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CRIMINAL LAW
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*Eleventh
Edition*

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CRIMINAL LAW AND ITS PROCESSES

CASES AND MATERIALS

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SUMMARY OF CONTENTS

Contents	ix
Preface	xxxiii
Acknowledgments	xliii
Chapter 1. Foundations	1
Chapter 2. The Process for Determining Guilt	77
Chapter 3. Defining Criminal Conduct—The Elements of Just Punishment	189
Chapter 4. Rape	377
Chapter 5. Homicide	461
Chapter 6. The Significance of Resulting Harm	567
Chapter 7. Group Criminality	651
Chapter 8. Exculpation	803
Chapter 9. Theft Offenses	1013
Chapter 10. Imposing Punishment	1095
Appendix, American Law Institute, Model Penal Code	1207
Table of Cases	1285
Table of Authorities	1303
Index	1363

CONTENTS

Preface	xxxiii
Acknowledgments	xliii
Chapter 1 Foundations	1
A. The Sweep of Criminal Law in America	1
Notes	1
B. Why Criminal Punishment?	8
Introductory Note	8
<i>Regina v. Dudley and Stephens</i>	9
Notes and Questions	14
1. The Utilitarian View	16
J. Bentham, An Introduction to the Principles of Morals and Legislation	16
J. Bentham, Principles of Penal Law	16
Notes and Questions	17
a. Deterrence	18
Introductory Note	18
J.Q. Wilson, Thinking About Crime	19
P.H. Robinson & J.M. Darley, The Role of Deterrence in the Formulation of Criminal Code Rules	19
b. Rehabilitation	22
M. Vitiello, Reconsidering Rehabilitation	22
M.S. Moore, Law and Psychiatry	23
Note—The Rise and Fall of the Medical Model	23
Note—Does Rehabilitation Work?	24
A. von Hirsch & L. Maher, Should Penal Rehabilitationism Be Revived?	26
c. Incapacitation	27
F.E. Zimring & G. Hawkins, Incapacitation— Penal Confinement and the Restraint of Crime	27
J.J. DiIulio, Jr., Prisons Are a Bargain, by Any Measure	27
Notes	28
	ix

2. Retribution	32
Introductory Note	32
I. Kant, The Philosophy of Law	32
M.S. Moore, The Moral Worth of Retribution	33
Note on Criticisms and Defenses of Retribution	34
H. Morris, On Guilt and Innocence	35
J. Murphy, Marxism and Retribution	35
J. Hampton, Correcting Harms versus Righting Wrongs: The Goal of Retribution	36
J.L. Mackie, Retribution: A Test Case for Ethical Objectivity	36
D. Sered, Until We Reckon: Violence, Mass Incarceration, and a Road to Repair	37
Note on Retribution as a Constraint	37
3. “Cousins” of Retribution	39
Introductory Note	39
a. Retaliation and Revenge	39
J.F. Stephen, A History of the Criminal Law of England	39
Questions	39
Problem: Unexpected Harm	40
Problem: Victim-Impact Statements	41
b. Social Cohesion	43
H.L.A. Hart, Punishment and Responsibility	43
E. Durkheim, The Division of Labor in Society	44
J.F. Stephen, A History of the Criminal Law of England	44
Note	45
4. Mixed Theories	46
Introductory Note	46
Questioning the Classic Mixed Theory	47
M.S. Moore, Law and Psychiatry	47
Notes and Questions	48
C. What to Punish	48
Problem—Sex Work	50
Human Rights Watch, Why Sex Work Should Be Decriminalized	50
N. Dowling & J. Bigelsen, A Big Mistake on Sex Work: Reformers Would Let Buyers, Pimps and Promoters Escape Criminal Consequences	51
D. Alternatives to Punishment	53
1. Abolish Prisons? Abolish Punishments?	53
Introductory Note	53

Contents	xi
M. Kaba, We Do This 'Til We Free Us	55
A. Akbar, Toward a Radical Imagination of Law	55
L. Ben-Moshe, The Tension Between Abolition and Reform	56
A.M. McLeod, Envisioning Abolition Democracy	57
J. Forman Jr., Comments Offered at Criminal Justice Roundtable	57
R. Kennedy, Say It Loud!	58
Notes and Questions	60
2. Restorative Justice	64
E. The Relevant Institutional Actors	67
Notes	69
 Chapter 2 The Process for Determining Guilt	 77
A. An Overview of a Criminal Case	78
B. Prosecutor's Discretion and the Decision to Charge	84
Introductory Notes	84
<i>Inmates of Attica Correctional Facility v. Rockefeller</i>	90
Notes on Checking the Decision Not to Prosecute	92
Problem	99
Notes on "Compulsory" Prosecution in Europe	100
Note on Selective Prosecution	101
<i>United States v. Armstrong</i>	102
P. Karlan, Race, Rights, and Remedies in Criminal Adjudication	105
Notes and Questions	106
Problem	108
C. Plea Bargaining	108
<i>Brady v. United States</i>	108
A.W. Alschuler, The Supreme Court, the Defense Attorney, and the Guilty Plea	111
Notes on Plea Bargaining	112
Note on Plea Outcomes versus Trial Outcomes	117
A. Enker, Perspectives on Plea Bargaining	117
A. Specter, Book Review	118
A.W. Alschuler, The Prosecutor's Role in Plea Bargaining	119
S. Bibas, Plea Bargaining Outside the Shadow of Trial	119
A.M. Crespo, The Hidden Law of Plea Bargaining	120
Notes	120
Notes on the Policy Debate	121
A.W. Alschuler, Book Review	121

<i>Scott v. United States</i>	123
<i>Bordenkircher v. Hayes</i>	129
D. Lynch, The Impropriety of Plea Agreements: A Tale of Two Counties	132
Notes	133
G.E. Lynch, Our Administrative System of Criminal Justice	135
Notes and Questions	138
D. Formal Trials	139
Introductory Note	139
1. The Presentation of Evidence	141
Notes	141
Questions on Jury Instructions	146
2. Proof Beyond a Reasonable Doubt	146
<i>In re Winship</i>	146
Notes	147
a. Allocating the Burden of Proof	151
Introductory Note	151
<i>Patterson v. New York</i>	152
Notes and Questions	155
J.C. Jeffries Jr. & P.B. Stephan, Defenses, Presumptions and Burdens of Proof in the Criminal Law	156
b. Presumptions	159
3. The Role of the Jury	160
<i>Duncan v. Louisiana</i>	160
Notes	163
G. Williams, The Proof of Guilt	165
L.M. Ouziel, Beyond Law and Fact: Jury Evaluation of Law Enforcement	166
H. Kalven & H. Zeisel, The American Jury	167
J. Bowers, Upside-Down Juries	168
D.W. Broeder, The Functions of the Jury— Facts or Fictions?	168
<i>United States v. Dougherty</i>	171
Notes and Questions on Nullification	174
P. Butler, Racially Based Jury Nullification: Black Power in the Criminal Justice System	181
R.L. Kennedy, Race, Crime, and the Law	182
Note on Race-Based Nullification	183
Notes on the Jury's Role in Sentencing	183
Notes and Questions on Inconsistent Verdicts	186

Contents	xiii
Chapter 3 Defining Criminal Conduct—The Elements of Just Punishment	189
A. Introduction	189
B. Legality	190
<i>Commonwealth v. Mochan</i>	190
Notes	192
<i>McBoyle v. United States</i>	195
<i>Yates v. United States</i>	195
Notes	203
Problem	207
<i>Keeler v. Superior Court</i>	207
Notes	211
Rogers v. Tennessee	212
Note	215
<i>City of Chicago v. Morales</i>	216
S. Chapman, Court Upholds America’s Right to Hang Out	223
Notes	224
C. Proportionality	234
Introductory Note	234
J. Bentham, Principles of Penal Law	234
H. Gross, A Theory of Criminal Justice	235
H.L.A. Hart & A. Honoré, Causation in the Law	236
A.C. Ewing, A Study of Punishment II: Punishment as Viewed by the Philosopher	236
H.L.A. Hart, Law, Liberty and Morality	236
A. von Hirsch & A. Ashworth, Proportionate Sentencing: Exploring the Principles	236
<i>Harmelin v. Michigan</i>	237
Notes	242
D. Culpability	248
1. Actus Reus—Culpable Conduct	248
a. The Requirement of Voluntary Action	248
<i>Martin v. State</i>	248
Notes and Questions	249
<i>People v. Newton</i>	251
Notes and Questions	252
M. Kelman, Interpretive Construction in the Substantive Criminal Law	258
M. Moore, Act and Crime	258

Note on the Concurrence Requirement	258
Note on Culpable Thoughts	260
W. Blackstone, Commentaries	260
J.F. Stephen, A History of the Criminal Law of England	260
G. Dworkin & G. Blumenfeld, Punishments for Intentions	260
G. Williams, Criminal Law: The General Part 2	261
A. Goldstein, Conspiracy to Defraud the United States	261
b. Omissions	261
<i>Jones v. United States</i>	261
Notes	262
<i>Pope v. State</i>	263
Notes	265
J. Kleinig, Good Samaritanism	268
Notes on the Duties of a Bystander	270
Notes on Duties Triggered by Special Circumstances	273
Note on Possession	279
c. Distinguishing Omissions from Acts	280
<i>Barber v. Superior Court</i>	280
Airedale NHS Trust v. Bland	282
Note	283
Cruzan	283
J. Robertson, Respect for Life in Bioethical Dilemmas—The Case of Physician-Assisted Suicide	283
2. Mens Rea—Culpable Mental States	284
a. Basic Conceptions	284
Introductory Note	284
<i>Regina v. Cunningham</i>	285
Regina v. Faulkner	287
Notes on Common-Law Terminology	288
State v. Hazelwood	292
Santillanes v. New Mexico	294
<i>Elonis v. United States</i>	294
Questions on <i>Elonis</i>	296
Note on the Model Penal Code Reforms	296
Model Penal Code and Commentaries, Comment to §2.02	297
Notes on Applying the MPC Approach	300
Burglary (N.Y. Penal Law §140.25) (2020)	300
Burglary (Cal. Penal Code §§459-460) (2020)	300

Contents

xv

Destruction of Property (D.C. Code Ann. §22-303) (2021)	300
b. Willful Blindness	304
Introductory Note	304
<i>United States v. Jewell</i>	305
Notes	306
c. Mistake of Fact	312
<i>Regina v. Prince</i>	312
Notes and Questions on Mistakes of Fact	314
Model Penal Codes and Commentaries, Comment to §2.04	317
Note on Current Law	318
<i>People v. Olsen</i>	320
Questions on <i>Olsen</i>	323
<i>B (A Minor) v. Director of Public Prosecutions</i>	323
Garnett v. State	325
Note on Statutory Rape	327
d. Strict Liability	329
Introductory Note	329
United States v. Balint	329
United States v. Dotterweich	330
<i>Morissette v. United States</i>	331
<i>Staples v. United States</i>	335
Problems	337
<i>State v. Guminga</i>	339
Notes on Vicarious Liability	341
<i>Regina v. City of Sault Ste. Marie</i>	343
Notes	345
Notes on the Academic Debate	347
A. Goodhart, Possession of Drugs and Absolute Liability	347
M. Kelman, Strict Liability: An Unorthodox View	347
P. Johnson, Strict Liability: The Prevalent View	348
S.J. Schulhofer, Harm and Punishment: A Critique of Emphasis on the Results of Conduct in the Criminal Law	348
D. Husak, Strict Liability, Justice, and Proportionality	349
V. Bergelson, Does Fault Matter?	349
Model Penal Code and Commentaries, Comment to §2.05	349
e. Mistake of Law	350
Introductory Note	350
<i>People v. Marrero</i>	350

Notes on the Rationale of <i>Ignorantia Legis</i>	355
Notes on Scope of the <i>Ignorantia Legis</i> Doctrine	357
<i>Cheek v. United States</i>	360
Note on “Willfully” and “Knowingly”	362
United States v. International Minerals & Chemical Corp.	362
Liparota v. United States	362
United States v. Ansaldi	363
Problem	364
Note on Mens Rea Reform	364
Notes on Official Reliance	365
<i>Lambert v. California</i>	370
Notes and Questions	372
Problem: The “Cultural Defense”	374
 Chapter 4 Rape	 377
A. Perspectives	378
R. Karuturi, Rape Anxiety	378
A. Taub, Rape Culture Isn’t a Myth. It’s Real, and It’s Dangerous	378
M. McEwan, Rape Culture	378
L. Gorman, Walking While Female: A Story of Sexual Assault in Broad Daylight	379
L. Hirschman, Reckoning	379
A. Semuels, Low-Wage Workers Aren’t Getting Justice for Sexual Harassment	379
Notes	380
B. Statutory Frameworks	386
Introductory Note	386
California Penal Code, Title 9 (1950)	387
Model Penal Code (Proposed Official Draft 1962)	387
California Penal Code, Title 9 (2021)	388
New York Penal Law (2021)	390
Wisconsin Statutes (2021)	391
Model Penal Code, Tentative Draft No. 5 (2021)	392
C. Actus Reus	392
1. Force and Coercion	393
Introductory Note	393
<i>State v. Rusk</i>	393
Note on Force and Resistance	398

Contents

xvii

<i>State v. DiPetrillo</i>	401
Commonwealth v. Torres	403
Notes on the Varieties of “Force”	405
S. Estrich, Real Rape	406
Notes on Nonphysical Coercion	407
Problems	409
S. Schulhofer, The Feminist Challenge in Criminal Law	411
S. Schulhofer, Unwanted Sex	411
M. Chamallas, Consent, Equality, and the Legal Control of Sexual Conduct	412
D.P. Bryden, Redefining Rape	412
2. Absence of Consent	412
a. Replacing Force with Non-Consent	412
<i>State in the Interest of M.T.S.</i>	412
Notes	416
b. The Meaning of Consent	417
<i>State v. McFadden</i>	417
Notes	419
D.N. Husak & G.C. Thomas III, Date Rape, Social Convention and Reasonable Mistakes	424
V. Berger, Rape Law Reform at the Millennium	424
S.J. Schulhofer, Taking Sexual Autonomy Seriously	424
M.J. Anderson, Negotiating Sex	425
Notes on Defective Consent	426
3. Deception	429
<i>People v. Evans</i>	429
Boro v. Superior Court	431
Notes on Deception	433
D. Mens Rea	435
<i>Commonwealth v. Sherry</i>	435
<i>Commonwealth v. Fischer</i>	438
Note on the <i>Fischer</i> Case	441
Notes on Mistake as to Consent	441
D.N. Husak & G.C. Thomas III, Date Rape, Social Convention and Reasonable Mistakes	447
C.A. MacKinnon, Feminism, Marxism, Method, and the State: Toward a Feminist Jurisprudence	447
E. The Marital Exemption	447
M. Hale, The History of the Pleas of the Crown	447

People v. Liberta	448
Notes	448
F. The Dynamics of Reform	450
G. Problems of Proof	454
Introductory Notes	454
<i>State v. DeLawder</i>	456
Notes	458
 Chapter 5 Homicide	 461
A. Introduction	461
<i>Report of the Royal Commission on Capital Punishment, 1945-1953</i>	462
California Penal Code (2021)	463
Pennsylvania Consolidated Statutes, Title 18 (2021)	465
New York Penal Law (2021)	467
Model Penal Code	468
The Penal Code of Sweden	469
B. Legislative Grading of Intended Killings	469
1. The Premeditation-Deliberation Formula	469
Introductory Note	469
Model Penal Code and Commentaries, Comment to §210.2	469
<i>Commonwealth v. Carroll</i>	470
<i>State v. Guthrie</i>	474
Notes on Premeditation	476
2. Mitigation to Manslaughter	480
a. The Concept of Provocation	480
<i>Girouard v. State</i>	480
<i>Maher v. People</i>	482
Notes	485
S.J. Morse, Undiminished Confusion in Diminished Capacity	489
E.L. Miller (Comment), (Wo)manslaughter: Voluntary Manslaughter, Gender, and the Model Penal Code	489
A. Gruber, A Provocative Defense	489
Law Commission (U.K.), Report No. 290, Partial Defences to Murder	490
Note on Nonprovoking Victims and Provoking Defendants	494
b. The Model Penal Code Approach	496
<i>People v. Casassa</i>	496
Notes on the Model Penal Code	499

Contents	xix
c. The Reasonable Person Requirement	501
Notes	501
C. Legislative Grading of Unintended Killings	506
1. The Creation of Homicidal Risk	506
a. Distinguishing Civil and Criminal Liability	506
<i>Commonwealth v. Welansky</i>	506
Notes and Questions	509
Rex v. Bateman	509
State v. Barnett	509
J. Hall, General Principles of Criminal Law	510
<i>People v. Hall</i>	511
Notes	513
b. Objectivity and Individualization in Criminal Negligence	514
Introductory Note	514
<i>State v. Williams</i>	515
Notes and Questions	517
Notes on the Objective Standard	518
Problem	523
c. Distinguishing Murder from Manslaughter	524
<i>Commonwealth v. Malone</i>	524
Notes	526
<i>United States v. Fleming</i>	528
Notes and Questions	529
2. The Felony-Murder Rule	532
a. The Basic Doctrine	532
<i>Regina v. Serné</i>	532
People v. Stamp	534
Notes on the Scope of the Felony-Murder Rule	535
Notes on the Rationale of the Felony-Murder Rule	536
People v. Washington	537
T.B. Macaulay, A Penal Code Prepared by the Indian Law Commissioners, Note M	537
G.P. Fletcher, Reflections on Felony-Murder	538
J.J. Tomkovicz, The Endurance of the Felony-Murder Rule	539
Model Penal Code and Commentaries, Comment to §210.2	539
Note on the MPC Solution	540
Notes on the Misdemeanor-Manslaughter Rule	541

Notes on Statutory Reform	542
Notes on Judicial Reform	543
b. The “Inherently Dangerous Felony” Limitation	545
<i>People v. Phillips</i>	545
Notes on Inherent Danger “In the Abstract”	546
<i>Hines v. State</i>	547
Notes on Inherent Danger “As Committed”	549
c. The Merger Doctrine	551
<i>People v. Burton</i>	551
Notes on the Merger Doctrine	553
<i>People v. Chun</i>	556
Questions	557
d. Killings Not “In Furtherance” of the Felony	558
Introductory Note	558
<i>State v. Canola</i>	559
Notes	561
 Chapter 6 The Significance of Resulting Harm	 567
A. Causation	567
1. Foreseeability and Coincidence	568
<i>People v. Acosta</i>	568
Notes and Questions	571
Notes on “Factual” and “Proximate” Cause	572
<i>People v. Arzon</i>	574
<i>People v. Warner-Lambert Co.</i>	576
Notes on Foreseeability and Risk	577
<i>M. Hale, Pleas of the Crown</i>	579
<i>Regina v. Cheshire</i>	579
<i>State v. Shabazz</i>	579
<i>United States v. Main</i>	580
Note on Omissions as Causes	580
Note on the Rationale of the Causation Requirement	581
Notes on Transferred Intent	582
2. Subsequent Human Actions	584
a. Subsequent Actions Intended to Produce the Result	584
<i>People v. Campbell</i>	584
<i>People v. Kevorkian</i>	585
Notes on Assisted Suicide	587

Contents**xxi**

Notes on Intervening Human Action	589
Notes on Subsequent Acts of Third Parties	592
b. Subsequent Actions That Recklessly Risk the Result	594
Introductory Notes	594
<i>Commonwealth v. Root</i>	595
Problems	597
<i>State v. McFadden</i>	598
<i>Commonwealth v. Atencio</i>	599
Notes and Questions	600
B. Attempt	601
1. Introduction	601
J.F. Stephen, A History of the Criminal Law	602
H.L.A. Hart, The Morality of the Criminal Law	602
J. Feinberg, Equal Punishment for Failed Attempts	602
A. Gruber, A Distributive Theory of Criminal Law	603
S.J. Schulhofer, Attempt	603
Model Penal Code §5.05(1)	603
Model Penal Code and Commentaries, Comment to §5.05	603
Note	603
2. Mens Rea	604
<i>Smallwood v. State</i>	604
Notes and Questions	606
3. Preparation versus Attempt	611
King v. Barker	611
<i>People v. Rizzo</i>	612
Notes	614
Note on the Interaction Between Actus Reus and Abandonment	615
<i>McQuirter v. State</i>	616
Notes and Questions	618
Notes on Substantive Crimes of Preparation	621
Notes on Stalking	623
<i>United States v. Jackson</i>	627
Note on Statutory Reform	629
Problems	630
4. Solicitation	633
<i>State v. Davis</i>	633
United States v. Church	634

Note	635
Notes on Solicitation	636
5. Impossibility	637
<i>People v. Jaffe</i>	637
<i>People v. Dlugash</i>	639
Notes on Impossibility	641
United States v. Berrigan	642
United States v. Oviedo	644
<i>The Case of Lady Eldon's French Lace</i>	644
Comment	647
Note	650
 Chapter 7 Group Criminality	 651
A. Accountability for the Acts of Others	651
Introductory Notes	651
S.H. Kadish, A Theory of Complicity	651
1. Mens Rea	655
Introductory Note	655
a. Mens Rea for Actions of the Principal	655
<i>Hicks v. United States</i>	655
Problem: Variations on <i>Hicks</i>	658
<i>State v. Gladstone</i>	658
Notes and Questions	659
<i>Rosemond v. United States</i>	663
Notes and Questions	667
Note on Substantive Crimes of Facilitation	668
b. Mens Rea for Results and Attendant Circumstances	672
<i>State v. McVay</i>	673
<i>Commonwealth v. Roebuck</i>	674
Notes and Questions	675
<i>People v. Russell</i>	678
Notes	679
c. The Natural and Probable Consequences Theory	680
<i>People v. Luparello</i>	680
Roy v. United States	682
Notes and Questions	683

Contents**xxiii**

2. Actus Reus	685
a. Encouragement	685
<i>Wilcox v. Jeffery</i>	685
Questions on Encouragement as Actus Reus	687
b. The Materiality of the Aid	688
State ex rel. Attorney General v. Tally, Judge	688
Problems on the Materiality of the Aid or Encouragement Given	689
3. The Relationship Between the Liability of the Parties	692
<i>State v. Hayes</i>	692
Vaden v. State	693
Notes and Questions	694
Notes and Problems on the Derivative Nature of Accomplice Liability	696
Notes on Differences in the Degree of Culpability	699
B. Conspiracy	701
Introductory Notes	701
1. Conspiracy as a Form of Accessorial Liability	707
<i>Pinkerton v. United States</i>	707
State v. Bridges	712
Notes on the Merits of <i>Pinkerton</i>	716
Notes on <i>Pinkerton</i> and Minor Participants	720
Transitional Note	721
2. The Actus Reus of Conspiracy	721
Introductory Note	721
<i>United States v. Alvarez</i>	721
Notes	723
<i>United States v. Apple, Inc.</i>	724
Problems	725
Notes on the Overt-Act Requirement	726
3. The Mens Rea of Conspiracy	728
<i>People v. Lauria</i>	728
Notes on Mens Rea	733
4. The Duration and Scope of a Conspiracy	737
Notes	737
5. Single or Multiple Conspiracies?	741
Model Penal Code and Commentaries, Comment to §5.03	741
<i>Kotteakos v. United States</i>	741

Anderson v. Superior Court	743
<i>United States v. Bruno</i>	744
United States v. Borelli	745
Problem	746
<i>United States v. McDermott</i>	747
Questions	749
Note on Multiple Objectives	749
Note on the Model Penal Code Approach	750
Model Penal Code and Commentaries, Comment to §5.03	750
6. Parties	752
<i>Gebardi v. United States</i>	752
Notes	753
<i>Garcia v. State</i>	756
Notes	757
7. Reassessing the Law of Conspiracy	759
P. Johnson, The Unnecessary Crime of Conspiracy	759
N.K. Katyal, Conspiracy Theory	760
C. Liability Within the Corporate Framework	760
1. Liability of the Corporate Entity	761
<i>New York Central & Hudson River Railroad Co. v. United States</i>	761
Questions	763
<i>United States v. Hilton Hotels Corp.</i>	763
Notes	766
Problem	775
<i>Commonwealth v. Beneficial Finance Co.</i>	776
State v. Community Alternatives Missouri, Inc.	779
Notes	780
2. Punishing the Corporate Entity: The Problem of Sanctions	783
Introductory Note	783
<i>United States v. Guidant LLC</i>	783
Notes	784
3. Liability of Corporate Agents	788
Introductory Note	788
<i>Gordon v. United States</i>	789
Note	790
<i>United States v. Park</i>	791
Notes	795
<i>United States v. MacDonald & Watson Waste Oil Co.</i>	797
Notes	799

Contents	xxv
Chapter 8 Exculpation	803
A. Introduction: The Concepts of Justification and Excuse	803
J.L. Austin, A Plea for Excuses	803
B. Principles of Justification	804
1. Protection of Life and Person	804
<i>United States v. Peterson</i>	804
Note on Self-Defense as a Justification	805
<i>People v. Goetz</i>	805
Notes on the <i>Goetz</i> Case	809
J. Berger, Goetz Case: Commentary on Nature of Urban Life	809
S.L. Carter, When Victims Happen to Be Black	810
Notes on Self-Defense and Race	811
A. Gruber, Race to Incarcerate: Punitive Impulse and the Bid to Repeal Stand Your Ground	812
American Bar Association, Report to the House of Delegates (National Task Force on and Your Ground Laws)	812
L.S. Richardson & P.A. Goff, Self-Defense and the Suspicion Heuristic	812
J.D. Armour, Race Ipsa Loquitur: Of Reasonable Racists, Intelligent Bayesians, and Involuntary Negrophobes	813
L.S. Richardson & P.A. Goff, Self-Defense and the Suspicion Heuristic	813
J. Markovitz, “A Spectacle of Slavery Unwilling to Die”: Curbing Reliance on Racial Stereotyping in Self-Defense Cases	814
Notes on the Meaning of “Deadly Force”	815
Notes on Standards of Judgment	816
<i>State v. Kelly</i>	820
Notes on Battering and Its Effects	825
E. Schneider, Describing and Changing: Women’s Self-Defense Work and the Problem of Expert Testimony on Battering	832
S. Estrich, Defending Women	832
Note on Nonpsychological Defenses	836
<i>State v. Norman</i>	837
R.A. Rosen, On Self-Defense, Imminence, and Women Who Kill Their Batterers	840
D. McCord & S.K. Lyons, Moral Reasoning and the Criminal Law: The Example of Self-Defense	841
Notes on the Imminent Danger Requirement	842
Notes and Questions on Other Issues of Self-Defense	847
<i>State v. Abbott</i>	849
Notes on the Duty to Retreat	851

<i>United States v. Peterson</i>	856
Notes and Questions	858
2. Protection of Property	861
<i>People v. Ceballos</i>	861
Notes on Defense of Habitation	864
Note on Defense of Other Types of Property	866
3. The Use of Force in Law Enforcement	867
Introductory Note	867
Notes on the Legal Framework	870
S. Mullainathan, Police Killings of Blacks: Here Is What the Data Say	875
4. Choice of the Lesser Evil	876
<i>People v. Unger</i>	876
Model Penal Code §3.02	879
Model Penal Code and Commentaries, Comment to §3.02	879
Notes on Prison Escape	880
Notes on the Boundaries of the Necessity Defense	881
Notes on Medical Necessity	884
Notes on Economic Necessity	885
<i>United States v. Schoon</i>	887
Note	889
<i>Regina v. Dudley and Stephens</i>	889
Notes	889
Note on Taking Life to Save Life	891
Note on Rights versus Lives	892
Problems	894
5. Euthanasia	896
Introductory Note	896
<i>Cruzan v. Director, Missouri Dept. of Health</i>	896
<i>Washington v. Glucksberg</i>	898
Notes	900
New York State Task Force on Life and the Law, When Death Is Sought—Assisted Suicide in the Medical Context	902
J. Feinberg, Overlooking the Merits of the Individual Case: An Unpromising Approach to the Right to Die	903
S.H. Kadish, Letting Patients Die: Legal and Moral Reflections	903
C. Principles of Excuse	904
Introductory Note	904

1. Introduction: What Are Excuses and Why Do We Have Them?	904
E.R. Milhizer, Justification and Excuse: What They Were, What They Are, and What They Ought to Be	904
S.H. Kadish, Excusing Crime	905
2. Duress	906
<i>State v. Toscano</i>	906
Model Penal Code §2.09	910
Model Penal Code and Commentaries, Comment to §2.09	910
Notes on the Model Penal Code	911
Note: Necessity and Duress Compared	914
Notes on Duress	915
United States v. Fleming	917
United States v. Contento-Pachon	918
Regina v. Ruzic	919
Problem	922
Note on Positive Inducements	924
3. Intoxication	924
Introductory Note	924
a. Voluntary Intoxication	925
G. Williams, Criminal Law: The General Part	925
Roberts v. People	925
<i>People v. Hood</i>	925
State v. Stasio	927
Notes on Voluntary Intoxication as Evidence Negating Mens Rea	928
Model Penal Code §2.08	930
Model Penal Code and Commentaries, Comment to §2.08	930
b. Involuntary Intoxication	934
Introductory Note	934
<i>Regina v. Kingston</i>	935
Notes	937
4. Mental Disorder	938
a. The Defense of Legal Insanity	938
Introductory Notes	938
Notes on Administering the Insanity Defense	944
i. Competing Formulations	949
<i>M’Naghten’s Case</i>	949
The King v. Porter	950

<i>Blake v. United States</i>	951
Model Penal Code and Commentaries (1985), §4.01	953
<i>United States v. Lyons</i>	955
Notes on the “Volitional Prong” Controversy	959
Notes on Changes in the Law	961
<i>Kahler v. Kansas</i>	964
Notes and Questions on <i>Kahler</i>	968
Note on Abolition of the Insanity Defense	968
H. Wechsler, Insanity as a Defense: A Panel Discussion	970
S.J. Morse & R.J. Bonnie, Abolition of the Insanity Defense Violates Due Process	970
N. Morris, Psychiatry and the Dangerous Criminal	970
S.J. Morse & R.J. Bonnie, Abolition of the Insanity Defense Violates Due Process	971
S.J. Morse, Internal and External Challenges to Culpability	971
Model Penal Code and Commentaries, Comment to §4.01	971
ii. The Meaning of Wrong	972
<i>State v. Crenshaw</i>	972
Notes	974
iii. The Meaning of “Mental Disease or Defect”	976
<i>State v. Guido</i>	976
Notes and Questions	978
Note on the Psychopath	980
Notes on Automatism—Sane and Insane	981
b. Diminished Capacity	982
<i>United States v. Brawner</i>	982
<i>Clark v. Arizona</i>	984
Notes on Mental Disorder to Negate Mens Rea	985
Note on Mental Disorder as a Ground for Mitigation	988
5. Changing Patterns of Excuse	990
<i>Robinson v. California</i>	990
Notes	992
<i>Powell v. Texas</i>	992
State ex rel. Harper v. Zegeer	998
Notes	999
<i>United States v. Moore</i>	1002
M. Dan-Cohen, Actus Reus	1004
Notes	1005
Note on Structural and Environmental Deprivation	1005

Contents**xxix**

R. Delgado, “Rotten Social Background”: Should the Criminal Law Recognize a Defense of Severe Environmental Deprivation?	1005
Note	1007
H.L.A. Hart, Punishment and Responsibility	1008
C. Thomas, Punishment and Personhood	1008
Questions	1010

Chapter 9 Theft Offenses**1013**

A. The Means of Acquisition	1013
Model Penal Code and Commentaries, Comment to §223.1	1013
1. Trespassory Takings	1014
<i>People v. Williams</i>	1014
Notes	1017
<i>Topolewski v. State</i>	1019
Notes	1021
Note on Robbery and Extortion	1022
Note, A Rationale of the Law of Aggravated Theft	1022
California Penal Code (2021) §211	1022
California Penal Code (2021) §212	1022
California Penal Code (2021) §518	1022
California Penal Code (2021) §519	1023
Model Penal Code §222.1	1023
Model Penal Code §223.4	1023
Model Penal Code and Commentaries, Comment to §223.4	1023
2. Misappropriation	1024
<i>Nolan v. State</i>	1024
Note on Embezzlement	1025
Notes on Appropriation of Lost Property and Property Transferred by Mistake	1027
Problem	1030
<i>State v. Riggins</i>	1031
Model Penal Code, §223.8	1033
Model Penal Code and Commentaries, Comment to §223.8	1033
Notes	1036
3. Fraud	1037
Introductory Note	1037
<i>Hufstetter v. State</i>	1039
<i>Graham v. United States</i>	1040

xxx

Contents

Notes and Questions	1041
<i>People v. Ashley</i>	1042
Notes and Questions	1044
<i>Nelson v. United States</i>	1045
Problem	1048
4. Blackmail	1049
<i>State v. Harrington</i>	1049
Notes and Questions	1051
<i>People v. Fichtner</i>	1055
Note	1057
Problem	1057
Note on the Rationale of Blackmail	1058
J. Lindgren, Unraveling the Paradox of Blackmail	1058
G.P. Fletcher, Blackmail: The Paradigmatic Crime	1058
D.H. Ginsburg & P. Shechtman, Blackmail: An Economic Analysis of the Law	1058
W.J. Gordon, Truth and Consequences: The Force of Blackmail's Central Case	1059
5. Consolidation	1060
Introductory Note	1060
Model Penal Code §223.1	1060
New York Penal Law §155.05 (2021)	1060
New York Penal Law §155.45 (2021)	1060
Illinois Compiled Statutes Chapter 720, Section 5/16-1 (2021)	1061
California Penal Code §484(a) (2021)	1061
California Penal Code §952 (2021)	1061
B. The Property Subject to Theft	1062
1. Traditional Theft	1062
<i>State v. Miller</i>	1062
Notes	1063
2. Theft of Information	1066
<i>United States v. Girard</i>	1066
Notes	1068
<i>Regina v. Stewart</i>	1074
Note	1075
3. Honest Services	1076
<i>Skilling v. United States</i>	1077
Notes	1081

Contents	xxxi
C. Mens Rea	1085
<i>People v. Brown</i>	1085
Note	1085
People v. Jennings	1086
<i>Regina v. Feely</i>	1087
Notes and Questions on Intent to Restore or Pay	1089
<i>People v. Reid</i>	1091
Notes	1092
 Chapter 10 Imposing Punishment	 1095
A. What Is Punishment?	1095
1. Imprisonment	1095
R. Delaney, S. Subramanian, A. Shames & N. Turner, Reimagining Prison	1096
R. Wright, Prisons: Prisoners, Encyclopedia of Crime and Justice	1097
Notes on Prison Conditions	1097
Note on Civil Sanctions	1102
2. Kinds of Punishment	1104
<i>United States v. Gementera</i>	1104
Notes	1108
D.M. Kahan, What Do Alternative Sanctions Mean?	1110
T.M. Massaro, Shame, Culture, and American Criminal Law	1110
J. Gilligan, Violence	1110
J.Q. Whitman, What Is Wrong with Inflicting Shame Sanctions?	1110
B. Sentencing in Non-Capital Cases	1114
1. Discretionary Sentencing Systems	1114
<i>Williams v. New York</i>	1114
Note, Due Process and Legislative Standards in Sentencing	1117
Notes	1118
F. Allen, The Borderland of Criminal Justice	1120
M. Frankel, Criminal Sentencing: Law Without Order	1120
Twentieth Century Fund, Task Force on Criminal Sentencing, Fair and Certain Punishment	1121
2. Sentencing Reform	1121
Introductory Notes	1121
United States v. Vasquez	1124
F.O. Bowman, III, The Failure of the Federal Sentencing Guidelines: A Structural Analysis	1129

Notes on the Sentencing Guideline Approach	1132
<i>United States v. Deegan</i>	1138
D.B. Henriques & J. Healy, Madoff Goes to Jail After Guilty Pleas	1141
<i>United States v. Bernard L. Madoff</i>	1142
Notes and Questions	1144
Notes on the Jury's Role in Sentencing	1148
Taking a Second Look at a Defendant's Sentence	1149
3. Constitutional Limits	1150
<i>Ewing v. California</i>	1151
Notes	1155
<i>Graham v. Florida</i>	1156
Notes	1159
C. Sentencing in Capital Cases	1161
1. The Current Context	1162
2. Theories of Punishment Applied to the Death Penalty	1163
3. Error	1166
4. Bias	1168
5. Constitutional Limitations	1170
Introductory Note	1170
<i>Gregg v. Georgia</i>	1172
Notes	1177
<i>Atkins v. Virginia</i>	1183
Notes	1188
<i>McCleskey v. Kemp</i>	1192
Notes	1199
Appendix, American Law Institute, Model Penal Code	1207
Table of Cases	1285
Table of Authorities	1303
Index	1363

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

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 LaFare, *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.

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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.

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———— **CRIMINAL LAW AND ITS PROCESSES**
CASES AND MATERIALS

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>.

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

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

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

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 *underenforced*. 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

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.

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).