⁷⁴ Criminal Barrister #3, Survey Response, n 1; Mixed Practice Barrister #2, Survey Response, n 1; Criminal Defence Barrister #2, Survey Response, n 1; n 22 and associated text.

too many offences, warning of the ‘tyranny of coverage’.⁷⁵ Only a small sample of offences need be employed as vehicles through which to teach generally applicable principles, lawyering skills and critical/analytical thinking.

With that in mind, the empirical results of the study suggest that a practice-oriented criminal law syllabus in Hong Kong ought to include the following offence categories, which in my view, sufficiently illustrate the main doctrinal principles, and stimulate debate concerning the previous and future trajectory of the criminal law. At the same time, these crimes are each commonly encountered in practice in the local jurisdiction:

- Property offences, including theft and offences of deception⁷⁶ (but excluding robbery and burglary), to teach dishonesty and the basics of intention;
- Non-fatal offences against the person, including wounding, grievous bodily harm and assaults,⁷⁷ to teach direct and oblique intent, recklessness, results and causation;
- Drugs offences, including simple possession and trafficking,⁷⁸ to teach knowledge and circumstances;
- Driving offences, to teach negligence (particularly careless or dangerous driving), and to teach states of affairs, for example with the drink driving offence;⁷⁹
- Regulatory offences, through which to teach strict and absolute liability, omissions, and even to revise students’ understanding of statutory interpretation.⁸⁰ Some of the most common regulatory offences would be sufficient for this purpose (eg industrial summonses),⁸¹ although course leaders retain considerable discretion here. The offences set out in the Securities and Futures Ordinance Cap. 571 and the Companies Ordinance Cap. 622, although given emphasis by survey respondents, might be better left for the latter weeks of a company law module;

⁷⁵ Livings (n 11) 145, quoting O’Shea P, ‘The Complete Law School – Avoiding the Production of Half-Lawyers’ (2004) 29 *Alternative Law Journal* 272, 274.

⁷⁶ Theft Ordinance, Cap. 210, s 9, 17-18B, 18D. On critical approaches to teaching and learning property offences, see eg Giles M, ‘Teaching Criminal Law’ (1991) 25(3) *Law Teacher* 214 and Lacey N, Wells C and Quick O, *Reconstructing Criminal Law: Text and Materials* (CUP, 4th ed, 2010).

⁷⁷ *Offences Against the Person Ordinance* (Hong Kong) cap 212, s 17, 19, 39, 40. On critical approaches to non-fatal offences against the person, see eg Lacey, Wells and Quick (n 76); Hartley H, *Sport, Physical Recreation and the Law* (Routledge, 2009).

⁷⁸ *Dangerous Drugs Ordinance* (Hong Kong) cap 134, s 4, 8. There is, of course, an extensive critical literature on the construction of drug offences. In the Hong Kong context, see Cheung YW, ‘Official reactions to crime and drug problems in Hong Kong’ in Cao L, Sun IY and Heberton B (eds), *The Routledge Handbook of Chinese Criminology* (Routledge, 2018).

⁷⁹ *Road Traffic Ordinance* (Hong Kong) cap. 374, s 37-39. For a wide-ranging normative critique of driving offences in England and Wales, the jurisdiction upon which Hong Kong’s road laws are based, see Corbett C, *Car Crime* (Willian Publishing, 2003).

⁸⁰ Gans (n 12) 93-96.

⁸¹ *Factories and Industrial Undertakings Ordinance* (Hong Kong) cap. 59, s 10, 15, 17.

- ‘White collar’ offences, particularly common law conspiracy to defraud and statutory money laundering,⁸² where not all of the elements overlap with the property offences mentioned above. Hong Kong being a global financial centre, ‘white collar’ offences are the crimes lawyers working outside of criminal litigation are most likely to encounter, if not in their junior years, at least at some point in their careers. Moreover, even highly technical ‘white collar’ and regulatory offences are useful devices encouraging critical reflection by students,⁸³ and have been considered by law reform bodies in the recent past.⁸⁴ In particular, summary-only regulatory offences are useful aids to help students reflect on the nature and definition of ‘crime’ itself, as opposed to other forms of social deviance.

So far, this may sound relatively straightforward. The less radical the proposed changes, the more likely that they are to be adopted by one or more law schools. What is more contentious is the list of offences which the study suggests ought *not* be covered, despite being taught in the past.⁸⁵ Yet criminal law educators should not be wedded to teaching particular offences that do not enhance pedagogical outcomes or prepare students for practice.⁸⁶ Specifically, homicide (including murder, voluntary and involuntary manslaughter, and infanticide) and sexual offences (eg rape, indecent assault, soliciting for an immoral purpose) are not justified inclusions based on the police crime data and the results of the practitioners’ survey, notwithstanding that many sexual offences are grossly underreported and undercounted within official statistics.⁸⁷ More than one survey respondent observed that junior practitioners should prioritise becoming most familiar with the summary and either-way offences that are tried in the Magistrates’

⁸² *Theft Ordinance* (Hong Kong) cap 210, s 16A(4); *Organized and Serious Crime Ordinance* (Hong Kong) cap 455, s 25.

⁸³ See eg Rorie ML (ed), *The Handbook of White-Collar Crime* (Wiley Blackwell, 2020); Lacey N, ‘Legal Constructions of Crime’ in Maguire M, Morgan R and Reiner R (eds), *The Oxford Handbook of Criminology* (OUP, 4th ed, 2007); Kilcommins S, Leahy S and Spain E, ‘The Absence of Regulatory Crime from the Criminal Law Curriculum’ in Gledhill K and Livings B (eds), *The Teaching of Criminal Law: The Pedagogical Imperatives* (Routledge, 2017).

⁸⁴ Since 1990, the Law Reform Commission of Hong Kong has considered the law of fraud (The Law Reform Commission of Hong Kong, ‘Publications’ (*The Law Reform Commission of Hong Kong*, 31 December 2020) <<https://www.hkreform.gov.hk/en/publications/subject.htm>>). Over the same timeframe, the (England and Wales) Law Commission has dealt with the following subjects of relevance: anti-money laundering; bribery; strict liability; conspiracy to defraud; forgery; regulatory crimes, and deception (Law Commission, ‘Projects’ (*Law Commission*, 2021) <https://www.lawcom.gov.uk/project/?keywords=&area_of_law=9>).

⁸⁵ There are several other offences presently and previously taught as part of the LLB and JD criminal law courses which I plan to review as a result of this research. These include: robbery, burglary, firearms and explosives offences, blackmail, criminal intimidation, handling stolen goods, and deprivation of liberty offences (i.e. false imprisonment, kidnapping, holding for ransom).

⁸⁶ Walker (n 2) 240.

⁸⁷ Broadhurst, Lee and Chan (n 45) 50; Social Surveys Section, Census and Statistics Department (n 46) 7.

Courts, leaving the most serious offences such as murder, manslaughter, rape, and holding for ransom for their later years in practice.⁸⁸ Murder and rape cases, in particular, are typically handled in Hong Kong by barristers with at least a decade's worth of experience.⁸⁹ Serious drug offences such as trafficking and manufacturing are the main exceptions to this rule, given their prevalence in the Court of First Instance.⁹⁰ Graduates entering criminal practice, and even careers focusing on criminal law policy, have ample opportunity learn the elements of serious offences triable only on indictment 'on the job'.

To counter the potential criticism that homicide cases possess a special symbolic significance because of the severity of penalties involved (ie mandatory life imprisonment for murder) and the inherent sanctity of human life,⁹¹ it is worth nothing that similar arguments relating to human life and dignity could be made about other crimes appearing on the Hong Kong statute book. Genocide,⁹² torture,⁹³ and piracy,⁹⁴ which are widely regarded as *jus cogens* crimes under customary international law,⁹⁵ have each been incorporated domestically as criminal offences in Hong Kong, and yet none are typically part of the criminal law syllabus. As to the concern that eliminating homicide and sexual offences from the syllabus would make it harder to capture the interest of students, criminal law educators can still bring to bear their skill in selecting for teaching the most intriguing case examples of property, drugs, driving and regulatory crimes and of non-fatal offences against the person, as well as employing creative pedagogy and assessment methods to keep their students engaged.⁹⁶ Social science research has even found that a perception of relevance (here, relevance for future legal practice) promotes deeper learning among students, as opposed to shallow, cursory learning.⁹⁷

There is also the potential criticism that the exclusion of sexual offences demeans the importance of those crimes at a time when victims of rape, indecent assault and other forms of sexual exploitation are being encouraged to speak out and report their abusers.⁹⁸ The response

⁸⁸ Criminal Defence Solicitor, Survey Response, n 1; Criminal Barrister, Survey Response, n 1; Criminal Barrister #5, Survey Response, n 1.

⁸⁹ Criminal Senior Counsel, Survey Response, n 1; Barrister-at-Law, Survey Response, n 1; Criminal Defence Barrister #2, Survey Response, n 1.

⁹⁰ See n 55.

⁹¹ Offences Against the Person Ordinance, Cap. 212, s 2; Bill of Rights Ordinance, Cap. 383, s 8, art 2(1).

⁹² *Offences Against the Person Ordinance* (Hong Kong) cap 212, s 9A.

⁹³ *Crimes (Torture) Ordinance* (Hong Kong) cap 427, s 3.

⁹⁴ *Crimes Ordinance* (Hong Kong) cap 200, s 19-20.

⁹⁵ Cherif Bassiouni M, 'International Crimes: *Jus Cogens* and *Obligatio Erga Omnes*' (1997) 59(4) *Law and Contemporary Problems* 63, 68.

⁹⁶ Criminal Defence Barrister #3, Survey Response, n 1. See also Gledhill (n 5) 191, and Pascoe (n 51).

⁹⁷ Ramsden P, *Learning to Teach in Higher Education* (Psychology Press 2003) 43.

⁹⁸ In the local context, see eg Tang CSK, 'Gender-based Violence in Hong Kong' in Cheung FM and Holroyd E, *Mainstreaming Gender in Hong Kong Society* (The Chinese University Press, 2009) and Chan B, 'The #MeToo movement', *EJInsight* (Web Page, 3 July 2018)

here is twofold: it is first unclear why the criminal law course, studied by a small minority of young Hong Kongers, ought to be one of the main vehicles through which to alter social attitudes and reporting behaviour. The high school curriculum, on campus university anti-sexual harassment training and public education campaigns stand to reach a much wider audience. Among teaching modules at a law school, an elective course on criminology might be a more appropriate place to consider the causal explanations for, underreporting of, and ultimately state and societal responses to sexual and other gendered crimes such as domestic violence. Of course, when the status quo changes and arrests and prosecutions show consistent increases, a practice-oriented criminal law curriculum ought to be responsive to these and other trends. The second counter to the purported need to include sexual offences is the emotional and philosophical burden that accompanies discussions around these subjects for certain students, especially those who themselves are victims of sexual abuse.⁹⁹ Several US law schools have already removed sexual offences from the criminal law syllabus for this reason.¹⁰⁰

On the other categories excluded from the list above, the offences currently being tried in connection with the protest movement in Hong Kong may in fact be deserving of their own module. Within an elective entitled 'Protest Litigation' or something similar, local criminal law educators could cover, among other topics, the new National Security Law offences (secession, subversion, collusion, terrorism), public order offences (eg unlawful assembly, riot), offences against the police, criminal damage (including arson), and the recently enacted regulatory offences relating to Covid-19 social distancing. In a jurisdiction where criminal law often does not seem relevant to law students intent upon a career in commercial practice,¹⁰¹ this elective would surely become popular, as it would speak directly to students' recent experiences.

The most surprising results from the empirical data include the relative lack of interest among survey respondents and the relative paucity in the police data on triad offences, indecent assault, arson, robbery, and immigration offences, all of which I had initially assumed would form a more prominent part of criminal practice in Hong Kong. These expectations arose partly from popular culture and anecdotes (particularly for triad offences and immigration offences), partly from media reports (particularly those covering arson perpetrated during the 2019 protests), and partly from the cases chosen by my students for criminal law court visits over recent years¹⁰² (featuring prominently robbery and indecent assault, often tried in the Magistrates' Courts). A

<<https://www.ejinsight.com/eji/article/id/1881012/20180703-the-metoo-movement>>.

⁹⁹ Meares, Katyal and Kahan (n 7) 1197; Suk Gersen J, 'The Trouble with Teaching Rape Law', *The New Yorker* (online, 15 December 2014) <<https://www.newyorker.com/news/news-desk/trouble-teaching-rape-law>>.

¹⁰⁰ Suk Gersen (n 99). However, see also n 7.

¹⁰¹ Civil Barrister #2, Survey Response, n 1; Employment Solicitor, Survey Response, n 1; Standing Committee on Legal Education and Training (n 15) 68.

¹⁰² See Appendix A, Question 12; Pascoe (n 51).

second unexpected outcome is the ultimate decision to *retain* theft, offences of deception, and non-fatal offences against the person within a practice-oriented criminal law syllabus, thereby maintaining the status-quo for offences long taught in most common law jurisdictions. Yet the police force crime statistics, if not the views of survey respondents and the wealth of critical literature on these topics¹⁰³ clearly justify such continuity in Hong Kong. As Anthony Bradney has written of the criminal law syllabus:

Innovation, though not innovation for innovation's sake, can be progress. At the same time, tradition is not wrong simply because it is tradition. What matters, as always, is the quality of arguments being made.¹⁰⁴

For the international (particularly the Australian) reader, how specific are these results to Hong Kong, as the site of the empirical research conducted? Different jurisdictions will possess different patterns of offending, different practice areas for criminal lawyers, and different trends in graduate career trajectories.¹⁰⁵ That being said, the divergence between criminal law pedagogy and practice exists throughout the common law world.¹⁰⁶ For example, in a recent study, Gibbon and Steel identified a disconnect between the topics taught in New South Wales criminal law modules and the crimes most commonly litigated in the courts in that jurisdiction.¹⁰⁷ Legal educators in Hong Kong enjoy a particular freedom to mould course syllabi so as to prioritise staff expertise, pedagogical aims or alignment with industry needs. Importantly, there are no prescriptions from the local Law Society and the Bar Association as to what the basic criminal law module should contain, other than that law degrees qualifying students to practise in the jurisdiction must contain a criminal law subject.¹⁰⁸ In other common jurisdictions, particularly in several Australian states, there are more detailed prescriptions,¹⁰⁹ yet as Gledhill observes, sometimes a particular 'constraint is more self-imposed or imaginary or arises from lethargy.'¹¹⁰

The aim of this study has not been to mandate a particular syllabus for institutions in other jurisdictions to follow, but rather to share the method, to help start a conversation on what a practice-supported criminal law curriculum might look like, and to encourage change if change seems justified by reference to pedagogical aims, including achieving readiness for practice. Empirical work in other common law jurisdictions, based on surveys, focus groups or interviews with an even

¹⁰³ See n 76-77.

¹⁰⁴ Bradney A, 'Foreword' in Gledhill K and Livings B (eds), *The Teaching of Criminal Law: The Pedagogical Imperatives* (Routledge 2017) ix.

¹⁰⁵ See n 16. Teachers in unitary jurisdictions larger than Hong Kong (eg England and Wales, New Zealand) may have to take into account regional differences in criminal offending, criminal practice, and graduate destinations.

¹⁰⁶ Gledhill and Livings (n 9) 2-5.

¹⁰⁷ Gibbon and Steel (n 8) 153-155.

¹⁰⁸ Standing Committee on Legal Education and Training (n 15) 60.

¹⁰⁹ Gledhill and Livings (n 9) 6-10.

¹¹⁰ Gledhill (n 5) 186.

wider range of criminal justice actors may bring to the fore expected but also surprising results, as it has done in Hong Kong.

APPENDIX A: SURVEY OF CRIMINAL LAW PRACTITIONERS

1. How would you usually describe your profession, ie criminal defence solicitor, commercial barrister, prosecutor?
2. Which areas of law do you practice in?
3. Within your practice, over the 12 months between July 2018 and June 2019, proportionally how much of your time did you spend on criminal law matters, compared with other areas of law? For example: 10%, 50%, 100%.
4. Over the 12 months between July 2018 and June 2019, please rank the amount of time that you spent working on cases concerning the following crime categories (1 = most time; 10 = least time):
 - Homicide offences (eg murder, manslaughter)
 - Sexual offences (eg rape, indecent assault)
 - Other offences against the person (eg assault, GBH, wounding, intimidation)
 - Theft and/or other property offences (eg burglary, robbery, criminal damage, blackmail)
 - ‘White Collar’ offences (eg fraud, tax offences, insider trading, money laundering)
 - Immigration offences
 - Public Order offences
 - Triad-Related offences
 - Drugs offences
 - Driving offences
5. Over the 12 months between July 2018 and June 2019, please rank the number of individual cases you worked on for the following crime categories (1 = most cases; 10 = fewest cases):
 - Homicide offences (eg murder, manslaughter)
 - Sexual offences (eg rape, indecent assault)
 - Other offences against the person (eg assault, GBH, wounding, intimidation)
 - Theft and/or other property offences (eg burglary, robbery, criminal damage, blackmail)
 - ‘White Collar’ offences (eg fraud, tax offences, insider trading, money laundering)
 - Immigration offences
 - Public Order offences
 - Triad-Related offences
 - Drugs offences

- Driving offences
6. Do you have any further comments on your answers to questions 4 and 5? For example, do you work on offences that are not mentioned within the categories listed above? Did one crime category occupy more than half of your time?
7. Did you study substantive criminal law as part of a degree level course or as part of a professional qualification, or in any other context? Tick all that apply:
- Degree level course (eg BA, LLB, JD)
- Professional qualification (eg PCLL; LPC)
- Other. Please specify which:

Which year/s did you study criminal law as part of the above programme/s? (eg LLB 1995, LPC 1998)

Within which jurisdiction/s did you study the above programme/s? (eg Hong Kong, England & Wales)

8. If you studied criminal law in a degree level course or professional qualification, please indicate whether the course/s included the following areas of criminal law. Tick all that apply:
- Homicide offences (eg murder, manslaughter)
- Sexual offences (eg rape, indecent assault)
- Other offences against the person (eg assault, GBH, wounding, intimidation)
- Theft and/or other property offences (eg burglary, robbery, criminal damage, blackmail)
- 'White Collar' offences (eg fraud, tax offences, insider trading, money laundering)
- Immigration offences
- Public Order offences
- Triad-Related offences
- Drugs offences
- Driving offences
- Other offences. Please specify which:
9. Please indicate which offences you think should be taught in current degree level (LLB/JD) criminal law courses in Hong Kong. Tick all that apply:
- Homicide offences (eg murder, manslaughter)
- Sexual offences (eg rape, indecent assault)
- Other offences against the person (eg assault, GBH, wounding, intimidation)

- Theft and/or other property offences (eg burglary, robbery, criminal damage, blackmail)
 - ‘White Collar’ offences (eg fraud, tax offences, insider trading, money laundering)
 - Immigration offences
 - Public Order offences
 - Triad-Related offences
 - Drugs offences
 - Driving offences
 - Other offences. Please specify which:
10. Please explain your answers to the previous question. Your views on this are central to this research project:
11. Please comment on the following views:
- A. Criminal lawyers should learn about driving and regulatory offences ‘on the job’, rather than being taught these offences in their degree courses.
 - B. Offences such as homicide and rape are more likely to hold the interest of law students in degree courses.
 - C. Serious offences such as homicide and rape are more likely to result in appeal hearings or arguments on law and so there is more ‘law’ to teach from these offences.
 - D. The general principles of criminal law are more readily explainable through homicide and rape than through drugs, driving and public order offences.
 - E. Degree level law students should be able to choose between criminal law specialisations such as ‘white collar crime’, ‘urban crime’, and so on - namely combinations of substantive offences that suit what they want from a law degree.
12. Regarding teaching methods, which of the following teaching and learning activities would you regard as useful in preparing students for criminal law practice, if any? Tick all that apply:
- Court Visits
 - Problem-Based Learning
 - Students Summarising Recent Caselaw Developments
 - Mooting
 - Mock Trial / Trial Advocacy
 - Peer Evaluation of Assessment Tasks
 - Student-Authored Reading List
 - Field Trip to Correctional Institution
 - Student-Led Class

- Student-Edited Law Journal
 - Student Submission to HKLRC, LegCo Committee or Newspaper Op-Ed
13. Please explain your answers to the previous question. Your views on this are central to this research project:
14. Reflecting on your early legal career, what other changes to the criminal law syllabus or teaching methods in your first law degree would have helped prepare you better for legal practice?
15. Please feel free to add any further comments.
16. Thank you very much for your assistance. Please choose any of the following options that apply to you:
- I would like a summary of the findings of this research. I have listed my contact details below.
 - I am willing to be asked further questions as part of this research. I have listed my contact details below.

Participant email address:

Participant postal address:

APPENDIX B: SURVEY RESPONDENTS

1. Criminal Defence Solicitor
2. Criminal and Civil Barrister
3. Civil Litigation Solicitor
4. Mixed Practice Barrister
5. Civil Barrister
6. Defence Counsel
7. In House Counsel, including follow-up communication
8. Criminal Barrister
9. Litigation Solicitor
10. Litigation Solicitor #2
11. Criminal Barrister #2, including follow-up communication
12. Barrister-at-Law
13. Criminal Barrister #3
14. Mixed Practice Barrister #2, including follow-up communication
15. Criminal Defence Barrister
16. Criminal Defence Solicitor #2
17. General Litigation Solicitor
18. Criminal Barrister #4, including follow-up communication
19. Academic Lawyer, including follow-up communication
20. Criminal Defence Barrister #2
21. Criminal Defence Barrister #3
22. Criminal Defence Lawyer
23. Employment Solicitor, including follow-up communication
24. Criminal Defence Solicitor #3 (not on DLS/criminal practitioners list)
25. Semi-Retired Barrister (not on DLS/ criminal practitioners list)
26. Criminal Senior Counsel (not on DLS/ criminal practitioners list)
27. Corporate Solicitor (not on DLS/ criminal practitioners list)
28. Criminal Barrister #5 (not on DLS/ criminal practitioners list)
29. Civil Barrister #2 (not on DLS/ criminal practitioners list)
30. Criminal Defence Solicitor #4 (not on DLS/ criminal practitioners list)