

RESPONSE

WHAT IS CRIMINAL LAW ABOUT?

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INTRODUCTION

In “The Changing Market for Criminal Casebooks,” Jens David Ohlin offers an appreciative, but nevertheless critical review of established criminal law casebooks.¹ He then introduces his own offering by describing “a vision for a new casebook” that will better serve the needs and wants of contemporary students.²

Ohlin begins with the arresting claim that criminal law professors are passionate about their subject because they are fascinated by human depravity.³ Then, throughout his essay, he stresses efficient, consumer-focused delivery of doctrinal instruction as the defining task of a successful casebook.⁴

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1. Jens David Ohlin, *The Changing Market for Criminal Law Casebooks*, 114 MICH. L. REV. 1155, 1155 (2016).

2. *Id.* at 1156.

3. *Id.* at 1155.

4. Thus, we learn that the leading casebooks do not satisfy student demand for doctrine:

[E]ven among those professors with an interest in theory or a background in philosophy, the overtly philosophical nature of [Kadish’s] introductory materials often generated substantial complaints from students, many of whom asked, not entirely facetiously, whether they had taken a wrong turn at the campus quad and ended up in the philosophy department instead of the law school. . . . [P]rofessors who assigned Kadish et al. to their students were forced to listen to the whistling of the pages as the students frantically searched for the doctrine they so clearly craved.

Id. at 1157. Similarly, “some [professors] find [Dressler’s] theoretical orientation still too heavy for their classrooms and crave a more doctrinal approach,” in part because Dressler still features “the dreaded Kant and Bentham.” *Id.* at 1158. Moreover, Ohlin claims the Robinson casebook is not

for those professors who do not wish to spend a significant amount of time surveying and debating common intuitions of justice Some professors—and indeed many students—labor under the (perhaps false) assumption that they are not teaching or learning the law if they are not reading cases.

Id. at 1160.

Ohlin urges that casebooks should be short enough to assign in their entirety, lest students “leave the course leave the course anxious that their introduction to the subject was

Moreover, he argues, casebooks should devote less attention to academic theories and articles, to normative questions about what the law should be, or even to interpretive questions about what the law is.⁵ Prevailing rules should be quickly summarized by the editor, so that students can focus on learning the skill of applying these rules to challenging fact situations.⁶

While Ohlin raises important issues of pedagogical method, his own announced pedagogical method would translate criminal law into technical training in pragmatic lawyerly skills. As a result, he offers readers something less than a “vision” of what criminal law is about, why it is worth learning, and what a criminal law casebook should teach. In this Response, we address these unanswered questions, identifying those issues of justice and politics that we believe make criminal law interesting and important. Further, we argue that even if doctrinal instruction is the goal, achieving it requires consideration of political philosophy, legal and intellectual history, and empirical research. Moreover, we argue that the indeterminacy of doctrine on some fundamental questions means that criminal lawyers often cannot avoid invoking normative theory in fashioning legal arguments. The discretion accorded many actors in the criminal justice system means that fundamental questions of justice are also highly practical questions. Finally, we argue that the high stakes of criminal law and its contingency on democratic politics make criminal law teaching as much a matter of civic education as of technical education.

I. WHAT MAKES CRIMINAL LAW COMPELLING?

Ohlin’s opening claim is that criminal law “takes as its point of departure the indignities that human beings visit upon each other . . . a parade of horrors, an indictment of humanity’s descent into moral weakness.”⁷ It

incomplete.” *Id.* at 1167. He would begin each chapter “with a succinct explanation of the doctrine for that particular legal concept,” *id.* at 1170, rather than distracting students with other challenges, such as learning how to distill doctrine from case reports, *id.* at 1162–63, or evaluating it. *Id.* at 1159. He prefers to avoid “overreliance on law review excerpts to engage with theoretical controversies,” *id.* at 1161, and would leave study of legal scholarship to the second year of law school. *Id.* at 1166.

Ohlin hints that one reason to focus more narrowly on doctrinal summary is to meet the needs of a growing cohort of less capable students. Thus, “what works in one law school might not work in another, due in part to the changing profile of law students.” *Id.* at 1155. A summary of the doctrine can lead to discussion “tailored to the demands of the particular student cohort: either a normative and philosophical discussion . . . or a more practice-oriented discussion.” *Id.* at 1163. Ohlin reserves discussion of policy for the end of each chapter because “some students may find [this] material so challenging or advanced that their professors may wish to downplay its significance.” *Id.* at 1172.

5. See, e.g., *id.* at 1156, 1160, 1162–63, 1166, 1172.

6. See *id.* at 1163 (“[F]irst give the students a lesson in the doctrine and then get them to apply the doctrine to the facts of some really interesting cases.”); *id.* at 1170 (“[T]here is no reason for casebooks to fall victim to excessive hide-the-ballism—as if making an actual doctrinal statement were vulgar.”).

7. *Id.* at 1155.

thereby captivates us in ways that torts and contracts cannot, and he suggests that because of the human proclivity toward indulgence in this depravity, professors in the field are “obsess[ed]” and “addicted” to this “intensity and despair.”⁸ Of course, we concede that crime is dramatic and criminal law cases can be colorful. But surely criminal law also calls its teachers for deeper reasons.

Punishment is the strongest manifestation of government power, and the need to justify, check, and channel that power is an intellectual challenge for professors and students alike. The conventional answers to that problem are supplied by utilitarian and deontological moral thought, but the problem of punishment, and the issues raised in criminal law, are political as well as moral.⁹ While American criminal law, as a historical matter, owes more to utilitarian legal thought than to deontological moral philosophy, any body of criminal law is both retributive and preventive *in function*. Criminal law regulates violence by asserting a public monopoly on vengeance. It mobilizes collective blame and deploys it to take sides in violent social conflicts. It may not be able to prevent every act of victimization, but by vindicating victims, it prevents them from suffering the indignity of an offender victimizing them with impunity. In this way criminal law serves as a guarantor of each individual’s civic equality. By identifying the state as the ultimate protector of each individual’s security and dignity, criminal law gives each individual a stake in the law’s authority. As the other first-year subjects are important for defining legal entitlements and relationships, criminal law is uniquely important in legitimizing the rule of law itself.

As an arbiter of social conflict and a guarantor of civic status, criminal law is necessarily also a potentially powerful weapon of subordination. Thus, students interested in inequality in American society need to realize that while racial discrimination or government abuse are not unavoidably inherent in a criminal justice system, the risk of them is ever-present. Because crime and punishment distribute status, criminal law is inevitably an important arena of political contestation. Indeed, this is why crime narrative is such a compelling tradition in American culture. The moral dramas of crime and criminal law command our attention because they implicate us. When we watch rampant violence and implacable justice on the flickering screen, whether on the television in the safety of our suburban rec rooms or in miniaturized form on our devices, we are reassured that others in American society face substantial risks of victimization or prosecution that we are spared. Because crime and law enforcement are such important markers of status in American society, Americans can enjoy privilege—real or imagined—by consuming crime drama.

8. *Id.*

9. See generally Richard H. McAdams, *Reply*, in *CRIMINAL LAW CONVERSATIONS* 539–42 (Paul H. Robinson et al. eds., 2009); JONATHAN SIMON, *GOVERNING THROUGH CRIME* (2007); Guyora Binder, *Punishment Theory: Moral or Political?*, 5 *BUFF. CRIM. L. REV.* 321 (2002); V.F. Nourse, *Reconceptualizing Criminal Law Defenses*, 151 *U. PA. L. REV.* 1691 (2003); William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 *MICH. L. REV.* 505 (2001).

II. COMMON LAW AND CODE AS INTELLECTUAL HISTORY

Ohlin's review of three leading casebooks hints at these larger stakes. All three books offer distinct and coherent points of view on the subject of criminal law. All present state punishment of crime as an important moral and political problem.

Kadish, Schulhofer, Steiker and Barkow's venerable and still-popular book draws attention to the fundamental question of how we justify punishment and to the contrast between retributivist and utilitarian answers to this question.¹⁰ It offers excerpts from Immanuel Kant and Jeremy Bentham at the outset and then invites students to apply these theories to each issue in criminal law.¹¹ It also distinguishes justification and excuse as reasons to absolve from punishment.¹² Finally, it draws attention to the problem of moral luck, the puzzle as to why we sometimes condition punishment on actually causing harm; and it explores different standards of causal responsibility.¹³ Ohlin acknowledges the book's great influence and its theoretical interest, but he claims that students complain about all this "philosophy" and "crave" more doctrine.¹⁴

In thus opposing doctrine and philosophy, Ohlin slights the central role that the "philosophical"¹⁵ concepts Kadish and his coauthors emphasize—retribution, prevention, justification, excuse, and causation—*actually play within doctrine*.

Kadish was a student of Herbert Wechsler and modeled his book on Wechsler's teaching materials.¹⁶ Wechsler had a thoroughly utilitarian view of criminal law and worked within a tradition of utilitarian codifiers, including Bentham, the English Criminal Law Commission of the 1830s, Thomas Macaulay's colonial Indian Penal Code of 1860, and James F. Stephen's *A Digest of the Criminal Law* and proposed code for England, adopted as the Criminal Code of Canada.¹⁷ Kadish's casebook appeared in 1962, the year the Model Penal Code was promulgated. It set the pattern of criminal law casebooks for the last fifty years in focusing on the issues and illustrative cases addressed in the drafting of the Model Penal Code. Kadish also had strongly utilitarian views of his own on some questions: he believed that criminal punishment should be confined to potentially harmful conduct but

10. See generally SANFORD H. KADISH, STEPHEN J. SCHULHOFER, CAROL S. STEIKER & RACHEL E. BARKOW, *CRIMINAL LAW AND ITS PROCESSES* (9th ed. 2012).

11. See *id.* at 89–96.

12. *Id.* at 817.

13. *Id.* at 571.

14. *Id.* at 102–03; Ohlin, *supra* note 1, at 1157–58.

15. Ohlin, *supra* note 1, at 1158.

16. Anders Walker, *The Anti-Case Method: Herbert Wechsler and the Political History of the Criminal Law Course*, 7 OHIO ST. J. CRIM. L. 217, 218, 238–42 (2009); see JEROME MICHAEL & HERBERT WECHSLER, *CRIMINAL LAW AND ITS ADMINISTRATION* (1940).

17. Sanford H. Kadish, *The Model Penal Code's Historical Antecedents*, 19 RUTGERS L.J. 521 (1988); see Herbert Wechsler, *The Challenge of a Model Penal Code*, 65 HARV. L. REV. 1097 (1952).

that punishment should be conditioned on knowing imposition of risk, rather than actual results.¹⁸

The Model Penal Code incorporated a distinctively utilitarian conception of a criminal offense, first developed by Bentham, as consisting of an objective element comprising conduct, circumstances rendering such conduct dangerous to legal interests, and harmful consequences to those interests; and a mental element consisting of either the purpose or the expectation of creating such harm.¹⁹ John Austin added a more refined taxonomy of expectations that became the Model Penal Code's distinctions among knowledge, recklessness, and negligence.²⁰ The Model Penal Code's basic analytic technology, requiring assignment of a particular culpable mental state to each conduct, circumstance, or result element, is ultimately derived from these "philosophical" ideas.

The Code would also incorporate utilitarian and other values into law as gap-fillers. Thus article 1.02 of the Code announces the purposes of forbidding and deterring "conduct that unjustifiably and inexcusably inflicts or threatens substantial harm to individual or public interests."²¹ It adds the purposes of incapacitating the dangerous and rehabilitating offenders, and it recognizes retributive considerations, such as conditioning punishment on fault and proportionality, as limits on these purposes. Finally, it provides that when any code provision "is susceptible of differing constructions it shall be interpreted to further the general purposes stated in this Section."²² Statutes modeled on the Model Penal Code contain similar provisions. New York Penal Law section 1.05 identifies the Law's "general purposes" as deterrence, rehabilitation, and incapacitation, as well as the retributive purposes of proportionate punishment and providing "an appropriate public response to particular offenses, including consideration of the consequences of the offense for the victim . . . and the community."²³ Section 5.00 provides that the New York code should be interpreted broadly "to promote justice and effect the objects of the law."²⁴

In short, theories of punishment, however philosophical, are not idealized abstractions: they are binding legal norms that students need to know

18. Sanford H. Kadish, *Foreword: The Criminal Law and the Luck of the Draw*, 84 J. CRIM. L. & CRIMINOLOGY 679 (1994) [hereinafter Kadish, *Luck of the Draw*]; see also Sanford H. Kadish, *The Crisis of Overcriminalization*, ANNALS AM. ACAD. POL. & SOC. SCI., NOV. 1967, at 157 (arguing against criminal enforcement of vice and vagrancy); Sanford H. Kadish, *Some Observations on the Use of Criminal Sanctions in Enforcing Economic Regulations*, 30 U. CHI. L. REV. 423 (1963) (arguing that criminal enforcement of economic regulations would erode the deterrent efficacy of criminal sanctions).

19. Guyora Binder, *Foundations of the Legislative Panopticon: Bentham's Principles of Morals and Legislation*, in FOUNDATIONAL TEXTS IN MODERN CRIMINAL LAW 79, 94 (Markus D Dubber ed., 2014)

20. *Id.*

21. MODEL PENAL CODE § 1.02(1)(a) (AM. LAW INST., 2001).

22. *Id.* § 1.02(3).

23. See N.Y. PENAL LAW § 1.05 (McKinney 2009).

24. *Id.* § 5.00.

how to invoke and apply, particularly to issues on which the statutory or doctrinal law is uncertain.

According to Ohlin, Joshua Dressler and Stephen Garvey's very popular book also emphasizes the question of how punishment serves utility and desert but offers a clear and elegantly structured account of the doctrine.²⁵ Thus, like theorists and lawyers from civil law jurisdictions, Dressler and Garvey divide criminal law into three issues: offense elements, justification, and excuse.²⁶ Ohlin might have added that Dressler and Garvey also divide offense elements into mental and act elements, a venerable distinction in common law jurisdictions.²⁷ In addition, on most doctrinal issues, Dressler and Garvey offer two contrasting solutions: a Model Penal Code solution and a common law solution.²⁸

Although approving the tripartite structure of criminal liability, Ohlin objects to the assumption that there should be only one alternative to the Model Penal Code's rules, and that it is supplied by the English common law.²⁹ This is a fair criticism. Most American criminal law is statutory, and fifty-two jurisdictions may offer more than two statutory alternatives. Some of the common law rules Dressler and Garvey present have an uncertain provenance. For example, the "common-law felony-murder rule" that imposes strict liability for causing death in any felony, although proposed in some eighteenth-century treatises, was not the law in England before the American Revolution, and it does not accurately describe American felony-murder rules enacted during the nineteenth century or in force today.³⁰ In any case, Ohlin plausibly argues that the appealing clarity of Dressler's presentation of doctrine comes at some cost in precision.

Yet Ohlin may misevaluate Dressler and Garvey's contrast between common law and Model Penal Code approaches by treating them merely as descriptions of current law. Instead, they may be seen as ideal types defining an axis of controversy along which different standards are possible. In presenting his common law model, Dressler and Garvey bring to life prevailing law as it stood before the Model Penal Code and as critiqued by the Code's drafters, and thereby illuminate the Model Penal Code's innovations. To be sure, the term "common law" misleadingly suggests that modern alternatives to the Model Penal Code's solutions are always of ancient English

25. Ohlin, *supra* note 1, at 1157–58 (discussing JOSHUA DRESSLER & STEPHEN P. GARVEY, *CASES AND MATERIALS ON CRIMINAL LAW* (6th ed. 2012)).

26. JOSHUA DRESSLER & STEPHEN P. GARVEY, *CASES AND MATERIALS ON CRIMINAL LAW* 253–759 (6th ed. 2012).

27. *Id.* at 133–227 (dedicating one chapter to *actus reus* and one chapter to *mens rea*).

28. See, for example, Dressler's chapter regarding criminal homicide, in which Dressler analyzes different degrees of homicide according to the Model Penal Code and common law approaches. DRESSLER & GARVEY, *supra* note 26, at 253–406.

29. Ohlin, *supra* note 1, at 1158–59.

30. GUYORA BINDER, *FELONY MURDER* 122, 136 (2012); JOSHUA DRESSLER, *UNDERSTANDING CRIMINAL LAW* 517 (6th ed. 2012); Guyora Binder, *Making the Best of Felony Murder*, 91 B.U. L. REV. 403 (2011); Guyora Binder, *The Origins of American Felony Murder Rules*, 57 STAN. L. REV. 59, 117–18 (2004).

origin, and that they are always judicially rather than legislatively enacted. Yet—as we shall see in the next section of this Response—the Model Penal Code *is* usefully contrasted with prerevolutionary English law. This dichotomy is illuminating if clearly presented as two moments in a historical narrative, rather than two exhaustive categories of contemporary rules, and Ohlin’s dismissal of this dichotomy overlooks that potential.

As summarized by Ohlin, legal scholar and casebook editor Paul Robinson offers a solution to the conflict between utility and desert as aims of criminal justice.³¹ According to Robinson, most Americans have convergent views on when punishment is deserved, and even on the relative amounts of punishment that are deserved. Robinson believes, however, that these retributive views should be reflected in criminal law for the utilitarian reason that fear of self-condemnation and the deserved condemnation of others is a more powerful deterrent to crime than fear of punishment.³² Punishment, Robinson argues, should be deserved to achieve the “utility” of desert.³³ In his comment on Robinson’s casebook, Ohlin objects that Robinson’s emphasis on these widespread normative intuitions comes at the expense of teaching students to apply enacted law. Thus, while Ohlin praises Robinson’s use of hypothetical problem cases, he argues that real appellate cases would give students more guidance.³⁴

Ohlin thereby undervalues Robinson’s contribution to doctrinal understanding. Robinson’s considerable body of writing on element analysis in the Model Penal Code has informed virtually every contemporary scholar’s understanding not only of this model but of the great majority of penal codes revised in light of it.³⁵ And Robinson’s book naturally incorporates these insights that he pioneered. But here Robinson is a victim of his own achievement: his interpretation of the Model Penal Code has become so influential that its influence is no longer visible. Robinson should not be denied credit for illuminating doctrine just because the rest of us—likely including Ohlin—have borrowed his ideas.

Moreover, Ohlin obscures an important theoretical claim about doctrine implicit in Robinson’s approach. American criminal law is not really “doctrinal” at all, because almost all of its important issues are decided by *legislation*. Robinson is our foremost expert on criminal *codes*, both as a scholar and as a practicing consultant to governments. In his casebook, he presents criminal law as a series of policy problems confronting elected legislators and their democratic constituents. From Robinson’s perspective, presenting criminal law as a received body of “doctrinal” principles misstates

31. Ohlin, *supra* note 1, at 1160 (summarizing Paul H. Robinson & John M. Darley, *The Utility of Desert*, 91 Nw. U. L. REV. 453 (1997)).

32. Paul H. Robinson & John M. Darley, *The Utility of Desert*, 91 Nw. U. L. REV. 453, 471–76 (1997).

33. *Id.* at 477–78.

34. Ohlin, *supra* note 1, at 1162–63.

35. See generally Paul H. Robinson & Jane A. Grall, *Element Analysis in Defining Criminal Liability: The Model Penal Code and Beyond*, 35 STAN. L. REV. 681 (1983).

the source of its authority and understates its potential dynamism.³⁶ Such an approach thereby misidentifies the cause of stability in criminal law, which Robinson regards as conformity to popular morality rather than to judicial or scholarly consensus.³⁷

III. KNOWING DOCTRINE: HARDER THAN IT LOOKS

So the market niche Ohlin hopes to fill is clear enough. He would downplay legal philosophy and aim “to get students to understand the doctrine and skillfully apply it.”³⁸ Ohlin offers to do this in three ways: by beginning with an explication of all the doctrine on a given issue, by proceeding to invite students to apply it to a series of challenging reported appellate cases, and finally by offering practice exercises based on recent cases in the news.³⁹ Ohlin prefers to explicate the basic background doctrine himself rather than to rely on cases to announce the rules. In his view, criminal law casebooks devote too much space to “announcement cases” and not enough to “application cases” that apply familiar rules to challenging facts.⁴⁰ Ohlin may have a good point here, but for an unstated reason: there are few interesting announcement cases in modern American criminal law, because most of the announcing is done in statutes, not cases. Perhaps the most useful way to “announce” the law, then, is to provide students with a range of contrasting statutes.

In any event, Ohlin wants to do a better job than his predecessors in explicating contemporary law and teaching students how to apply it. Ohlin eschews his predecessors’ common aspiration to offer a distinct and coherent view on criminal law and punishment as political or moral problems. He faults their casebooks not for offering less than a review of doctrine but for offering more.⁴¹ Yet he thereby suggests that rival books might not do a good job of inculcating legal doctrine because they are pursuing conflicting aims.

There is some truth in the claim that contemporary casebooks could do a better job of accurately describing criminal law doctrine. Few criminal law scholars have detailed knowledge of the current state of the law on the ground. Many casebooks include early- and mid-twentieth century cases discussed in the Model Penal Code Commentaries;⁴² few describe the current distribution of statutory rules among the fifty states, the District of Columbia, and the federal system. But to include such information, each casebook author would have to invent this particular wheel. While some casebooks

36. PAUL H. ROBINSON, CRIMINAL LAW xxxvii (3d ed. 2012).

37. *Id.*

38. Ohlin, *supra* note 1, at 1172.

39. *Id.* at 1170–72.

40. *Id.* at 1162.

41. *Id.* at 1162–63.

42. *Id.* at 1170–72.

introduce particular doctrines with a sampling of relevant state statutes,⁴³ they do not offer comprehensive surveys or classifications of the statutes, because those sources are largely unavailable. Because reference works on criminal law have traditionally presented it as a common-law subject, they do not organize the law by jurisdiction or by statutory formulation. Thus LaFave's popular and very useful hornbook cites mostly pre-Code cases and does not generally survey contemporary statutes.⁴⁴ Dressler's deservedly popular hornbook, *Understanding Criminal Law*, deploys the same dichotomy between common law and Model Penal Code rules that organizes his casebook.⁴⁵ Surveying statutory solutions is also not a straightforward task, because it calls for potentially controversial interpretive and classificatory judgment. For example, John Decker provides an impressively careful and enormously helpful survey of the mental element of accomplice liability.⁴⁶ But even such a helpful survey cannot offer an uncontested view of legal doctrine beyond any need for interrogation. Thus, while we reference Decker in the new edition of our casebook, we respectfully disagree with some of his characterizations of the law in many jurisdictions and with his overall conclusions about the prevailing standard.⁴⁷

If Ohlin has done the thankless work of surveying statutes and their applications by courts on each legal issue and has classified these rules in an illuminating way, his casebook will make a great contribution not only to criminal law teaching, but also to criminal law scholarship. However, his essay gives us no indication that he has done so. The only issue on which Ohlin describes a range of tests is the insanity defense, for which the Supreme Court helpfully provided a survey of state law in the 2006 case *Clark v. Arizona*.⁴⁸

Even if Ohlin has not surveyed law in every jurisdiction, his doctrinally focused book could still be very useful in one of the ways that Dressler's casebook is very useful: providing a clear and illuminating, but necessarily simplified, model of legal doctrine. But there is no reason to assume that any such simplified model will be more accurate than Dressler's. Certainly such

43. See, e.g., DRESSLER & GARVEY, *supra* note 26, at 238–47 (homicide statutes); *id.* at 389–97 (rape statutes).

44. WAYNE R. LAFAYE, *CRIMINAL LAW* (5th ed. 2010). LaFave's three volume treatise, *Substantive Criminal Law* cites more recent cases, but also deemphasizes statutes. 1–3 WAYNE R. LAFAYE, *SUBSTANTIVE CRIMINAL LAW* (2d ed. 2003).

45. DRESSLER, *supra* note 30.

46. John F. Decker, *The Mental State Requirement for Accomplice Liability in American Criminal Law*, 60 S.C. L. REV. 237 (2008).

47. JOHN KAPLAN, ROBERT WEISBERG & GUYORA BINDER, *CRIMINAL LAW* (8th ed. forthcoming 2016). Our main point of disagreement is about his conclusion that the consensus of American states does not condition accomplice liability on the accomplice's intent to promote or facilitate the principal's actual perpetration of the crime charged. Decker, *supra* note 46, at 380; see also GUYORA BINDER, *THE OXFORD INTRODUCTIONS TO U.S. LAW: CRIMINAL LAW* (forthcoming 2016).

48. *Clark v. Arizona*, 548 U.S. 735, 749–52 (2006); Ohlin, *supra* note 1, at 1158–59.

a simplified model is unlikely to be better informed.⁴⁹ Nor should we assume that Dressler's model of the doctrine is inaccurate merely because he connects it to a view of criminal law as a political and moral phenomenon. Indeed, we have suggested that Dressler's dichotomy between the common law and the Model Penal Code is most illuminating to students when presented as an axis defining pervasive conflicts within criminal law doctrine.⁵⁰ If anything, Dressler can be criticized for not being explicitly theoretical enough: he could more clearly connect the Model Penal Code with utilitarian penology and the requirement of a mental element. He could more clearly identify the common law with ideas about governing authority, public peace, and objective criteria of liability. In any case, the theoretical ambitions of Dressler's book, and those of others Ohlin criticizes, are strengths rather than weaknesses. This is because normative theory and social context are not ancillary to criminal law. They are properly part of the subject of criminal law itself.

IV. INTELLECTUAL HISTORY AS DOCTRINAL KNOWLEDGE

As we have seen, Ohlin describes the leading casebooks as structured by distinctions between retributive and utilitarian justifications for punishment, between offenses and defenses of justification and excuse, and between common law and Model Penal Code rules. When these distinctions are presented independently of one another, they seem like competing—and perhaps mutually discrediting—interpretations of doctrine.

Yet each of these categories emphasizes a different aspect of the same intellectual history. And when we locate the ideas of retribution and utility in that history, they seem less like academic philosophies and more like *policies*. When we recognize that distinctions between offenses and defenses and between act and mental elements were introduced at different times to achieve different policies, we can better understand how controversy and confusion can arise as to whether mistake is an excuse defense or the absence of a required mental element. Similarly, when we recharacterize the common law as a set of policies and doctrines expounded by jurists during a certain period of the past, we can trace its legacy in contemporary doctrine without oversimplifying that legacy.

Such a historical perspective is provided by a theoretical work that Ohlin cites respectfully, George Fletcher's 1978 book, *Rethinking Criminal Law*.⁵¹ Fletcher generally sympathizes with the revival of retributivism and promotes the tripartite analysis of liability (offense, justification, excuse)

49. Dressler regularly updates a 700 page hornbook. DRESSLER, *supra* note 30.

50. See *supra* text following note 31.

51. Ohlin, *supra* note 1, at 1156 (citing GEORGE P. FLETCHER, *RETHINKING CRIMINAL LAW* (1978)).

that prevails in the civil law tradition.⁵² But Fletcher also adds another important distinction between manifest and subjective criminality. According to Fletcher, English criminal law up to the eighteenth century conditioned liability primarily on objective criteria—manifestly criminal conduct or harmful consequences—rather than on subjective mental states.⁵³

In medieval and early-modern law, crimes were not conceived as injuries to interests of individuals. Instead, they were breaches of a duty of political loyalty to a lord.⁵⁴ The criminal jurisdiction of the royal courts was defined by the king's peace, which asserted a monopoly on legitimate violence, particularly in public, where any unauthorized use of arms could be taken as a claim to governing authority and a challenge to the crown.⁵⁵ The king's peace also forbade revenge, substituting public punishment.⁵⁶ Conduct that violated the king's peace included trespasses by force of arms or by breach of an enclosure. When harm followed from such a trespass, the result could be a criminal offense.⁵⁷ Trespasses were *manifestly* criminal in the sense that they publicly flouted royal authority.⁵⁸ A crime might nevertheless be justified, which meant legally authorized, or excused, which meant that it merited a pardon.⁵⁹ Excuses included infancy, insanity, and duress—but also self-defense, seen as a justification today. Excuses also included mistake and accident, which today would be thought of as the absence of required mental elements of the offense, rather than as defenses.⁶⁰

Fletcher showed that the “pattern” of manifest criminality explained puzzles in the history of larceny.⁶¹ Courts were initially reluctant to punish

52. GEORGE P. FLETCHER, *RETHINKING CRIMINAL LAW* § 6.3.2 (1978) (comparing retributive and utilitarian rationales for punishment); *id.* at § 6.6.2 (retributivist critique of recidivist sentencing); *id.* at § 9 (distinguishing mistakes bearing on mental element of offense from excusing mistakes); *id.* at § 10 (distinguishing justification and excuse).

53. *Id.* at § 2.1.1.

54. 4 WILLIAM BLACKSTONE, *COMMENTARIES ON THE LAWS OF ENGLAND* 1–2 (Univ. of Chicago Press 1979) (1769); 1 FREDERICK POLLOCK & FREDERIC WILLIAM MAITLAND, *THE HISTORY OF ENGLISH LAW BEFORE THE TIME OF EDWARD I* 51, 303–05 (Liberty Fund 2010) (1898); 2 FREDERICK POLLOCK & FREDERIC WILLIAM MAITLAND, *THE HISTORY OF ENGLISH LAW BEFORE THE TIME OF EDWARD I* 453–54 (Liberty Fund 2010) (1898).

55. Guyora Binder, *Homicide*, in *THE OXFORD HANDBOOK OF CRIMINAL LAW* 702, 702 (Markus D. Dubber & Tatjana Hörnle eds., 2014); JOHN H. LANGBEIN ET AL., *HISTORY OF THE COMMON LAW* 31–32 (2009); 2 POLLOCK & MAITLAND, *supra* note 54, at 453, 462–63.

56. 4 BLACKSTONE, *supra* note 54, at 1–2.

57. *Id.* at 5–9; see 1 POLLOCK & MAITLAND, *supra* note 54, at 59–60; 2 POLLOCK & MAITLAND, *supra* note 54, at 512, 519.

58. 2 POLLOCK & MAITLAND, *supra* note 54, at 166–68, 462–63.

59. Statute of Gloucester, 1278, 6 EDW. c. 9 (Eng.); 4 BLACKSTONE, *supra* note 54, at 201 (self-defense and accident reclassified as excuses); 2 POLLOCK & MAITLAND, *supra* note 54, at 502 (pardons for self-defense and accident).

60. 4 BLACKSTONE, *supra* note 54, at 21, 201; MICHAEL FOSTER, *A REPORT OF SOME PROCEEDINGS ON THE COMMISSION FOR THE TRIAL OF THE REBELS IN THE YEAR 1746, IN THE COUNTY OF SURRY* 255 (3d ed. 1809).

61. George P. Fletcher, *The Metamorphosis of Larceny*, 89 HARV. L. REV. 469, 469–70, 481–489, 505 (1976).

misappropriations of property achieved by deception or betrayal of trust, because the manifest breach of the peace—the trespass—was absent.⁶² They attempted to finesse the problem with metaphysical arguments that deception prevented possession from transferring by delivery, so that a sufficiently trespassory taking from possession could occur later, even though the offender appeared to have already acquired possession.⁶³ By the second half of the nineteenth century, courts had decided that fraudulent intent could substitute for force to supply the trespass itself at the time of delivery. At that point, theft no longer required a manifestly criminal act.⁶⁴

While Fletcher took theft as his paradigm for the “metamorphosis” from manifest to subjective criminality, he pointed to other examples, such as the appearance and expansion of inchoate crimes around the beginning of the nineteenth century.⁶⁵ Such crimes require proof of intent but may require far less by way of conduct than completed crimes.⁶⁶ The general doctrine that the attempt to commit a crime is also a crime did not appear in English law until the late eighteenth century.⁶⁷ From that time until the late twentieth century, attempt expanded to require less conduct. Originally attempts required the same conduct as a completed offense, minus only the result. But by the late twentieth century, many jurisdictions had adopted the Model Penal Code’s “substantial step” test, requiring only some conduct showing seriousness of purpose.⁶⁸ In the nineteenth century, courts sometimes excluded attempt liability on the ground that success was impossible, but this argument is rarely accepted today.⁶⁹

We see similar patterns in the law of rape, with the difference that change has come much more slowly and incompletely. In medieval England, rape appears to have been seen more as an offense against the honor and property of the victim’s family than as a crime against her sexual autonomy.⁷⁰ It seems likely that rape was recognized as a felony because certain rapes—particularly of marriageable daughters of respectable households by strangers—might provoke violent conflict. By contrast, the sexual exploitation of a servant by her master would likely have been seen as a matter of

62. *Id.* at 492.

63. *Id.* at 481–489, 505 (discussing *The Carrier’s Case* (1473) Y.B. Pasch. 13 Edw. 4, f. 9, pl. 5, *Chisser* (1678) 83 Eng. Rep. 142, and *The King v. Pear* (1779) 168 Eng. Rep. 208).

64. *Id.* at 506–7, 518.

65. *Id.* at 521.

66. *Id.* at 522.

67. *Rex v. Higgins* (1801) 102 Eng. Rep. 269; *Rex v. Scofield* (1784) Cald. 397; Fletcher, *supra* note 61, at 503.

68. MODEL PENAL CODE § 5.01(2) (AM. LAW INST., 2001); Fletcher, *supra* note 61, at 522 & n.223.

69. FLETCHER, *supra* note 52, at 137.

70. 2 HENRY DE BRACON ET AL., BRACON ON THE LAWS AND CUSTOMS OF ENGLAND 414 (George E. Woodbine ed., Samuel E. Thorne trans., 4th ed. 1997); 2 POLLOCK & MAITLAND, *supra* note 54, at 488–92.

household governance, not a breach of the king's peace.⁷¹ In early-modern England, rape required sexual intercourse by force overcoming physical resistance.⁷² There was no requirement to prove knowledge of the victim's nonconsent because—as with most felonies—the required conduct was manifestly incriminating. The requirement of resistance persisted into the twentieth century—“utmost resistance” was still required in New York in the 1970s.⁷³ Yet, as Susan Estrich shows, it was deployed selectively, to preclude liability in acquaintance rapes but not stranger rapes.⁷⁴ To this day, most states continue to require force.⁷⁵ Only in the late twentieth century was there widespread recognition that sexual assault was frequent and generally unreported and unprosecuted in dating, family, workplace, and educational settings.⁷⁶ Estrich, Stephen Schulhofer, and others proposed a redefinition of rape as sexual intercourse without consent, combined with negligence with respect to nonconsent.⁷⁷ Such negligence could be established by showing that the defendant proceeded toward the sexual act in the face of express nonconsent,⁷⁸ or—somewhat more controversially—that the defendant proceeded without express consent.⁷⁹

The historical development of the core crime of homicide also involved a transformation from objective to subjective criteria of liability. The common law defined murder as an unlawful killing with malice.⁸⁰ Killing was a much narrower category of conduct than what we now include within the category of causing death. To “kill” in Middle English meant to strike a

71. On the distinction between penal law and household governance, see MARKUS DIRK DUBBER, *THE POLICE POWER* 18–19 (2005).

72. 4 BLACKSTONE, *supra* note 54, at 210; EDWARD COKE, *THE SECOND PART OF THE INSTITUTES OF THE LAWS OF ENGLAND* 180 (M. Flesher & R. Young 1642); 1 MATTHEW HALE, *THE HISTORY OF THE PLEAS OF THE CROWN* 628 (The Lawbook Exchange Ltd. 2003) (1736); 1 WILLIAM HAWKINS, *A TREATISE OF THE PLEAS OF THE CROWN* 108 (Eliz. Nutt 1716).

73. *People v. Yanik*, 390 N.Y.S.2d 98, 101 (App. Div. 1977), *rev'd*, 371 N.E.2d 497 (N.Y. 1977).

74. See Susan Estrich, *Rape*, 95 YALE L.J. 1087, 1179 (1986).

75. See John F. Decker and Peter G. Baroni, “No” Still Means “Yes”: *The Failure of the “Non-Consent” Reform Movement in American Rape and Sexual Assault Law*, 101 J. CRIM. L. & CRIMINOLOGY 1081, 1084–86 (2011).

76. Estrich, *supra* note 74, at 1164–66; Allan Griswold Johnson, *On the Prevalence of Rape in the United States*, 6 SIGNS 136 (1980); Diana E. H. Russell & Nancy Howell, *The Prevalence of Rape in the United States Revisited*, 8 SIGNS 688 (1983); see Gail L. Zellman & Jacqueline D. Goodchilds, *Becoming Sexual in Adolescence*, in *CHANGING BOUNDARIES: GENDER ROLES AND SEXUAL BEHAVIOR* 49, 61 (Elizabeth Rice Allgeier & Naomi B. McCormick eds., 1983).

77. See STEPHEN J. SCHULHOFER, *UNWANTED SEX* 111 (1998); Estrich, *supra* note 74, at 1102–03.

78. See *State v. Smith*, 554 A.2d 713, 717 (1989).

79. See *In re MTS*, 609 A.2d 1266, 1278–79 (N.J. 1992).

80. Guyora Binder, *The Meaning of Killing*, in *MODERN HISTORIES OF CRIME AND PUNISHMENT* 88, 88 (Markus D. Dubber & Lindsay Farmer eds., 2007) (citing WILLIAM LAMBARDE, *EIRENARCHA; OR, OF THE OFFICE OF THE JUSTICE OF THE PEACE* 240–50 (De Capo Press, 1970) (1588)).

blow.⁸¹ In early-modern English law, killing meant inflicting a fatal wound or injury by means of an armed attack of some kind. Provided that the conduct was manifestly violent, a wound or injury was inflicted, and the victim died, the element of killing was established.⁸² There was almost no litigation of causation apart from these questions of weapon and wound.⁸³

“Malice” was not any particular mental state with respect to the prospect of death, but instead inhered in killing, absent some exculpatory claim like self-defense, provocation, or accident.⁸⁴ The excuse of accident required that the infliction of the wound or injury be accidental, not the death itself.⁸⁵ Unless a weapon or poison was involved, the question of accident would not likely arise because there was no killing.⁸⁶ A study of homicide law as applied in London’s Old Bailey in the seventeenth and eighteenth centuries shows that an armed attack (or poisoning or strangling) was required for murder but that intent to kill was not. Murder indictments invariably described the weapon and the wound in detail and usually said nothing about the killer’s intentions.⁸⁷

The focus of litigation was not intention, but self-defense, provocation, or mutual combat. When a defendant killed, the important question was the extent of the victim’s responsibility for the breach of the peace. Thus, homicide liability was framed less as a question of causal responsibility for a result than as a problem of allocating moral responsibility for violent conflict.⁸⁸ Homicide cases required the jury to pick a side in a moral drama.

All of this had changed by the end of the nineteenth century, in both England and the United States. In Pennsylvania, reformers had divided murder into degrees and required either a deliberate intention to kill or killing in the course of enumerated felonies for capital murder.⁸⁹ Over the course of the nineteenth century, other codes also defined the mental states required for murder. In England, Bentham offered his new model of offending as harming or endangering a legally protected interest, with an accompanying mental state with respect to that danger.⁹⁰ In the 1830s, Bentham’s acolytes on the Criminal Law Commission reinterpreted objective criteria of liability, such as a blow with a weapon or a wound, as evidentiary rules establishing presumptions of intent to kill on the basis of such conduct.⁹¹ From there, it

81. *Id.* at 91.

82. *Id.* at 88–91; Binder, *supra* note 55, at 705; Mackalley’s Case (1611) 77 Eng. Rep. 828; 9 Co. Rep. 65 b (K.B.).

83. Binder, *supra* note 80, at 93.

84. FOSTER, *supra* note 60, at 255; Binder, *supra* note 55, at 706; Binder, *supra* note 80, at 101–06.

85. Binder, *supra* note 80, at 104.

86. *Id.* at 93.

87. Binder, *supra* note 55, at 707; Binder, *supra* note 80, at 93–95.

88. Binder, *supra* note 55, at 703–08.

89. *Id.* at 711.

90. *Id.* at 709.

91. *Id.*

was natural to critique these presumptions as artificial constructions of a mental element. By the end of the nineteenth century, Stephen had redefined murder as causing death with malice, and malice as one of several mental states, all reducible to recklessness of a substantial risk of death.⁹² In the 1930s Wechsler and Jerome Michael proposed a rationale of homicide, defining homicide as causation of death and grading homicide offenses entirely on the basis of the actor's expectation that death would result from his or her conduct.⁹³ The Model Penal Code and many states adopted this approach to homicide.

And yet the transformation of homicide from manifest to subjective criminality was not and could not be completely successful. The utilitarian logic of the Model Penal Code favors conditioning liability on expected harm, but it disfavors conditioning punishment on actual harm. From the utilitarian perspective, conditioning punishment on harm rather than risk is "rationally indefensible" and makes punishment a matter of "moral luck."⁹⁴ It thereby reduces the certainty of punishment and blunts its deterrent effect.⁹⁵ As Herbert Wechsler explained:

From the preventive point of view, the harmfulness of conduct rests upon its tendency to cause the injuries to be prevented far more than on its actual results; results, indeed, have meaning only insofar as they may indicate or dramatize the tendencies involved. Reckless driving is no more than reckless driving if there is a casualty and no less if by good fortune nothing should occur. . . . [I]f the criminality of conduct is to turn on the result, it rests upon fortuitous considerations unrelated to the major purpose to be served by declaration that behavior is a crime.⁹⁶

For this reason, the Model Penal Code generally equated the punishment of inchoate and completed crimes.⁹⁷ Yet most codes reject this position, because—as Robinson shows⁹⁸—*results* matter to the public. For the public, punishment serves not only to deter future risk but to redress past wrongs by vindicating the dignity of victims. Our legal system's persistence in punishing actual results is a vestige of the common law's overriding concern with establishing and enforcing the king's peace.

The ideas of manifest criminality and the king's peace help us understand the values informing the common law of crimes, just as utilitarianism offers the key to understanding the Model Penal Code's doctrinal solutions. The common law developed a distinction between offenses and defenses,

92. *Id.* at 709–10.

93. Herbert Wechsler & Jerome Michael, *A Rationale of the Law of Homicide: I*, 37 COLUM. L. REV. 701, 730–33 (1937).

94. Kadish, *Luck of the Draw*, *supra* note 18, at 680–90.

95. Stephen J. Schulhofer, *Harm and Punishment: A Critique of Emphasis on the Results of Conduct in the Criminal Law*, 122 U. PA. L. REV. 1497, 1533–57 (1974).

96. Wechsler, *supra* note 17, at 1106.

97. MODEL PENAL CODE § 5.05 (AM. LAW INST., 2001).

98. See PAUL H. ROBINSON & JOHN M. DARLEY, *JUSTICE, LIABILITY, AND BLAME* 16–28 (1995).

while utilitarian reformers developed an analysis of offenses as composed of act elements and corresponding mental elements. In the common law offenses were challenges to the law's monopoly on violence, and defenses were claims of authorization or pleas for mercy. Among the utilitarian codifiers, offenses were choices to risk harm to protected interests, and defenses were claims to have maximized utility or to have been undeterrable. Contemporary American criminal law reflects the continuing influence of these two competing approaches to the purposes, limits, and structure of criminal law. For example, our contemporary law of homicide is utilitarian in form—conditioning liability on the expectation of causing death, but retributive in function—punishing actual results. In deferring to popular intuitions, the law of homicide illustrates what Robinson calls “the utility of desert.”⁹⁹ At the same time, there is a cost to deferring to popular moral intuitions when those intuitions reinforce unjust social hierarchies. This cost is visible in the persistence of the requirement of force—a legacy of the common law pattern of “manifest criminality”—in the law of rape.

In summary, by recounting the evolution of American criminal law as a dialectic between the common law, with its ethos of public order, and the Model Penal Code with its utilitarian ethos, we can see that normative theory is not just a source of critical or policy perspectives on legal doctrine, but inheres in legal doctrine itself.

V. ACADEMIC RESEARCH AS DOCTRINAL KNOWLEDGE

Somewhat in passing, Ohlin criticizes our book (and others) for excerpting a wealth of law review articles and other academic writings. Ohlin regards these excerpts as distractions from the primary legal sources that he thinks should be the core of a casebook. If their purpose is to explain the law, he reasons, this purpose can be accomplished more clearly and succinctly in brief explanations in the editor's own prose.¹⁰⁰ Yet the purpose of these excerpts is often to provide critical perspective on the law, which is most enlightening to students if offered from a variety of viewpoints. Here is how we explain this in our preface:

Since its inception . . . 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.¹⁰¹

Sometimes a critical perspective is a normative viewpoint, revealing social effects or cultural meanings of legal rules. But some articles deploy empirical

99. See Robinson & Darley, *supra* note 32.

100. See Ohlin, *supra* note 1, at 1166.

101. JOHN KAPLAN, ROBERT WEISBERG & GUYORA BINDER, *CRIMINAL LAW* xxv (7th ed. 2012).

methods to expose the otherwise invisible content of legal doctrine itself, by showing the “law in action.”¹⁰²

One good example is Estrich’s demonstration that the requirement of resistance was selectively applied in cases of “acquaintance rapes,” thereby revealing that a social category was more important than a legal rule in determining the outcome of cases.¹⁰³ And Estrich’s argument for shifting the focus of rape law from force to negligent violation of consent¹⁰⁴ provides a great example of scholarly counterpoint when paired with the powerful response by Lynne Henderson, who questions the value of such a shift.¹⁰⁵

But for a fuller example consider Victoria Nourse’s research on the gender dynamics of defenses to homicide. In “Passion’s Progress: Modern Law Reform and the Provocation Defense,” Nourse offered an empirically based critique of the Model Penal Code’s standard for mitigating an intentional killing from murder to manslaughter.¹⁰⁶ Before the promulgation of the Code, most jurisdictions mitigated intentional killing to manslaughter based on a combination of provocative wrongdoing by the victim and a strong emotional reaction on the part of the killer.¹⁰⁷ In the common law, provocation could be established by physical attack or by adultery with the killer’s spouse if personally witnessed.¹⁰⁸ Eventually, American courts extended provocation to killings of the adulterous spouse as well as the “paramour.”¹⁰⁹ The Model Penal Code proposed a more subjective standard, putting the emphasis almost entirely on the killer’s emotional state rather than on a normative judgment of the victim’s conduct. Model Penal Code 210.3 mitigates killings “committed under the influence of extreme mental or emotional disturbance for which there is a reasonable explanation or excuse.”¹¹⁰ That reasonableness would be “determined from the viewpoint of a person in the actor’s situation under the circumstances as he believes them to be.”¹¹¹

102. Indeed, the LaFave casebook, which Ohlin characterizes as dominantly consisting of appellate cases, Ohlin, *supra* note 1, at 1160–61, includes plenty of excerpts from scholarly commentary, from the interpretive to the normative to the empirical. *E.g.*, WAYNE R. LAFAVE, *MODERN CRIMINAL LAW* 332–36 (5th ed. 2011) (on felony murder).

103. Estrich, *supra* note 74, at 1172.

104. *See id.* at 1099–101.

105. *See* KAPLAN ET AL., *supra* note 101, at 930–31; Lynne N. Henderson, *What Makes Rape a Crime?*, 3 *BERKELEY WOMEN’S L.J.* 193, 211–14 (1987) (reviewing SUSAN ESTRICH, *REAL RAPE* (1987)).

106. Victoria Nourse, *Passion’s Progress: Modern Law Reform and the Provocation Defense*, 106 *YALE L.J.* 1331 (1997).

107. *See id.* at 1339–42.

108. 1 *HALE*, *supra* note 72, at 486; *Regina v. Mawgridge* (1707) 84 Eng. Rep. 1107; Kel. J. 119 (Q.B.).

109. *See, e.g.*, *Rowland v. State*, 35 So. 826, 827 (Miss. 1904).

110. MODEL PENAL CODE § 210.3(1)(b) (AM. LAW INST., 2001).

111. *Id.*

Nourse showed that in a remarkable number of cases—all arising in jurisdictions with the Model Penal Code's extreme emotional disturbance standard¹¹²—defendants successfully mitigated on the basis of their emotional reactions to separation rather than infidelity:

A significant number of the reform cases I studied involve no sexual infidelity whatsoever, but only the desire of the killer's victim to leave a miserable relationship. Reform has permitted juries to return a manslaughter verdict in cases where the defendant claims passion because the victim left, moved the furniture out, planned a divorce, or sought a protective order. Even infidelity has been transformed under reform's gaze into something quite different from . . . sexual betrayal . . . —it is the infidelity of a fiancée who danced with another, of a girlfriend who decided to date someone else, and of the divorcée found pursuing a new relationship months after the final decree.¹¹³

Nourse concludes that the Model Penal Code's effort to adopt a value-neutral standard for loss of self-control simply invited juries to make normative judgments that devalued the autonomy of women.¹¹⁴ It is hard to see how students would know this without the benefit of her research, presented, in part, in her own words.

The law of self-defense generally requires that the use of deadly force must reasonably appear necessary to avert an imminent use of deadly force.¹¹⁵ In some jurisdictions, retreat is required if it reasonably appears safe. Yet even when retreat is not required, killings to prevent future attacks—however probable—are precluded by the requirement of imminence.¹¹⁶ Thus the requirement of imminence bars nonconfrontational killings.¹¹⁷ Remarkably, however, Nourse demonstrates that over a twenty year period the great majority of reported cases in which prosecutors had argued that self-defense was barred by imminence were confrontational killings.¹¹⁸ In particular, she finds that prosecutors would often argue that a deadly attack was not imminent even when such an attack had commenced, because the defender could have avoided the confrontation by retreating before it occurred.¹¹⁹ Thus, prosecutors would argue that victims of prolonged domestic abuse who either could not retreat or were not obliged to retreat nevertheless had no right to defend themselves against their abusers because they had remained in an abusive relationship.¹²⁰ Thus, Nourse again shows how objectionable social norms could override legal rules or give them completely unexpected content.

112. Nourse, *supra* note 106, at 1332 n.2.

113. *Id.* at 1332–33 (footnotes omitted).

114. *Id.* at 1374–80.

115. V.F. Nourse, *Self-Defense and Subjectivity*, 68 U. CHI. L. REV. 1235, 1239 (2001).

116. *Id.* at 1240–42.

117. *Id.* at 1237.

118. *See id.* at 1248–55.

119. *See id.* at 1262–64.

120. *See id.* at 1282–83.

Many other examples of empirical scholarship in this vein might be adduced. Where social norms are influencing arguments and outcomes in this way, a lawyer who knows only the doctrinal rules will have a misleading view of how they operate. Such a lawyer will not be well-equipped to apply the law, let alone to critique and improve it. And we should be long past the point of having to justify the use of nonlegal scholarship in illuminating legal doctrine. Thus, the dramatic change in self-defense law wrought by the proffering of the battered-spouse concept by such social scientists as Lenore Walker¹²¹ is precisely due to the introduction of social and medical science into the doctrine.¹²²

VI. INDETERMINACY AS DOCTRINE

Criminal law teaching should present rules of law clearly when the rules are clear. But as shown by our discussions of *Estrich* and *Nourse*, intellectually honest teaching must sometimes show students that the law is uncertain or even incoherent. And where that uncertainty is foundational, our pedagogic duty is indeed to teach the uncertainty—to help students understand the moral and political conflicts preventing the courts from providing easy answers.

To illustrate this pedagogic principle, we now undertake a somewhat detailed review of an area of legal doctrine that is not only important to a criminal law course, but a virtually obligatory predicate to all else in the course. This is the area of the constitutional limits on criminal punishment.

As background, William Stuntz famously demonstrated that the Warren Court, concerned about the discriminatory use of the criminal justice system, responded in two ways: by incorporating the federal criminal-procedure rights into the Due Process Clause, and by establishing new due process standards for substantive criminal law.¹²³ Yet it pursued the first strategy much more vigorously than the second. Stuntz argues that, in hindsight, this was a mistake.¹²⁴ Legislatures responded to the new impediments to police investigation (as well as rising crime rates) by criminalizing more offenses, making them easier to prove, and punishing them more severely.¹²⁵ Central to this expansion of liability was the proliferation of drug offenses.¹²⁶ For example, police and prosecutors responded to the difficulty of proving homicides by drug traffickers by increasing arrests and prosecutions for drug

121. See e.g., LENORE E. A. WALKER, *THE BATTERED WOMAN SYNDROME* (3d ed. 2009).

122. See *Ibn-Tamas v. United States*, 407 A.2d 626, 634–35 (D.C. 1979) (holding that trial court erred as a matter of law by excluding expert testimony by Walker on a substantive basis).

123. See WILLIAM J. STUNTZ, *THE COLLAPSE OF AMERICAN CRIMINAL JUSTICE* 216–26 (2011).

124. See *id.* at 225–28.

125. *Id.* at 260–67.

126. *Id.* at 267.

trafficking, while legislators accommodated this strategy by raising penalties.¹²⁷ These and other stratagems contributed to the rapid increase in incarceration that arguably had a much greater effect on the African American population than the discriminatory policing that the Warren Court sought to control through criminal-procedure reforms.¹²⁸

The Warren Court's half-hearted attempt to constitutionalize substantive criminal law resulted in several cases suggesting limits that never quite materialized. The doctrinal history of this fitful attempt offers students a crucial lesson in how the indeterminate nature of some of the most basic components of substantive criminal law implicates profound issues of jurisprudence. This indeterminacy created by the Warren Court lingers to this day, and an intellectually honest criminal law course should ensure that students confront it.

One area of foundational uncertainty is the so-called requirement of an act. We can easily utter the mantra that because punishment expresses blame, it should be imposed only for voluntarily chosen conduct, not for unexecuted thoughts or desires, nor unchosen circumstances or statuses. But does the Constitution require an act? A due process requirement of conduct was implicit in the requirement of notice and specificity. Thus, in *Connally v. General Construction Co.*, the Court held due process to require "[t]hat the terms of a penal statute . . . must be sufficiently explicit to inform those who are subject to it what *conduct* on their part will render them liable to its penalties."¹²⁹ In *Lanzetta v. New Jersey*, the Court struck down a law criminalizing being a gangster.¹³⁰ The Court concluded "[t]he challenged provision *condemns no act or omission*; the terms it employs to indicate what it purports to denounce are so vague . . . that it must be condemned as repugnant to the due process clause of the Fourteenth Amendment."¹³¹

The Court made a requirement of conduct, independent of notice, explicit in the seminal case of *Robinson v. California*, striking down a statute criminalizing addiction as a violation of the Eighth Amendment Cruel and Unusual Punishment Clause.¹³² Yet the Court left the scope of this requirement uncertain. Writing for a majority of five, Justice Stewart observed that the statute:

is not one which punishes a person for the use of narcotics, for their purchase, sale or possession, or for antisocial or disorderly behavior resulting from their administration. . . . Rather, we deal with a statute which makes the "status" of narcotic addiction a criminal offense, for which the offender may be prosecuted "at any time before he reforms." California has said that a person can be continuously guilty of this offense, whether or

127. *Id.* at 269–72.

128. *See id.* at 273–74.

129. 269 U.S. 385, 391 (1926) (emphasis added).

130. 306 U.S. 451, 458 (1939).

131. *Lanzetta*, 306 U.S. at 458 (emphasis added).

132. 370 U.S. 660 (1962).

not he has ever used or possessed any narcotics within the State, and whether or not he has been guilty of any antisocial behavior there.¹³³

In condemning this statute, Justice Stewart likened it to punishment for mental illness or leprosy, and noted that it was possible to become addicted involuntarily. He implied, however, that the state could punish use of drugs.¹³⁴

Justice Douglas joined Justice Stewart's opinion, but his concurrence emphasized the possibility of involuntary addiction, the ill health effects of addiction, the physiological basis of the cravings, and the difficulty of overcoming addiction without assistance.¹³⁵ Justice Harlan's concurrence reasoned that the use of drugs by an addict could be voluntary and that punishing addiction would be acceptable if conditioned on proof of drug use. "Since addiction alone," however, is nothing "more than a compelling propensity to use narcotics," punishing addiction without use would be unconstitutional "punishment for a bare desire to commit a criminal act."¹³⁶ In short, Justice Douglas's opinion condemned the punishment of conduct that was blameless because it was involuntary; Justice Harlan's opinion condemned the punishment of status, identity, and disposition rather than conduct; and Justice Stewart's controlling opinion gestured in both directions. Thus, the *Robinson* case can be read as standing for two principles: a requirement that every offense include a conduct element—not merely circumstances and mental elements—and a further requirement that the conduct be performed voluntarily. Dissents by Justice Clark and Justice White feared that the ruling would prevent punishment of drug use by addicts.¹³⁷

The later case of *Powell v. Texas* put Justice Douglas's voluntariness principle to the test.¹³⁸ Powell challenged his conviction for public drunkenness on the grounds that he was an alcoholic, helpless to control his drinking and helpless to restrain himself from going in public once drunk. Hence, he argued, application of the statute to him cruelly punished involuntary conduct in violation of the Eighth Amendment.¹³⁹ Four Justices agreed. Another group of four Justices reasoned that drinking and going in public were acts and that since the statute did not single out alcoholics for punishment it did not define a status crime.¹⁴⁰ The deciding vote fell to Justice White, who agreed with the Justice Douglas plurality that the *Robinson* case had forbidden the punishment of involuntary conduct and could therefore be applied to bar punishment of an alcoholic for drinking.¹⁴¹ But White argued that the

133. *Robinson*, 370 U.S. at 666.

134. *Id.* at 666–67.

135. *Id.* at 668–78 (Douglas, J., concurring).

136. *Id.* at 678–79 (Harlan, J., concurring).

137. *Id.* at 679–85 (Clark, J. dissenting); *id.* at 685–89 (White, J., dissenting).

138. 392 U.S. 514 (1968) (plurality opinion).

139. *Powell*, 392 U.S. at 517.

140. *See id.* at 554–70 (Fortas, J., dissenting).

141. *See id.* at 548–54 (White, J., concurring).

statute as applied did not violate this voluntariness principle because alcoholism did not cause an irresistible compulsion to go in public.¹⁴²

So which of the two interpretations of *Robinson* did the *Powell* decision endorse—the requirement of voluntariness, or the requirement of conduct? We cannot say, because while Justice White treated the voluntariness requirement as the holding of *Robinson*, he had dissented from the result in *Robinson* and criticized the voluntariness principle as bad policy. We cannot know now whether Justice White would have resolved an addict's challenge to a conviction for involuntary drug use by favoring precedent or policy. Nor has any Supreme Court decision directly resolved this open question in the intervening half-century. The prohibition on status crimes continues to preclude laws criminalizing dispositions like the Jacksonville ordinance punishing "rogues and vagabonds . . . common gamblers . . . thieves . . . lascivious persons, . . . habitual loafers, [and] disorderly persons."¹⁴³ Yet some lower courts have also read *Robinson* to prohibit punishing conduct that is involuntary for persons with a certain status—such as sleeping in public by homeless persons¹⁴⁴—while others have disagreed.¹⁴⁵

Punishment of possession offenses is problematic even when the possessor is not an addict, however, because it is not obvious that possession is conduct at all. To the contrary, possession seems like the status of having a legal relationship to an object or, perhaps, the circumstance of proximity to the object. Thus, in the classic case of *Proctor v. State*, the Oklahoma Criminal Court of Appeals held that possessing real property with the intent to sell liquor there could not be criminalized, on the ground that mere possession of real property was not an act.¹⁴⁶ The Model Penal Code solves this problem by punishing not possession itself, but only knowing acquisition or knowing failure to dispose of the object possessed.¹⁴⁷ Federal law defines possession as having power over an object with the intention to control it.¹⁴⁸ If we subtract the intention, however, we are left with a status or circumstance of proximity or access to an object. Sometimes the required power can be quite fictive. Thus, in *United States v. Maldonado*, the defendant was convicted of possession with intent to distribute cocaine without ever touching the cocaine, being alone with it, paying for it, or controlling access to it.¹⁴⁹ If possession of this kind is an act, it is hard to know what the Eighth Amendment requirement of an act now forbids.

142. *Id.* at 552–53.

143. *Papachristou v. City of Jacksonville*, 405 U.S. 156, 156 n.1 (1972).

144. *E.g.*, *Pottinger v. City of Miami*, 810 F. Supp. 1551, 1562–65 (S.D. Fla. 1992) (finding homelessness to be a status protected by *Robinson*).

145. *E.g.*, *Joyce v. City of San Francisco*, 846 F. Supp. 843, 858 (N.D. Cal. 1994) (finding that homelessness is not a status protected by *Robinson*).

146. 176 P. 771 (Okla. Crim. App. 1918).

147. MODEL PENAL CODE § 2.01(4) (AM. LAW INST., 2001).

148. *United States v. Maldonado*, 23 F.3d 4, 6–7 (1st Cir. 1994).

149. *Id.*

Even more uncertainty attends the question of whether and when the Constitution requires a culpable mental state. In an influential article, Francis Bowes Sayre argued that strict liability should be confined to a narrow class of regulatory offenses punished by fines and designed to force businesses to internalize external costs too diffuse to motivate anyone to sue civilly.¹⁵⁰ Justice Jackson drew on these arguments in reading a requirement of knowledge that misappropriated property belonged to another into a federal theft statute in *Morrisette v. United States*.¹⁵¹ Justice Jackson reasoned that criminal liability for injury has traditionally been conditioned on an intention to injure. He therefore presumed a legislative purpose to condition criminal liability on intention for offenses outside the regulatory category.

Subsequent decisions have applied *Morrisette* to require proof of culpability for several federal crimes. In *United States v. U.S. Gypsum Co.*, the Supreme Court held that the offense of price-fixing required an intention to fix prices.¹⁵² The Court's opinion concluded that

Morrisette can be fairly read as establishing, at least with regard to crimes having their origin in the common law, an interpretative presumption that *mens rea* is required. . . .

While strict-liability offenses . . . do not invariably offend constitutional requirements, the limited circumstances in which Congress has created and this Court has recognized such offenses attest to their generally disfavored status.¹⁵³

Some lower courts have interpreted *Morrisette* as setting limits on the permissibility of strict liability. In *Holdridge v. United States*, the Eighth Circuit ruled that due process did not require that an offense of repeated trespass on a government base be predicated on an additional unlawful purpose, in part because the penalty was slight and the offense was not derived from the common law.¹⁵⁴ The Sixth Circuit applied this reasoning in striking down a statute imposing up to two years of imprisonment for selling migratory-bird parts where the law did not require knowledge that the goods sold contained protected-bird parts. The court held that a culpable mental state was required for any felony.¹⁵⁵

The Supreme Court has held that due process requires culpability with respect to the obscene (and therefore unprotected character) of criminally punishable speech.¹⁵⁶ In *Lambert v. California*, the Court reasoned that due process requirements of notice and specificity implied a requirement of culpability with respect to legal duties for at least some crimes of omission.¹⁵⁷

150. Francis Bowes Sayre, *Public Welfare Offenses*, 33 COLUM. L. REV. 55 (1933).

151. 342 U.S. 246 (1952).

152. 438 U.S. 422, 435 (1978).

153. *U.S. Gypsum Co.*, 438 U.S. at 437–38 (citations omitted).

154. 282 F.2d 302, 310 (8th Cir. 1960).

155. *United States v. Wulff*, 758 F.2d 1121, 1125 (6th Cir. 1985).

156. See *United States v. X-Citement Video, Inc.*, 513 U.S. 64, 78 (1994); *Smith v. California*, 361 U.S. 147, 152 (1959).

157. 355 U.S. 225, 229–30 (1957).

In his opinion for the majority, Justice Douglas reasoned that specific notice of duties was unnecessary when passive conduct took place under circumstances that should alert the actor to the likely consequences.¹⁵⁸ Thus Justice Douglas effectively required negligence with respect to duties.

Another line of cases requires culpability to ensure proportionate imposition of capital punishment or life without parole. Capital punishment is intended to be imposed on the basis of desert and deterrence, making culpability necessarily relevant.¹⁵⁹ Thus offenders who were developmentally disabled or minors at the time of the crime cannot be executed because their culpability is necessarily limited, while participants in fatal felonies cannot be executed for crimes committed without at least reckless indifference to human life.¹⁶⁰ Finally, the Supreme Court has held that when culpable mental states are required, the prosecution must prove them beyond a reasonable doubt, rather than allow the jury to presume them from other facts.¹⁶¹

A Florida statute recently put the uncertain import of these various lines of precedent to the test. The state's drug-trafficking statute imposes penalties of up to thirty years of incarceration on the basis of strict liability for possession or delivery of drugs, presumes knowledge of the illicit nature of drugs from the fact of possessing them, and permits defendants to offer an affirmative defense of lack of knowledge of their illicit nature.¹⁶² In *Shelton v. Secretary of the Department of Corrections*, a federal district court granted habeas relief on the theory that this statute violated due process.¹⁶³ The court interpreted *Morissette*, *U.S. Gypsum*, and *Lambert* as implying that strict liability is permitted only when the conduct knowingly engaged in is obviously dangerous or likely to be regulated and the penalty and associated stigma are small.¹⁶⁴ The court reasoned that delivery of packages is generally harmless conduct not likely to be regulated, while the penalty for delivering drugs is great.¹⁶⁵ On appeal, the Eleventh Circuit observed that the Supreme Court's case law leaves the constitutionality of strict liability uncertain.¹⁶⁶ Reasoning that habeas corpus is available only for an obvious and unreasonable violation of federal law, however, it overturned the district court's decision.¹⁶⁷

158. *Lambert*, 355 U.S. at 228.

159. *Gregg v. Georgia*, 428 U.S. 153, 183–86 (1976).

160. *Roper v. Simmons*, 543 U.S. 551 (2005); *Atkins v. Virginia*, 536 U.S. 304 (2002); *Tison v. Arizona*, 481 U.S. 137 (1987).

161. *Francis v. Franklin*, 471 U.S. 307, 316 (1985); *Sandstrom v. Montana*, 442 U.S. 510, 523–24 (1979); *Mullaney v. Wilbur*, 421 U.S. 684, 704 (1975); *In re Winship*, 397 U.S. 358, 364 (1970).

162. See *Shelton v. Sec'y, Dep't of Corr.*, 802 F. Supp. 2d 1289 (M.D. Fla. 2011), *rev'd*, 691 F.3d 1348 (11th Cir. 2012).

163. *Id.* at 1308.

164. See *id.* at 1299–303.

165. See *id.* at 1300, 1305.

166. *Shelton v. Sec'y, Dep't of Corr.*, 691 F.3d 1348, 1354 (11th Cir. 2012).

167. *Id.* at 1352, 1355–56.

On the question of required mental culpability, as on the question of a required act, the Supreme Court announced sweeping principles—and then drew back in apparent fright from applying them. These constitutional limits on substantive criminal liability could have played a significant role in restraining the great expansion of liability and incarceration occasioned by the war on drugs, but sadly they did not. And the next generation of lawyers needs to know this story. It is especially important that prosecutors—who now have virtually unfettered power to overcharge—consider principles of justice that public defenders may lack the leverage, and courts may lack the courage, to hold them to. Yet the courage of courts and the leverage of lawyers to move them may also depend on the quality of arguments lawyers can fashion out of uncertain precedent, indefinite principle, and astute politics.

VII. CRIMINAL LAW: TECHNICAL EDUCATION OR CIVIC EDUCATION?

Having stated our case for the practical value of incorporating history, social science, and normative theory into legal education, we now turn to Ohlin's seeming concern that such an education may aim over the heads of students. When Ohlin refers to the "changing market for criminal law casebooks" as a factor in the design of any new book, he discreetly invokes a market on the mind of every law professor in the country. This is the market for law degrees, which has seen a 50 percent drop in demand since the financial crisis, leading to declining selectivity, price, and revenue.¹⁶⁸ Students today probably come to law school despite having seen negative press about legal job prospects. Contemporary students may also be aware that bar-passage rates have declined in many jurisdictions.¹⁶⁹ In any case, Ohlin argues that new pedagogical alternatives are needed "due in part to the changing profile of law students."¹⁷⁰ He describes contemporary students as "crav[ing] a more doctrinal approach," and "anxious" about whether their courses have covered the subjects completely.¹⁷¹

Perhaps the average ability and confidence of law students have dropped so much that a different curriculum is needed. But there may also be a good deal of projection of law professors' own anxieties in the common wisdom that says so. While law school applications have dropped, so has enrollment. If faculty are redirecting their teaching to a substantially less-selective student population, that may not be a reflection on the student population they have, but on the one they feel economically obliged to try to recruit. Yet it may be wishful thinking to assume that a remedial curriculum will motivate less-capable students to invest their tuition dollars in law school or that it will justify them in doing so.

168. Karen Sloan, *Has Law School Enrollment Hit Rock Bottom?*, NAT'L L. J. (July 20, 2015), <http://www.nationallawjournal.com/id=1202732508706> [<https://perma.cc/X32K-ZZAX>].

169. Sara Randazzo, *Bar Exam Passage Rates Nationwide Keep Dropping*, WALL ST. J.: L. BLOG (Nov. 24, 2015, 3:27 PM), <http://blogs.wsj.com/law/2015/11/24/bar-passage-rates-keep-dropping-across-the-country/> [<https://perma.cc/DE7N-FR6G>].

170. Ohlin, *supra* note 1, at 1155.

171. *Id.* at 1158, 1167.

Whenever the legal employment market suffers decline, calls for a more practical curriculum may be expected, despite an absence of evidence that curriculum affects the employment prospects of students.¹⁷² Thus, current efforts to emphasize skills instruction and to better communicate pedagogic goals and outcomes are predictable marketing responses to the bursting of the legal education bubble and the attendant decline of applications and enrollment. Moreover, the push for skills, learning outcomes, and performance metrics is also part of a wider phenomenon in higher education. Like law school tuition, undergraduate tuition has risen ahead of the general rate of inflation.¹⁷³ The slowing job market after the financial crisis raised questions about return on investment for higher education generally, not only in law. Contributing to this crisis of consumer confidence in higher education has been a decline in public subsidization of higher education, leading to an alarming decline of quality at public institutions, and higher tuition payments at both public and private institutions.¹⁷⁴ Thus the reduction in public investment in higher education suggests that the increasingly prevalent view of higher education as a commodity is not only an effect, but also a cause, of its high price.

Nevertheless, if higher education has indeed priced itself out of its market, the proposed responses—skills training, learning objectives, assessment—seem overdetermined, reflecting wider trends in management and governance. When we treat education as just another consumer good, we assume that students come to it with fully formed preferences that educators must satisfy. In so doing, we lose sight of the ideal of liberal education as a public good that benefits society by fostering citizens, and as a formative experience that helps individuals determine their own preferences.

This ideal is relevant to the professional education of lawyers who are charged with fulfilling the Sixth Amendment right to counsel and who serve all three branches of government. Lawyers serve not merely as operators of the legal system but as stewards, charged with assessing and improving it.

172. See generally Alfred S. Konefsky & Barry Sullivan, Essay, *In This, the Winter of Our Discontent: Legal Practice, Legal Education, and the Culture of Distrust*, 62 *BUFF. L. REV.* 659, 691–738 (2014).

173. See *id.* at 717 n.202.

174. See Don Hossler et al., *State Funding for Higher Education: The Sisyphean Task*, 68 *J. HIGHER EDUC.* 160, 181 (1997) (declining public subsidy associated with rising cost of college for students); Rajindar K. Koshal & Manjulika Koshal, *State Appropriation and Higher Education Tuition: What Is the Relationship?*, 8 *EDUC. ECON.* 81, 88–89 (2000) (tuition rates are correlated with state funding appropriations); Dennis Epple et al., *The U.S. Market for Higher Education: A General Equilibrium Analysis of State and Private Colleges and Public Funding Policies* (Nat'l Bureau of Econ. Research, Working Paper No. 19298, 2013), <http://www.nber.org/papers/w19298.pdf> [<https://perma.cc/T3JS-PBHG>] (noting that reduced subsidies and increases in tuition reduce enrollment at public universities with only moderate switching into private colleges); Thomas J. Kane & Peter R. Orszag, *Funding Restrictions at Public Universities: Effects and Policy Implications* 19–20 (Brookings Inst., Working Paper, 2003), <http://www.brookings.edu/views/papers/orszag/20030910.pdf> [<https://perma.cc/E45T-AX6C>] (finding that declines in per student spending appear to be having an adverse effect on educational quality).

This important role of lawyers requires independent critical thinkers, not passive recipients of content.

There is no area of law more in need of civic leadership than criminal justice. The emergence of mass incarceration over the last three decades of the twentieth century is one of the most dramatic social changes in American history and has only recently attracted the attention it merits. Within a relatively short period, America experienced a 700 percent increase in the inmate population to 2.3 million, resulting in the highest incarceration rate in the world.¹⁷⁵ From 1990 to 2009 the average length of prison terms increased by 36 percent.¹⁷⁶ That our criminal law has so abruptly changed toward coercion and condemnation on such a vast and unprecedented scale surely calls for critical examination.

To grasp the novelty of mass incarceration, it is important to recall that from the 1820s until the 1970s, American correctional policy was organized around the aim of rehabilitation.¹⁷⁷ Suddenly in the 1970s, political and ideological support for this “rehabilitative ideal” collapsed.¹⁷⁸ The now-familiar story includes rising crime rates and the political provocations of urban unrest; reaction against enforcement of the civil rights of criminal suspects; conservative objections to coddling criminals and absolving them of blame; studies of prison rehabilitative programs indicating that “nothing works”; liberal concerns that the discretion involved in probation and parole invited racial and political discrimination; libertarian concerns about coerced therapeutic treatment; and even leftist critiques of rehabilitation as diverting attention from the social causes of crime to the personality of the offender.¹⁷⁹

At that time, skepticism about determinism and utilitarianism in moral philosophy helped fuel a renaissance in retributivist thought, with such thoughtful exponents as Herbert Morris, Michael Moore, Stephen Morse,

175. PEW CTR. ON THE STATES, *TIME SERVED: THE HIGH COST, LOW RETURN OF LONGER PRISON SENTENCES*, at 1 (2012), http://www.pewtrusts.org/~media/assets/2012/06/6/time_served_report.pdf [<https://perma.cc/7EYD-FKAP>] (700% increase in state inmate population since 1972); Roy Walmsley, *World Population List*, INT’L CTR. FOR PRISON STUD. (Jan. 30, 2009), http://www.prisonstudies.org/sites/default/files/resources/downloads/wppl-8th_41.pdf [<https://perma.cc/4K8N-PNML>] (U.S. highest incarceration rate in the world).

176. PEW CTR. ON THE STATES, *supra* note 175, at 6.

177. DAVID J. ROTHMAN, *CONSCIENCE AND CONVENIENCE: THE ASYLUM AND ITS ALTERNATIVES IN PROGRESSIVE AMERICA* (Aldine de Gruyter 2002) (1980); DAVID J. ROTHMAN, *THE DISCOVERY OF THE ASYLUM: SOCIAL ORDER AND DISORDER IN THE NEW REPUBLIC* (Aldine de Gruyter, Inc. 2002) (1971); Edward L. Rubin, *The Inevitability of Rehabilitation*, 19 *LAW & INEQ.* 343 (2001); James Q. Whitman, *The Case for Penal Modernism: Beyond Utility and Desert*, 1 *CRITICAL ANALYSIS* L. 143 (2014).

178. See generally FRANCIS A. ALLEN, *THE DECLINE OF THE REHABILITATIVE IDEAL* (1981).

179. JOHN BRAITHWAITE & PHILIP PETTIT, *NOT JUST DESERTS: A REPUBLICAN THEORY OF CRIMINAL JUSTICE* 2–5 (1990) (offering a theoretical argument for the resurgence of retributivism); ELLIOTT CURRIE, *CONFRONTING CRIME* 236–40 (1985) (discussing the shift to retributive theories of justice).

Andrew Von Hirsch, and Jeffrey Murphy.¹⁸⁰ Retributivism provided some intellectual grounding for determinate sentencing reforms.¹⁸¹

States abandoned rehabilitation as the central purpose of punishment and replaced it, not with the retribution favored by many academics, but with incapacitation. If “nothing works” to reduce recidivism, it seemed to follow that offenders should not be released from prison.¹⁸² Many states eliminated or curtailed probation and parole, imposed mandatory minimum penalties, and added sentencing enhancements for repeat offenders.¹⁸³ In *Ewing v. California*, the Supreme Court upheld a penalty of twenty-five years to life for the theft of three golf clubs under California’s recidivist law.¹⁸⁴ The Court denied that such a sentence was unconstitutionally disproportionate, on the ground that it served the permissible penal purpose of incapacitation.¹⁸⁵ Proportionality did not require that sentences of incarceration be deserved.

Jonathan Simon shows how criticism of the Warren Court’s criminal-procedure decisions and of its brief abolition of the death penalty helped make crime a national political issue. The governors and state legislators who swept into office on a platform of restoring the death penalty also helped pass determinate and recidivist sentencing reforms that greatly increased penalties.¹⁸⁶ As we have noted, Stuntz narrates the story of many states responding to criminal-procedure reforms that appeared to impede police investigation by criminalizing conduct that was easy to prove, such as possession offenses, expanding inchoate offenses like conspiracy and burglary, and raising penalties for low-level offenses. Stuntz argues that high penalties also resulted from racial politics, as suburban-dwelling whites

180. MICHAEL MOORE, *PLACING BLAME* (1997); ANDREW VON HIRSCH, *DOING JUSTICE: THE CHOICE OF PUNISHMENTS* (Northeastern Univ. Press 1986) (1980); Herbert Morris, *Persons and Punishment*, 52 *MONIST* 475 (1968); Stephen J. Morse, *The Twilight of Welfare Criminology: A Reply to Judge Bazelon*, 49 *S. CAL. L. REV.* 1247 (1976); Jeffrie G. Murphy, *Marxism and Retribution*, 2 *PHIL. & PUB. AFF.* 217 (1973).

181. See, e.g., MARVIN E. FRANKEL, *CRIMINAL SENTENCES* 106, 111–15 (1973) (claiming that retribution is one of the historical ends of criminal sentencing that should still play an important role in determining the punishment for offenders); RICHARD G. SINGER, *JUST DESERTS: SENTENCING BASED ON EQUALITY AND DESERT* 14–18, 33 (1979) (emphasizing that all criminal punishment systems must be based on blameworthiness); TWENTIETH CENTURY FUND TASK FORCE ON CRIMINAL SENTENCING, *FAIR AND CERTAIN PUNISHMENT* 24–26 (1976) (recommending a presumptive-sentencing system based on the degree of culpability of the defendant); VON HIRSCH, *supra* note 180, at 44–55 (arguing that sentencing and incarceration should be based on the idea of “desert,” or how much the offender deserves the punishment).

182. Frances T. Cullen & Paul Gendreau, *Assessing Correctional Rehabilitation: Policy, Practice, and Prospects*, in 3 *CRIMINAL JUSTICE* 109, 119 (2000); see also Robert Martinson, *What Works? Questions and Answers about Prison Reform*, 35 *PUB. INT.* 22, 48–50 (1974).

183. Mirko Bagaric, *Consistency and Fairness in Sentencing – The Splendor of Fixed Penalties*, 2 *CAL. CRIM. L. REV.* 1 (2000).

184. 538 U.S. 11, 20 (2003).

185. *Ewing*, 538 U.S. at 29–31.

186. SIMON, *supra* note 9, at 34–35.

elected county prosecutors who concentrated their tough enforcement efforts against urban-dwelling African Americans.¹⁸⁷

Certainly racial disparity prevails in the American criminal justice system. A Bureau of Justice Statistics study found that black men were imprisoned at more than six times the rate of white men in the last quarter of the twentieth century.¹⁸⁸ African Americans are more likely to be stopped by police than whites, whether in cars¹⁸⁹ or on foot.¹⁹⁰ They are three times more likely than whites to be searched if stopped in a car,¹⁹¹ with no evidence that the success rate for these searches can justify those numbers.¹⁹² African Americans are 2.5 times more likely to be arrested than whites,¹⁹³ and when they are convicted of offenses, African Americans face longer sentences.¹⁹⁴

At one time the Supreme Court viewed the danger of racial discrimination in the criminal justice system as a contributing reason for imposing rights to counsel and jury trials on the states,¹⁹⁵ for strengthening the right

187. STUNTZ, *supra* note 123, at 38–39.

188. Thomas P. Bonczar, BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, NCJ 197976, PREVALENCE OF IMPRISONMENT IN THE U.S. POPULATION, 1974-2001 5 (2003), <http://www.bjs.gov/content/pub/pdf/piusp01.pdf> [<https://perma.cc/8GWE-8TKA>]. African-Americans constitute 40 percent of the inmate population despite making up only 13 percent of the general population. Leah Sakala, *Breaking Down Mass Incarceration in the 2010 Census: State-by-State Incarceration Rates by Race/Ethnicity*, PRISON POL'Y INITIATIVE, <http://www.prisonpolicy.org/reports/rates.html> [<https://perma.cc/TKC2-HW8T>].

189. U.S. GEN. ACCOUNTING OFFICE, GAO/GGD-00-41, RACIAL PROFILING: LIMITED DATA AVAILABLE ON MOTORIST STOPS 8–10 (2000), <http://www.gao.gov/new.items/gg00041.pdf> [<http://perma.cc/CCK2-GKQH>] (finding that black motorists are more likely to be pulled over than white motorists, but unable to conclude whether or not that is a result of racial discrimination).

190. See, e.g., Andrew Gelman et al., *An Analysis of the New York City Police Department's "Stop-and-Frisk" Policy in the Context of Claims of Racial Bias*, 102 J. AM. STAT. ASS'N 813 (2007).

191. *Traffic Stops*, BUREAU OF JUSTICE STATISTICS, <http://www.bjs.gov/index.cfm?ty=tp&tid=702> [<https://perma.cc/T67K-AW4N>].

192. E.g., *Floyd v. City of New York*, 951 F. Supp. 2d 540 (2012).

193. CHRISTOPHER HARTNEY & LINH VUONG, NAT'L COUNCIL ON CRIME AND DELINQUENCY, CREATED EQUAL: RACIAL AND ETHNIC DISPARITIES IN THE U.S. CRIMINAL JUSTICE SYSTEM 10 (2009), <http://www.nccdglobal.org/sites/default/files/publication-pdf/created-equal.pdf> [<https://perma.cc/T9GC-AU38>]. Disparate arrest rates for drug offenses in particular contrast with observed rates of drug use that are roughly equal. See Jamie Fellner, *Race, Drugs, and Law Enforcement in the United States*, 20 STAN. L. & POL'Y REV. 257, 261, 266, 269–71 (2009); Katherine Beckett et. al, *Race, Drugs, and Policing: Understanding Disparities in Drug Delivery Arrests*, 44 CRIMINOLOGY 1, 105 (2006).

194. See, e.g., Joe Palazzolo, *Racial Gap in Men's Sentencing*, WALL ST. J. (Feb. 14, 2013, 5:36 PM), <http://www.wsj.com/articles/SB10001424127887324432004578304463789858002> [<https://perma.cc/7RWR-B6K7>].

195. See *Duncan v. Louisiana*, 391 U.S. 145 (1968) (finding a fundamental right to a jury trial in a criminal case on a set of facts in which race was a factor); *Powell v. Alabama*, 287 U.S. 45 (1932) (finding a fundamental right to counsel in a criminal case on a set of facts in which race was a factor).

to silence during interrogation,¹⁹⁶ for prohibiting vague and retroactive offenses,¹⁹⁷ and for limiting capital-sentencing discretion.¹⁹⁸ Yet as incarceration rates climbed, the Supreme Court came to accept pervasive racial discrimination in criminal justice as inevitable and irremediable.

Thus, in *McCleskey v. Kemp* the Court rejected a challenge to Georgia's capital punishment statute, where the challenge was based on a statistical study. Controlling for all relevant neutral factors, the study showed that Georgia prosecutors were almost five times more likely to seek the death penalty when the victim of a black killer was white as when such a victim was black, and twice as likely to seek the death penalty when the killer of a white victim was black as when such a killer was white.¹⁹⁹ *McCleskey*—a black killer of a white police officer—lost his equal protection challenge on the ground that he could not demonstrate racial discrimination in his own case, nor could he show a racially discriminatory motive for the grant of discretion to prosecutors to seek the death penalty.²⁰⁰ Moreover, the Court held that discretion was somehow necessary to punish murder and that it was unduly burdensome to require prosecutors to explain and justify their capital charging decisions.²⁰¹ Despite the Court's own attack on discretion as potentially discriminatory,²⁰² the Court treated *McCleskey*'s challenge to discretion as a challenge to "the heart of the State's criminal justice system."²⁰³

Then, in rejecting his Eighth Amendment claim—that the statistical pattern showed the death penalty to be operating arbitrarily—the Court declared that discretion is required in capital sentencing to enable the jury to empathize with capital defendants and to consider all possible mitigating circumstances.²⁰⁴ In so doing, however, the Court accepted that juries will show selective empathy, based on their ability to identify with both the defendant and the victim. In a society with an enduring history of racial animus, racial disparities in capital sentencing seem almost inevitable. The Court recognized and accepted this unhappy implication when it concluded that *McCleskey* had no complaint that similarly situated defendants were spared the death penalty when he was not.²⁰⁵ More significantly, the Court averred that racial disparities in the criminal justice system were too widespread and pervasive to remedy—that to recognize racially disparate punishment as unconstitutionally unacceptable would require holding that a

196. *Brown v. Mississippi*, 297 U.S. 278 (1936) (applying a due process right against coerced confession in a case in which race was a factor).

197. *Papachristou v. City of Jacksonville*, 405 U.S. 156 (1972); *Bouie v. City of Columbia*, 378 U.S. 347 (1964).

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

199. 481 U.S. 279 (1987).

200. *McCleskey*, 481 U.S. at 291–93, 297.

201. *Id.* at 296–97.

202. See, e.g., *Furman*, 408 U.S. 238; *Papachristou*, 405 U.S. 156; *Bouie*, 378 U.S. 347.

203. *McCleskey*, 481 U.S. at 297.

204. *Id.* at 303–04.

205. See *id.* at 307, 313.

society suffused with racial prejudice could not impose legitimate punishment:

McCleskey's claim, taken to its logical conclusion, throws into serious question the principles that underlie our entire criminal justice system. The Eighth Amendment is not limited in application to capital punishment, but applies to all penalties. Thus, if we accepted McCleskey's claim that racial bias has impermissibly tainted the capital sentencing decision, we could soon be faced with similar claims as to other types of penalty.²⁰⁶

The Court then noted that "[s]tudies already exist[ed] [to] allegedly demonstrate a racial disparity in the length of prison sentences."²⁰⁷ Just out of view was the question of why American political culture, with its strange combination of liberal institutions, penal severity, and intractable racial stratification, uniquely insists on so much discretion in prosecution, disposition without trial, and sentencing.

Thus, the Supreme Court seemed committed to affording law enforcement broad discretion while professing helplessness to affect the racial disparities that such discretion renders inevitable. In first developing its challenge to capital punishment as arbitrary and discriminatory, the NAACP Legal Defense Fund argued that capital punishment would be seen as cruel and barbarous if applied uniformly and consistently, and that it was tolerated by the white majority only on the assumption that a discretionary criminal justice process would confine execution to the poorest and most powerless, including African Americans.²⁰⁸ Today, mass incarceration is subject to a similar critique. Deterrence does not justify very long sentences, since increasing the length of terms of incarceration has no demonstrable deterrent effect.²⁰⁹ Mass incarceration cannot be justified on grounds of incapacitation because of our limited ability to predict future criminality, and because incarcerated offenders are still capable of crimes of violence against each other.²¹⁰ So mass incarceration is hard to justify and may be tolerated only on the expectation that it will be aimed primarily against someone else.

Like the death penalty in the 1950s, mass incarceration today can be critiqued as an instrument of racial stratification, conferring privilege on whites because they are advantaged in the discretionary processes of policing, prosecution, and sentencing that control its boundaries. The racial distribution of punishment means that its unprecedented expansion has impacted African Americans disproportionately. Recent books by Michelle

206. *Id.* at 314–15 (citation omitted).

207. *Id.* at 315 n.38.

208. MICHAEL MELTSNER, *CRUEL AND UNUSUAL: THE SUPREME COURT AND CAPITAL PUNISHMENT* 180–85, 231, 268–78 (1973) (discussing Anthony Amsterdam's brief in *Boykin v. Alabama*, 395 U.S. 238 (1969), and similar arguments in subsequent cases).

209. Anthony N. Doob & Cheryl Marie Webster, *Sentence Severity and Crime: Accepting the Null Hypothesis*, 30 *CRIME & JUST.* 143, 181–89 (2003).

210. See KAPLAN ET AL., *supra* note 101, at 58–59; FRANKLIN E. ZIMRING & GORDON HAWKINS, *INCAPACITATION* 31–38, 83–84 (1995).

Alexander and Alice Goffman detail the corrosive effects of overincarceration and overcriminalization on the families, neighborhoods, and life chances of African Americans in particular.²¹¹ Other scholars, including Stuntz, Randall Kennedy, and James Forman Jr. have emphasized that high violent-crime rates and ineffective law enforcement have also plagued the same communities.²¹²

Two generations ago, many of the young people who flocked to law schools were inspired by the role that lawyers and judges played in supporting the civil rights movement to redress long-established injustice. Talented people who could expect professional success in any number of pursuits chose law because they saw an opportunity to exercise agency, participate in progress, and serve justice.

In the last generation, the explosion of criminal punishment has undone or reduced to irrelevance some of the successes of the civil rights movement. Prohibitions on segregation and even slavery may have little practical value for 2.3 million prisoners confined and separated from the rest of society.²¹³ Voting rights can mean little to the six million Americans disenfranchised by a criminal sentence or a criminal record.²¹⁴ Rights against employment discrimination may mean little to those whose resumes are blemished by a criminal record and whose wages are garnished to pay proliferating fines and fees.²¹⁵

If law school has lost its power to inspire young people, perhaps that is not most fundamentally because it has become a less-reliable elevator to the penthouse of inequality. Perhaps it is because, in an era when law no longer presents itself as defender of the disadvantaged, the legal profession has nothing to offer its recruits except money. If so, law schools eat their own seed corn by acclimating students to accept unjust legal arrangements. A model of legal education as technical training thus may be particularly inapt for contemporary criminal law, where it can imply acceptance of a frequency

211. MICHELLE ALEXANDER, *THE NEW JIM CROW* (2012); ALICE GOFFMAN, *ON THE RUN: FUGITIVE LIFE IN AN AMERICAN CITY* (2014).

212. RANDALL KENNEDY, *RACE, CRIME, AND THE LAW* 10–12, 29–75 (1997); STUNTZ, *supra* note 123, at 2, 22, 55; James Forman Jr., *Racial Critiques of Mass Incarceration: Beyond the New Jim Crow*, 87 N.Y.U. L. REV. 21, 45–53 (2012).

213. See KAPLAN ET AL., *supra* note 101, at 59. See generally Sharon Dolovich, *Exclusion and Control in the Carceral State*, 16 BERKELEY J. CRIM. L. 259 (2011).

214. These include 2.2 million African Americans and one-fifth of African American adults in such key battleground states as Florida and Virginia. Jean Chung, *Felony Disenfranchisement: A Primer*, THE SENTENCING PROJECT 1–2 (Aug. 2015), http://www.sentencingproject.org/doc/publications/fd_Felony%20Disenfranchisement%20Primer.pdf [https://perma.cc/PTV4-LUEN].

215. ALEXANDER, *supra* note 211, at 148–156. According to one estimate, there are nearly 20 million Americans who have been convicted of a felony, and this population is also disproportionately African American. Sarah Shannon et al., *Growth in U.S. Ex-Felon and Ex-Prisoner Population, 1948 to 2010* (2011) (unpublished manuscript), paa2011.princeton.edu/papers/111687 [https://perma.cc/YYW9-H94Y].

and severity of punishment unprecedented in American history and unparalleled in the developed world. A legal system in which levels of incarceration can change by 700 percent in a generation is not stable enough to justify restricting legal education to the explication and application of settled doctrine. We must prepare our students to read the political landscape pragmatically and fashion arguments of principle and policy to guide the path of change.