

TEACHING CRIMINAL LAW IN AN ERA OF GOVERNING THROUGH CRIME

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I. INTRODUCTION: WHERE TO BEGIN

Where to begin a first-year course on Criminal Law provides a central dilemma. Since Wechsler and Michael's influential 1940 casebook, most casebook authors have placed the subject of punishment early in the book. This part generally discusses the four familiar "theories" of punishment—deterrence, rehabilitation, incapacitation, and retribution. Placed early in the book, they provide a framework that students and teachers can discuss as they proceed through the canonical subjects such as *actus reus*, *mens rea*, or causation. For almost any case that is used to illustrate one of these topics, it is fair to ask whether the case will offer fertile ground for second guessing the choices of the legislature or court as to whether a particular set of events falls on one side or the other of the boundaries of criminal liability.

For example, take Mr. Proctor—whose prosecution for "keeping a place" with the intent of running an illegal drinking establishment in Oklahoma under a 1913 state law was thrown out by the Criminal Court of Appeals on the grounds that it was in excess of the penal law making powers of the legislature.¹ Proctor had not yet taken possession of any illegal liquor, and thus in the view of the court he had yet to accomplish a criminal act.² The law was an early part of the legal reform wave that brought prohibition to the nation as a whole in 1923. The court had no quarrel with the legislature's power to criminalize the alcohol trade, only with whether Proctor had completed a sufficient amount of the criminal act.³ Although the court never takes up the question of punishment, its decision can be questioned on whether it can be defended in terms of the reasons for punishment. Is Proctor dangerous as the soon-to-be purveyor of an addictive product that the legislature has defined as a serious social danger? Does the *Proctor* court truly believe that there is a meaningful requirement of retribution that has not yet

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1. *Proctor v. State*, 176 P. 771, 772 (Okla. Crim. App. 1918).

2. *Id.* at 774.

3. *See id.*

been earned or is the opinion primarily a *Lochner* era *paean* to formalism and property rights?⁴

This punishment theory can be revisited throughout the course and is particularly fitting with the Model Penal Code (“Code”) focus of most casebooks. The Code’s underlying jurisprudence is one acutely sensitive to the role of the general part of criminal law as an important regulator of the government’s power to punish. The Code’s authors, especially its general reporter Herbert Wechsler, were strong supporters of social defense criminal law that recognized the trio of rehabilitation, deterrence, and incapacitation (in roughly that order) as the appropriate modern grounds for criminal law. They wanted to adjust common law boundary rules in ways that facilitated the rational extension of law enforcement and prosecutorial power (which was, after all, expected to result in “treatment” for the guilty).

I have been reluctant to spend too much time in my Criminal Law course on the “theories” of punishment for several reasons. First, for most of the last century our laws defining criminal liability, and rules for attributing that liability to particular individuals, have been decoupled from the distribution of punishment. For much of the twentieth century, decoupling took the form of indeterminate sentencing systems under which those convicted of felonies received nominally long sentences, even life, but which were routinely set at much lower levels by the actions of administrative bodies known commonly as “parole boards.”⁵ Such administrative discretion has been cut back or eliminated in more recent decades. The discretion has largely been shifted to prosecutors who can take advantage of many overlapping offenses and a range of new laws enhancing sentences for recidivists and armed criminals. As William Stuntz has argued, the political dynamics created by legislative competition for penal severity and the power of prosecutors often makes the boundaries drawn by substantive criminal law irrelevant to punishment.⁶

This reality can easily be cloaked by the presumption in both common law and modern case law that the boundary-setting problems that preoccupy any casebook are vitally important for distributing punishment. The reform of criminal law recommended by the Model Penal Code⁷ was aimed in large part at making the grading of punishment consistent with the principle objectives of

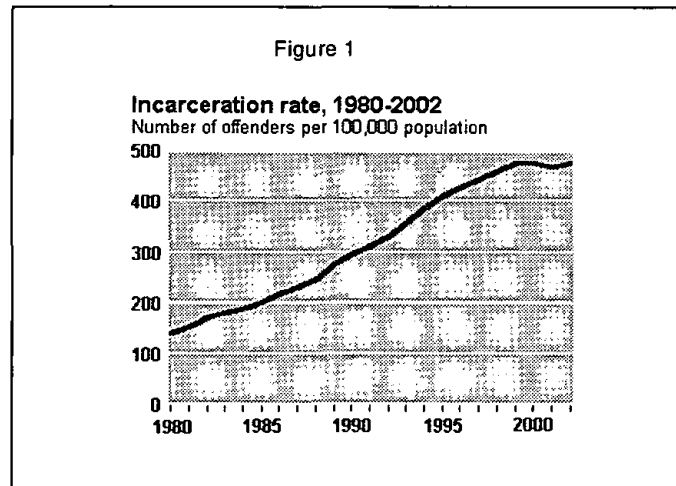
4. “It cannot be true that ‘the keeping of a place’ coupled with the present intent to violate the law, constitutes an overt act.” *Id.* at 772.

5. California’s indeterminate sentencing law was exemplary, giving its “Adult Authority” power to set the total prison and parole sentence after as little as six months in prison for crimes with nominal life sentences. See JONATHAN SIMON, POOR DISCIPLINE: PAROLE AND THE SOCIAL CONTROL OF THE UNDERCLASS, 1890–1990 123, 123 n.24 (1993).

6. William Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505, 534-35 (2001).

7. MODEL PENAL CODE: OFFICIAL DRAFT AND EXPLANATORY NOTES (1985). The Code is given extensive coverage by many, if not most, contemporary Criminal Law casebooks.

the Code, especially the deterrence of dangerous behavior and the “treatment” of those not deterred.⁸ The current era of harsh sentencing laws, however, has dramatically transformed that grading logic. Not only is “treatment” no longer anything like a presumptive logic of criminal law, the very linkage between culpability—whether tweaked toward dangerousness as the Model Penal Code does or anchored in retribution—has been loosened. In an era of “mass imprisonment,”⁹ the individual criminal, whether the subject of deterrence, retribution, or treatment, is displaced by an operation that works on the population.¹⁰



I begin my class with Figure 1 above. This reflects not the logic of punishment, but rather its effects. The dramatic rise in imprisonment recorded in that graph contrasts with a relatively gentle fluctuation in the national imprisonment rate between the beginning of hard federal data on the subject in 1925 and the late 1970s. The data indicates 100 prisoners for every 100,000 free adult residents of the United States. While the rate of imprisonment has experienced change—the imprisonment rate went as high as 139 during the Great Depression and down as low as the 80s during the years of the Vietnam War—it began a rise after 1975 that has only leveled off in the past few years.

The criminal laws being produced by contemporary legislatures and Congress are far more populist in their construction. There is little jurisprudential or criminological depth to new penal statutes such as California’s “Three Strike” law, upheld by the Supreme Court in 2003.¹¹ Even

8. MARKUS D. DUBBER, *CRIMINAL LAW: MODEL PENAL CODE 13* (2002).

9. See generally *MASS IMPRISONMENT: SOCIAL CAUSES AND CONSEQUENCES* (David Garland ed., 2001).

10. See Malcolm M. Feeley & Jonathan Simon, *The New Penology: Notes on the Emerging Strategy of Corrections and Its Implications*, 30 *CRIMINOLOGY* 449, 452 (1992).

11. *Ewing v. California*, 538 U.S. 11 (2003).

capital crimes are defined with regard to popular fears about things such as drive-by shootings, gang activities, or even satanic rituals. It is not that these laws cannot be discussed in terms of deterrence, rehabilitation, incapacitation, and retribution, but only that they seem to radically underdetermine these laws and the way they operate.

This leaves somewhat of a hole in the class, but it is a hole I am not sure I want to fill. This hole will not cause harm to students. The one thing I want to avoid is inoculating lawyers, some of who will be legislators, prosecutors, and judges, with the conviction that American punishment is under the control of law and thus more or less both democratic and rational.¹² Instead, the first class focuses on the legal and political changes that have brought us to an unprecedented level of punishment in America and the collateral consequences this penal excess is having on large segments of our society.¹³

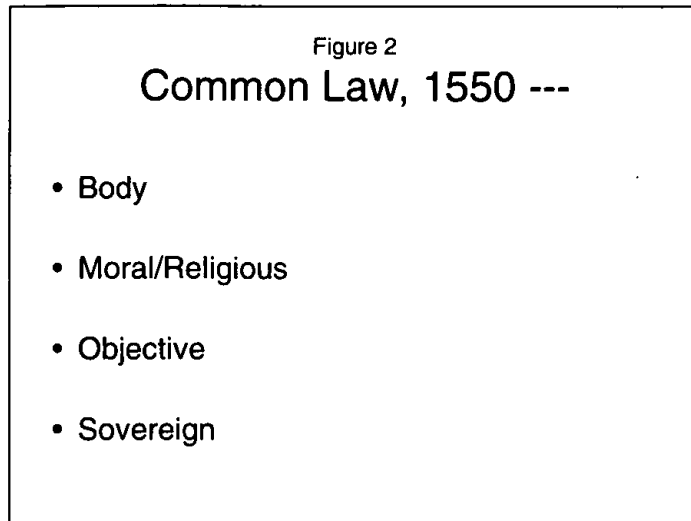
II. MENTALITIES, OR HOW WE THINK ABOUT CRIMINAL LAW, HISTORICALLY

With the Code's modernizing aspirations now fundamentally sidetracked and yet not replaced by any competitor enterprise, I have found it useful to make the theme of historical change in criminal law an analytic framework of its own. In place of a jurisprudential analysis of policy choices among penal objectives, I have tried to develop a historical reading of the canonical parts of the Criminal Law class. Neither working within the Code, nor with an ambition to replace it with a successor approach, I sought to make its rise and its decline a kind of plotline for the court.

As a useful heuristic, crude but no more so than the fourfold division of punishment discussed above, I divide the development of Anglo-American criminal law into three distinct "mentalities" by which I mean "rationalities" or styles of reasoning about criminal law: (1) a common law mentality, which emerges during the sixteenth century; (2) a modern law mentality, beginning in the first third of the twentieth century; and (3) a post-modern mentality emerging in the late twentieth century. I put no end date because each of them continues to a certain extent in the present.

12. Compare Robert Cover, *Violence and the Word*, 95 YALE L.J. 1601, 1628-29 (arguing that violence is at the heart of judicial function, but that this places law in control of violence in the United States), with Jonathan Simon, *The Vicissitudes of Law's Violence*, in *LAW, VIOLENCE, AND THE POSSIBILITY OF JUSTICE* 17 (Austin Sarat ed., 2001) (arguing that Cover overestimated the control law has over violence).

13. See Theodore Caplow & Jonathan Simon, *Understanding Prison Policy and Population Trends*, in 26 *PRISONS* 63 (Michael Tonry & Joan Petersilia eds., 1999).



A. *Common Law*

Law is prone to using a term in more than one way. Terms like “due process” or “jurisdiction” mean different things in different contexts. Few words are more overused than “common law.” Sometimes it means the law of England and its colonial societies, in contrast with the “civilian” legal systems of the European continent. Sometimes it means law declared by judges, in contrast to the “statutory law” created by legislatures. Still other times it means law before the modern era.

It is in this last sense that I adopt the term to describe the way of reasoning about criminal law associated with England and its colonial societies, including the United States, that predominated before the twentieth century. This law was sometimes declared by judges, but it also includes rules formally adopted by legislatures and even codified. Most casebooks present an implicitly historical framework in the analysis of different topics in the substantive criminal law. The first case or cases will typically present the law as it stood before the twentieth century. Referring to this as common law may invite confusion. I make this implicit historicism explicit, while at the same time eliminating the presumptive evolutionism that often goes along with a treatment of how modern law progresses beyond the formalism and rigidity of common law rules.

The focus here is less on particular legal rules, and more on how lawyers and judges are encouraged to reason about criminal law. The elements I identify with common law can be thought of as master themes that get worked and reworked in different ways in different doctrines. These elements are intended to help students identify how different courts’ reasoning about

different problems can nevertheless make common aspects of the facts central to their decisions.

1. The Body

Michel Foucault famously argued that the rise of the prison represented the triumph of a new technology of power in the realm of punishment (on its way to a more general societal ubiquity): the disciplines, which made the explicit target the mind, soul, or psyche.¹⁴ The earlier penal practices that the prison displaced—public executions that were sometimes turned into ghastly public torture sessions—had in contrast laid a very explicit claim to the body. The common law fascination with the body is quite consistent with this history. Common law judges and legislatures addressed their analyses more directly to bodies, with physical movements, and with the visible signs that are emitted by bodies engaged in criminal behavior.¹⁵ The fundamental (now constitutional to some degree) requirement of a guilty act before a punishment can be imposed is very much a living inheritance from the common law mentality. There is no crime at all unless, in some way, the body gets involved. Modern law, as we shall see, relaxes this in numerous ways. The *Proctor*¹⁶ decision discussed above, quoted Blackstone:

Indeed, to make a complete crime cognizable by human laws, there must be both a will and an act. For, though, in foro conscientiae, a fixed design or will to do an unlawful act is almost as heinous as the commission of it, yet, as no temporal tribunal can search the heart, or fathom the intentions of the mind, otherwise than as they are demonstrated by outward actions, it therefore cannot punish for what it cannot know. For which reason, in all temporal jurisdictions, an overt act, or some open evidence of an intended crime, is necessary in order to demonstrate the depravity of the will, before the man is liable to punishment.¹⁷

This emphasis on the body, and the physical forces generally, can be traced through many criminal law doctrines. The law of manslaughter requires that a killing be “hot blooded.” This is a metaphor, to be sure, but not merely a literary one.¹⁸ As a narrative with which judges were assigned to decide who should be tried for manslaughter and who for murder, the hot-blooded metaphor anchored a whole series of moves that focused analysis on the body in space and time. Thus the “cooling” of the blood was said to follow a peak

14. MICHEL FOUCAULT, DISCIPLINE AND PUNISH: THE BIRTH OF THE PRISON 16 (Alan Sheridan trans., 1977).

15. A good example of this is the law of theft, which begins in the early common law period criminalizing only those takings of property that involved a forcible dispossession from the victim’s possession. See WAYNE R. LAFAVE, CRIMINAL LAW 919-20 (4th ed. 2004).

16. *Proctor v. State*, 176 P. 771 (Okla. Crim. App. 1918).

17. *Id.* at 773.

18. See STEVEN L. WINTER, A CLEARING IN THE FOREST: LAW, LIFE, AND MIND 59 (2001).

of provocation, and the passage of time between the provocative act and the lethal response served as a primary rationale for judges to cut off consideration for those killers the judges wished to expose to the death penalty—the mandatory punishment for murder at common law.

Indeed the common law categories of manslaughter themselves almost all require as provocation a physical assault of something closely analogous. Common law judges in theory limited the opportunity for the jury to consider manslaughter to those cases that fell near enough to certain canonical categories of lethal violence.¹⁹ The earliest categories involved “physical battery” or “mutual combat.”²⁰ Mere insults were generally not recognized as sufficient. The most famous, or infamous category, a killing following the discovery of adultery by one’s spouse, required in its purest common law forms actual “sight of adultery.” By the end of the nineteenth century, the trend in American courts was toward relaxing this rule. Nevertheless, the common law mentality remained operational as courts sought some indication that the provoked killer had experienced a physical discovery of the adultery rather than merely learning of it through “hearsay.” A nineteenth-century Texas court allowed a manslaughter instruction when there was no actual sighting but the aggrieved husband had discovered strong evidence of the adultery in a direct and physical way:

It is a late hour of the night,—the parties are found in a corn crib some distance from the house, lying down in the dark. They refuse, at first, to answer when called; then, when the wife answers, she denies that any one is with her,—when deceased gets up he clutches the gun,—defendant finds that the one whose previous conduct and “carrying on” with his wife has excited his suspicions is the one he has thus found in company with his wife. What would any reasonable, sensible man have concluded from these circumstances?

....

As to a proper construction of the expression “taken in the act,” we cannot believe that the law requires or restricts the right of the husband to the fact that he must be an eye-witness to the physical coition of his wife with the other party. As we have seen, adultery can be proven by circumstances, and the circumstances in this case were not hearsay so far as this defendant was concerned; they transpired in his own presence, sight and hearing.²¹

Likewise, the early definitions of the most aggravated killing, murder, focused on the physical features of the killing, lying in wait or poisoning, which involve more than the causally efficacious purpose to kill. They

19. JOHN KAPLAN ET AL., *CRIMINAL LAW: CASES AND MATERIALS* 384 (3d ed. 1996).

20. *Id.* at 390.

21. *Price v. State*, No. 3581, 1885 WL 6853, at *5-6 (Tex. Ct. App. Jun. 13, 1885).

involved the way the killer conducted himself.²² One of the most colorful pieces of common law language on the subject of murder frames precisely the physicality of the common law mentality: “abandoned and malignant heart” killing.²³

There is no clearer example of the bodily nature of common law than the treatment common law judges gave to the crime of rape. The traditional rule that the female victim must receive injuries—physical signs on the body itself of resistance to violence—speaks a fascination with the body that is almost as grotesque as the rituals of the scaffold.²⁴

2. Religion

The common law mentality also rests in fundamentally moral or even religious terms. A great deal of the discourse produced by common law judges makes a lot more sense if we acknowledge this deeply religious view and accept it as part of our reading of their analysis (I’ll get back to the opening we may need to make to religion with regard to the post-modern mentality). Essential to this religious worldview are the ideas of evil and pollution. The two are actually the same. “Evil” is the word that believers give to the characteristic of a person having a corrupted soul, for example, one in rebellion against God. “Pollution” is a term also used by some of these believers. It also has been adopted by anthropologists to describe the more generic feature of cultural belief systems to define certain substances, people, and situations as presenting a catastrophic risk to the well being of individuals and the community.²⁵

Figure 3: Cotton Mather to a condemned Salem “Witch”



“You are now to dy....[because] the Land where you now Live, would be polluted, if you should be spared from Death.”

22. Notice the issue is not, as it is in the contemporary law of capital aggravators, whether the killing is especially painful to the victim.

23. CAL. PENAL CODE § 188 (West 1999).

24. Like much of rape law, the analysis is as concerned with the behavior and motives of the victim as with the perpetrator.

25. See MARY DOUGLAS & AARON WILDAVSKY, *RISK AND CULTURE: AN ESSAY ON THE SELECTION OF TECHNOLOGICAL ENVIRONMENTAL DANGERS* 36 (1982).

Analysis that begins with the modern law's dilemma of choosing between utilitarian and rights-based or moral theories of penal justice cannot appreciate how nicely the cultural category of evil or pollution brings these things together. The evil person is quintessentially dangerous to both the moral and physical well being of the community. In making the boundary decisions over criminal liability and grading, judges and juries must face the hard task of deciding whose crime revealed a truly corrupt person as opposed to a soul still in a relation, albeit possibly a faltering one, with God.²⁶ Naturally the law attempted to help them with formulas of various sorts. These formulas can be read most coherently when recognizing their essentially religious nature.

The religiousness of common law is hammered home to many Criminal Law students in one of the most celebrated cases in the modern criminal law canon, the 1884 Queen's Bench opinion in *The Queen v. Dudley and Stephens*.²⁷ The defendants, young men crewing a yacht to Australia, were charged with killing and eating their shipmate Richard Parker after the three, and a fourth party, who was not charged, were forced to take refuge in a raft after the yacht foundered far out at sea.²⁸ The jury had used a special verdict form on which they had indicated that defendants Dudley and Stephens had indeed killed Parker but had done so under dire circumstances in which the action may have been their only hope for survival.²⁹ The Queen's Bench declined to reverse the decision of the trial judge finding this murder and thus rejected the possibility that taking a life could be justified on the necessity of saving another or even several others.³⁰ In ruling out any utilitarian debate about whether taking the life may have been justified, the opinion directly invoked the religious foundations of English common law. Declining to make elaborate arguments for this hard line, the court stated, "[I]t is enough in a Christian country to remind ourselves of the Great Example whom we profess to follow."³¹

3. Objective

The concept of objectivity and its opposite, subjectivity, share with common law the attribute of being overused in over-inclusive ways. Moreover, common law judges themselves did not necessarily thematize the property of objectivity itself. This would come later and was a kind of retrospective recognition through the awareness of a modern mentality. But

26. This is not a question of salvation. The Christianity of the common law was open to the soul of even the worst criminal being redeemed. It was that only for some the execution would be a necessary, if not sufficient, part of the salvation.

27. 14 Q.B.D. 273 (1884).

28. *Id.* at 273-74.

29. *See id.* at 277.

30. *See id.* at 288.

31. *Id.* at 287.

because contemporary criminal lawyers need to think through all three of the existing mentalities, it is important to consider this aspect. A less anachronistic way of characterizing this attribute of the common law mentality is in terms of its preference for criminalizing action whose wrongness is visible and obvious rather than ambiguous and compatible with benign motives.

Thus the law of attempt, to the extent that the common law recognized it at all, required careful parsing of the line between preparation and attempt. The key question is whether the course of conduct has proceeded to the point where its moral obnoxiousness or threat has become visible. In *People v. Murray*,³² the Supreme Court of California reversed a conviction for an “attempt to contract an incestuous marriage,” because Murray, who apparently intended to marry his niece, had not yet secured the presence of a magistrate, although he had already sent for one.³³

It shows very clearly the intention of the defendant, but something more than mere intention is necessary to constitute the offense charged. Between preparation for the attempt and the attempt itself, there is a wide difference. The preparation consists in devising or arranging the means or measures necessary for the commission of the offense; the attempt is the direct movement toward the commission after the preparations are made.³⁴

Of course judges were often begging the question when they invoked terms like “necessary” or “continuous and natural sequence” in describing the law of causation, but they had in mind the necessity of providing a definitive answer one way or the other. This mandate to make law determinate is another common law quality that gets thematized in the opinions of the Queen’s Bench judges in the 1884 decision of *The Queen v. Dudley and Stephens*. The case, as noted before, offers a kind of apologia for the common law mentality precisely at the historical moment when the modernization of criminal law was becoming more powerful.³⁵ The lead opinion cites the great common law digester Lord Hale for the proposition that: “if a person, being under necessity for want of victuals or clothes, shall upon that account clandestinely and animo furandi steal another man’s goods, it is felony, and a crime by the laws of England punishable with death.”³⁶

Thus, there is clearly no need to consider whether starvation could justify Dudley and Stephens’ act of maritime cannibalism against their shipmate Richard Parker.

32. 14 Cal. 159 (1859).

33. *Id.* at 159.

34. *Id.*

35. For a description of the transformation of penal practices and ideologies in the United Kingdom in the last decades of the nineteenth century and the first decades of the twentieth century, see DAVID GARLAND, PUNISHMENT AND WELFARE: A HISTORY OF PENAL STRATEGIES (1985).

36. *Dudley*, 14 Q.B.D. at 283.

The opinion then acknowledges that the standard they have imposed on Dudley and Stephens is one that they might not be able to live up to themselves. It states:

We are often compelled to set up standards we cannot reach ourselves, and to lay down rules which we could not ourselves satisfy. But a man has no right to declare temptation to be an excuse, though he might himself have yielded to it, nor allow compassion for the criminal to change or weaken in any manner the legal definition of the crime.³⁷

Nevertheless, it is their duty to hold that the “facts as stated in the verdict are no legal justification [for] homicide.”³⁸ The law cannot take its measure from human frailty. It must be anchored in something greater that makes it determinate and, in that sense, objective.

4. Sovereignty

The common law of England was the law produced by the King’s courts as opposed to other manorial or ecclesiastical courts. The common law mentality of criminal law retains this connection to sovereignty in the authority of its judges to hand down normative judgments with reference to no authority other than common law itself. This is a notion reflected more in the absence of the problem of authority in common law opinions than the presence of arguments grounded explicitly in the theory of sovereignty. Yet it also means that the acceptance of common law by American state courts, often restated in statutes, embedded a closer link to the King than post-revolutionary American law generally acknowledged. There is little explicit need to invoke empirical information about social conditions or even the hypothetical problem of reasonableness. Thus, in the case of *The Queen v. Dudley and Stephens*, discussed above, the Court readily assumed that Dudley and Stephens were both bound by law to a higher duty than the preservation of their own lives. The court’s examples of this speak directly to the importance of sovereignty. The court stated:

To preserve one’s life is generally speaking a duty, but it may be the plainest and the highest duty to sacrifice it. War is full of duty, in instances in which it is a man’s duty not to live, but to die. The duty, in case of shipwreck, of a captain to his crew, of the crew to the passengers, of soldiers to women and children, as in the noble case of the *Birkenhead*; these duties impose on men the moral necessity, not of the preservation, but of the sacrifice of their lives for others, from which in no country, least of all, it is to be hoped, in England, will men ever shrink, as indeed, they have not shrunk.³⁹

37. *Id.* at 288.

38. *Id.* at 287.

39. *Id.*

Figure 4. Common Law Mistake Doctrine Assumptions

- Criminal law is part of a general system of legal rules extending ultimately to divine law
- Law is determinate
- Both society and nature exist apart from law

Another example of this is the exculpatory role of good-faith mistakes. When a person in good faith is ignorant of the existence of fact, legal definition, or rule of law that makes his or her actions liable, the proof necessary for the prosecution may be in danger. In common law decisions, only mistakes of fact were exculpatory in this way; mistakes of legal definition did not count, at least in theory. A case consistent with this view is a federal decision from the nineteenth century, *United States v. Learned*.⁴⁰ *Learned* held irrelevant the defendant's good-faith ignorance that the voucher he had issued his employees payable in merchandise out of his store was a "contract" for purposes of an internal revenue law and thus subject to a stamp tax. In the view of the court, "[E]very man is presumed to know the law, and that ignorance of the law is no excuse, as general propositions, are too well established to admit of dispute."⁴¹ The presumptions not discussed by this proposition surround in varying degrees of separation the absent King of England, whose rule included the interpretive work of common law courts.

First, the law, whether the law defining what counts as a contract for purposes of the revenue laws, or the law defining crimes, is presumed to be part of a continuous system ultimately anchored in the revealed truth of religion. Second, this system is determinate and provides determinate answers to any legitimate questions put to it. No one need speculate as to how their conduct will be defined for legal purposes. Finally, law is clearly distinct from both nature and society, which follow their own "natural" or "divine" laws. The sovereign law may intervene in society, but it does not play any role in constituting it.

40. 26 F. Cas. 893 (E.D. Mich. 1870) (No. 15,580).

41. *Id.* at 895.

B. Modern Law

Most casebooks offer a number of opinions exemplifying the common law mentality. These are usually presented as undergoing a pattern of decline as courts increasingly relax the harsh assumptions of the common law. This narrative of a clear but harsh common law giving way to a process of interpretive relaxation is contrasted with an alternative ideal—one rooted in distinctly modern ways of thinking about law and society. In most American Criminal Law casebooks the model of the modern mentality is the Model Penal Code of the American Law Institute. Most books also include leading opinions of the California, New York, and other state high courts that exemplify modern ways of thinking, but the Model Penal Code is dominant, so much so that it is tempting to interpretively misread it as the Modern Penal Code.

Figure 5: Modern Law, 1900 ---

- Mind
- Analytic/Scientific
- Subjective
- Social

1. Mind

Modern criminal law jurisprudence is at pains to deny that pure thought or status can be a crime,⁴² but the very need to clarify that limit is a clue to how much modern law makes the mind the measure of all things, at least all things criminal. To be sure, there are reasons for modern law to avoid too close an identification with scientific psychology and its popular but risky claims to understand the criminal subject. Throughout the first half of the twentieth century, criminal lawyers, jurists, and professors worried about the danger that the human sciences would displace legal expertise from the center of criminal law.⁴³ Instead, modern law has thought to focus attention on the mental life of individuals without being too explicit about the nature of that reality. The whole topic of the mental state accompanying bad acts or circumstances is present but very low-key in common law reasoning. While quick to defend the

42. See *Robinson v. California*, 370 U.S. 660 (1962).

43. See Thomas A. Green, *Freedom and Criminal Responsibility in the Age of Pound: An Essay on Criminal Justice*, 93 MICH. L. REV. 1915, 1923-24 (1995).

proposition that some culpable mental state is required, common law cases, especially those present in contemporary casebooks,⁴⁴ tend to treat mental life as imminent in the acts and circumstances, rooted in their very moral obnoxiousness or evil, rather than something that transcends the act altogether. In contrast, the most developed expression of the modern mentality of criminal law, the Model Penal Code, takes great pains to create a complex framework for defining different levels of culpable mental state in a way that can be read consistently across very different acts, circumstances, and result elements. There is no simple criminal intention in the Code. Every separate bit of conduct, circumstance, or result that a substantive crime definition includes must have its own burden of proof with respect to the subject's awareness.⁴⁵

A powerful example of the hold of the mental over modern law is the development of the law of provocation manslaughter. As we saw above, common law courts limited manslaughter to those cases where a killing had arisen out of a limited set of circumstances defined in terms of specific acts and analyzed in terms of physical metaphors like "heat of passion." Modern cases shift the focus from the body and specific provocative physical circumstances to the mind and the question of whether the killing was caused by an emotional disturbance. The Model Penal Code's provision is, once again, exemplary:

[A] homicide that would otherwise be murder is committed under the influence of extreme mental or emotional disturbance for which there is reasonable explanation or excuse. The reasonableness of such explanation or excuse shall be determined from the viewpoint of a person in the actor's situation under the circumstances as he believes them to be.⁴⁶

2. Analytic-Scientific

While the common law mentality looked to religion to provide its dominant normative criteria, the modern criminal law mentality turns to two sometimes divergent sources of meaning, the political process and the human sciences, to define the substantive ends that the system should pursue. The association of modernism in criminal law with greater legislative authority

44. *E.g.*, *Regina v. Prince* L.R. 2 C.C.R. 154 (1875) (holding that the prosecution was required to show the defendant had acted with at least negligence when he accidentally set fire to a ship while stealing rum).

45. As Markus Dubber notes in his treatise on the Model Penal Code:

The price of lucidity was complexity, and of the differentiation, confusion. The common law had known two units of analysis: *mens rea* and *actus reus*. The Code recognized seven, and that's not even counting strict (*mens-rea-less*) liability. The quartet "purpose, knowledge, recklessness, and negligence" took the place of *mens rea*, and conduct, attendant circumstance, and result, that of *actus reus*.

DUBBER, *supra* note 8, at 51.

46. MODEL PENAL CODE, *supra* note 7, at § 210.3(1)(b).

over criminal law is reflected in the importance given to rules of statutory construction aimed at directing interpretation toward the policy ends preferred by lawmakers with democratic authority. Thus the Model Penal Code provides a series of explicit analytic rules for deciding what to do when no term indicating the level of culpability is present or when an expression of culpability in one part of a statute should be applied in other parts of the statute.⁴⁷ Indeed the pursuit of more precise analytic terms is a perennial quest in the modern criminal law, and it reflects the imperative of allowing the political process to speak.

In addition to a commitment to political accountability, the modern mentality is heavily influenced by the rise of the human sciences in the nineteenth century and their promise that institutions of law operate to solve social problems. The goal of modern criminal law in this respect is to prevent crime and to do so in ways that take maximum advantage of what can be discerned about human nature from the positive sciences of humanity. For the Model Penal Code, the challenge for criminal law is to balance the goal of preventing crime through deterrence with the aspiration to treat those who are not deterred. The concept of dangerousness, while rarely mentioned directly, suffuses the Model Penal Code and other modernist efforts at reforming criminal law.⁴⁸

3. Subjective

The modern law confronts objectivity and subjectivity as a problem for itself in a way probably absent from the thinking of common law courts and lawyers. If modern courts are nervous to embrace the often pejorative-sounding quality of subjective, they also recognize that the centrality of the subject is a potential strength in a society where law no longer fits around a unified and coherent moral and religious common wealth. A good example is the law of self-defense where modern courts have increasingly looked to the individual qualities of a particular defendant, and his or her view of the circumstances, in determining whether they were justified in using lethal force. In an often-cited opinion expounding on how the law of self-defense applies to a woman who had experienced battery in the past from the victim, her husband, the Supreme Court of North Dakota held in favor of a "subjective" standard for reasonableness, in which:

the issue is not whether the circumstances attending the accused's use of force would be sufficient to create in the mind of a reasonable and prudent person the belief that the use of force is necessary to protect himself against immediate unlawful harm, but rather whether the circumstances are sufficient

47. *Id.* at §§ 2.02(3)-(4).

48. DUBBER, *supra* note 8, at 12.

to induce in *the accused* an honest and reasonable belief that he must use force to defend himself against imminent harm.⁴⁹

The Code's provision on provocation manslaughter exemplifies this pursuit of a common ground forged in understanding across subjective experiences. Replacing altogether the common law focus on "heat of passion," and thus cooling time, the Code specifically examines the mind of the defendant and asks whether the person was under the influence of an "extreme mental or emotional disturbance for which there is a reasonable explanation."⁵⁰ The Code explicitly states that "[t]he reasonableness of such explanation or excuse shall be determined from the viewpoint of a person in the actor's situation under the circumstances as he believes them to be."⁵¹ Reasonableness is the name an increasingly modern law will give to the free-floating standard required for stability in a post-conventional society.

The same modern mentality has influenced state courts in reconstructing manslaughter doctrine, sometimes even in the face of statutes that embody common law language. A strong example, discussed in many casebooks is the 1976 decision of the California Supreme court in *People v. Berry*.⁵² Berry was convicted of murdering his wife, Rachel Pessah. Shortly after the marriage, Rachel made a trip to her native land of Israel. When she returned about a month and a half later, she informed Berry that she had fallen in love with another man. Less than two weeks after her return, Rachel was strangled to death by Berry in their apartment. Berry's defense was that the killing had taken place while he was in a state of uncontrollable rage. Berry blamed this rage on the combined effects of Rachel taunting him with her unfaithfulness while periodically sexually stimulating him and demanding sexual intimacy. In addition to his own testimony, Berry presented the testimony of a psychiatrist, Dr. Martin Blinder. Based on his examination of Berry—Blinder never met Rachel—Dr. Blinder testified that Rachel "was a depressed, suicidally inclined girl and that this suicidal impulse led her to involve herself every more deeply in a dangerous situation with [Berry]."⁵³ The trial court permitted the testimony, but refused to instruct the jury that they could find Berry guilty of manslaughter. Berry was convicted of murder. He appealed, claiming that the judge erred in refusing to instruct the jury on manslaughter, defined by California statute as "the unlawful killing of a human being, without malice . . . upon a sudden quarrel or heat of passion."⁵⁴

49. *State v. Leidholm*, 334 N.W.2d 811, 817 (N.D. 1983) (emphasis added).

50. MODEL PENAL CODE, *supra* note 7, at § 210.3(1)(b).

51. *Id.*

52. 556 P.2d 777 (Cal. 1976).

53. *Id.* at 780.

54. *Id.* (quoting CAL. PENAL CODE § 192 (West 1999)).

The Attorney General, defending the trial court verdict, argued that because Berry waited in their apartment for almost a whole day before confronting and killing the victim, he could not have been under a heat of passion. By any traditional notion of “cooling,” twenty-two hours was just too long to stay legally provoked. The California Supreme Court reversed, relying heavily on the testimony of Dr. Blinder. The Court made clear that an individualized and scientifically informed analysis of Berry’s mental state was determinative, rather than the amount of time or the bodily metaphors of heat and cooling. The Court wrote:

[T]he long course of provocatory conduct, which had resulted in intermittent outbreaks of rage under specific provocation in the past, reached its final culmination in the apartment when Rachel began screaming. Both defendant and Dr. Blinder testified that defendant killed in a state of uncontrollable rage, of passion, and there is ample evidence in the record to support the conclusion that this passion was the result of the long course of provocatory conduct by Rachel⁵⁵

4. Social

Without a King to anchor the authority of the criminal law, modern law looks to societal norms to determine the standards. One way of grounding law in the social is to allow the jury to bring its own conception of community standards to bear. The trend of modern courts has been to allow questions of provocation, self-defense, duress, and others to go to the jury rather than deciding them at the judicial level. In effect, courts no longer operate from a sovereign grant of authority but rather as facilitators of society’s judgment.

Figure 6: Modern Law Mistake Doctrine Assumptions

- Law is fragmented, civil law is quite different than criminal law
- Law is indeterminate
- Law plays a role in constituting social reality

55. *Id.* at 781.

Mistake doctrine provides a window into this more social perspective on the law. Modern criminal law tends to recognize both mistakes of fact and mistakes of what can be called “non-governing law,” such as legal definitions relevant to determining the applicability of specific crimes, as exculpating. This recognition that some mistakes of law negate the prosecution’s required proof reflects a social conception of law in three respects. First, law is seen as fragmented into distinct specializations rather than as a unified system. Second, there is recognition that law is indeterminate and that people can make reasonable mistakes about whether they fit a particular legal definition relevant to their criminal liability. Finally, there is a recognition that law helps constitute the social world, which is the relevant context for attributing criminal liability.

C. Post Modern Law

The common law and modern law mentalities more or less represent transparent and coherent structures of knowledge and action. They define the ways that criminal courts can know about and act on crime in terms consistent with broader understandings. Most casebooks embrace some version of “common law becomes modern law” because it describes the self understanding that has, at least until recently, prevailed over the teaching of Criminal Law since World War II. In that sense the framework thus far developed is perfectly consistent with the dominant pedagogy which identifies a modernizing trend in criminal law and seeks to characterize its dominant logics. Where my framework diverges is in suggesting that criminal lawyers ought to think of themselves as operating in what amounts to a post-modern mentality. We can observe that the modern mentality no longer seems to be as self-evident or to provide as satisfying an account as it once seems to have, but no new understanding has radically reorganized the categories of this way of thinking.

Figure 7: Post-Modern, 1968 ---

- Cyborg (e.g., carjacking)
- Populist/Risk
- Situational
- Privatized

1. Cyborgs

If the common law focused on the body and the modern law focused on the mind, postmodern law is characterized by the emergence of a new target, one that fuses the human with the technological. The political theorist Donna Haraway has used the term “cyborg” to describe “a cybernetic organism, a hybrid of machine and organism, a creature of social reality as well as a creature of fiction.”⁵⁶ To some extent this begins under the modern mentality of law with the way possession crimes are defined. As Markus Dubber has argued, making possession a crime should raise problems for the act requirement because to be in possession of something is less an act than a status.⁵⁷ In recent decades, possession crimes have become more and more important sources of criminal liability, playing a major role in the rise of the imprisonment rate documented in Figure 1 above.

A good example of the focus of the post-modern mentality on cyborgs is the priority given to prosecuting gun crimes in recent years. Laws making it a crime to be a felon in possession of a firearm apply regardless of the act or intentions of the offender, defining the very combination of being a convicted felon and having a weapon as criminal threat.⁵⁸ The target of the law is not the behavior of these felons but the very combination of organism and machine. A similar development is the growing number of states that make it an aggravating factor, for death penalty purposes, if the killing was done from a car or with an automatic weapon.⁵⁹

Another powerful example of this post-modern trend is the Federal government’s Racketeer Influenced and Corrupt Organization Act (RICO),⁶⁰ which developed the traditional concept of conspiracy law into a much broader and more powerful weapon of law enforcement. The target of RICO prosecutions is not individuals’ acts and intentions so much as it is an “enterprise” that includes an individual or group of individuals, or formal or informal organization.⁶¹

56. DONNA HARAWAY, *SIMIANs, CYBORGS, AND WOMEN: THE REINVENTION OF NATURE* 149 (1991).

57. DUBBER, *supra* note 8, at 40.

58. 18 U.S.C. § 922 (2000).

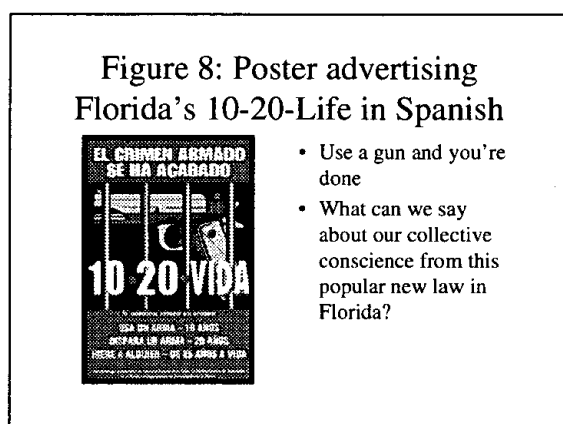
59. See Jonathan Simon & Christina Spaulding, *Tokens of Our Esteem: Aggravating Factors in the Era of Deregulated Death Penalties*, in *THE KILLING STATE: CAPITAL PUNISHMENT IN LAW, POLITICS, AND CULTURE* 81 (Austin Sarat ed., 1999).

60. 18 U.S.C. § 1962 (2000).

61. *Id.* § 1961(4). “[E]nterprise’ includes any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity.” *Id.*

2. Populist Punitiveness and Risk Management

Both the common law and modern law mentalities looked outside of law for other authoritative forms of knowledge that could shape the rules for defining and attributing criminal liability. The postmodern mentality's new focus is on popular sentiment, particularly the American public's desire for more punitively expressive laws and more protection from criminal risk instead of religion or science. Contemporary laws against sex offenders, recidivists, and armed criminals all reflect this logic.⁶² These laws are populist in the language they use that often seems to invoke the "in-your-face" confrontationalism of prime-time television. Terms such as "sexual predator," or "three strikes and you're out" reflect neither religion, nor science, nor even jurisprudence so much as popular culture.



As the poster above shows, this new generation is designed to fit into a world of popular commodity advertising.

3. Situational

Rather than either the objective world of the common law mentality or the pursuit of consensus within the realm of the subjective, postmodern law is relentlessly situational, in the sense of pragmatic and flexible, with a focus on reducing risk. RICO again provides a powerful example. The focus of criminal liability here is on "enterprises" and "patterns" of behavior. What the criminal law targets are not morally obnoxious acts or dangerous intentions (or proclivities) but rather situations that pose a risk of possible criminal harm. This is also reflected in the growing harshness with which the law treats reckless and negligent behavior that is correlated with risk, without regard to moral obnoxiousness or the dangerousness of the intentions or persons involved.

62. See, e.g., CAL. PENAL CODE § 667 (West 1999) (California's three strikes law); CAL. WELF. & INST. §§ 6600-6609.3 (West 1998 & Supp. 2004) (California's sexually violent predator law).

One of the strongest hints that the modern mentality is losing its purchase on the field of criminal law is in the area of provocation manslaughter. As noted above, cases such as *People v. Berry*⁶³ reflected the power of the modern mentality in the readiness of courts to work beyond the common law language of statutes. When I first studied Criminal Law as a student, the then-recently decided *Berry* case was treated by both teacher and students as correctly decided and a positive indicator of the influence that modern sciences such as psychiatry had on law and on the willingness of courts to open up law to the realm of subjective experience. Today when I teach the *Berry* case, it feels very different to both teacher and students. We notice how unfair it is that the defense expert was allowed to testify to the mental state of a victim he never met. We cringe at the court's willingness to blame the victim for the violence of her husband. We draw on and discuss recent scholarship suggesting that *Berry* was a serial batterer with a proclivity for escalating violence against women he could not control.⁶⁴ It seems shockingly clear that modern law is, at least in this instance, far less protective of women against the well-established pattern of male intimate violence than the common law, which allowed male rage to mitigate lethal violence only when caused by adultery and only when the male had either witnessed it or at least responded the instant he learned of it.

The move toward a post-modern situational justice is suggested by the effort of feminist legal scholars to develop an alternative standard for provocation manslaughter that would be more protective of women. A return to "objective" common law categories based on the body seems impossible (and would hurt many women defendants who tend to reach violence on a slower curve than men). Instead, one leading article has proposed limiting the modernist focus on subjective mental state to those circumstances where the "emotional judgments are inspired by a belief in a 'wrong' that is no different from the law's own"⁶⁵ Whatever the merits of this proposal, it exemplifies the current tendency to focus on the situation rather than either the objective or the subjective.

4. Privatized

As suggested above, each mentality of the criminal law reflects an intuitive sense of what law is reflecting. In the common law it is something like the sovereign realm that defines what the law relates to and where it draws on for

63. 556 P.2d 777 (Cal. 1976).

64. See Donna K. Coker, *Heat of Passion and Wife Killing: Men Who Batter/Men Who Kill*, 2 S. CAL. REV. L. & WOMEN'S STUD. 71 (1992); WILLARD GAYLIN, *THE KILLING OF BONNIE GARLAND: A QUESTION OF JUSTICE* (1982).

65. Victoria Nourse, *Passion's Progress: Modern Law Reform and the Provocation Defense*, 106 YALE L.J. 1331, 1337-38 (1997) (footnote omitted).

authority and meaning. In the modern mentality, it is society to which the law looks for its authority and meaning. Postmodern law is increasingly fragmented and privatized. The interest of the law is not society as a whole, or the sovereignty of its rulers, but specific communities defined either by their special risks or status. New laws impose enhanced penalties for selling drugs in proximity to schools. New aggravators in state death penalty statutes make capital killings of the very young or very old, of pregnant women, and a variety of different kinds of public employees. Hate crime legislation enhances punishment for crimes directed at individuals of a particular group or identity. Along with developments such as “community” policing, this trend reflects a retreat from society as law’s interlocutors and towards a variety of different kinds of community.

III. CONCLUSION: IT’S CULTURE STUPID!

While it is useful to associate each of these “mentalities” with a particular period of relative dominance, it is more accurate to think of them as alternative ways of knowing about and acting on the criminal law that are more or less available to contemporary lawyers. At the heart of each of these are different pathways by which the cultural knowledge available in historically specific social contexts enters into legal judgment. The study of case law that consumes American Criminal Law classes is all about how judges use somewhat different techniques to bring facts and law together through the manipulation of culture, such as the ensemble of narratives that provide categories of meaning available in a particular historically specific society. Each of the mentalities I have described represents a shift in the kind of narratives which the law draws on.

Figure 9: Dominant Narratives

- Revealed Religious Truth
- Science and Analytic Moral Philosophy
- Multiple

Common law, as I have suggested above, draws heavily on religious thinking and imagery. Modern law draws on analytic methods, mainly from

twentieth century philosophy and science, to provide its categories. Perhaps the most distinctive feature of our post-modern situation is the sheer multiplicity of narratives available for reasoning about and acting on criminal law.

**Figure 10: Discourses Infusing
Contemporary Criminal Law**

- Psychologies
- Criminologies
- Feminism
- Conservative Religious Thought
- Liberal Religious Thought
- Civil Rights
- Neo-liberal Economics
- Cognitive Science

There really is no post-modern mentality yet, in the sense of an emerging consensus on how this multiplicity of narratives is relevant to interpreting and applying the criminal law. In a sense I view my course as a practical exercise in creating a mentality for the next generation of lawyers. By helping students become aware of the role that historically specific narratives and discourses play in making it possible to legally reason about crime, I hope my course teaches them to work with the multiple sources of meaning and authority that compete in our present age. Naturally this makes it more difficult to engage in the project of reforming the criminal law by identifying its principles and seeking to work out implications for various boundary-drawing problems. But we are not in an age when academic legal scholars have much influence on the making of criminal law. Instead we must make our contribution, if any, in the preparation of new criminal law mentalities.