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Inside



Criminal Law

What Matters and Why

John M. Burkoff

Russell L. Weaver



Wolters Kluwer

Law & Business

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AUSTIN BOSTON CHICAGO NEW YORK THE NETHERLANDS

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Aspen Publishers
Attn: Order Department
PO Box 990
Frederick, MD 21705

Printed in the United States of America.

1 2 3 4 5 6 7 8 9 0

ISBN 978-0-7355-6410-7

Library of Congress Cataloging-in-Publication Data

Burkoff, John M.

Inside criminal law : what matters and why/John M. Burkoff, Russell L. Weaver.

p. cm.

Includes index.

ISBN 978-0-7355-6410-7 (pbk. : alk. paper) 1. Criminal law—United States. 2. Criminal law. I. Weaver, Russell L., 1952- II. Title.

KF9219.B83 2008
345.73—dc22

2008014280

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Preface and Acknowledgments

Every state in the United States—and the federal government and the District of Columbia—has (literally) tens of thousands of criminal statutes on the books. These bodies of criminal statutes (sometimes collected in a so-called Crimes Code) are different as well as constantly changing—in every single one of these jurisdictions. But there are, nonetheless, important similarities in the history, approach, coverage, and application of *all* of the major criminal offenses in *each* of these jurisdictions. It is these similarities, as well as the most significant differences in approach and coverage, that are discussed in appropriate detail in the chapters that follow.

This book was written primarily for use by law students who are taking a law school course in criminal law. We have each taught just such a course for longer than we care to admit, and we have tried to include herein all of the information necessary for a law student to obtain an informed overview of everything (and more) that is typically taught in such a law school course.

This book should prove helpful to non-law students as well. It would serve as a useful overview of criminal law in the United States for undergraduate students enrolled in criminal justice courses. Moreover, this book would serve as a useful tool for criminal justice professionals working in other countries who might want to look to American criminal law as a basis for comparison to their own criminal codes. Indeed, this book would be helpful for many others as well, such as journalists, legislators, and administrators working in the U.S. criminal justice system and interested lay people who would simply like to gain a better understanding of—and more informed insights into—the nature of substantive criminal law in this country.

It is the authors' hope that the unique features of this book will prove to be particularly useful for readers. The Overview at the beginning of each chapter positions the material that follows in that chapter within the whole field of criminal law. The Frequently Asked Questions feature (FAQs) gives readers clear and cogent answers to issues that commonly pop up in a criminal law course. Sidebars add some color to the coverage of substantive criminal law, offering readers some parenthetical insights. (Use that material to show off in class!) The Summary feature near the end of each chapter offers you a quick and easy guide to the most basic points covered in that chapter. And the Connections feature at the very end of each chapter helps you fit the points made in that chapter with the other chapters in the book, the whole body of substantive criminal law.

Finally, the authors wish to acknowledge with their sincere gratitude the assistance in the production of this book of Barbara Roth, the Managing Editor for this

project at Aspen; the editorial assistance of Dana Wilson; the research assistance of Sarah Drinkwater (Pitt Law, Class of '09); and the drawings of Dan Schneider (in the conspiracy chapter). The authors also wish to express their gratitude to their families, not only for their forbearance of the time the authors took to accomplish this project, but for their crucial role as well in spending all of the (modest) amount of money generated by sales of this book.

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May 2008

Summary of Contents

<i>Contents</i>	<i>xi</i>
<i>Preface and Acknowledgments</i>	<i>xvii</i>
Chapter 1 Purposes of the Criminal Law	1
Chapter 2 Actus Reus Requirement	17
Chapter 3 Mens Rea	35
Chapter 4 Causation	61
Chapter 5 Complicity	79
Chapter 6 Attempt	97
Chapter 7 Conspiracy	115
Chapter 8 Homicide	133
Chapter 9 Assault and Battery	151
Chapter 10 Rape and Sexual Assault	165
Chapter 11 Theft Offenses and Related Crimes	183
Chapter 12 Justification Defenses	203
Chapter 13 Excuses	225
<i>Index</i>	<i>239</i>

Contents

<i>Preface and Acknowledgments</i>	xvii
--	------

Chapter 1. Purposes of the Criminal Law 1

A. Justifications for Punishment 2

1. Retribution	4
2. Restraint	5
3. Specific Deterrence	5
4. General Deterrence	6
5. Rehabilitation	7
6. Expressing Community Values	9

B. Application of the Justifications for Punishment 9

1. Scenario # 1	11
2. Scenario # 2	11
3. Scenario # 3	13

Chapter 2. Actus Reus Requirement 17

A. The Voluntary Act Requirement 18

1. Defining "Voluntariness"	19
a. Hypnosis	20
b. Forced Movements	20
c. Automatism	21
2. Recklessness/Negligence Crimes	22
3. Strict Liability Offenses	23
4. Possession Offenses	23
5. "Status Based" Crimes	24

B. Omissions 24

1. Exceptions to the General Rule	25
2. Duties to Act	26
a. Statutory Obligations	26
b. Status Relationships	27

c. Contractual Obligations	29
d. Assumption of Duty	30
e. Creation of Peril	30
3. Predicates to Duty	31
4. Constitutional Issues	32
Chapter 3. Mens Rea	35
A. Mens Rea Formulations	36
1. Concurrence of Act and Intent	37
2. Common Law	38
3. Changes in the Common Law	38
4. Purpose	39
5. Knowledge	40
6. Recklessness and Negligence	41
7. Construction of Criminal Statutes	44
B. Strict Liability Offenses	47
1. Traditional Aversion to Strict Liability	47
2. Public Welfare Offenses	49
3. Impact of Strict Liability	50
C. Intoxication and Drugged Condition	51
D. Mistake of Fact	55
E. Mistake of Law	57
Chapter 4. Causation	61
A. Common Law Approaches	62
1. Actual Causation	62
2. Legal Causation	64
a. The Year and a Day Rule	65
b. Legal Causation Tests	65
c. Dependent and Independent Intervening Causes	67
d. Model Penal Code Approach	68
B. Specific Applications	69
1. Transferred Intent	69
2. "Eggshell" Victims	70
3. Unexpected Acts of the Victim	71
4. Negligent Medical Care	72

5. Crimes Involving Recklessness or Negligence	73
a. Intoxicated Drivers	73
b. High-Speed Chases	74
c. Omissions	74
d. Pursuing Attackers	75
e. Drag Racing	75
f. Games of "Chicken"	76
g. Narcotics Suppliers	76
 Chapter 5. Complicity	 79
A. Accomplice Culpability	80
1. Common Law Restrictions and Modern Approaches	81
2. Mens Rea Requirement	84
3. Act Requirement	87
4. Renunciation	89
5. Scope of Accomplice Responsibility	89
B. Vicarious Liability	90
1. Corporate Culpability	90
2. Criminal Responsibility of Corporate Officers and Agents	93
 Chapter 6. Attempt	 97
A. Actus Reus	98
1. Traditional Definitions	98
2. Model Penal Code Test	101
3. Other Attempt-Related Crimes	104
B. Mens Rea	104
C. Abandonment	107
D. Impossibility	109
 Chapter 7. Conspiracy	 115
A. Unilateral-Bilateral Conspiracies	117
B. Mens Rea	119
C. The Act of Agreement	121
D. Overt Act	123
E. Renunciation or Withdrawal	124
F. No Merger	125

G. Culpability of Co-Conspirators: <i>Pinkerton</i> Doctrine	126
H. Who Is a Co-Conspirator and with Whom?	127
I. How Many Conspiracies Are There?	131
 Chapter 8. Homicide	 133
A. Intentional Killings	135
1. Murder	135
a. Murder by Degrees	135
b. The Model Penal Code Formulation	138
2. Voluntary Manslaughter	138
a. Provocation or Heat of Passion Defense	139
b. Imperfect Defense	141
B. Unintentional Killings	142
1. Unpremeditated Murder	142
2. Felony-Murder	143
3. Involuntary Manslaughter/Negligent Homicide	145
 Chapter 9. Assault and Battery	 151
A. Traditional Assaultive Crimes	152
1. Battery	152
2. Assault	154
3. Mayhem	155
4. The Model Penal Code and Merged Assault Formulations	155
B. Aggravated Assaultive Crimes	157
C. Consent Defense	161
D. Modern Variations on Assault Crimes	162
 Chapter 10. Rape and Sexual Assault	 165
A. Elements of Rape	167
1. Force Requirement	167
2. Consent	170
3. Mens Rea	171
4. Spousal Rape	173
5. Expanded Scope of Rape and Lesser Sexual Offenses	174

B. Statutory Rape	175
C. Evidentiary Provisions	177
1. Rape Shield Laws	177
2. Defendant's Sexual Assault Record	178
3. Rape Trauma Syndrome	178

Chapter 11. Theft Offenses and Related Crimes **183**

A. Traditional Theft Offenses	184
1. Larceny	184
a. Custody Versus Possession	185
b. Bailments	186
c. Lost and Mislaid Property	186
d. Owner's Presence	186
e. Mistaken Delivery	187
f. Consent	187
g. Carrying Away	188
h. Personal Property	188
i. Wild Animals	188
j. New Forms of Property	188
k. Intent to Steal	189
l. Degrees of Larceny	190
2. Larceny by Trick	190
B. Legislative Expansion of Theft Crimes	191
1. Embezzlement	191
2. False Pretenses	192
C. Modern Consolidated and Expanded Theft Crimes	192
D. Robbery	195
E. Burglary	196
F. Receiving Stolen Property	198
G. Carjacking	199

Chapter 12. Justification Defenses **203**

A. Self-Defense	205
1. Imminency	205
a. Limited Use of Force	205
b. Battered Spouses	206

2. Honest and Reasonable Belief	207
3. Deadly Force	208
4. Aggressors	209
5. Retreat	210
B. Imperfect Defense	212
C. Defense of Others	213
D. Defense of Property	215
E. Law Enforcement Defense	217
F. Necessity	219
G. Other Justification Defenses	223
 Chapter 13. Excuses	 225
A. Duress	226
B. Insanity and Related Mental Defenses	228
1. Insanity Tests	229
a. <i>M'Naghten</i> and Irresistible Impulse	231
b. <i>Durham</i> "Product" Test	232
c. ALI Model Penal Code Test	232
2. Compulsive Gambling Disorder	233
3. Diminished Capacity	234
4. Guilty but Mentally Ill	234
5. Burden of Proof	235
6. Competency	235
C. Infancy	236
 <i>Index</i>	 <i>239</i>

Purposes of the Criminal Law

1

Why do we use the criminal law to meet our societal objectives, rather than relying instead on the civil law? Or simple moral force? And

OVERVIEW

even when we have made the decision that a particular act should be criminalized, how do we determine the severity of the punishments that should be imposed? When is a fine sufficient? Imprisonment necessary or desirable? Capital punishment? The answers to these questions are of critical importance to lawyers for many reasons, not the least of which is that the “whys” of the criminal law often determine the “whats”—that is, why we punish often dictates what sentence (if any) a convicted defendant may receive.

A. JUSTIFICATIONS FOR PUNISHMENT

1. Retribution
2. Restraint
3. Specific Deterrence
4. General Deterrence
5. Rehabilitation
6. Expressing Community Values

B. APPLICATION OF THE JUSTIFICATIONS FOR PUNISHMENT

1. Scenario # 1
2. Scenario # 2
3. Scenario # 3

The criminal law is unique in that it provides a mechanism for controlling individual behavior through the medium of punishment. Punishment can take the form of imprisonment, fines, restitution, and, in the most extreme cases, even execution. In this respect the criminal law is distinguishable from other areas of the law.

A. Justifications for Punishment

For moral and ethical reasons, we need sound justifications for imposing criminal penalties. Criminal convictions usually carry a stigma and moral condemnation,¹ that can and usually do affect an individual's reputation, status in society, personal relations, and professional career.² In addition, some punishments entail relatively severe personal consequences, such as significant deprivations of individual liberty or even death. Even when criminal punishment involves nothing more than a fine, the loss of money as a result of a criminal conviction is rarely taken lightly.

Civil tort law, by contrast, is designed to provide appropriate *economic* compensation to those injured by the conduct of others. Our criminal law would likely be quite different if it was driven strictly by economic considerations:



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¹See, e.g., Henry M. Hart, Jr., *The Aims of the Criminal Law*, 23 *Law & Contemporary Problems* 401 (1958) ("[A crime] is conduct which, if duly shown to have taken place, will incur a formal and solemn pronouncement of the moral condemnation of the community.").

²See, e.g., Louis Michael Seidman, *Soldiers, Martyrs, and Criminals: Utilitarian Theory and the Problem of Crime Control*, 94 *Yale L.J.* 315 (1984) ("[B]lame not only makes the threat of other punishment credible, but also provides a kind of deterrence that other punishment cannot achieve. . . . [But] moral condemnation is a unique sanction because it inflicts suffering on individuals even when the conduct is otherwise efficient.").

While tort damages also serve as a mechanism for controlling individual behavior in the sense that people may alter their conduct in an effort to avoid liability and civil damages, tort remedies do not include in their repertoire forcible imprisonment or execution. In addition, again unlike criminal offenses, tort damages are usually awarded for compensatory rather than punitive purposes, except in the limited case of civil punitive damages.

Because of the potentially dramatic and life-altering consequences resulting from a criminal conviction, criminal punishment is usually reserved for the more serious departures from societal standards of conduct. Indeed, relatively minor deviations from the prescribed norms are sometimes referred to as only “violations” rather than as “crimes.”

The commission of actual criminal offenses is typically punished on the basis of the perceived severity of the offense. Crimes such as murder, manslaughter, robbery, and rape typically carry the most severe punishments. In addition, certain necessary elements of proof are included in virtually all crimes as prerequisites to the imposition of criminal sanctions, for example, a voluntary act, a culpable *mens rea*, and, in some instances, a specific result and/or an appropriate causal link between the act and the result.³

But it is one thing to convict someone of a crime by establishing all of these prescribed elements of a statutory criminal offense, and it is another thing entirely to forcibly punish that person, whether that punishment be a fine, imprisonment, or execution. Unless we are to reflexively legitimize the gratuitous infliction of suffering upon others, society must have reasons—*good* reasons—for imposing such punishment.

Many people contend that it is appropriate to punish a convicted criminal by looking primarily to application of the moral principle of “just deserts.” That is to say that criminal punishment is appropriate when scaled to the offender’s culpability and the level and scope of the harm that he or she has caused. If an offender is less culpable, then he or she “deserves” less punishment; more culpable, then he or she “deserves” more punishment.

Not everyone agrees, however, that punishment for crimes should be determined strictly by looking to the accused or by applying the principle of just deserts. Some critics point out that even if we all agreed on that rationale, how in the world are we to determine what an offender justly deserves in fact? *What are just deserts?* A prison sentence rather than a fine? If prison, for how many months or years? What is just?

There are a number of reasons why it is important as a practical matter to know why particular activity has been criminalized. When sentencing, judges often consider, for example, the purposes of the criminal law in making discretionary judgments about the length of criminal sentences, at least where such discretionary judgments are permissible because no mandatory sentence is required.

Over the years, a number of different justifications have been discussed both for the imposition of criminal sanctions and for the determination of the severity of those sanctions. Most commonly, these justifications include the following:

- Retribution
- Restraint
- Specific deterrence
- General deterrence
- Rehabilitation
- Expressing community values

³See Chapters 2-4.

(1) Retribution

The concept of **retribution** is quite elementary really. It is the notion that society should punish criminals in a fashion similar to the crime actually committed in order either (depending upon point of view) to exact just deserts or simply to exact vengeance for the wrong-doer's own violation of the law. The Biblical "eye for an eye": "Thou shalt give life for life, eye for eye, tooth for tooth, hand for hand, foot for foot, burning for burning, wound for wound, stripe for stripe."⁴

The concept of retribution as justification for punishment is often premised upon the view that we can and should require people to be—and to be held—responsible for their own actions. If a person acts in a morally blameworthy manner appropriately criminalized by the force of law, he or she should be called to account for his or her improper and antisocial actions.⁵ Justice demands a sort of moral compensation for the wrongdoing.

Moreover, when ordinary citizens refer to the criminal law, they often do so in just such patently retributive terms. People frequently state, for example, that criminals should be required to "pay their debt to society." And when convicted criminals are released from prison, many people say that they have paid their "debt." In the most extreme examples of retributive sentiment, the families of murder victims sometimes seek to have the perpetrators put to death for their crimes. A "life for a life."

Despite these popular sentiments, many commentators question whether punishment can be justified sensibly based only upon such retributive grounds. Indeed, some commentators have argued that criminal punishment serving *only* to exact retribution is inherently cruel. One well-known commentator argued that the primary justification for punishment should simply be to diminish further instances of such anti-social conduct (see discussion of deterrence, *infra*) and that society should only make such "concessions to retaliatory passions as are practically necessary for the system to survive."⁶

Nonetheless, retribution continues to survive as a common justification, popular and philosophical, for imposing criminal punishment. The public perception, that retaliation or retribution is a valid and important basis for punishment, may simply be too strong to ignore. In addition, some fear that if society does not retaliate against the perpetrators of crimes, the victims will. Some argue further that "[r]esentment (perhaps even some hatred) is a good thing,' that forgiveness of wrongdoers is overvalued in our culture, and that there is little room for mercy in the sentencing of wrongdoers."⁷

The Supreme Court has concluded that a legislature might reasonably conclude that the death penalty serves legitimate retributive (and/or general deterrent) aims.⁸

⁴Bible, Exodus 21:23-25, King James Version.

⁵See, e.g., Immanuel Kant, 6 *The Metaphysics of Morals* 331 (1785) ("Punishment by a court . . . can never be inflicted merely as a means to promote some other good for the criminal himself or for civil society. It must always be inflicted on him only because he has committed a crime He must previously have been found punishable before any thought can be given to drawing from his punishment something of use for himself or his fellow citizens. The law of punishment is a categorical imperative.").

⁶Herbert Wechsler, *The Challenge of a Model Penal Code*, 65 *Harvard Law Review* 1097 (1952).

⁷Joshua Dressler, *Hating Criminals: How Can Something that Feels So Good Be Wrong?*, 88 *U. Mich. L. Rev.* 1448 (1990).

⁸See *Gregg v. Georgia*, 428 U.S. 153, 183-184, 186, 186-187 (1976):

Retribution is no longer the dominant objective of the criminal law, . . . but neither is it a forbidden objective nor one inconsistent with our respect for the dignity of men. . . . Indeed, the decision that capital punishment may be the appropriate sanction in extreme cases is an expression of the community's belief that certain crimes