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Ninth Edition

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Ninth Edition

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In memory of John Kaplan, 1929–1989

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I

JUST PUNISHMENT **19**

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PREFACE

Well into its fourth decade, *Criminal Law: Cases and Materials* continues to aim to introduce students to the basic purposes, concepts, doctrines, and analytic techniques of the substantive criminal law. Our foundational premise is that the substantive criminal law is a statutory as well as a "common law" subject. Therefore, this book teaches lawyers-to-be to construe and apply express legislative rules of liability as well as to understand the fundamental concepts that are just as often *presupposed* in criminal codes. We expose students to alternative statutory formulations of offenses and defenses and enable students to become familiar with the influential Model Penal Code. This book emphasizes the crucial skills of element analysis, and illuminates the considerations of social policy and moral principle that inform the interpretation, application, and evaluation of criminal statutes.

Of course, this book participates in the classic pedagogic tradition of relying on appellate decisions in actual cases to explicate the doctrines and policy dilemmas of the criminal law. The book's introduction explains just how these cases arise, what kinds of substantive criminal law issues come up on appeal, what sources of law appellate courts bring to bear on these issues, and what methods of reasoning and argument the courts use to resolve them. We continue to include some of the most venerable of the illustrative cases, but we also add very recent cases that capture newer developments in this constantly changing field of law.

Since its inception, however, this book has always been more than a collection of cases. It continues to interweave judicial opinions with statutory material, sociological accounts of crime, historical accounts of the development of the criminal law, and philosophical arguments about criminal justice. Thus, we continue our commitment to place the substantive criminal law in a realistic social setting in which inequality—whether based on race, gender, or poverty—plays an undeniable role.

But our commitment is also to pedagogical clarity, so we include throughout the book introductory and transitional material that provides straightforward explanations of the alternative rules applied in each doctrinal area. The notes that follow principal cases are organized and labeled by legal issue so that students' thinking can be focused on the most pressing questions raised by the cases. And at key points in the text, we interweave problems and exercises to help students master the analytic skills emphasized throughout the book.

Chapter 1, on the purposes and limits of punishment, continues to focus on the policy controversy over historically high incarceration rates, along with the causes and implications of fluctuating crime rates. It includes a comprehensive treatment of Eighth Amendment proportionality, enriched by the important new Supreme Court cases on the legality of life-without-possibility-of-parole sentences for juveniles. (As in previous editions, we place our discussion of proportionality limits on death sentences in this chapter (with references back to it when we turn directly to capital murder in Chapter 7).) But in light of heightened national concerns about mass incarceration, this new edition also includes a timely scholarly articulation of the case for prison abolition, along with updated material on in-prison criminal victimization of inmates as a rarely acknowledged form of punishment.

Chapter 2, "The Criminal Act," continues its coverage of voluntary acts, possession, harm, omissions, status crimes, prospectivity, legality, and specificity. It also includes our very contemporary treatment of possession doctrine applied to computer files. But this new edition shows that some of the more classic doctrines dealing with constitutional limits on crime definition have been undergoing new scrutiny by the U.S. Supreme Court. Thus, on executive definition of crimes, the new case of *Gundy v. United States* (concerning sex offender registration laws) casts doubt on the venerable precedent of *United States v. Grimaud*, allowing broad delegation of crime-creating power to executive agencies. And *United States v. Davis* (addressing the statutory term "crime of violence") emphasizes the roots of the void-for-vagueness doctrine in separation of powers as well as fundamental liberty, in applying it to ensure public notice and democratic accountability. Finally, a new Circuit case revives the legacy of *Robinson v. California*, invoking the Eighth Amendment in questioning the status element of being a "habitual drunkard" in a state law applied to the homeless.

Chapter 3, "The Guilty Mind," continues to explore the question of whether and when criminal liability depends on culpability. It distinguishes different culpable mental states and trains students to construct the mental elements of statutory offenses. This new edition adds enhanced historical material on the roots and current application of the general/specific intent distinction. This chapter concludes by examining the special problems of mistake of law and capacity for *mens rea*.

Chapter 4, on causation, continues to pose the problem of why and how we assign causal responsibility for harmful results. It also analyzes the doctrinal structure of causation by exploring the nuances of causation-in-fact, proximate causation, direct causation, and causation by omission. On a contemporary note, the new edition adds in-depth treatment of the prosecution of Michelle Carter, convicted of manslaughter for inducing a young man's suicide remotely through text messages and calls.

Chapter 5, "Intentional Homicide," continues to illustrate the concepts of intent and premeditation. This edition adds new historical material on when, at common law, "intent to injure" could suffice for this crime. As always, the chapter explores the moral dilemmas posed by the problem of whether and how emotional distress can mitigate murder liability in a society riven by controversies over cultural diversity and gender inequality. In particular, it updates law and commentary exploring the so-called "gay panic defense" and "trans panic defense."

Chapter 6, "Unintentional Homicide," distinguishes involuntary manslaughter, extreme indifference murder, and felony murder. The section on felony murder continues to be informed by research on the historical and normative underpinnings of felony murder liability, reported in Guyora Binder's comprehensive study, *Felony Murder* (2012). The new edition further clarifies the varying criteria of culpability, causation, and dangerousness for felony murder. Moreover, in light of renewed scrutiny of felony murder across the nation, we include updated material on reforms to felony murder and movement toward its abolition for certain offenders, including the influential new *Brown* case from Massachusetts and California's extensive statutory change to felony murder.

Chapter 7, on capital murder, continues its focus on the operation of capital murder statutes as sentencing schemes requiring a structured assessment of aggravating and mitigating factors. At a time when changes in public and political attitudes signal a sober national reassessment of capital punishment, we include updated empirical information on its incidence and on the demographics of defendants and victims.

Chapter 8, on necessary force, lesser evils, and duress, has been enriched and augmented by material on some very salient contemporary topics. It adds new material on the battered spouse defense, incorporating evolving scholarship on the use and significance of expert evidence. We continue our treatment of such divisive legal developments as "Stand Your Ground" and "Make My Day" laws. In light of national controversies over police killings of civilians and racial justice, we have an expanded section on the divergent treatment of police violence in constitutional civil rights law and state homicide law. In particular, we include the new and controversial California statute that limits (or purports to limit) justification claims by police. Finally, we offer a new section on the state of American law in regard to the power of and limitations on citizen's arrest.

Chapter 9, on mental illness and crime, continues its methodical treatment of the changes in the NGI defense over recent decades, along with a succinct digest of the state of the law in regard to the various relationships between insanity and intoxication. The chapter also considers recent decisions of the Supreme Court suggesting that the Constitution may not require any form of insanity defense, including the new case of *Kahler v. Kansas* (declining to require an excuse for incapacity to distinguish right from wrong). While giving freer rein to the states, these cases also address the relationship between the affirmative NGI defense and proof of capacity for required mens rea dealt with in Chapter 3.

Chapter 10, "Attempt," offers a new and historically informed approach to the perennial puzzle of "impossible attempts." It offers students a new analytic scheme, distinguishing and applying four distinct tests for identifying which unsuccessful endeavors should be immunized from criminal liability: the Model Penal Code test; The Legal Impossibility test; the Rational Motivation test; and an "Obvious Futility" test.

Chapter 11, "Complicity," continues its approach of separately examining the *actus reus* and *mens rea* of complicity. It offers a methodical scheme for sorting the varied permutations of relationships between principal and accomplice that lead to discrepant liability because of differing menial states, defenses, or statuses of the parties. A new inclusion is the New Hampshire case of *State v. Anthony*, which helpfully reframes the question of accomplice liability for

unintended harm. As is our tradition, we close the chapter with a very succinct review of the principles of and tests for criminal liability of corporations or other collective enterprises.

Chapter 12, "Conspiracy," adds two cases to its comprehensive treatment of the elements, incidents, and limitations on conspiracy law. The new *Jones v. State* case from Indiana adds new insight on "renunciation" of conspiratorial purpose. And in our long-standing comprehensive section on the scope and structure of complex conspiracies, we add to the illustrative *Rigas* case on single vs. multiple conspiracies the complementary case of *United States v. Cooper*.

Chapter 13, "Rape," continues to take account of law reform efforts and scholarly research (including new feminist commentary) in this rapidly changing field of law; it also continues to offer a comparison and precise element analysis of the broad range of alternative definitions of sexual assault offenses. The new edition brings up-to-date our narrative regarding the American Law Institute's work in revising the very dated Model Penal Code rules on rape, and, its ultimate lack of consensus on an affirmative consent standard. New case law in this edition addresses doctrines of incapacity and *mens rea*, and particularly explores the changing treatment of incapacity to consent arising from voluntary intoxication.

Chapter 14, "Theft Offenses," continues to include a succinct history of the common law roots of theft, lively case law on theft-based white collar crimes, including mail fraud and bank fraud; and illustrative contemporary case law on some of the intriguing variations of robberies and burglaries.

Chapter 15, "Perjury, False Statements, and Obstruction of Justice," continues to focus on federal criminal law. In recent decades, federal prosecutors have increasingly and controversially used their investigatory powers to incriminate suspects in these collateral crimes. This practice poses some of the same fundamental questions about law enforcement discretion raised by the vagrancy, possession, attempt, and conspiracy offenses explored in earlier chapters. In this edition, we augment our illustrative set of perjury and obstruction cases with recent commentary on the irresistible question of whether broad constitutional powers leave room for obstruction liability.

Finally, but most importantly, we are pleased to announce a new member of our team. Professor Aya Gruber, of the University of Colorado Law School, will be joining us as a co-editor. Professor Gruber is well-known to the legal academy as one of the nation's leading scholars of criminal law, as well as criminal procedure, comparative and international law, and critical and feminist legal theory. We have already benefited from her insights and wisdom in preparing this new edition. We are delighted that she will contribute to summer updates to this edition and then will be a full partner for future editions.

Meanwhile, we reiterate the deep motivation for this book. When government takes a person's life or liberty by condemning that person's actions, purposes, and character, we see the most powerful domestic manifestation of government power. The criminal law therefore poses the most important challenge to our responsibility as citizens to understand, to evaluate, and to improve the law that is enforced in our name. We hope the new edition of this book continues to help our students meet that challenge.

Guyora Binder
Robert Weisberg

January 2021

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SPECIAL NOTICE

Some citations have been edited from cases for the sake of smoother reading. Footnotes in cases and other quoted materials have generally been eliminated without indication. Those that were not edited, however, have been renumbered to run consecutively with the editors' footnotes. References to the Model Penal Code, unless otherwise indicated, are to American Law Institute, Model Penal Code and Commentaries (1985).

CRIMINAL LAW

Cases and Materials

INTRODUCTION

This book will introduce you to the basic concepts of criminal law, the alternative rules of criminal law considered and adopted by different American jurisdictions, and the processes of reasoning that lawyers and judges employ when identifying and applying these rules. It is also designed to encourage critical reflection about all three.

Much of the reading in this book consists of reported appellate decisions in criminal cases. In most criminal law courses, such judicial opinions receive the bulk of attention in class discussion. This introductory chapter will assist you in reading these judicial opinions. It will review how criminal cases come before appellate courts, and it will explain as well the range of options those courts have in disposing of these cases. It will alert you to some of the sources of law bearing on the judicial decisions in criminal cases, and to the role that considerations of policy and justice may play in those decisions. This chapter also will make explicit some widely shared and seldom articulated assumptions about legal reasoning. It will introduce the most influential conceptual schemes used to analyze criminal cases into their component issues. Finally, it will discuss the crucial matter of how the burden of proof on these issues is allocated between the prosecution and the defense.

A. THE CAREER OF A CRIMINAL CASE

The bulk of violations of criminal law that come to the attention of law enforcement agencies are reported by victims or other witnesses. Other violations are discovered by police in the course of routine patrols, or observed in the course of police surveillance or undercover work, or uncovered by government officials in the routine gathering of information on the movements of persons, goods, and money entailed in the workings of a modern administrative state. Most reported crimes are never "solved." The police are most likely to make arrests in reported crimes harming individual persons because such crimes command the most investigative resources and because reports by the victim (if he or she survives) or other witnesses or physical evidence make it easier to

identify the perpetrators. Among all crimes, homicides are the ones most vigorously investigated and most often solved, in part because the police are often able to find the killer among the acquaintances or relatives of the victim.

1. Procedure Before Trial

DONALD DRIPPS, CRIMINAL JUSTICE PROCESS
1 Encyclopedia of Crime & Justice 362, 364-69 (2002)

In the United States the adjudicatory process varies considerably from one jurisdiction to another, although the process throughout the country is highly similar. Most cases originate with an arrest by the police. The Supreme Court has held that the Constitution requires a prompt judicial determination of probable cause to believe that the arrestee has committed an offense. If that judicial probable cause determination was not made prior to arrest by the issuance of a warrant or the return of an indictment by a grand jury, the arrestee must be brought before a judicial officer for a determination of probable cause. Although the time frame prior to this first appearance is not rigidly defined, the Court has recognized a presumption that detention without judicial authorization that lasts longer than forty-eight hours is unconstitutional.

. . . [C]ommon practice is to perform several functions at the first appearance in court if the court finds that probable cause indeed exists. Bail or other conditions of pretrial release may be set, counsel for the indigent may be appointed, and a date for further proceedings may be set.

The period between arrest and presentment in court offers the police the opportunity to interrogate the suspect under the *Miranda* rules. Once the suspect is represented by counsel, it is highly unlikely that the suspect will volunteer information, and any questioning by the police after the right to counsel has attached is unconstitutional. The *Miranda* right to counsel is not the Sixth Amendment right to counsel at trial, but a right derived from the Fifth Amendment privilege against self-incrimination. . . . The Supreme Court in *Miranda* accepted the proposition that counsel may be waived without an appearance in Court or consultation with counsel for purposes of interrogation, but has never intimated that such a waiver of the right to counsel at trial would be valid.

After the arrest and a judicial determination of probable cause, the next step in the process is the selection of a charge by the prosecutor. Prosecutors enjoy extremely wide discretion in selecting charges. Consider, for example, a suspect who fired a gun at another man. This might be dismissed as no crime because the suspect was acting in self-defense (or because the prosecutor concludes that although the defendant was not acting in self-defense a jury might conclude otherwise). At the other end of the continuum the case might be charged out as attempted murder or aggravated assault. In between it might be charged out as illegal possession or discharge of a firearm, or a simple assault. If the suspect has prior convictions the prosecutor may but need not add a charge under a recidivism statute such as the *three strikes* laws. Thus prosecutors typically have discretion to expose the suspect to a range of liability extending from zero to a substantial term of years.

Prosecutors decline to proceed in a substantial percentage of cases. In some cases the police themselves never expected a prosecution and made the

arrest solely for immediate social control purposes. For example, the police might arrest one or both of the drunks involved in a brawl simply to separate them and prevent further violence, or to prevent one of the inebriates from passing out outdoors on a cold night. In other cases the police might hope for an eventual conviction but the prosecutor may decide the evidence is unlikely to persuade a jury.

Often the prosecutor will agree to drop the criminal charges if the defendant will undertake some alternative program to prevent a recurrence of the offense. The prosecutor may agree with a defendant charged with an offense involving or induced by narcotics to abandon the criminal charge provided the suspect enters a drug treatment program. These so-called *diversion arrangements* are quite common, and there is great variety in the types of programs to which persons might be diverted from the criminal justice system.

Juveniles make up a substantial percentage of the population arrested. All U.S. jurisdictions have by statute created specialized juvenile courts. . . . The applicable statutes typically permit juveniles suspected of serious felonies to be transferred to the general criminal justice system and tried as adults. . . .

In jurisdictions that do not require grand jury indictment the prosecutor may unilaterally file an information accusing the defendant of the crime or crimes the prosecutor has chosen to pursue. About half the states and the federal government require grand jury indictment in felony cases. Whether the charging instrument takes the form of an indictment or an information, the basic purpose of the accusation is to enable the accused to prepare a defense to present at a subsequent trial.

The grand jury usually consists of twenty-three citizens who review cases presented by the prosecutor. Although the grand jurors have the power to refuse to indict, in practice the grand jury very rarely rejects a prosecutor's request for an indictment.

If the case originates with an indictment filed before arrest, the process will differ somewhat. The accused will be either arrested or will surrender to face the charge. At that point the process will continue just as in cases that begin with arrest, with the important qualification that the accused's Sixth Amendment right to counsel has attached even before the arrest. Absent a valid waiver of that right to counsel, so-called critical stages of the process require the presence of defense counsel. Critical stages include interrogation, lineups, and court appearances. They do not include photo identification sessions, the interviewing of witnesses other than the defendant, or the gathering or testing of physical evidence.

Once the charge selected by the prosecutor is filed in court, whether by indictment, information, or complaint, the next step in the process is an arraignment at which the defendant appears in court to hear the charges and enter a plea. If the defendant has not yet retained or been appointed counsel, counsel must be appointed, retained, or waived in open court before entering a plea. Likewise if bail has not been previously set or denied, a pretrial release decision will be made at this point.

If the defendant and the prosecution do not reach a plea agreement and the case goes to trial, there typically will be a *discovery* period, an opportunity for pretrial motions, a preliminary hearing, and a trial. The discovery process has become more extensive but still falls far short of the discovery permitted on the civil side. The principal reasons for the difference are fears that criminal

defendants are more likely than civil litigants to harass or intimidate witnesses and the belief that the defendant's right not to testify unfairly turns criminal discovery into a one-way street. . . .

. . . A majority of criminal defendants are represented by publicly provided counsel. There is widespread agreement that the funds provided for indigent defense do not permit anything like an independent investigation by defense counsel in every case. Caseload pressures, often in the range of hundreds of felony files per lawyer per year, require defense counsel to select a few cases for trial while arranging the most favorable plea agreement possible for the rest.

Pretrial motions can be made for a wide variety of purposes, including but not limited to: (1) suppression of otherwise admissible evidence because the evidence was improperly obtained; (2) change of venue; (3) admission or exclusion of evidence; (4) compelling discovery withheld by the other side; (5) determining competence to stand trial; and (6) court appointment of expert witnesses for an indigent defendant. Motions are decided by the court without a jury. If a ruling on a motion turns on disputed facts, the court will hold an evidentiary hearing to determine the facts. Pretrial rulings are ordinarily not appealable by the defense until after a conviction, but [appeals] are commonly allowed for the prosecution, as otherwise the double jeopardy principle might prevent a retrial even though the government lost the trial because the trial court erroneously ruled on a motion.

Like rulings on motions, the preliminary hearing is conducted by the court without a jury. In theory the preliminary hearing is designed both as a final test of probable cause for a trial and as a discovery tool.[1] Actual practice varies a great deal. In some cases prosecutors introduce their full case, both to encourage a plea from the defense and to preserve the testimony of wavering witnesses. In other cases the prosecutor may put on the minimum needed to go forward to trial out of fear of giving the defense an opportunity for discovery. . . .

. . . Prosecutors refuse to file charges or dismiss charges in a large number of cases. In the cases prosecutors choose to pursue, the majority end not in trial by jury but by a plea of guilty or a successful motion to dismiss. Statistics vary across jurisdictions, but it would not be uncommon for half of all arrests to result either in no charges or in charges that are later dismissed, for 80 percent of the cases that are not dismissed to end in guilty pleas, and for the remaining cases to be tried. The government typically wins a significant but not overwhelming majority of criminal trials; a 70 percent conviction rate at trial would not be unusual.

These statistics reflect the ubiquity of plea bargaining. Plea bargaining involves the prosecutor trading a reduction in the seriousness of the charges or the length of the recommended sentence for a waiver of the right to trial and a plea of guilty to the reduced charges. Both sides usually have good reasons for settlement. In a case in which the evidence of guilt is overwhelming, the prosecution can avoid the expense and delay of a trial by offering modest concessions to the defendant. When the evidence is less clear-cut the government can avoid the risk of an acquittal by agreeing to a plea to a reduced charge. Because the substantive criminal law authorizes a wide range of charges and sentences

1. [Thus, the preliminary hearing is especially important in cases where the prosecutor is not required to and chooses not to proceed by way of obtaining an indictment through a grand jury. Proceeding by way of indictment is constitutionally required in felony cases in federal court (unless the defendant waives), but requirements vary widely among the states.—Eds.]

for typical criminal conduct, and because the procedural law allows prosecutors wide discretion in selecting charges, the prosecution can almost always give the defense a substantial incentive to plead guilty. . . .

[T]he prosecution has the incentive to maximize the benefit of pleading guilty in the weakest cases. The more likely an acquittal at trial the more attractive a guilty plea is to the prosecution. Given caseload pressures prosecutors may simply dismiss the weakest cases. But in a borderline case that does go forward the prosecution may very well threaten the most serious consequences to those defendants who may very well be innocent. . . .

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2. Substantive Legal Issues Before Trial

Whether entered in the form of an indictment or an information, the formal criminal charge identifies the criminal violation, often referring to the specific criminal statute violated, and alleges facts on the basis of which the grand jury or prosecutor believes the criminal violation occurred. These are the facts that the prosecution is obliged to prove at trial. The charging paper often describes the facts in vague language that tracks the language of the statutory provision.

The defense will generally have an opportunity to challenge the legal sufficiency of the charge before trial. The defense may file a motion to have the charge dismissed on any of three grounds: (1) the crime charged is not, in fact, a violation of the criminal law of the relevant jurisdiction; or (2) the facts alleged, even if true, do not constitute the crime charged; or (3) the evidence proffered at the preliminary hearing does not support the facts alleged.

In almost all American jurisdictions, an act cannot constitute a crime unless it violates a criminal statute, although exactly what this minimal condition means is contestable (see Chapter 2, "The Elements of the Criminal Offense"). In addition, conduct cannot constitute a crime if the criminal statute, as applied to the conduct, violates federal or applicable state constitutional law. The clauses of the federal constitution with the greatest bearing on "substantive" criminal law are the prohibitions on the taking of life, liberty, and property without "due process of law" that appear in the Fifth and Fourteenth Amendments, and the Eighth Amendment's prohibition on "cruel and unusual punishments." The application of these constitutional provisions to criminal law will be given some attention in this book, particularly in Chapter 1 ("Just Punishment"), Chapter 2 ("The Elements of the Criminal Offense"), Chapter 3 ("The Guilty Mind"), and Chapter 7 ("Capital Murder and the Death Penalty").

The facts that must be alleged in order to charge a crime are often referred to as the "elements" of the criminal offense. The prosecution may be required to prove additional facts at trial, depending on the strategies of the defendant. For example, if a homicide defendant claims to have used force justifiably in self-defense, the prosecution may be required to disprove this justification "defense" at trial. But the *absence* of justification is not generally considered an element of the offense and usually need not be alleged in the charge; moreover, as we will shortly see, in some instances it is the defense that must bear the burden of proving certain key facts establishing the *presence* of a defense-like justification. Most of the legal questions considered in this book involve the

definition of offense elements, while other questions involve the definition of defenses.

The indictment or information may charge a number of different crimes. The judge may dismiss some or all or none of these charges at a pretrial hearing. Other pretrial motions by the defense may bear on the evidence, objecting, for example, that some of the evidence proffered at the preliminary hearing was unconstitutionally obtained, or is irrelevant, unreliable, or prejudicial. This book does not consider the procedural protections of the Fourth, Fifth, and Sixth Amendments that are often at issue in these evidentiary motions, since these matters are covered in courses or books on criminal procedure. Nor does it examine the rules of evidence, which are covered comprehensively in a distinct set of courses and books. Nevertheless, these matters are relevant to substantive criminal law, since the outcome of evidentiary motions may affect the outcome of a motion to dismiss one or more charges, and since the suppression of certain evidence may make it impossible for the prosecution to prove the facts alleged in a charge. Thus, some of the cases in this book will indirectly involve questions of procedure and evidence.

Dismissal of a charge for failure to properly allege the elements of a crime or for want of evidence does not preclude the prosecution from recharging the same offense if it occurs at a pretrial phase before the Fifth Amendment's bar on double jeopardy intervenes. Moreover, the prosecution may appeal the dismissal of a charge, alleging that the judge made an error of law. A few of the judicial opinions excerpted in this book involve appeals from the dismissal of a charge.

At this early stage, the defense ordinarily may not appeal the denial of a motion to dismiss a charge. If the defendant is found guilty, however, the defense may appeal the conviction on the basis that no actual crime was charged, that the facts alleged did not support the charge, or that the evidence offered at trial was insufficient to justify any jury in finding guilt beyond a reasonable doubt.

3. Procedure at Trial

The accused has a constitutional right to trial by jury for any crime for which the possible sentence is more than six months in jail or prison, unless the accused chooses to waive that right and instead have a "bench" trial before a judge alone. (Nevertheless, in some states the prosecution itself can insist on a jury trial.) Typically, first the judge and opposing attorneys select a jury, and then the judge formally reads the charge and confirms that the accused is pleading not guilty. After pretrial motions on such matters as suppression of challenged evidence, the prosecution makes an opening statement describing the facts it intends to prove and the evidence it expects to offer. The defense may respond with its own opening statement or it may opt to wait until the prosecution has rested. The prosecution then presents witnesses for direct examination, along with physical evidence and documents. The defense can cross-examine each prosecution witness.

When the prosecution has completed its case, the defendant may move for dismissal of the charge on the ground that no reasonable fact finder could find guilt beyond a reasonable doubt. On the basis of such a claim of "insufficient

evidence," the trial court may accordingly dismiss all or some of the charges. A successful motion to dismiss on grounds of insufficiency of evidence after the prosecution has presented its case permanently disposes of the charge. The Fifth Amendment prohibition on double jeopardy precludes each jurisdiction from recharging or retrying the defendant for the same offense, and so the prosecution cannot appeal if the trial court dismisses the charge as clearly unproven. On the other hand, the defense normally cannot appeal the *denial* of the motion to dismiss at this stage. It will wait and then seek a basis for appealing any resulting conviction. It will argue on appeal that even after the whole prosecution case was presented at trial, still no reasonable jury could have found guilt beyond a reasonable doubt.

Assuming some charges remain at the start of the trial, the defense has a choice of resting or presenting its own witnesses and exhibits. The prosecution may cross-examine these witnesses, and present rebuttal evidence. Finally, the defense gets one more opportunity to present surrebuttal evidence. The defendant has the right to choose not to testify, and the prosecution may neither call the defendant as a witness nor draw attention to the defendant's failure to testify in any way. Should the defendant choose to testify, however, the prosecution may cross-examine.

After both sides rest and the judge has heard any final motions, each side can make a closing argument, summarizing its case. In a jury trial, the judge then instructs the jury on the elements of the offenses charged, any available defenses, and the nature and allocation of the burden of proof. If the case is tried without a jury, the judge deliberates and decides the case, applying the same legal standards that he or she would instruct a jury to employ. The order of argument and jury instruction may vary among jurisdictions and individual courts.

Jury instructions are generally drawn from three sources: (1) "pattern" jury instructions, published by appellate courts; (2) instructions requested by the defense or prosecution; and (3) instructions written by the judge based on his or her understanding of the relevant law. If the judge rejects an instruction proposed by the defense and the defendant is convicted, the defendant might later appeal the judge's refusal of the instruction. On the other hand, if the judge rejects a prosecutor's instruction and the defendant is acquitted, the bar against double jeopardy prevents the prosecution from appealing. Much of this book concerns disputes about the proper instruction of juries, because this is the medium by which the judge must correctly determine the elements of a crime and possible defenses at issue in the case.

After instruction, the jury deliberates until it reaches a verdict of conviction or acquittal on every charge, or until the judge is convinced that the jury cannot reach a verdict on some charges. Many jurisdictions use 12-person juries, although the Constitution permits juries as small as six members. The Supreme Court determined that the Sixth Amendment requires that guilty verdicts be unanimous, in Ramos v. Louisiana, 140 S. Ct. 1390 (2020). If the jury cannot agree on a particular charge, the judge may declare a mistrial, permitting the prosecution to begin another trial, should it so choose. Of course, if the jury acquits, double jeopardy precludes retrial or appeal of an acquittal; on the other hand, if the jury convicts, the defendant may move for a new trial or appeal to a higher court.

After conviction, the judge will normally order a probation report to inform himself or herself on factors in the defendant's background bearing on sentencing. Then, unless the charge carries a completely mandatory sentence, the judge will conduct a sentencing hearing, considering arguments from both sides, and choosing a sentence within the range prescribed by statute, or in conformity with guidelines developed by sentencing commissions in some jurisdictions. In cases where the prosecutor seeks the death penalty, the sentencing hearing is quite elaborate, resembling a second trial (see Chapter 7).

4. Substantive Legal Issues on Appeal

Although many appeals are based on claims of procedural error, the defendant may appeal a conviction on the *substantive* grounds that:

1. The charge on which he or she was convicted is not a crime, i.e., it is not criminally proscribed, or the criminal proscription is unconstitutional, either in general, or as applied to this defendant. If the court accepts such an argument, it reverses the conviction.
2. The indictment or information did not allege all the necessary elements of the crime. Again, if the court accepts such an argument, it reverses the conviction.
3. The evidence was insufficient to justify any reasonable fact finder in finding all the necessary elements of the crime proved beyond a reasonable doubt. Again, if the court accepts such an argument it reverses the conviction.[2]
4. The jury was improperly instructed on the elements of the offense or on the criteria for a justification or an excuse defense; or the court wrongly allowed or excluded particular evidence because of an error in its determination of the substantive elements or defenses to which this evidence might be relevant. If such an argument is accepted, the defendant will win a right to a new trial, unless the appellate court also concludes that had the jury been *properly* instructed or "had it" received evidence of the proper scope, it probably *still* would have convicted on the evidence presented (the so-called "harmless error" rule). If the defendant wins a right to a new trial, the prosecution has discretion to retry the defendant or drop the charges, though often the result is a guilty plea to a lesser charge.

In this book, you will read judicial dispositions of defense appeals of these four types, as well as the occasional prosecution appeal from the dismissal of a charge. Defendants may also appeal convictions by claiming procedural or evidentiary errors. Most of the procedural and evidentiary claims underlying such appeals are beyond the scope of this book. But evidentiary appeals will appear in this book when a defendant claims that (a) evidence supporting a

2. The doctrines of double jeopardy are complex and their application to the first two categories of appeal are well beyond the scope of this book, but note that a successful appeal on ground no. 3 above will forbid retrial.

defense was wrongly excluded as irrelevant, because the trial court wrongly disallowed the defense or defined it incorrectly; or (b) prosecution evidence was wrongly admitted as relevant, because the trial court misunderstood the elements of the offense or of the defenses offered. If such an appeal is successful, the defendant normally wins a right to a new trial, subject to the harmless error rule.

B. SOURCES OF CRIMINAL LAW

How does a judge go about deciding whether the prosecution charged a genuine and constitutionally proscribable criminal offense? How does a judge determine what the prosecution must prove and what evidence a fact finder is justified in accepting as sufficient proof? How can a judge determine the correct instructions to a jury?

Judges can draw on three types of legal sources in resolving these questions: statutes, judicial precedent, and constitutions, although they may invoke considerations of policy and justice in applying any of these sources.

1. Statutes

All 50 states and the federal government have different criminal statutes; no jurisdiction is bound by another's statute or judicial interpretation of its statute. The federal constitution and some state constitutions have been interpreted to say that criminal defendants can only be charged with violations of a criminal statute (see the section on legality in Chapter 2). Some state criminal codes declare this, and many state courts have declared this as a common law principle. Because criminal statutes are often vague or ambiguous, courts often have broad discretion in interpreting them. On the other hand, courts may not *overrule* statutes except on constitutional grounds.

Despite the supremacy of statutory law in criminal justice, the origins of statutory law in the common law remain important, especially because even today ostensibly new statutes are often essentially rewordings of established common law definitions of crimes or defenses. After 1066 and the Norman Conquest, English law blended civil and criminal prohibitions (what we would call torts and crimes). Common law offenses generally involved acts of violence in breach of the King's peace and could lead to both punitive and compensatory remedies.

Ultimately, common law judges developed a fairly coherent body of doctrines, and such modern criminal categories as homicide, robbery, assault, and theft emerged. By the time of the Renaissance, Parliament had "begun" to add some new offenses by statute, but no comprehensive code of criminal laws existed—only treatise-like summaries of common law doctrines.

Before independence, each American colony "received" and followed a substantial part of the common law, whether by charter, legislation, or judicial adoption, and then each colony's common law of crimes developed in parallel

to that of England. Nevertheless, by the start of the nineteenth century, political reformists began to advocate for formal codification of the criminal law. These reform efforts found powerful intellectual authority in the utilitarianism of Jeremy Bentham, who argued for reduction in the severity of some of the harsher common law doctrines but also called for greater clarification and consistency as the goal of a fair and efficient political system.

The culmination of a more than century-long movement toward codification of the criminal law was promulgation in 1962 of the Model Penal Code (MPC) by the influential American Law Institute. More information on the MPC appears in Appendix A and in relevant places throughout this book. But suffice for now that the MPC is a systematic reformulation of traditional criminal law doctrines, and even where it is not wholly or explicitly adopted in particular states, it serves as a guiding model for the general goals of statutory clarification and transparency.

2. Precedent

Understanding the judicial opinions in this book requires awareness of the basic conventions of common law judicial reasoning, conventions that are implicit in most American judicial opinions.

Even though criminal charges now must have a legislative mandate, statutes sometimes unavoidably suffer from ambiguity or vagueness of terms or incompleteness of coverage. Judges, therefore, often must engage in common law judicial reasoning when they decide how to *interpret* a statute or constitution and when they *supply* rules of law not found in statutes or constitutions. Here are some examples of criminal law questions requiring judges to supply rules:

1. A police officer shoots a fleeing burglar dead. Is the officer guilty of violating a statute that prohibits the intentional or reckless killing of a human being?
2. You find a mail sack full of money in the woods and keep it. Have you violated a statute that simply punishes "theft" without further defining it?
3. Defendant has sexual intercourse with an unwilling person, too drunk to notice that the unwilling person says no. Is the defendant guilty under a statute that simply punishes "rape" without further defining it?
4. Can the state make it a criminal offense to "annoy a police officer" without violating a constitutional clause ensuring "due process of law"?

A crucial feature of "common law" systems like those in American jurisdictions is the practice of stare decisis, or the ascription of binding legal authority to judicial precedent. An implication of this practice is that in deciding questions like the ones listed above, courts do not only resolve the case in front of them; rather, they provide a rule or standard of decision binding in future cases.

But which future cases? Most students bring to legal study a general impression of legal reasoning as an intuitive process of seeing analogies. According to this conception, if the facts of two cases strike a judge as sufficiently similar, the judge will decide the two cases similarly. This impression is roughly accurate,

but it leaves out an important feature of legal reasoning. Judges are concerned only with *relevant* similarity. Many similarities between two cases — the defendants' first names, for an obvious example — are irrelevant. In order to distinguish relevant from irrelevant factual similarities, judges advert to rules, and to justifications for those rules. Usually, these justifications (or "rationales," as we will call them) invoke some consideration of fairness or social utility. Chapter 1 will introduce you to a variety of views on the overall purposes of criminal punishment that are often invoked to justify judicially adopted rules in criminal law opinions.

Let us take our first problem, the killing of a fleeing burglar by Officer Duke. Suppose that in an earlier case, Officer Wayne had unsuccessfully sought a jury instruction that a police officer could not be guilty under the statute if the officer intended to prevent the escape of a pedestrian observed jaywalking. Until we know more about why the judge refused the requested instruction, we cannot tell if the prior case is *relevantly similar* to Duke's case. Suppose Wayne's judge denied the requested instruction because the statute did not explicitly mention any such defense. Presumably, Duke is in the same boat — his requested instruction would also be barred by a rule against nonstatutory defenses. Duke's case is then relevantly similar to Wayne's case. But suppose instead that Wayne's judge denied the requested instruction on the ground that preventing the escape of one suspected of a misdemeanor is not worth killing for. If burglary is a felony, Duke's request is not covered by the *rule* of Wayne's case. Now the question arises whether Duke's killing is covered by the *rationale* of the earlier case — that is, whether preventing the escape of a burglar is a sufficiently valuable purpose to justify killing him or her. If not, burglary is relevantly similar to jaywalking, even though one is a felony and the other a misdemeanor.

When lawyers and judges use an earlier decision as precedent, they do not simply assert that the earlier case was circumstantially similar to the case before the court. They assert that the rule or rationale of the earlier case governs the case before the court.

Lawyers and judges disagree about just to what degree precedent really does constrain judges. For one thing, many judicial opinions do not clearly articulate any rule or rationale. For another, courts often will justify a particular result as compatible with several rival rules — rules that might diverge in other cases, but that coincide in the case before the court. Further, when judges do articulate a rule, they may offer several potentially inconsistent rationales for it. Finally, even a single rule or rationale may not compel any particular choice in the case before the court. As Justice Holmes famously wrote, "Abstract propositions do not decide concrete cases." Thus, the rule that preventing the escape of a misdemeanant cannot justify homicide has no clearly necessary implications for one who kills to prevent the escape of a felon. And the rationale that killing is justified only if it serves a sufficiently important purpose does not tell us whether preventing the escape of a burglar is sufficiently important. Thus, judges often have considerable leeway in interpreting and applying precedent. Nevertheless, to use a case as precedent, one must ascribe a rule or rationale to it. It is the rule or rationale, rather than the circumstances of the earlier case, that one applies to the current case.

Courts are expected to comply with the past decisions of the highest court of appeal in their jurisdiction. The highest court of appeal in a jurisdiction can

change its interpretation of a constitution or statute, and it can reject rules of law it has made. Nevertheless, appellate courts will generally express reluctance to overrule their own precedent, and feel compelled to offer elaborate justifications in the rare cases when they do so. They may assert that social conditions have changed, that scientific knowledge has advanced, that the original decision misunderstood the intent of the legislature, or that the rule adopted has not achieved the court's purposes.

All courts must defer to the United States Supreme Court on federal constitutional law, while state courts need not defer to federal courts on state criminal or state constitutional law. Nevertheless, even where courts are not bound by the statutory or decisional law of other jurisdictions, they may be influenced in their common law reasoning by those other courts, as well as by the writings of legal scholars.

3. Constitutions

The original federal constitution has a number of clauses pertaining to substantive criminal law; for example, the Ex Post Facto Clauses bar legislatures, state and federal, from punishing acts that occurred before the legislative proscription was passed, and the Bill of Attainder Clause prohibits criminal statutes singling out particular individuals for punishment.

As a matter of constitutional law under the due process clauses of the Fifth and Fourteenth Amendments, and the Sixth Amendment right to a jury trial, a burden of proof beyond a reasonable doubt rests on the prosecution in both the federal and state systems. The due process clauses, along with similarly vague civil rights provisions in state constitutions, also set more substantive boundaries on what a legislature can punish. Thus, due process clauses may be invoked in arguments that conduct cannot be punished unless the defendant had reasonably clear notice that it was criminal, and that punishment must be pursuant to precisely drafted statutes. Also, in concert with the Eighth Amendment prohibition of "cruel and unusual punishments," these clauses are invoked in arguments that punishment must be for *harmful conduct* rather than for characteristics, conditions, statuses, propensities, desires, or thoughts. These issues are taken up in Chapter 2. The due process clauses may also play a role in arguments that certain defenses are so fundamental that they must be available to defendants, or that the prosecution should be required to disprove certain defenses beyond a reasonable doubt. In addition, the Eighth Amendment may set limits on punishments arguably disproportionate to the crime involved (as discussed in Chapter 1) and plays the major role in constraining the scope and nature of death penalty laws (see Chapter 7).

To the extent that these constitutional clauses or their state constitutional analogs set limits to criminal liability, courts may not only strike down statutes that transgress those limits, but also, where possible, try to interpret statutes so as to avoid such conflicts. Thus, constitutional standards of just punishment are potentially relevant to any substantive criminal law issue. Nevertheless, judicial decisions about what elements of a crime must be proved by the prosecution and what defenses must be made available to the defense rarely invoke constitutional standards. For the most part, they apply common law standards of just

punishment in interpreting statutes. This means that most judicial precedent concerning just punishment can be overturned by legislative action.

Other civil rights provisions not obviously directed at criminal law set limits on what conduct can be punished. The Equal Protection Clause of the Fourteenth Amendment bars purposively discriminatory legislation by the states, and the Due Process Clause of the Fifth Amendment bars such legislation by the federal government; thus, they may operate to preclude criminal laws that violate constitutional norms against, say, discrimination on the basis of race or national origin. The Thirteenth Amendment bars slavery and involuntary servitude except as punishment for crime. Despite this exception, however, the Thirteenth Amendment is assumed to preclude imprisonment for debt, and to set limits on the use of convict labor, so as to avoid the reinstitution of slavery under the guise of criminal punishment.

The free speech and free exercise of religion clauses of the First Amendment bar some criminal statutes, as well as some decisions to prosecute under otherwise constitutional statutes. The Fourteenth Amendment Due Process Clause applies these limits to the states. And insofar as due process protects abortion, birth control, and consensual sexual intimacy, it precludes criminal prosecution of these practices.

C. THE ANALYSIS OF CRIMINAL LIABILITY

1. The Purpose of Analysis

Judges, lawyers, legislators, and legal scholars often analyze the question of liability for a particular crime by dividing it into discrete issues. Dividing the question of liability into issues can help resolve three problems:

1. *The scope of legality.* As we noted above, almost all jurisdictions forbid punishment without a pre-established legislative definition of the crime. But the meaning and scope of this principle is unclear and subject to controversy. One purpose of a scheme of analysis is to determine which issues must be covered in the statutory offense definition and which can be left to judicial resolution.
2. *Burdens of proof.* Although nowhere mentioned in the federal constitution, the presumption of innocence is assumed to be a requirement of due process. But again, the meaning and scope of this principle is subject to controversy. One purpose of a scheme of analysis is to help identify who bears the burden of proof on which issues. This decision may be confronted at four different levels: (1) The constitutional question of how heavy a burden of proof courts and legislatures *can* place on the defense on different issues; (2) The legislative question of how heavy a burden legislators *should* place on the defense; (3) The interpretive question of what allocation of the burden of proof judges should assume when the statute is silent; and (4) The common law question of how, within constitutional limits, to allocate the burden of proof when judges recognize defenses not provided by statute.

3. *Statutory interpretation.* Statutes defining offenses inevitably leave a great deal unsaid. For example, must defendants know all the facts and circumstances that make them guilty of a particular defense? Only some? Only if the statute says so? One purpose served by systems of analysis is to fill in these blanks. These systems can be stated explicitly in what is sometimes called "the general part" of a criminal code, or they can be developed judicially and passively accepted by legislatures (which always have the power to change nonconstitutional rules of law developed by judges).

Two of the most influential and widely respected analytic schemes are those reflected in the Model Penal Code, and in the German Penal Code. We offer a brief introduction to each here.

2. The Model Penal Code Scheme

The basic analytic structure of offenses in the Model Penal Code (MPC) is summarized in the following excerpt from an important treatise on criminal law defenses.[3]

1. An offense has been committed where an actor has satisfied all elements contained in the definition of the offense. The elements of an offense are of two sorts: objective requirements (*actus reus* elements) and culpability requirements (including primarily *mens rea* elements).
2. The objective elements of an offense may include the *conduct* of the actor (or other persons), the *circumstances* under which the conduct takes place, and the *results* stemming from the conduct.
3. Every offense must contain at least one objective element consisting of the conduct of the actor. (This is termed "the act requirement.")
4. The mental or culpability elements of an offense may be purpose (or intention), knowledge, recklessness, negligence, or lack of culpability [i.e., strict liability], with regard to engaging in the conduct, causing the result, or being aware of the circumstances specified as the objective elements. ([Although] . . . negligent and strict liability [should] be avoided. . . .)
5. Every objective element must have a corresponding culpability element and that level of culpability may be different for each of the objective elements of the same offense.

In addition, the Model Penal Code defines certain "affirmative defenses," such as necessity, self-defense, duress, and insanity. The MPC treats any circumstance that negates one of these defenses as an objective element of the offense, and so applies the MPC's culpability scheme to these defenses. For example, let us say that self-defense requires an imminent and life-threatening attack. A killer who was negligent in believing such an attack was imminent would thus be guilty of negligent homicide.

3. Paul Robinson, 1 Criminal Law Defenses §11(a) (1984).

3. The German Scheme

The basic structure of the German Penal Code has influenced analysis of criminal liability around the world for more than a century, and in the United States more recently. Professor Markus Dubber has summarized it:[4]

> Since the completion of the Model Penal Code in 1962, . . . interest in German criminal law theory among Anglo-American criminal law scholars has grown steadily. George Fletcher's *Rethinking Criminal Law,* in particular, has been remarkably successful in introducing basic concepts of German criminal law into Anglo-American criminal law discourse and doctrine.
>
> The feature of German criminal law theory that is perhaps most familiar to Anglo-American scholars is the three-step analysis of criminal liability (*Straftatsystem*), which appears in American casebooks, textbooks, and court opinions, though its German origins are not always acknowledged. Developed in the early 20th century, the *Straftatsystem* distinguishes between three levels of inquiry: satisfaction of all offense elements as defined in the statute . . . , wrongfulness . . . , and . . . [responsibility]. Under this scheme, the analysis of criminal liability begins by determining whether the defendant's conduct matches the definition of a criminal offense—say, because she has intentionally caused the death of another human being, thus satisfying the definition of murder. Next the inquiry proceeds to the second level, wrongfulness—or justification, in Anglo-American terminology. Here the question is whether her conduct was not only prima facie criminal, but also unlawful (or wrong, in a legal sense . . . —contrary to law). (So, to stick with our example, the question might be whether the defendant killed in self-defense, i.e., in order to prevent a deadly unlawful attack against her.) Eventually, assuming the conduct matches the definition of some offense and is unlawful, the inquiry turns to the third, and final, step, which homes in on the actor's responsibility for her concededly criminal and unlawful conduct. Here Anglo-American criminal law, with its traditional proceduralist approach, considers whether the defendant can raise an excuse "defense." (For instance, instead of claiming self-defense as justification, the defendant might be entitled to the insanity defense on the ground that she cannot be held responsible for her conduct because she lacked some minimum capacity to appreciate the wrongfulness of her conduct or to exercise sufficient self-control.)

D. BURDENS OF PROOF AND DUE PROCESS

The burden of proof has tactical importance in criminal cases because it determines which side gets the benefit of the doubt in disputed questions. It is also an important "policy" issue because it allocates the risk of error. Thus, the normal rule that the prosecution must prove its case beyond a reasonable doubt implies a social or political or moral judgment that we are far more willing to tolerate erroneous acquittals than erroneous convictions. This rule also gives concrete definition to the ideal that the accused are entitled to a "presumption of innocence."

4. Markus D. Dubber, Theories of Crime and Punishment in German Criminal Law, 53 Am. J. Comp. L. 679, 679-81 (2005). See also George Fletcher, Rethinking Criminal Law (1978).

A criminal litigant may face two different kinds of burdens: (1) the burden of production — the duty to introduce at least some prima facie evidence in order to compel a fact finder to at least *consider* a claim, and (2) the burden of persuasion — the duty to persuade the fact finder that the totality of evidence presented warrants accepting or rejecting the claim. In addition, criminal litigants may be compelled to meet different *standards* of persuasiveness, ranging from proof "beyond a reasonable doubt" down to proof by mere "preponderance of the evidence."

According to Blackstone, the prosecution was required to prove that the defendant had committed a criminal act, while the defense was required to prove "circumstances of justification, excuse and alleviation," 4 Blackstone's Commentaries 201 (1769). For Blackstone, these included the "excuses" of mistake or accident, circumstances that today would be thought to disprove the mental element of an offense, on which the prosecution now bears the burden of proof. Blackstone's division of the burden of proof was influential in nineteenth-century America. A leading American case was Commonwealth v. York, 50 Mass. (9 Met.) 93 (1845), requiring the defendant to prove the "defense" of provocation.

By the end of the nineteenth century, however, courts had begun to question whether requiring the defense to prove such exculpatory claims was compatible with the principle of the presumption of innocence. Those decisions, however, were largely based on common law. And in Leland v. Oregon, 343 U.S. 790 (1951), the Supreme Court rejected a due process challenge to Oregon's then-unique practice of requiring defendants to prove insanity beyond a reasonable doubt (at that time about 20 states required defendants to meet a lesser burden). In the case of *In re* Winship, 397 U.S. 358 (1970), the Supreme Court made clear that the presumption of innocence was a constitutional principle binding on the states, holding that "the Due Process clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime charged." Left unresolved was the question of what facts constituted the crime charged.

The Court addressed this issue in an unfortunately confusing pair of cases in the mid-1970s. In Mullaney v. Wilbur, 421 U.S. 684 (1975), a unanimous Court struck down Maine's murder statute, which (1) defined murder as unlawful killing "with malice," and (2) defined malice as deliberate and unprovoked cruelty, but (3) presumed intentional killings to be unprovoked unless the defense proved provocation by a preponderance of the evidence. Provoked intentional killings were downgraded to manslaughters. Justice Powell's opinion for the Court held provocation to be a crucial part of the charge of murder because it determined "the degree of culpability attaching to the criminal homicide." Yet just two years later in Patterson v. New York, 432 U.S. 197 (1977), by a 5-4 vote the Supreme Court upheld New York's murder statute, which resembled Maine's, but for a subtle difference. New York's murder statute defined murder simply as intentional killing, without any reference to malice. It offered defendants the opportunity to lower their liability to manslaughter by proving the partial excuse of "extreme emotional disturbance," by a preponderance of the evidence. Since "extreme emotional disturbance" was similar to provocation, the defendant argued that the New York statute was functionally identical to the Maine statute struck down in *Mullaney*. The majority reasoned, however, that New York was still requiring the prosecution to prove every fact defining the

crime, including its mental element—or, in the language of the Model Penal Code, its level of culpability. The Court held that by reclassifying provocation as an *excuse* negating responsibility, rather than a circumstance negating the *mental element* of murder, New York was able to constitutionally shift the burden of proof on the issue. Thus, while the constitutional principle remained intact in the abstract, careful drafting by a state legislature could avoid the constitutional prohibition.

In Sandstrom v. Montana, 442 U.S. 510 (1979), the Supreme Court reaffirmed the prosecution's burden to prove the mental element of the offense, in this case intent to kill. The Supreme Court struck down a jury instruction that "the law presumes that a person intends the ordinary consequences of his voluntary acts." It was clear in the wake of *Patterson* and *Sandstrom* that while the prosecution is constitutionally required to prove the elements of each offense beyond a reasonable doubt, it is not constitutionally required to bear such a burden on defenses of excuse. Thus, *Patterson* did not resolve the proper allocation of the burden of proof on defenses of justification like self-defense or necessary force in making an arrest. Most jurisdictions placed the burden of production on the defendant for such a defense, but once the defendant has satisfied this burden, almost all jurisdictions required the prosecution to disprove these defenses beyond a reasonable doubt.

In 1982, however, an Ohio Appeals Court ruled that self-defense was "an affirmative defense," which a defendant charged with an "unlawful" killing was required to prove by a preponderance of the evidence. State v. Morris, 455 N.E.2d 1352 (Ohio App. 1982). Effacing the distinction between justification and excuse, the Ohio court reasoned that if a justified killing could be considered "lawful," then so could a wrongful killing, excusable on grounds of the defendant's insanity. The court concluded that "unlawful" meant simply "defined as an offense by statute." Thus, prosecutors were only obliged to prove a homicide "unlawful" in that limited sense; they did not need to prove that the homicide was not justified or excused. Then in 1986, in the case of Martin v. Ohio, 480 U.S. 228, the Supreme Court upheld this position by a 5-4 vote. *Martin* effectively decided that as a matter of federal constitutional law, the presumption of innocence is confined to the elements of the offense and therefore does not extend to defenses of justification. Nevertheless, many jurisdictions extend the presumption further as a matter of statutory or common law.

New questions were raised about the scope of the prosecution's constitutional burden to prove the mental element of offenses as a result of the Supreme Court's (again, unfortunately) confusing decision in Montana v. Egelhoff, 518 U.S. 37 (1996). Here the Court upheld a Montana statute prescribing that voluntary intoxication "may not be taken into consideration in determining the existence of mental state which is an element of an offense." Four dissenting Justices voted that this statute offended due process, asserting that by creating an evidentiary presumption that intoxication does not interfere with culpable mental states, the statute illegally reduced the prosecution's burden to prove the mental element of offenses. Four other Justices voted that such an evidentiary presumption would not violate due process. The decisive vote was cast by Justice Ginsburg, who agreed with the dissenters that reducing the prosecution's burden to prove the mental element of the offense would offend due process—but insisted that the Montana statute did not reduce this burden in

any event. Instead, she said, the Montana statute permissibly added voluntary intoxication to the culpable mental states constituting the mental element of certain offenses. (*Egelhoff* is treated at the end of Chapter 3.)

The latest question to emerge concerning the constitutional allocation of burden of proof is whether the prosecutorial burden to prove offense elements applies to factual claims considered by judges in sentencing. In McMillan v. Pennsylvania, 477 U.S. 79 (1986), the Supreme Court held that legislatures have broad discretion to denominate particular circumstances as sentencing factors rather than elements. In this way, legislatures can remove the prosecution's burden to prove these circumstances beyond a reasonable doubt at a jury trial. Shortly thereafter a congressionally established Sentencing Commission issued guidelines for federal judges to use in sentencing all federal offenders. These guidelines were designed to promote uniform and determinate sentencing. One of their most controversial features was that they required judges to enhance sentences on the basis of "relevant" criminal conduct proven by a preponderance of evidence at a sentencing hearing, even if defendant had never been charged with this conduct, or had been acquitted of it at trial.

Subsequent Supreme Court decisions raised questions about the constitutionality of sentencing on the basis of unproven "relevant conduct." In Jones v. United States, 526 U.S. 227 (1999), the Court considered a federal carjacking statute that added large sentencing increments if the carjacking resulted in injury or death. The Court decided, 5-4, that such resulting harms were offense elements rather than mere sentencing factors. Justice Souter declared for the Court that "under the due process clause of the Fifth Amendment and the notice and jury trial guarantees of the Sixth Amendment, any fact (other than prior conviction) that increases the maximum penalty for a crime must be charged in an indictment, submitted to a jury, and proven beyond a reasonable doubt." 526 U.S. at 243-44 n.6. Then, in Apprendi v. New Jersey, 530 U.S. 466 (2000), the Court applied *Jones* to a hate crime statute that doubled the maximum punishment for a crime committed with a biased motive. Predictably, the decision required the biased motive to be proved to a jury beyond a reasonable doubt.

In Blakely v. Washington, 542 U.S. 296 (2004), the Court determined that under the Sixth Amendment jury trial right, "any fact that increases the maximum penalty for a crime" included any fact raising the penalty above the most it could be based on the facts proven at trial. In United States v. Booker, 543 U.S. 220 (2005), the Court applied this ruling to the federal sentencing guidelines. In a complex decision, the Court held the guidelines no longer binding on judges, but permitted judges to continue drawing on them as advisory guidance. (*Apprendi, Blakely,* and *Booker* are treated at the end of Chapter 1, "Just Punishment.")