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CRIMINAL LAW AND ITS PROCESSES

Cases and Materials

Eleventh Edition

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PREFACE

This edition retains the principal content and pedagogical commitments of the Tenth Edition, along with several changes in organization and emphasis. We have retained nearly all the major cases and have maintained the intellectual framework and concrete questions and problems that so many of our colleagues have found helpful for successful teaching. At the same time, an acceptable 21st Century course of study in criminal law must give a prominent place to America's long-overdue reckoning with over-criminalization, mass incarceration, and discriminatory law enforcement. While the Tenth Edition covered those topics, the Eleventh Edition gives more in-depth treatment to those issues, both as standalone material at the outset of the book and where relevant in the discussion of other topics. This Preface discusses the basic goals of the course before turning to the specific changes made for this edition.

Why substantive criminal law? We conceive of a criminal law course as serving the ends of both general legal education and training in the criminal law in particular. Both ends are important, particularly since criminal law is often a required course. Many criminal law students will never serve as prosecutors or defense attorneys, but regardless of their field, their practice will presuppose familiarity with foundational concepts and perspectives that the study of criminal law provides. Equally important, as citizens and members of the bar, they will be called upon to contribute to discussion of criminal justice policy, and their judgments on matters of criminal responsibility and punishment will influence the fairness and effectiveness of society's responses to matters that will always have a high place on the agenda of public concern.

There are, as we see it, three chief ways that the study of criminal law contributes to the education of law students and all practicing lawyers. First, it provides a vehicle for close reading of statutory texts—the Model Penal Code as well as state and federal statutes—to help balance the emphasis on case law in the first-year curriculum. Second, criminal law introduces students to the rules and principles that govern our society's efforts to apportion blame and responsibility in accordance with moral norms and practical restraints. Concepts of fault, wrongdoing, proportionality, and accountability play an essential role in determining liability throughout the law. Hence mastery of the analytical elements used to assign blame and assess justifications and excuses is an indispensable component of any lawyer's legal education, regardless of the field in which she or he will ultimately practice.

Third, the study of criminal law affords insight into the potential and limits of legal processes in general, and criminal law in particular, as instruments of social control. We have in mind the difficulty of giving legal form to the compromises made necessary when goals conflict; the creation of appropriate institutional arrangements—judicial and administrative; the moral and practical constraints on using law to achieve social ends; the need for individualization and discretion to

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account for meaningful differences in cases while maintaining a commitment to equity and racial justice; and the value and costs of employing *criminal* sanctions, rather than regulatory or administrative approaches or other social processes, as mechanisms for setting norms and inhibiting socially harmful behavior.

Substantive criminal law provides an ideal introduction to these problems that pervade all of the law. The ends criminal law serves involve social and human values of the highest order. Its means, entailing the imposition of brute force on the lives of individuals, are potentially the most destructive and abusive to be found within the legal system. The issues it raises and the setting in which it raises them are compelling and vivid. Its institutions are acutely controversial. At its core is the foundational dilemma for organized society—the reconciliation of authority and the liberty of the individual. As Professor Herbert Wechsler has written (The Challenge of a Model Penal Code, 65 Harv. L. Rev. 1097, 1087-98 (1952)):

> [Penal law] is the law on which [people] place their ultimate reliance for protection against all the deepest injuries that human conduct can inflict on individuals and institutions. By the same token, penal law governs the strongest force that we permit official agencies to bring to bear on individuals. Its promise as an instrument of safety is matched only by its power to destroy. If penal law is weak or ineffective, basic human interests are in jeopardy. If it is harsh or arbitrary in its impact, it works a gross injustice on those caught within its toils. … Nowhere in the entire legal field is more at stake for the community or for the individual.

What of the course's narrower purpose of training students in the criminal law in particular? Here there are two main pedagogical objectives. One is to furnish a solid foundation for those who will, at some point in their careers, participate directly in the processes of the criminal law. This foundation does not require mastery of the full range of technical skills and information held by the practicing criminal lawyer, judge, or administrator, but rather the development of confidence in handling abstract concepts, principles, and rules—judge-made or statutory—through knowledge about the larger implications of the doctrines and institutions of the criminal law. The second purpose is to give those students who will not practice criminal law an understanding of its problems. As influential members of their communities—and more directly as judges, legislators, or teachers—lawyers versed in the principles of criminal law can bring an informed intelligence to the challenge of solving some of the most vexing problems of our times.[1]

Revisions for the Eleventh Edition. The next few paragraphs give an overview of revisions for this edition, followed by a more detailed summary of continuity and change in specific chapters.

As mentioned, this edition largely maintains the content and approach that have proved successful in previous editions. At the same time, we have made it a priority to add substantial contemporary critiques and reorganize the sequencing of the material to permit classroom discussion, at the outset of the course, of topics

1. For a fuller discussion of the role of the criminal law course in a law school curriculum, see Sanford H. Kadish, Why Substantive Criminal Law-A Dialogue, 29 Clev. St. L. Rev. 1 (1980).

that are sure to be foremost in the minds of most students—discrimination in law enforcement, overuse of incarceration, and in general America's often-unthinking reliance on criminal law as a response to real or perceived social problems.

Every student who follows the news comes to law school expecting to discuss issues of criminal justice/social justice/racial justice. To a degree not seen in decades, criminal justice concerns such as mass incarceration, police use of deadly force, racial profiling, and the like now occupy center stage in public discussion and political debate.

Too often these issues are treated as matters of criminal procedure that lie beyond the scope of a course devoted to foundational concepts like mens rea and criminal responsibility. We disagree. To be sure, substantive criminal law doctrine matters a great deal. Conveying a mastery of its nuances has to be an important goal of any criminal law course, and particularly so for those who expect to be active on the ground in seeking more just case outcomes. But at the same time, students expect to learn—and are entitled to know—how these abstract tools relate to the pressing issues that make headlines almost every day. We are convinced that issues of social justice—including policing, incarceration policy, and the exercise and control of discretion—are centrally implicated in the doctrinal specifics of criminal law, and that traditional casebook material can be presented in a way that makes those implications salient. The book's increased emphasis on these themes permits in-depth classroom discussion and analysis for teachers and students drawn to these issues, while preserving the option of a traditional analytic approach for those who are so inclined.

A second goal, as in the Tenth Edition, has been to insure the accessibility of cases, notes, and questions throughout the book. We keep questions short, provide frequent explanations in the notes, and include frequent roadmaps to guide students and highlight the points that the cases and notes illustrate. We also include more problems throughout the book, to provide the basis for classroom discussion and help students assess their understanding of the material.

In addition to revisions related to presentation and clarity, we have updated the material throughout. We have added new principal cases and updated the notes to include the most recent trends in the law as well as prominent decisions from the U.S. Supreme Court and other courts on doctrinal issues that are central to the substantive criminal law agenda.

Chapter 1 retains some of the material from the Tenth Edition, but with a renewed emphasis on the larger social justice issues students are eager to discuss as part of their study of American criminal law. It begins by describing and analyzing the enormous reach of criminal law in the United States; the disparate impact of punishment on people of color and the poor; and the dilemmas posed by the tensions between over-enforcement (which is often the primary focus of criminal-law critiques) and the often overlooked or de-emphasized areas of *under*-enforcement, such as corporate/white-collar crime, domestic violence, hate crimes, and sexual assault. New questions and comments raise those same themes throughout the book. And attention to policing is integrated with the doctrines of substantive criminal law through both a stand-alone section on police use of force in Chapter 8 and new material on policing in connection with discretion, vagueness, and the legality principle in Chapter 3. Racial profiling and other dimensions of disparate impact and implicit bias are explored in connection with jury nullification (Chapter 1),

policing of gangs (Chapter 3), the death penalty (Chapter 10), defenses for the use of deadly force by private citizens in self-defense (the Trayvon Martin case in Chapter 8), and defenses for police use of both deadly and sub-deadly force (tasers) (also in Chapter 8).

Chapter 1 also now contains the material on the justifications of punishment that was previously placed in Chapter 2. We have moved this material up so that it can be part of the central organizing themes for professors to explore at the outset and then use to critique substantive material that follows. The Chapter includes a new focus issue on criminalization: whether the purchase of sex should continue to be prohibited or instead partially or totally decriminalized. Then, in an especially important revision, that section on criminalization is now followed by a substantial body of material and questions for discussion of more radical proposals to rethink criminal punishment, in particular the "abolition" movement to eliminate prisons and policing completely and proposals for much greater reliance on restorative justice. We think coupling the traditional justifications of punishment with the more probing critiques of America's chosen forms of punishment and enforcement works well at the outset of the book to set the stage for what follows. Finally, Chapter 1 retains material from Chapter 10 describing the key players who administer criminal law in the United States.

Chapter 2 now contains material that previously existed in different chapters of the Tenth Edition that all fall under the umbrella of how cases are processed in America. We begin with an overview of a criminal case that was previously in the Tenth Edition's Chapter 1. Chapter 2 also contains the Tenth Edition's Chapter 1 material on the formal trial process but we now put that unit after material (moved forward from the Tenth Edition's Chapter 10), that gives extensive, in depth attention to prosecutorial charging discretion and plea bargaining. This Chapter thus allows a professor to explore what the administration of criminal law looks like on the ground in most cases (lots of charging discretion and plea bargaining) and how that world operates against the background of the more formal trial process that can be invoked if a deal is not reached. Teachers who prefer a more traditional approach can defer or skip these sections and move directly into the doctrinal material on legality, proportionality, and culpability. But others may prefer to foreground that material with discussion that will sensitize students to the on-the-ground dynamics that shape how criminal law requirements are applied. This material poses different teaching challenges than conveying traditional doctrinal information. To help professors highlight why it is so important to understand discretion despite the lack of traditional rules to govern it, we include problems on possible charging options so students can see how different facts may pull in different directions and why prosecutorial discretion does so much work in our system.

Chapter 3 largely follows the same format as the prior edition, though with new cases and material throughout. We have moved some of the material on proportionality from the Tenth Edition that was previously in Chapter 3 to a newly constituted Chapter 10 that focuses on the imposition of punishment.

Chapter 4, on rape, retains its traditional lead cases but repositions the material to make more readily understandable the major split that now characterizes American law—between states that still require proof of some kind of force and those that now make absence of consent sufficient. We also provide more depth for

discussion of the increasingly important question of what "consent" means, including several of the most recent cases and the new Model Penal Code provisions on rape approved by the ALI membership in June 2021.

Chapter 5 on homicide is updated and refreshed, but otherwise follows the same organizational structure. The major organizational change was to move the material on the death penalty to Chapter 10 so it can be considered alongside other forms of punishment.

Chapter 6 similarly retains its basic structure and format, albeit with all the material refreshed and updated. We have cut the *Stephenson* case because we think the issues of voluntary intervening actors are better explored with more recent note cases and discussion.

Chapter 7 includes two new cases on the actus reus of conspiracy—the first in a drug distribution context and the second addressing Apple's strategy for marketing ebooks on its iPad. We think these cases work better than the prior featured case (*Perry*) on agreement from the Tenth Edition.

Chapter 8 has been updated to include the Supreme Court's decision in *Kahler*, more in-depth treatment of racial profiling and police use of excessive force, and a broader discussion of structural pressures and biases in the context of exploring the expansion of excuses.

In Chapter 9, on theft, we highlight for students the continuing relevance of distinctions among the different types of theft offenses in a modern setting (credit card fraud). We have also added the discussion of wage theft so students can consider what the law decides to criminalize and what it decides to leave to the civil system (if at all) to be regulated. Throughout the Chapter we have updated examples to reflect current situations, including the ways that theft of information has been affected by technological change.

Chapter 10 retains the material from the Tenth Edition on sentencing, but it also now includes material that was scattered throughout the Tenth Edition that is also relevant when considering the imposition of punishment. It thus includes a discussion of the Supreme Court's approach to reviewing non-capital cases for proportionality and its capital jurisprudence. In addition, this Chapter also includes the material that was in Chapter 2 of the Tenth Edition on the nature of punishment in America, and specifically what life is like in prisons and jails. This Chapter also has the material on shaming punishments. This allows an instructor to consider all aspects of punishment in one context (or to pick and choose which topics are best suited for their course).

Like prior editions, the eleventh emphasizes the latest *empirical* research throughout. Chapter 1 provides updated statistics on what the criminal justice system looks like, and updated data and studies, including recent research on the relationship between longer sentences and the risk of increased recidivism because of the challenges lengthy sentences pose to reentry. Chapter 4's materials on rape similarly contain new data on the incidence and prevalence of this offense, including data on the often-overlooked problem of prison rape. Chapter 10's material on sentencing and the death penalty also accounts for recent empirical research and developments.

As in previous editions, the substantive materials continue to focus on imparting an understanding of what is often called the general part of the criminal law—that is, those basic principles and doctrines that come into play across the

range of specific offenses (for example, actus reus, mens rea, and the various justifications and excuses). We believe that mastery of the detailed elements of many particular crimes is not an appropriate goal for a basic criminal law course. Nevertheless, we have found that an understanding of the basic principles is enhanced by testing their applications and interactions in the context of particular offenses. Accordingly, we examine in detail three offense categories: rape (Chapter 4), homicide (Chapter 5), and theft (Chapter 9). The Chapter on rape provides an opportunity to focus on the definitional elements of a major crime in a context that remains the focus of acute controversy because of changing perceptions and changing social values. The theme of the Chapter on homicide is the task of legislative grading of punishment in a particularly challenging area. The Chapter on theft explores the significance of history and the continued impact of old doctrinal categories on the resolution of thoroughly modern difficulties in defining the boundaries of the criminal law.

We have paid close attention to the language we use in this edition, striving in our hypotheticals to avoid gender-specific names or pronouns and seeking throughout to avoid pejorative terms that dehumanize the people being described. While we were occasionally obliged to retain problematic language because of its centrality to a case or excerpt—for example the Court's use of "retardation" in its capital jurisprudence—we have been careful to signal to students why that language is no longer appropriately used. In discussing sexual assault and intimate-partner violence, we emphasize that these crimes victimize people of all sexual identities; where we preserve material on "violence against women" and other gender-specific language, we note that there is an important substantive debate about the extent to which that terminology should continue to be used as a way to identify a distinctive problem. We always welcome reader feedback on any language that should be changed in future editions.

Use of the materials in diverse teaching formats. Over the years, law schools have experimented with a variety of formats for the basic criminal law course. Although the year-long five- or six-hour course remains common, some schools offer criminal law as a four- or even three-hour course, and some schedule the course in the first or second semester or even in the second or third years. Under these circumstances, a short book designed to be taught straight through, without adjustments or deletions, is bound to prove unsatisfactory for many users. In preparing the eleventh edition, we have edited the materials to avoid significant surplusage for the average course, without preempting all judgments about inclusion and exclusion. The book allows teachers to select topics that accord with their own interests and with the curricular arrangements at their own schools. Thus, we have aspired to create a flexible teaching tool, one that reflects the rich diversity of the subject. For the five- or six-hour, year-long course, the book can be taught straight through, perhaps with some minor deletions. For a four-hour course, and especially in the case of a three-hour course, substantial omissions will be necessary. The Teacher's Manual presents detailed suggestions for appropriate coverage and focus, together with specific suggestions for sequencing and class-by-class assignments.

Collateral Reading. There are a number of useful readings for students interested in pursuing questions developed in this casebook. Some of the suggestions that follow may no longer be in print, but they are available in virtually all law libraries.

Comprehensive Works: The following publications should be helpful to the student:

American Law Institute, Model Penal Code and Commentaries (1980-1985). This is a six-volume set containing the text and supporting commentaries of the Model Penal Code. The commentaries constitute the most comprehensive available examination of the American substantive criminal law.

Encyclopedia of Crime and Justice (J. Dressler ed., 2d ed. 2002). This work contains relatively short treatments, written by experts for the general lay reader, on virtually all the subjects covered in this casebook. It should prove particularly helpful for orientation and perspective.

Textbooks: There are two books that may be useful for review purposes:

Wayne LaFave, *Criminal Law* (6th ed. 2017). A widely used hornbook; comprehensive and heavily footnoted.

Joshua Dressler, *Understanding Criminal Law* (8th ed. 2018). A shorter textbook, available in paperback; its coverage largely focuses on the subjects covered in this casebook but in a more simplified format.

Monographs: The following books deal selectively with aspects of the criminal law:

George Fletcher, *Rethinking Criminal Law* (1978). A comparative and theoretical treatment of the criminal law that is critical of dominant thinking in the field. See also Fletcher's more recent *Basic Concepts of Criminal Law* (1998).

H.L.A. Hart, *Punishment and Responsibility* (1968). A collection of powerfully argued essays that have had a great influence on contemporary thinking concerning issues of punishment and excuse.

Sanford H. Kadish, *Blame and Punishment—Essays in the Criminal Law* (1987). Authored by one of the editors of this casebook, a collection of essays, most of which grew out of the experience of teaching prior editions.

Herbert Packer, *The Limits of the Criminal Sanction* (1968). A classic treatment of the problems of criminalization and the theory of punishment.

Style. Citations in the footnotes and text of extracted material have been omitted when they did not seem useful for pedagogical purposes, and we have not used ellipses or other signals to indicate such deletions. Ellipses are used, however, to indicate omitted text material. Where we have retained footnotes in readings and quotations, the original footnote numbers are preserved. Our own footnotes to excerpts and quotations from other works are designated by letters, while footnotes to our own notes are numbered consecutively throughout each chapter.

Acknowledgements. More than half a century has passed since the first edition of *Criminal Law and Its Processes* appeared in 1962. This revision and its immediate predecessor were both published since Sandy Kadish died in 2014, just short of

his ninety-third birthday. The book's initial impact was extraordinary, and over the years it continued to have lasting influence—not only on the teaching of criminal law but as well on the profession's understanding of criminal law's conceptual structure and practical dynamics. The realities of penal law administration in the United States and public awareness of those realities both have changed dramatically, especially in the past decade. Those developments inevitably prompt changes in emphasis and organization, changes that Sandy himself would have insisted upon. At the same time, those developments have renewed the importance of the book's core commitment: To combine intellectual rigor with realistic awareness of the practical dilemmas posed by law's obligation to serve ever-evolving social needs while respecting the rights of the individual. As co-authors, both of us have sought to carry forward the spirit that Sandy Kadish embodied. Stephen Schulhofer was exceptionally privileged to work closely with Sandy over the years and to pursue with him the education of several generations of law students, many of them now law teachers themselves, inspired as he was to foster appreciation of the essential predicates of a just system of criminal law. Our acknowledgments therefore begin, first and foremost, with our incalculable debt of gratitude to him. It is fitting and accurate that Sandy, though no longer with us in person, remains our lead author.

This edition retains the many thoughtful contributions that Carol Steiker made to the eighth and ninth editions, and we remain grateful for all the insights she has added to the book.

Several previous editions drew on Dan Markel's insightful scholarship pertaining to the philosophy of punishment, and for the ninth edition he generously offered a host of valuable suggestions, many of which continue to influence our understanding and approach to that material. His cruel murder in July 2014 deprived the criminal justice community of one of its most kind, intelligent, and energetic colleagues.

The book suffered another enormous loss with the tragic passing of our NYU colleague Jim Jacobs, who died from complications of ALS (Lou Gehrig's disease) in March 2020. Jim was an unfailingly generous mentor to both of us, and his constant stream of emails flagging issues, anecdotes, and (yes) deficiencies in the book was a steady source of inspiration and professional rigor. We were grateful to be able to incorporate Jim's suggestions in this edition and to hear his familiar voice in our ears as we read over those emails.

We are grateful for the many suggestions we have received from other colleagues and users too numerous to acknowledge individually. But we want to express special thanks to several colleagues who have provided particularly extensive comments and suggestions over the years: Harry First, David Garland, and Erin Murphy. Two criminal justice colleagues, Alec Walen and Kenneth Simons, deserve special recognition for the exceptional thoughtfulness and care they brought to suggestions they offered for dozens of pages in almost every chapter. We are also grateful to Sam Buell and Sharon Dolovich for their close reads and edits. We also want to give a special shoutout to James Forman Jr. for allowing us to publish remarks he gave on abolition at a workshop and to Randy Kennedy for providing us an early read of his book so we could use excerpts for this edition.

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SJS
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Dowling, Nancy and Jayne Begelsen, A Big Mistake on Sex Work: Reformers Would Let Buyers, Pimps, and Promoters Escape Criminal Consequences, New York Daily News, June 5, 2019. All rights reserved. Distributed by Tribune Content Agency LLC.

Estrich, Susan, Defending Women (Book Review, Cynthia Gillespie, Justifiable Homicide: Battered Women, Self-Defense and the Law (1989)), Mich. L. Rev. 1430, 1434-1437, 1990.

Forman, James, Jr., Comments Offered At Criminal Justice Roundtable, Columbia University, May 2021.

Henriques, Diane B. and Jack Healy, Madoff Goes to Jail After Guilty Pleas, The New York Times, March 13, 2009, The New York Times Company. Reprinted by permission. All rights reserved. Used under license.

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Lynch, David, The Impropriety of Plea Agreements: A Tale of Two Counties, 19 Law & Soc. Inquiry 115, 125 (1994). Reprinted with permission of Cambridge University Press via Rightslink.

Lynch, Gerard E., Our Administrative System of Criminal Justice, 66Fordham L. Rev. 2117 (1998).

Mackie, J.L., Retributivism: A Test Case for Ethical Objectivity. Copyright © 1986 Joan Mackie. Reprinted by permission. All rights reserved.

Moore, Michael S., Law and Psychiatry 234-235 (1984). Cambridge University Press via PLSClear. Reprinted with permission.

Moore, Michael, The Moral Worth of Retributivism, in Responsibility, Character, and Emotions 179 (F. Schoeman ed., 1987), Copyright © 1987 Cambridge University Press via PLSClear. Reprinted with permission.

Mullainathan, Sendhil, Police Killings of Blacks: Here Is What the Data Say, The New York Times Company. Reprinted by permission. All rights reserved. Used under license.

Robinson, Paul H. and John M. Darley, 21 U.L.Rev. 453, 468 (1997). Reprinted by permission of Paul H. Robinson.

Restak, Richard, The Fiction of the "Reasonable Man", Washington Post, May 17, 1987. Copyright © 1987 Richard Restak. Reprinted with permission. All rights reserved.

San Francisco Chronicle, "A Man Who Withdrew $43,000 Mistakenly Credited to His Bank Ac-count and Refused to Give It Back," November 14, 1964, at 4. Copyright © 1964 San Francisco Chronicle. Reprinted by permission. All rights reserved.

Von Hirsch, Andrew, Lisa Maher, Criminal Justice Ethics, Should Penal Rehabilitationism Be Revived? (Winter/Spring 1992). Copyright ©John Jay College of Criminal Justice of The City University of New York, reprinted by permission of Informa UK Limited, Trading as Taylor & Francis Group, www.tandfonline.com on behalf of John Jay College Of Criminal Justice of The City University of New York.

Williams, Glanville, Criminal Law: The General Par (2d ed. 1961). Copyright ©1961 Sweet & Maxwell Ltd. Reprinted by permission. All rights reserved.

Yeager, Daniel B., A Radical Community of Aid: A Rejoinder to Opponents of Affirmative Duties to Help Strangers, 71 Wash.U.L.Q. 1, 15 (1993). Reprinted with permission of author.

Criminal Law and Its Processes

Cases and Materials

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CHAPTER 1
FOUNDATIONS

A. THE SWEEP OF CRIMINAL LAW IN AMERICA

NOTES

1. **An overview.** The structures for administering criminal law in the United States have produced the largest penal system in the world. Before the 1970s, America's approach to crime and incarceration had much in common with other Western democracies as each "shared a relatively sparing use of imprisonment."[1] Then all this changed dramatically. At its peak in 2008, the American penal system reached 2.3 million people, and by late 2020 it incarcerated 1.8 million people,[2] a situation that is both "historically unprecedented and internationally unique."[3] The U.S. incarceration rate of 830 per 100,000 is more than five times what it was in 1972 when it began its record climb upward,[4] and is a rate 5 to 10 times higher than that of other industrialized countries.[5] America has less than 5 percent of the world's population but almost a quarter of the world's prisoners.[6] In addition to this, one out of every 38 people in the United States is under some other form of criminal justice supervision (such as probation or parole).[7] In some states, the rate is even higher. In Georgia, for example, one out of every 18 people is on probation or parole.[8] One out of every

1. Alessandro Corda & Rhys Hester, Leaving the Shining City on a Hill: A Plea for Rediscovering Comparative Criminal Justice Policy in the United States, 31 Int'l Crim. Just. Rev. 203 (2021).

2. Vera Institute for Justice, People in Jail and Prison in 2020, Jan. 2021, https://www.vera.org/downloads/publications/people-in-jail-and-prison-in-2020-fact-sheet.pdf.

3. National Research Council, The Growth of Incarceration in the United States 2 (2014); The Sentencing Project, Fact Sheet: Trends in U.S. Corrections 2 (2019), https://sentencingproject.org/wp-content/uploads/2016/01/Trends-in-US-Corrections.pdf.

4. U.S. Dept. of Justice, Bureau of Justice Statistics, Correctional Populations in the United States, 2016, https://www.bjs.gov/content/pub/pdf/cpus16.pdf; National Research Council, The Growth of Incarceration in the United States 2 (2014).

5. Equal Justice Initiative, United States Still Has Highest Incarceration Rate in the World (Apr. 26, 2019), https://eji.org/news/united-states-still-has-highest-incarceration-rate-world/.

6. Dir van Zyl Smit & Catherine Appleton, Life Imprisonment: A Global Human Rights Analysis (Harvard Univ. Press 2019).

7. U.S. Dept. of Justice, Bureau of Justice Statistics, Correctional Populations in the United States, 2016, https://www.bjs.gov/content/pub/pdf/cpus16.pdf.

8. United States Census, Bureau Quick Facts (July 2019), https://www.census.gov/quickfacts/fact/table/US/PST045219.

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three adults in America now has a criminal record.[9] For every 17 people born in 2001, one is expected to go to prison or jail. So while the mark of a criminal conviction was unusual throughout most of American history, today it is commonplace.[10]

2. **Social and racial concentration.** The effects of criminal law in America are not spread equally among the population. African Americans make up about a third of the people incarcerated, even though they are 13.4 percent of the U.S. population.[11] One third of Black men have at least one felony conviction.[12] Black adults are 5.9 times more likely to be incarcerated than white adults.[13] In some communities, these effects are even more pronounced. In the District of Columbia, for example, more than 75 percent of Black men can expect to be incarcerated at some point during their lives.[14] At our current pace, almost one out of three Black men in the country can expect to be incarcerated during their lifetimes, compared to 6 percent of white men.[15] One in six Hispanic males born in 2001 are also expected to serve time in prison at some point in their lives.[16] A United States Sentencing Commission study found Black men receive sentences that are an average of 19.1 percent longer than those received by similarly situated white men.[17] The National Research Council, a broad-based and prestigious arm of the National Academy of Sciences, concludes:[18]

> Those who are incarcerated in U.S. prisons come largely from the most disadvantaged segments of the population. They comprise mainly minority men under age 40, poorly educated, and often carrying additional deficits

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9. Executive Office of the President, Economic Perspectives on Incarceration and the Criminal Justice System (2016), https://obamawhitehouse.archives.gov/sites/whitehouse.gov/files/documents/CEA%2BCriminal%2BJustice%2BReport.pdf.

10. The Sentencing Project, Report to the United Nations on Racial Disparities in the U.S. Criminal Justice System (Apr. 19, 2018), https://www.sentencingproject.org/publications/un-report-on-racial-disparities/.

11. John Gramlich, The Gap Between the Number of Blacks and Whites in Prison Is Shrinking, Pew Research Center (Apr. 30, 2019), https://www.pewresearch.org/fact-tank/2019/04/30/shrinking-gap-between-number-of-blacks-and-whites-in-prison/.

12. Alan Flurry, Study Estimates U.S. Population with Felony Convictions, UGA Today (Oct. 1, 2017), https://news.uga.edu/total-us-population-with-felony-convictions/.

13. The Sentencing Project, Report to the United Nations on Racial Disparities in the U.S. Criminal Justice System (Apr. 19, 2018), https://www.sentencingproject.org/publications/un-report-on-racial-disparities/.

14. Jeremy Travis, But They All Come Back: Facing the Challenges of Prisoner Reentry 122 (2005).

15. Bureau of Justice Statistics, Criminal Offender Statistics, Lifetime Likelihood of Going to State or Federal Prison, http://www.ojp.usdoj.gov/bjs/crimoff.htm#lifetime.

16. The Sentencing Project, Report to the United Nations on Racial Disparities in the U.S. Criminal Justice System (Apr. 19, 2018), https://www.sentencingproject.org/publications/un-report-on-racial-disparities/.

17. United States Sentencing Commission, Demographic Differences in Sentencing (Nov. 14, 2017), https://www.ussc.gov/research/research-reports/demographic-differences-sentencing.

18. National Research Council, supra note 3, at 2.

> of drug and alcohol addiction, mental and physical illness, and a lack of work preparation or experience. Their criminal responsibility is real, but it is embedded in a context of social and economic disadvantage. More than half the prison population is black or Hispanic. In 2010, blacks were incarcerated at six times and Hispanics at three times the rate for non-Hispanic whites. . . . The meaning and consequences of this new reality cannot be separated from issues of social inequality and the quality of citizenship of the nation's racial and ethnic minorities.

David Garland points out that "[i]mprisonment becomes *mass imprisonment* when it ceases to be the incarceration of individual offenders and becomes the systematic imprisonment of whole groups of the population." Garland, Introduction: The Meaning of Mass Imprisonment, 3 Punishment & Soc'y 5, 6 (2001). The current reach of criminal law in the United States is thus notable for both its overall sweep and its heavy concentration on specific groups, particularly the poor and Black and brown people.

3. **Causes.** How did the American penal landscape change so dramatically in the few short decades since the early 1970s? One instinct may be to assume that the fault lies not in our laws or institutions but instead in our high volume of serious crime. Yet the relationship between crime rates and incarceration rates does not follow a clear pattern. It is true that a dramatic increase in crime in the 1970s and 1980s corresponded with rising incarceration rates. But incarceration continued to rise in the 1990s, even though crime rates declined steeply throughout that period and stabilized in the early 2000s to "the lowest levels recorded" since the Justice Department started conducting surveys in 1973.[19] Some researchers argue that mass incarceration is primarily a result of the prevalence of increasingly high rates of arrest for known crimes, more punitive attitudes in American culture that are reflected in longer sentences, and more aggressive policies in the enforcement of our drug laws.[20] The National Research Council concludes:[21]

> The best single proximate explanation of the rise in incarceration is not rising crime rates, but the policy choices made by legislators to greatly increase the use of imprisonment as a response to crime. [These choices] contributed not only to overall high rates of incarceration, but also especially to extraordinary rates of incarceration in black and Latino communities. Intensified enforcement of drug laws subjected blacks, more than whites, to new mandatory minimum sentences — despite lower

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19. U.S. Dept. of Justice, Bureau of Justice Statistics, Criminal Victimization — 2004 (Sept. 2005), p. 1. Data for 2015 suggest a possible shift in this trend. Although the crime rate for property offenses continued to decline, dropping by 2.6 percent, the crime rate for violent offenses rose by 3.9 percent in 2015. See FBI, 2015 Crime in the United States (Sept. 26, 2016), http://ucr.fbi.gov/crime-in-the-u.s/2015/crime-in-the-u.s.-2015/home.

20. See John Pfaff, The Empirics of Prison Growth: A Critical Review and Path Forward, 98 J. Crim. L. & Criminology 547 (2008); James P. Lynch, A Comparison of Prison Use in England, Canada, and West Germany, 79 J. Crim. L. & Criminology 180 (1999).

21. National Research Council, supra note 3, at 3-4.

> levels of drug use and no higher demonstrated levels of trafficking among the black than the white population. Blacks had long been more likely than whites to be arrested for violence. But [changes in sentencing policies, such as three-strikes laws and the elimination of or restrictions on parole] have likely increased sentences and time served for blacks more than whites. As a consequence, the absolute disparities in incarceration increased, and imprisonment became common for young minority men, particularly those with little schooling. [A]n increasingly punitive political climate surrounding criminal justice policy . . . provided the context for a series of policy choices—across all branches and levels of government—that significantly increased sentence lengths, required prison time for minor offenses, and intensified punishment for drug crimes.

4. **Consequences: public safety and social welfare.** Criminal law has traditionally been society's primary mechanism for protecting the safety and security of individuals and the community. But many now worry that the deployment of criminal sanctions, especially imprisonment, has expanded far beyond what's needed to serve those purposes and may have become counterproductive. As we explore in more detail at pp. 18-20 infra, there is at most only a small incremental deterrent effect from adding more time to already-long prison sentences—for example through "three strikes" laws and mandatory minimum sentences. And because the risk of recidivism declines sharply as people age, using long prison sentences for incapacitation makes sense only when those sentences can be reserved for exceptionally dangerous individuals or those who can be identified in advance as very likely to re-offend. Moreover, long sentences can themselves become criminogenic because it is more difficult for those released from prison after long periods of time to successfully reenter society.

A full assessment of America's incarceration policies also must consider not only direct crime-control benefits and costs but broader social consequences. Again, the National Research Council has sketched a daunting picture:[22]

> [P]rison admission and return have become commonplace in [neighborhoods that are] characterized by high levels of crime, poverty, family instability, poor health, and residential segregation. . . . Incarceration is strongly correlated with negative social and economic outcomes for former prisoners and their families. Men with a criminal record often experience reduced earnings and employment after prison. Fathers' incarceration and family hardship . . . are strongly related. From 1980 to 2000, the number of children with incarcerated fathers increased from about 350,000 to 2.1 million—about 3 percent of all U.S. children. . . . The rise in incarceration rates marked a massive expansion of the role of the justice system in the nation's poorest communities. Many of those entering prison come from and will return to these communities. When they return, their lives often continue to be characterized by violence, joblessness, substance abuse, family breakdown, and neighborhood disadvantage. . . . The vast

22. National Research Council, supra note 3, at 5-7, 9.

> expansion of the criminal justice system has created a large population whose access to public benefits, occupations, vocational licenses, and the franchise is limited by a criminal conviction. . . .
>
> We are concerned that the United States has gone past the point where the numbers of people in prison can be justified by social benefits. Indeed, we believe that the high rates of incarceration themselves constitute a source of injustice and, possibly, social harm.

Compounding these difficulties, the prominence of criminal law responses in the public policy toolbox has meant that when new social problems emerge, criminal law is often viewed not as a last resort but as the preferred course of action. In the absence of a well-functioning mental health system, criminal law often is called upon to fill the void. More than half of the people in prisons and jails suffer from mental illness.[23] About 70 percent of those in California's prisons are former foster-care youth.[24] While some argue that drug and alcohol dependency should be approached as a public health problem, the United States gives primacy to criminal law responses. Jonathan Simon points out that the United States has also turned to criminal law as its favored method for addressing disorder in workplaces, families, and schools.[25] Even where regulatory agencies have powerful civil sanctions at their disposal, criminal law often assumes a leading role; prosecutors seek to change corporate behavior through threats of prosecution and may have added incentives to do so when civil agencies—often subject to "capture" by the industries they regulate—are perceived to be insufficiently aggressive. See Chapter 7 infra.

5. **Abolition as a solution?** The shockingly large number of people who are subject to penal systems around the country (because they are incarcerated or under some form of supervision or surveillance), the glaring racial disparities, and the poor results for public safety have led many to question the entire enterprise. There is a growing group of activists and scholars advocating for the abolition of policing, jails, and prisons. We discuss abolition at pp. 53-63 infra. But in the absence of a complete reordering of our responses to crime through abolition, which is not foreseeable on any short-term horizon, there remain questions of what should or could be done now to address mass incarceration and to improve the current response to behaviors like murder, rape, burglary, theft, and other actions that harm others.

6. **Substantive-law reforms.** If America's response to crime is indeed deeply flawed, substantive criminal law by itself clearly cannot solve all that is wrong. But what can reform of substantive criminal law contribute to addressing America's problems of overcriminalization and mass incarceration? Do our written laws sweep too broadly? Do we fail to account for economic and structural deprivation in assessing blame and/or punishment? More narrowly drafted offenses and greater allowance for justifications or excuses offer ways to restrain the reach of criminal law, which should, in turn, reduce the number of people who fall under a

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23. White House Council of Economic Advisers, Economic Perspectives on Incarceration and the Justice System 33 (Apr. 2016).

24. Mariame Kaba, We Do This 'Til We Free Us 21 (2021).

25. Jonathan Simon, Governing Through Crime (2007).

criminalization umbrella. The appropriate role and scope of criminal sanctions in maintaining social order and promoting social welfare is thus a bedrock question for criminal justice and for public policy generally, one we examine throughout this book.[26] But even when violent behavior, interference with property rights, and dealing in hard drugs are properly defined as crimes, the punitive impact of the system still depends crucially on policy choices embedded in substantive criminal law, especially the extent to which the law affords discretion and how that discretion is exercised—whether the right crime was charged and whether the right sentence was imposed. These topics are taken up systematically in Chapters 2 and 10.

7. **Do we ever have *too little* law enforcement?** The preceding concerns might suggest a strong presumption in favor of lenity—that we should resolve close questions by narrowing the reach of criminal statutes, reducing punishments, and granting officials greater discretion to treat potentially criminal conduct more leniently. Given the broad consensus that America is too quick to resort to criminal law solutions and that we have far too many people in prison, a clear preference for lenity might seem the right way to frame our thinking about problems throughout the criminal law. But matters are not so simple. There are also many situations where the penal system fails to do enough. In the wake of the financial crisis of 2008, few individuals were prosecuted, leading many to question why prosecutors failed to pursue criminal cases. See Brandon L. Garrett, Too Big to Jail (2014); Jed S. Rakoff, The Financial Crisis: Why Have No High-Level Executives Been Prosecuted?, N.Y. Rev. Books, Jan. 9, 2014. Many lament what they see as unjustified impunity for police officers and civilians who use deadly force against unarmed African-American youth. See Aya Gruber, Leniency as a Miscarriage of Race and Gender Justice, 76 Alb. L. Rev. 1571 (2013). Critics often argue that inner-city minority neighborhoods receive *too little* police protection and that sexual assault and domestic violence laws are woefully *under*enforced. See Chapters 3.B, 4.A, and 8.B.2, infra. Deborah Tuerkheimer writes:[27]

> [Often] the criminal justice system withholds its protective resources from groups deemed unworthy of protection. Evidence of this dynamic can be found across a range of law enforcement responses, including black-on-black homicide, hate crime, and unlawful police violence against civilians. . . . Unremedied injuries suffered by women, in particular, have

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26. See, for example, the question of when to punish "immoral" behavior (pp. 48-50 infra); when to make *failure to act* a crime (Chapter 3.D.1); whether (and if so when) one should be liable for causing harm without regard to intent or negligence (Chapters 3.D.2c & d and 5.C.2); when we should criminalize threatening or preparatory conduct that *does not* cause harm (Chapters 6.B and 7.B); when mistakes of law, intoxication, mental disability, and other conditions should be recognized as excuses (Chapters 3.D.2.e and 8.C); how far the criminal law should regulate sexual overreaching (Chapter 4); when a person should be held responsible for crimes committed by another (Chapter 7.A and B); when corporations should be criminally liable (Chapter 7.C); when to allow (and how to limit) the use of deadly force for self-protection (Chapter 8.B); and when to punish misrepresentation, dishonesty, and interference with intellectual property (Chapter 9).

27. Deborah Tuerkheimer, Underenforcement as Unequal Protection, 57 B.C. L. Rev. 1287, 1290-1291 (2016).

> historically been the norm. . . . Across the spectrum of violence—domestic and sexual—substantive law reform has not readily translated into law enforcement. Instead, to this day, the same biases reflected in repudiated legal regimes continue to influence the implementation of more progressive laws that have emerged in their stead.

How can we reconcile these claims of underenforcement with the sweep of America's carceral state? Is it possible that *more* people should be in prison? Is it still valid to insist that the punitive capacities of American criminal law be restrained? Or instead should they sometimes be made even more far-reaching? Consider Alexandra Natapoff, Underenforcement, 75 Fordham L. Rev. 1715, 1716-1719 (2006):

> [A] system as pervasive, harsh, and racially charged as ours requires serious rethinking. [In the 1990s], Randall Kennedy argued that "the principal injury suffered by African-Americans in relation to criminal matters is not overenforcement but underenforcement of the laws."[a] . . . Underenforcement is far from abstract. . . . Within certain communities or institutions—what I will call "underenforcement zones"—the state routinely and predictably fails to enforce the law to the detriment of vulnerable residents. Police concede that they will not arrest certain sorts of perpetrators; many victims expect that they will remain unprotected; and violators rest secure in the knowledge that their crimes are the sort that will go unpunished. This type of underenforcement deprives residents of personal and economic security, rendering calls to the police futile or even dangerous and victimhood a routine fact of life.
>
> [Overenforcement and underenforcement] are typically juxtaposed as a conundrum, particularly in poor, high-crime communities of color: How can a community be simultaneously over-policed and under-policed? [Yet] underenforcement is not necessarily an alternative to overenforcement but often its corollary. Over- and underenforcement are twin symptoms of a deeper democratic weakness of the criminal system: its non-responsiveness to the needs of the poor, racial minorities, and the otherwise politically vulnerable. Because of this weakness, justice and lawfulness are distributed unevenly and unequally across racial and class lines, crime remains rampant in some communities but not others, and some people can trust and rely on law enforcement while others cannot. Official disregard of crime is part of this dynamic, as are mass imprisonment, excessive sentences, and racially skewed enforcement practices. . . .
>
> Underenforcement encompasses a broad spectrum of state behavior, not all of which is pernicious. [But when underenforcement] disadvantages already vulnerable groups or impedes their ability to participate fully in civic life, underenforcement . . . deserves special scrutiny above and beyond the deference traditionally given to law enforcement discretion.

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a. See pp. 182-183 infra, discussing Professor Kennedy's concerns in connection with the problems of jury nullification.—Eds.

This tension between underenforcement and the excesses of overenforcement complicates calls for defunding the police and broadly reducing the reach of the criminal law. While many want to reduce the footprint of the police to address mass incarceration and create fewer opportunities for police violence, others worry that a reduced police force might make neighborhoods that already feel like they receive insufficient police protection even more vulnerable. A council member from the West Bronx in New York recently explained that she was concerned about overpolicing in her district but that a recent increase in violent crime in the district made a budget cut tricky. "Many residents equate public safety with more policing. If I go to them and tell them there would be less police, they would not be happy."[28]

QUESTIONS: Is criminal law predestined to reinforce these social inequalities? Or are there reliable ways to identify the situations in which enforcement needs to be strengthened, not restrained, without creating a risk that the carceral state will balloon even more and further aggravate racial disparities? Can we seek to treat everyone as well as the wealthiest and most powerful are treated, or will the push for equality inevitably mean that the harshest treatment wins out for all? The challenge is to ensure that stronger enforcement tools—when needed—are deployed fairly, and not just in favor of individuals and groups that are already advantaged. Can criminal law address these issues meaningfully on its own, or are they inextricably embedded in broader social policies, from educational and employment opportunities to affordable housing, urban design, and access to medical services and mental health care? Consider how the criminal justice dimension of these issues can best be addressed in the context of the material in the next section and throughout this book.

B. WHY CRIMINAL PUNISHMENT?

INTRODUCTORY NOTE

It is not possible to answer whether we have too much or too little criminal punishment in America without stepping back to ask why any society punishes at all. Punishment is unpleasant. In America, most people equate punishment with prison, which is a particularly harsh response, even more so given the way American prisons are typically run. See pp. 1096-1102 infra. However, punishment can take many other forms, including fines, probation, community service, mandatory treatment programs, and other restrictions on behavior. Some of these, like probation, are used more often than incarceration. While some of these other forms of punishment are not as afflictive as prison, they are all unpleasant. And unlike other potentially unpleasant experiences (paying taxes, military service in wartime), punishment is *intended* to be unpleasant. Moreover, convictions also entail formal and informal collateral consequences, from the loss of voting and other civic rights to significant impediments to employment, housing, and public benefits. There is

28. Jeffrey C. Mays, Who Opposes Defunding the N.Y.P.D.? These Black Lawmakers, N.Y. Times, Aug. 10, 2020 (quoting City Councilwoman Vanessa L. Gibson).