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Stanford Law Review

April, 2004

*56 Stan. L. Rev. 1171***LENGTH:** 18626 words2004 STANFORD LAW REVIEW SYMPOSIUM: PUNISHMENT AND ITS PURPOSES: SYMPOSIUM ARTICLE:
Updating the Study of Punishment**NAME:** Tracey L. Meares*, Neal Katyal** & Dan M. Kahan*****BIO:** * Professor of Law and Director of the Center for Studies in Criminal Justice, The University of Chicago;
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SUMMARY:

... Criminal law, for much of the nineteenth century and part of the twentieth, was at the forefront of interdisciplinary studies in law. ... Stephen believed that a penalty can affect the behavior of more than the individual punished - the general deterrence point. ... Understanding this broader context of social control is essential to understanding deterrence. ... Drug-law enforcement aimed at increasing the severity of punishment (by lengthening sentences) and the certainty of punishment (by increasing the number of people against whom the law is enforced) as traditional deterrence theory would prescribe, risks negative consequences for community social organization in poor, minority neighborhoods. ... Through examination of this work, it becomes clear that the study of deterrence through abstract discussions of prison sentences and likely individual responses, without attention to the social realities of such punishment and the growing body of research regarding these realities, leaves gaping holes in the education of law students about the operation of criminal law. ... The lesson of this work for criminal law is that the practice and procedures of punishment can matter just as much (if not more) than the amount of punishment itself to achieving the goal of compliance. ...

TEXT:

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Introduction

Criminal law, for much of the nineteenth century and part of the twentieth, was at the forefront of interdisciplinary studies in law. Criminologists borrowed heavily from psychology, sociology, and philosophy in an attempt to understand why people act the way they do and how government should punish them. Yet recently, a movement inward has dominated criminal law scholarship. Suffused by doctrine after doctrine, many criminal law scholars now are content to accept technical legal rules instead of asking whether those rules accord with modern knowledge about human behavior.

Recent years have witnessed a tremendous outpouring of research in economics, psychology, sociology, and other disciplines concerning how [*1172] institutions, incentives, and rules actually affect behavior. This research has had a

significant impact on criminal law scholarship. But it has had almost none on popular criminal law textbooks and thus (we suspect) next to none on the education of criminal lawyers. n1

The narrowness of conventional criminal law is unfortunate. The implosion may lead to incomplete answers to age-old questions in criminal law, and it has deterred criminal lawyers from asking questions that are commonplace in other areas of law. Perhaps most importantly the failure to fully engage in the classroom the kinds of questions that are being pursued in contemporary scholarship puts our students at risk of being ill-equipped to deal with the pressing questions of criminal justice policy. n2

This state of affairs is in desperate need of correction. To illustrate, we review some basic themes that a useful casebook on criminal law should cover. We will sketch four areas in which interdisciplinary approaches to thinking about the purposes punishment can and should be incorporated into teaching criminal law. Notably, each case emphasizes nonretributivist approaches to punishment, which we believe have gotten short shrift in criminal law textbooks published most recently. The four areas are: (1) the impact of social science research on our contemporary understandings of punishment; (2) modern doctrinal analogues to theft - computer crimes; (3) expressive values of punishment; and (4) criminal law and the legislative process. Through our examination of these four areas, we hope to demonstrate the problems with the typical, stunted view of punishment and the value of our approach.

I. Punishment and Social Science: What Works, What Doesn't, and Why

To the detriment of students, legal casebooks largely limit their focus to classic deterrence insights. The standard trope in criminal law, both in scholarship as well as contemporary public understanding, is that enacting high penalties on a particular crime will deter offenders from committing it. n3 The [*1173] traditional analysis simply turns on whether the penalty is set at an appropriate level to optimize deterrence - balancing the cost of the activity against the cost of enforcement. We do not dispute the central insights of economic theory that people generally act to maximize their preferences and that crime is an area ripe for application of these concepts. However, modern deterrence analysis must incorporate several refinements to the deterrence function, particularly: substitution effects, decision framing, educational impact of laws, social control, and perceived legitimacy. We will discuss each in turn.

A. Substitution Effects

The most pervasive economic conception of criminal law, made famous in modern times by economist Gary Becker, views the legal sanction for a given act as its "price" and asks whether that price will exceed the benefit of the criminal act to the criminal. n4 Within the economic tradition itself, some (most preeminently George Stigler) have explained that this calculation misses a crucial variable for optimality: marginal deterrence. The idea is essentially the problem of cliffs - exacting equal penalties for crimes of lesser and greater magnitude leads to crimes of greater magnitude: "If the thief has his hand cut off for taking five dollars, he had just as well take \$ 5,000." n5 The marginal [*1174] deterrence argument, therefore, is one about creating incentives for individuals to refrain from committing the same crime on a greater scale. While the traditional question asks whether a penalty for X deters X, the marginal deterrence one asks whether a penalty for X may prompt commission of the marginally more severe crime X + 1 because that crime receives the same magnitude of punishment as X. n6 Unfortunately, contemporary casebooks, when they mention deterrence, generally omit this key point. Instead, the analysis is framed as whether a higher penalty on X will produce greater "deterrence," without asking what activity precisely is being deterred and what behavior is being encouraged through the law. n7

Once economics is taken seriously, the problems with contemporary criminal law analysis become even more acute. Marginal deterrence is only the tip of the iceberg, for it functions as an illustration of a broader concept at work: substitution effects. Put simply, two products are substitutes when they compete with each other and are complements when they "go together." Consumers will tend to use more of a good - to substitute in favor of the good - when its relative price falls, and to use less of it - to substitute away from the good - when its relative price increases. If the price of tea increases, for example, substitution theory predicts that the demand for coffee would increase. But the demand for other products that go with tea, such as lemons, may drop because tea and lemons are complementary products.

[*1175] Instead of framing the deterrence inquiry as simply whether a penalty for crime X will reduce X (the conventional perspective) or lead to X+1 (the marginal deterrence one), another question that has to be asked is whether the penalty on X will distort behavior and lead people to commit an altogether different crime (Y, Z, or some combination of the two). Y and Z may be other crimes, or they may be lawful endeavors. The possibility of lawful endeavors illustrates just how criminal law has unconsciously relied on the substitution concept: The whole point of

deterrence is to make the price of a crime high enough so that a criminal will "substitute" forgoing the crime. Just as a high price on train rides means that some people will not take them and ride bicycles instead, a high price on a crime, it is thought, means people will not commit that criminal act. When it comes to crime, however, most of us don't take the economics seriously enough to examine whether an analogue to the bicycles exists: We assume that deterrence works and - poof! - a would-be lawbreaker is now magically converted into a law-abider.

Consider, for example, the way our government treats crack cocaine. Congress passed dramatic penalties against crack cocaine only a few days after learning of the drug's existence. n8 The mandatory-minimum scheme Congress enacted provides that a minor crack dealer caught with five grams of crack will be in jail for at least sixty months, even on a first offense. n9 Yet legislators never gave serious consideration to what the impact of high crack penalties would be on consumption of other drugs. Much attention has been given to the racial implications of the disparity between powder cocaine and crack cocaine. n10 But none on substitution effects.

This lack of attention to substitution issues is troubling given the significant disparity between punishments for possessing crack and punishments for possessing other drugs. Simply by weight, the ratio of crack to heroin penalties can be as high as 20:1. n11 Indeed, a dealer can carry 375 grams [*1176] of heroin and be punished at the same level - 5 to 6 years - as the 5-gram crack dealer. When drug dosage is factored into the equation, the crack to heroin punishment ratio can be 80:1 or even higher. n12 As such, drug dealers, who are motivated at least in part by money and a desire to avoid incarceration, would be much better off carrying heroin instead of crack. And while it is difficult to test the substitution effect here without better data, crack consumption has decreased since 1988 while heroin consumption has increased. n13 Perhaps the shift isn't due to substitution effects. But our policymakers, and our casebooks, do not even ask these questions. n14

[*1177] Thinking about criminal law, it is easy to understand how crimes committed for profit, like drug dealing, are ripe candidates for substitution analysis, but it is more difficult to imagine how other crimes can be analyzed in such terms. Yet even crimes of passion may be examined in terms of substitution. n15 Passion, after all, comes in different forms, and a penalty structure may induce people to act in particular ways by assigning costs to particular passionate activities. As Richard Herrnstein puts it, when husbands and wives start throwing dishes at each other, they do not usually throw the fine china. n16

Take what seems like the quintessential example in which substitution would not occur: rape. Insofar as these categories are separable - and the argument does not depend on their separation - is rape a crime of sex, violence, or domination? If rapists seek sex, it might follow that legalizing prostitution will reduce the frequency of rape. If they seek to dominate and humiliate, legalized prostitution may provide a substitute as well. n17 To the extent that rapists seek violence, lowering the penalties for other violence, say assaults, may reduce the commission of rapes. Conversely, a high penalty for rape may mean that there are more instances of spousal abuse and other violence. These ideas are not policy suggestions, only possible illustrations of substitution at work. There may be many reasons why legalized prostitution is problematic - including its potential complementarity to rape. n18 But the complementarity between prostitution and rape itself suggests that interrelationships between behavior cannot be ignored.

Even when the penalties for a crime are so high that it appears that all the [*1178] crime that can be deterred will be deterred, substitution presents other possible problems. After all, one result of a higher penalty may be an increase in criminal activity - both of the particular crime and of other crimes. As explained above, at high prices, many crimes may substitute for one crime. The rapist who is determined to rape a particular woman and is not deterred by a high penalty for rape may go out and commit other crimes. He may first commit the rape, then kill the victim, and finally assault unrelated others, because the cost of future criminal activity is negligible. If, on the other hand, the penalty for rape is not high, the marginal cost of additional criminal activity may be much higher.

To take another example, imagine the potential consequences of the "three strikes you're out" rule that has recently been implemented in several jurisdictions. n19 If offenders know that on their third offense they will be jailed for life, they may be less likely to commit that third offense; but if they do, the offenders may make the third crime a drastic one. Indeed, they may even decide to kill the witnesses to their crimes, because - at least in states without a death penalty - there is nothing more that the government can do to them. n20

Viewed in these terms, the death penalty could provide an incentive for additional crime. The person who has already killed a victim in a state where such action qualifies for the death penalty will not have a legal incentive, or at least not a very strong one, to refrain from killing again. If a legal incentive exists, it is simply to avoid getting caught. But because deterrence is a function of both the sanction level and the probability that it will be imposed, the

disincentive is lower for the repeat murderer than it is for the first-time one. n21 Since the penalty for one, two, or even three more murders is the same, the penalty itself does not work to provide additional deterrence.

The inattention to substitution in contemporary criminal law is even more striking when it is juxtaposed against the everyday attention received by its economic opposite, complementarity. Prosecutors, for example, often will justify their aggressive prosecutions of narcotics traffickers on the ground that drug traffickers are likely to engage in violence. n22 In other words, drug dealing [*1179] has a complementary relationship to violence, and even if drug dealing is not a terrible evil, punishing that dealing can avert greater harm to society. Policymakers, for their part, criminalize certain drugs like marijuana on the ground that they are "gateway" drugs that lead to consumption of harder, more dangerous, drugs. And yet the casebooks never point out that the policymakers get the question backwards: n23 Shouldn't it be asked whether, by branding the common act of smoking marijuana a crime, criminalization creates the gateway effect in the first place? After all, those who smoke marijuana are now introduced to a variety of dealers who carry other illegal drugs, and the cost of undertaking a second criminal act is much lower than it is the first time around (particularly when the first time might produce beliefs in the illegitimacy of the criminal law in, for example, teenagers who question why marijuana is punished in a way that alcohol is not).

Relationships of substitution and complementarity underscore a fundamental point about criminal law - that it will often influence tastes or preferences rather than constrain opportunity. Criminal law may be said to set itself apart from many other areas of the law because it concentrates more on altering people's preferences, particularly with its focus on criminal intent, which can be understood as a proxy for taste. n24 Taste shaping explains why potential substitutes for a particular crime may radiate well beyond crimes with similar characteristics to the original one.

A penalty structure has importance not only for current criminals, but for future ones. By shaping preferences, a penalty structure therefore may encourage people to choose certain lines of "work" - much the way that opportunities for profit guide many college students and channel them into certain jobs. A drastic change in the profitability of a career, say law, may not induce those who are already lawyers to switch to another career, but it may prevent many students from becoming lawyers in future years - not only because of profit, but because people internalize the belief that they do not [*1180] "want" to become lawyers. In a similar way, the point about substitution must be taken not only in terms of what current criminals will do, but what future criminals will do.

Substitution theory expands on this insight by demonstrating that the law may shape tastes in perverse ways. If the penalty for consumption of one drug induces people to use other drugs, for example, these penalties are altering those people's desires. Punishment, therefore, can breed crime by increasing the taste for it and by reducing the "price" of future criminal activity.

B. Decision Framing

Consider an additional wrinkle in the deterrence story: Traditional understandings of deterrence ignore a wealth of research from psychology about the way in which people frame choices. Imagine, for example, two products of equal value to a consumer; Product A is high quality with a high price, while Product B is low quality with a low price. A consumer is indifferent between Product A and Product B because Product B's low price compensates for its low quality. If a third option, Product C, is introduced, with the same low price as Product B but even lower quality, people may begin to favor Product B over Product A, because Product C makes Product B look like a good value. Conversely, if Product C has the same high price as Product A but with less quality, people likely will buy more of Product A than Product B. Even though people are not receiving additional information, the extraneous information skews their choices. In other words, a particular option can become more desirable simply because the options are presented or framed along with irrelevant information. n25

The addition of an inferior alternative may thus enhance the desirability of a particular option. Cognitive psychologists dub this the asymmetric dominance effect - the tendency to prefer x over y increases by the addition of [*1181] alternative z that is inferior to x but superior to y. n26 Here is a clear example: Simonson and Tversky offered subjects a choice between \$ 6 and "an elegant Cross pen." n27 36% chose the pen and 64% took the cash. A second group was given the choice between \$ 6, the Cross pen, and a second, less attractive, pen. This time, 46% took the Cross and 52% chose the cash. Again, the cheap pen option should not influence the choice between the Cross pen and the cash. Yet it does. Closely related to this is the finding of extremeness aversion, which shows that within an offered set, options with extreme values are relatively less attractive than those with intermediate values. n28

Both asymmetric dominance and extremeness aversion are explanations of why reference points influence choices between options. The substitution perspective predicts that individuals do not view the costs and benefits of a particular

crime in a vacuum. Rather, they examine them in light of the costs and benefits of other crimes. The psychological addendum to substitution suggests that people evaluate the relative harms and benefits of a particular crime by using reference points. Consequently, when the law proclaims, through a harsh penalty, that the cost of a particular activity is very high, it might make other crimes appear more attractive than they were before the penalty.

A harsh penalty on an activity might, therefore, invert Johannes Andenaes's idea of general deterrence. Andenaes argues that the criminal law creates deterrence by educating people about those acts that should not be done. n29 But Andenaes's educational effect can be stood on its head. High penalties on crime X may not only educate people about the particular danger of X, but also about the comparably less dangerous - that is, less punished - crimes Y and Z, even if Y and Z are in reality more dangerous. Y and Z may then look more attractive than they did before. So, for example, by penalizing crack as an extremely dangerous drug, the high crack penalties, via extremeness aversion, could make heroin look better than it did before and [*1182] thereby increase the taste for it.

C. Educational Impact of Criminal Law

Implicit in the discussion up to this point has been the assumption that people know what the penalties actually are. The skeptic is rightfully concerned: How can policymakers expect would-be lawbreakers to know such details? And if people do not know the law and do not understand the penalties, then how can deterrence ever function? Traditional economic analysis of criminal law, too focused on the price of criminal conduct, has not explained how preferences can be shaped in a world of unknown prices and therefore has made it easy for many (including several leading casebooks) to dismiss deterrence altogether with the formulaic claim that criminals do not know the law. n30

Yet an explanation is not that hard to offer. The educational impact of the criminal law is not a brittle Skinnerian stimulus and response, but rather one that works through a complex process of social interaction. A small group of people may look at the sentencing structure and be influenced by its relative treatment of crimes. As time passes, the information this group possesses will trickle down but now in a way no longer tied to sentencing. Instead, it may simply be said that activity X is worse than activity Y. People who have never eaten caviar, for example, do not need to know its cost for their preferences to be affected by the price - particularly when the high price places a stigma on caviar-eaters as being greedy and selfish. In such circumstances, even if the monetary price of the good is unknown, the social price (which is in part a function of the monetary one) will deter consumption.

In this way, contemporary understanding of deterrence must take into account the educational impact of the criminal law. As Andenaes argued, penalties send out "messages" to members of society, and these messages exert [*1183] a moral influence that inculcates social norms. n31 This theory of messages thus gives meaning to English jurist James Fitzjames Stephen's statement on why most men abstain from murder:

Some men, probably, abstain from murder because they fear that, if they committed murder, they would be hung. Hundreds of thousands abstain from it because they regard it with horror. One great reason why they regard it with horror is, that murderers are hung with the hearty approbation of all reasonable men. n32

Stephen realized that a penalty can have an unconscious deterrent effect through a subtle changing of social norms. Stephen's words, therefore, mark him for more than the general deterrence theory for which he is cited today. Stephen believed that a penalty can affect the behavior of more than the individual punished - the general deterrence point. But he also argued that the criminal law has an educational effect and that this effect may dwarf general deterrence. n33 Note also Stephen's important assumption about taste-shaping, that murder is regarded with horror because of the penalty structure. n34 As such, the substitution effect cannot be confined merely to calculating criminals who weigh the sanction on activity X and compare it to the one for activity Y. Rather, its power lies in the way in which a particular sanction influences not simply the relative legal price, but the social price as well.

But the claim about creating social prices, through punishment's inculcation of social "norms," itself misses a fundamental problem - punishment's effect on the criminal. By segregating such actors from mainstream America, the criminal law may reinforce a tendency towards criminal action. In economic terms, when an individual cannot get hired for lawful work because she was once an outlaw, the relative cost of illegal activity decreases. Moreover, from a psychological perspective, those branded outlaws may begin to internalize such labels and fulfill the expectation that they believe the criminal system and society have for them. Instead of reducing crime, stigmatization strategies may increase the criminal activity of particular actors.

The provenance of this claim lies in sociologist Erving Goffman's work on stigma. n35 Goffman explains that "normal" society shuns stigmatized individuals - those that deviate from the norm. Such individuals may choose either to correct the stigma (for example, a physically deformed person who elects plastic surgery), devote effort to overcome the stigma's effect and thus [*1184] open doors that appear closed (for example, work hard in school to compensate for the deformity), or join with others who face the same stigma. n36 Those who cannot remove the stigma, whose identities are spoiled, will often arrange their lives to avoid contact with normal - that is, unstigmatized - people. Even if the deformity can be hidden, the risk of being exposed will often serve as an inducement to avoid such contacts.

Both internal and external avoidance prompts those with stigma to find sympathetic others. Those with the similar stigma can provide the individual with moral support and the comfort of feeling at ease. n37 Goffman concentrates primarily on physical and social handicaps, but his conceptualization of stigma provides two useful insights into criminal punishment. First, criminal punishment imposes a stigma on individuals that may lead criminals to avoid contact with law-abiding people. For the criminal, outside contact becomes problematic because of the risk that normal people will disapprove or define a criminal only in terms of his stigma. n38 Outsiders, for their part, will avoid a criminal because of the possibility that being seen with one will contaminate them both socially and legally. Criminals may use the stigma as a way to justify their career choices, much the way those with scars and harelips may justify their decisions. n39 Thus, those who have already committed crime may feel that other options are closed to them and continue their criminal activity. n40

Second, stigmatization from the law-abiding world will prompt criminals to band together with others like them. The stigma imposed from outsiders is celebrated within this group, and their norms differ from the world of the nonstigmatized. They develop subnorms that may be antithetical to those of the law-abiding world. This may become both an inducement to further crime, as lawbreaking is seen as a socially positive act within the group, and a disincentive to noncriminal alternatives. As one criminal describes it:

I can remember ... on more than one occasion ... going into a public library near where I was living, and looking over my shoulder a couple of times before I actually went in, just to make sure no one who knew me was standing [*1185] about and seeing me do it. n41

Goffman's work thus reinforces the explanatory power of adaptive preference and anomie theories. The former theory explains how the preferences of lawbreakers develop - as an adaptation to a world where crime is a more realistic option than lawful employment. The latter explains how such attitudes become entrenched within a social group and how subnorms originate out of that interaction.

In this fashion, social norms strategies can force additional crimes. The youth who is caught selling one vial of crack emerges from confinement as a social pariah. He internalizes that belief and avoids contact with the law-abiding world. His isolation from the lawful world leads him to keep company with other pariahs. The subnorms of this group reward the criminal activity that the law-abiding world punishes, and devalues the lawful alternatives that the law-abiding world celebrates. The punishment, then, produces the crime it was intended to prevent. What is more, it may even produce other types of crime, substitutions of sorts, both because stigmatized individuals avoid the law-abiding world and because they may learn new ways of earning money from members of the stigmatized group.

D. Inverse Sentencing Effect

Incorporating social norms into criminal law analysis also illustrates other defects in the opportunity-shaping view of behavior. The traditional approach ignores the way in which people react to high penalties. Such penalties create what may be termed an inverse sentencing effect. High penalties, instead of increasing conviction rates, may decrease them. As penalties increase, people may not be as willing to enforce them because of the disproportionate impact on those caught.

Several different mechanisms are responsible for the inverse sentencing effect. When the penalties are high, for example, the public may not be willing to turn lawbreakers in, police and prosecutors may not want to prosecute, and jurors may not vote to convict. Legal scholar Frederick Beutel observed this phenomenon in his study of bad check laws. n42 He found that in Colorado fewer bad checks were written because the punishment was weaker but enforcement [*1186] was more consistent. n43 In Nebraska, by contrast, he discovered that Nebraska's severe punishment for bad checks hampered enforcement and conviction. n44 Similarly, in the eighteenth and nineteenth

centuries, even though the number and severity of English penal laws had increased, English jurors regarded the penalties as excessive and were lenient in applying them. n45 Of course, the law is only one variable that affects social norms, but when increasing the penalty on a particular law is out of step with norms in a community, it may reduce deterrence instead of promoting it. This real world effect is, again, contrary to most treatments of deterrence, which treat the probability of enforcement as a variable fungible with the extent of the sanction.

E. Impact of Social Control

Today more than two million people are incarcerated in state and federal prisons and local jails in the United States, n46 and the notion of deterrence has heavily influenced the massive escalation of imprisonment over the last two decades. n47 Despite the oft-repeated public rhetoric connecting the increase in the American imprisonment rate to deterrence, modern deterrence research has failed to find consistent evidence of the deterrent effects of punishment. Empirical evidence on the deterrent effects of punishment remains speculative and inconclusive, and the ability of formal punishment alone to deter crime appears to be quite limited. n48

[*1187] A final factor that should be assessed when discussing the purposes of punishment is the offender's community context and social role within that community. Understanding this broader context of social control is essential to understanding deterrence.

Kirk Williams and Richard Hawkins suggest that community knowledge of an individual's probable involvement in a violent act is necessary in order to activate informal social controls. n49 Community members acquire this knowledge from various sources ranging from the possibly public nature of formal intervention, such as an arrest, to information networks independent of the formal sanctioning agents. These informal and often interpersonal social controls often involve very explicit remedial actions that can raise the social costs of crime. In other words, the effectiveness of these controls requires that an offender perceive that his social ties and accomplishments will be jeopardized by his actions. n50

Understanding the deterrent effects of punishment requires not only recognition of the dimensions of legal punishment, but also whether legal punishment is a threat worth avoiding, that there is a job with economic and social value to lose, that relationships are stable and have value, and that the assailant is socially embedded in a neighborhood or work context that accords status or metes out shame and social opprobrium.

Examination of connections to work (or a lack of them) provides a specific example of the impact on deterrence of the interaction between legal punishment and social controls. Research shows individuals with regularized paying jobs have commitments that enhance the deterrent effect of formal legal sanctions. However, as economist Richard Freeman and criminologist Jeff Fagan have noted, a sustained decline in wages for unskilled workers has weakened both attachments to work and incentives to participate. n51 The returns from illegal work often exceed legal wages for workers with limited human capital or access to higher wage jobs and neutralize incentives to avoid crime and possible punishment. n52 This is especially true in communities where large numbers of the jobless are concentrated. n53 The attractions of illegal work are reflected in variables often unmeasured in quantitative studies on crime and [*1188] work, especially "tastes and preferences" that inflate the nonmonetary dimensions of illegal work. n54

A fuller understanding of the purposes of punishment can be gained through an assessment of punishment at the community level rather than simply that of the individual - a macro rather than a micro level if you will. Sociological studies of communities provide just such a lens.

For most of this century, criminologists have acknowledged the importance of community in explaining crime rates and activating processes of social control. Clifford Shaw and Henry McKay pioneered the study of such problems at the community level. n55 Seeking to explain earlier findings that juvenile delinquency remained high in certain areas of central cities over time despite population turnover, they rejected individualistic explanations of delinquency. n56 Instead, they looked to the processes by which law-breaking behavior could be transmitted across generations. n57 They maintained that three structural factors - low economic status, ethnic heterogeneity, and residential mobility - led to the disruption of community social organization that, in turn, accounted for variation in crime and delinquency rates in a given area. n58 Because Shaw and McKay believed that the capacity of a community to maintain social control was a function of the structural context of that community, they looked to the community itself as the unit to explain crime rates in urban areas and not the individual. This was a path-breaking finding at [*1189] the time, since Shaw and McKay's contemporaries believed that associations between crime in urban areas and concentrations of African Americans and the foreign-born was due to the individual dispositions of group members, including genetic explanations for offending. n59

It is critical to understand the nature of the problem that Shaw and McKay were addressing. In contrast to the research that emphasizes the nature and extent of social controls that inhibit (or even encourage) an individual to engage in crime, Shaw and McKay sought to examine the differences between communities. Why, they asked, did some communities demonstrate high crime rates over time, while other communities do not?

Contemporary researchers have extended Shaw and McKay's work by solidifying the notion of community characteristics as distinct from the aggregated demographic characteristics of individuals who live in communities. n60 For example, researchers have demonstrated in several studies that violence is associated with poverty and residential instability in neighborhoods, making it clear that violence is connected to neighborhood composition as opposed to the spatial distribution of individuals with particular demographic characteristics. n61 Additionally, researchers have recently made inroads in defining those characteristics that best enable social control and the realization of the common values of residents - -community social organization.

In describing the continuous nature of community social organization, theorists have focused on three processes: (1) the prevalence, strength, and interdependence of social networks; (2) the extent of collective supervision by neighborhood residents and the level of personal responsibility they assume for addressing neighborhood problems; and (3) the rate of resident participation in voluntary and formal organizations. n62 Their hypothesis is straightforward: [*1190] When the processes of community social organization are prevalent and strong, crime and delinquency should be less prevalent, and vice versa.

Of course, the implication of this work is that criminal law policy - punishment - meted out among individuals living in community contexts can have an impact on the community's ability to regulate itself through informal means. It is not difficult to imagine the ways in which formal legal punishment - in potentially large amounts - could be beneficial to communities with a social structure that predicts a kind of social organization that is not conducive to crime resistance and control. As one of us writing about drug law enforcement in impoverished innercity communities has noted, "By relying on incarceration, law-abiders can create physical distance between themselves and law-breakers. In this way, ... removal of law-breakers from the community [is] akin to leaving the neighborhood." n63

The strength of this supposition obviously depends on the probability of incarceration for drug offending as well as the length of the sentence. However, law abiders in high-crime communities can hope to gain other more long-term benefits from enforcement of tough drug laws in addition to temporary physical separation from lawbreakers, as the theory of community social organization suggests that enforcement of tough drug laws could lead to higher levels of neighborhood social organization and, consequently, less crime. Work by sociologist Rob Sampson and his coauthors demonstrates empirically that better networks are associated with lower levels of victimization and offending. n64 They did not show that less crime leads to stronger networks (which, of course, could in turn prevent more crime). It is very likely, however, that the causal arrow runs in both directions. If long sentences actually deter drug offenders, and if the structural components of social organization also improve, the tough drug-law enforcement policy could potentially amplify its own crime-fighting ends.

But there is reason to think that deterrence-based strategies aimed at drug offenses may actually impair the ability of a community to resist crime. Drug-law enforcement aimed at increasing the severity of punishment (by lengthening sentences) and the certainty of punishment (by increasing the number of people against whom the law is enforced) as traditional deterrence [*1191] theory would prescribe, risks negative consequences for community social organization in poor, minority neighborhoods. Specifically, when punishment is heaped on a class of offenders that is not geographically dispersed but that is instead spatially concentrated, as is the class of low-level drug retailers, it is possible that the policy confounds its own crime-fighting ends by fueling the precursors to social organization disruption, such as family disruption, unemployment, and low economic status. n65

There is empirical research relevant to the iatrogenic effects of high rates of imprisonment in urban areas. The first piece of evidence concerns the clustering of imprisonment. If the social organization of communities is going to be impacted in ways that impair a community's ability to resist crime because of the removal (and subsequent return) of large numbers of offenders from a community, then the data should show that the increase of imprisonment over time is concentrated in residential neighborhoods. There is a small body of literature on the topic, but it is clear: The expansion of incarceration in the United States has not been randomly distributed in geographic space. It is well known that young black men bear the largest proportional burden of any demographic group of imprisonment, n66 but city-based data also demonstrate that prison admissions and returns are concentrated in neighborhoods. Todd Clear, Dina Rose, Elin Waring, and Kristen Scully have documented that released offenders return to only a few Tallhassee neighborhoods. n67 Recent data from Ohio document a similar phenomenon of concentration of offenders in Cleveland neighborhoods. n68 And,

Lynch, Sabol, and Shelley show through Maryland Corrections data that the median neighborhood incarceration rate in Baltimore for men 18 to 34 years old was 2.7% - the highest rate, however, was 22%. Five percent of Baltimore neighborhoods accounted for 25% of admissions that year, and 10% of the neighborhoods accounted for 40% of admissions. n69 The data plausibly show that incarceration is prevalent enough in some communities to affect social organization. The data regarding negative effects of these levels of incarceration are also telling.

[*1192] Lynch and Sabol canvassed existing studies of the impact of high levels of incarceration on urban communities. Specifically they assessed research regarding the impact of incarceration on labor force participation, income and community, family formation and maintenance, and community organization. They concluded that the studies connecting the negative impact of incarceration on the labor force is quite persuasive, and that there is some evidence that incarceration undermines community-level parochial controls n70 in residential communities. n71 While Lynch and Sabol note that large empirical studies have not unequivocally demonstrated that incarceration has adversely affected private controls and families, there is ethnographic work that is suggestive of this thesis.

One such study that looks at the costs of incarceration was implemented by anthropologist (and soon-to-be lawyer) Donald Braman. He conducted more than two hundred interviews over a three-year period with fifty families living in the Washington, DC area. Each of these families was located in a poor, mostly minority neighborhood where the male incarceration rate exceeded two percent. n72 These interviews contain valuable insights concerning the effects of incarceration on family life. Through a recounting of the experiences of several families, Braman explains that the most costly expense that families of the incarcerated must regularly bear is collect calls from the inmate. It turns out that correctional facilities contract out for phone services, and facilities select carriers based on which carrier will provide the facility with the highest fee - not which company will provide cheapest service for the inmate. According to the families Braman interviewed, ten dollar fees for ten-minute conversations were not uncommon. n73 In addition to phone calls, families bear the expenses of visits, which can include car rental or some other form of transportation, hotels, childcare, and, of course, food. n74 If costs associated with maintaining legal battles on appeal and with stress-related medical expenses that some left-behind family members experience when a loved one is incarcerated are added to the list, it is easy to see how these direct costs of incarceration add up quickly - especially given that such expenses must be borne by families in the worst position to deal with them. n75

[*1193] Braman also shows how family members left behind withdraw from their own families. Increased economic costs sometimes force female partners of the incarcerated (or their mothers or sisters) to turn to extended family for financial assistance, childcare, and other resources. But the assistance extended family members can offer is limited by their own constrained finances. Eventually, extended family members begin to resent the burden of caring for family members whose partners are incarcerated. One woman Braman interviewed shares, "My mother can't even hear me talk about him. She'll be like, "What? Are you crazy?" n76 This woman stopped talking to her own extended family about her husband and ended up turning only to his sisters for help. This kind of isolation from family networks is clearly inconsistent with promotion of social norms in favor of positive neighborhood outcomes.

Work of ethnographers, such as Braman, together with analysis of large community-level surveys, such as the Project of Human Development in Chicago Neighborhoods supported by the MacArthur Foundation, is needed to help to solidify the connections between theory and experience of people in disadvantaged neighborhoods in ways that make incarceration as punishment more concrete. Through examination of this work, it becomes clear that the study of deterrence through abstract discussions of prison sentences and likely individual responses, without attention to the social realities of such punishment and the growing body of research regarding these realities, leaves gaping holes in the education of law students about the operation of criminal law.

E. Punishment Practice and Legitimacy

One area where there is increasing interest among criminal law scholars is the work of social psychologists and the theories that they have offered to explain compliance with the law. The issue is a critical one in criminal law as the basic theories of deterrence taught in criminal law courses posit promotion of compliance with the law as an important reason for punishing people. Theories of deterrence assume that compliance is instrumental. That is, people comply with the law because they fear the consequences of failing to do so. But social psychologists offer another view of compliance with the law - a view that is notably absent from widely used criminal law casebooks. n77

[*1194] The social psychologists point to normative bases for compliance rather than instrumental ones, and they have connected voluntary compliance with the law to the fact that individuals believe the law is "just" or because they believe that the authority enforcing the law has the right to do so. n78 These factors are considered normative because

individuals respond to them differently from the way they respond to rewards and punishments. In contrast to the individual who complies with the law because she is responding to externally imposed punishments, the individual who complies for normative reasons does so because she feels an internal obligation. n79 It is "the suggestion that citizens will voluntarily act against their self-interest [that] is the key to the social value of normative influences." n80

Social psychology also provides assistance in answering what it means to say that "authorities have the right to dictate proper behavior." Psychologists Allan Lind and Tom Tyler argue that processes that lead up to an outcome are important indicators to individuals about how the authority in question views the group to which the evaluator perceives herself belonging. Their theory, called the "group value" model, maintains that procedural justice may have a greater impact than other justice theories of legitimacy (such as a theory arguing that people will evaluate authorities as legitimate when authorities make decisions that benefit them in the long run) n81 because the use of procedures regarded as fair by all parties facilitates the maintenance of positive relations among group members, preserving the fabric of society, even in the face of the conflict of interest that exists in any group whose members have different preference structures and different beliefs concerning how the group should manage its affairs. n82 Putting this point another way, procedures might be considered more "trait-like" n83 than outcomes, which are variable, or which may be extremely indeterminate in a particular case. While it may not be obvious how a particular case should come out, it is almost always clear how [*1195] parties should proceed and be treated in that particular case.

The latter point drives the relational view of procedural justice. Individuals care about how they are treated by government authorities because treatment provides important indicators to individuals about how the authority in question views the group to which the individual evaluator perceives herself belonging. In order to make this assessment, individuals focus on three factors: standing, neutrality, and trust. n84 By standing, researchers are referring to indications that the authority recognizes an individual's status and membership in a valued group, such as polite treatment and treatment that accords dignity and respect, such as concern for rights. n85 Neutrality refers to indications that decisions in which the perceiver is not made to feel as if she is less worthy than others because of bias, discrimination, and incompetence. n86 And trust refers to the extent to which a perceiver believes that the authority in question will act fairly and benevolently in the future. n87 Of course, individuals making assessments do not disaggregate their assessments in terms of these factors; rather, they come to conclusions about authorities by considering information that is relevant to these factors.

Empirical work is quite persuasive that these legitimacy factors matter more to compliance than instrumental factors, such as sanctions imposed by authorities on individuals who fail to follow the law or private rules. For example, in a study designed to test compliance directly, Tyler used regression analyses to test the relative impact on the compliance of respondents of legitimacy, public deterrence, peer disapproval, and personal morality (cite). He found that the regression estimate for legitimacy on compliance was about five times greater than the estimate for deterrence. n88 Other studies exploring the relationship between legitimacy and behavior related to compliance, such as acceptance of arbitration awards n89 and decision acceptance and rule [*1196] following in business settings, n90 have found that legitimacy has a profound impact on behavior.

It is important to see that the research does not imply that instrumental means of producing compliance have no effect. In each of the studies cited here, deterrence or outcome-based judgments influenced compliance or related behavior in some way. Still, the work suggests that legitimacy is typically more important to compliance than instrumental reasons.

When one is thinking about punishment, this idea is a central one. Reliance on carrots and sticks to produce compliance can be a costly strategy. Programs featuring rewards and punishments can be costly because instrumental means of producing compliance are rarely self-sustaining; rather, authorities must be willing to maintain mechanisms of instrumental compliance. For example, if deterrence is to be produced by maintaining a certain probability of detection of rule-breakers, then authorities must be willing to devote resources to maintenance (or increase) of the desired level of police to ensure that the requisite probability of detection is met. Therefore, instrumental means of producing compliance always depend on resource limits. Legitimacy as a means of producing compliance, in contrast, does not always depend on resource limits because legitimacy can be acquired simply by changing procedures and practices of current officials in ways that require almost no additional resources. For example, some research indicates that police who regularly treat arrestees with courtesy are more likely than those who do not to be viewed as legitimate. n91 While police officers may not like to be told to be more polite to arrestees, this research suggests that law enforcement gains could be achieved more cheaply than through more instrumental means simply by telling officers to "be nice." Once established, perceived legitimacy can support acceptance of decisions. We should, therefore, expect greater compliance in communities where police treat arrestees with greater respect [*1197] than communities where police do not, even if

the former community does not hire any more police officers. The lesson of this work for criminal law is that the practice and procedures of punishment can matter just as much (if not more) than the amount of punishment itself to achieving the goal of compliance.

II. Punishment and Modernity: Computer Crimes

Many traditional courses in criminal law used to spend a great deal of time on the crime of theft. The modern course eschews all of that, by beefing up the study of the general part of criminal law, from theories of punishment to studies of vagueness and the like. Often times, the only two crimes students learn about in any systematic way are rape and murder.

This movement away from teaching theft has both advantages and disadvantages. On the one hand, teaching an offense like theft permits students to test their concepts in a less freighted setting, in contrast to discussions about rape and murder that may be burdened by their enormous emotional and philosophical complexity. But, on the other hand, theft, unlike the other two offenses, is so removed from the lives of many law students that discussions can become unwieldy and abstract.

One promising solution is for a teacher to cover a modern analogue to theft, and one that a great many of today's law students have in fact committed: music piracy. n92 The "No Electronic Theft Act" passed by Congress provides that anyone who downloads more than \$ 1000 in music within a half-year period is guilty of a felony. n93 Millions of Americans, including, presumably, many readers of this Article, have violated this Act and are potential federal felons. And unlike the traditional criminal law course that focuses on crimes with ancient roots, thinking about computer crime invites a discussion about [*1198] how to structure an ideal set of prohibitions, freed from the trappings of a longstanding discourse and evolved set of rules and doctrine that already govern the subject.

Consider the questions that arise from thinking about criminal law in this modern setting. What is the proper role of criminal law when its prohibitions are flouted by so many? Are there alternatives to the criminal system that are appropriate in such instances? These are issues that repeatedly arise in criminal law, most obviously with prohibitions on drugs. Should the answer differ here?

The answers to these tough questions become even harder to grasp when it is understood that computers and other forms of technology, like people, are rarely inherently "good" or "evil." The most ardent defenders of file sharing of music, for example, have to deal with the fact that these networks are used to share child pornography. The staunch movement for Internet freedom, similarly, has trouble once it is pointed out that computers can facilitate a variety of offenses, from terrorism to complicated fraud. Yet the claims by law enforcement, as well as those of copyright holders such as record labels, often go too far as well, by making legal arguments and demanding architectures of control that threaten the network and much of the good the Internet generates.

While some forms of computer crime may physically threaten human beings, most of the harm occurs within cyberspace itself - with harm to private data, financial well being, and online reputations. This, too, makes computer crime different than most traditional crimes, like rape and murder, where physical harm is an integral part of the offense. And the monetary harm, for its part, can be huge. Until the attacks on the World Trade Center of September 11, 2001, for example, the launch of the "I Love You" virus by a couple of very young men in the Philippines may have been the most damaging single economic attack in history, with more than \$ 11 billion in losses. n94

The high dollar/low physical harm combination generates attacks on two flanks. From one side, some believe that there should be greater sentencing equity between white collar criminals (the archetype of whom is an older CEO of a corporation) and those individuals who commit other forms of crime. Yet those who espouse that equity principle generally do not extend it to computer criminals. Why should computer criminals be treated more leniently than other forms of white collar crime? Is it the youth, inexperience, relative lack of financial means, or something else that the archetypical computer criminal possesses? From the other flank, some believe that crimes that do not involve violence should not be severely punished. Here, the archetypical crime is the consumption of marijuana. Yet, with billions of dollars potentially at stake, is it inappropriate to use massive penalties to punish, deter, and incapacitate cybercriminals? If the dollars themselves aren't a good reason, what is? [*1199] Consider, for example, the rich density of networks and human interaction that have sprung up around the Internet, and whether computer crime (whether in the form of privacy violations, spam, viruses, or hacking) might threaten to rip those networks apart.

The lack of physical harm also helps students understand that there are always other solutions to criminal problems apart from penal sanctions. When Smith maims Jones, the natural impulse is to punish Smith, and only later (if at all)

perhaps think about punishing those who might have facilitated Smith's maiming. But crimes are not just a function of personal impulse; they often are the result of poor design and monitoring. In brief, much crime is the result of bad architecture - architecture that separates city residents from one another; architecture that makes it difficult for residents to self-police because they cannot see each other; architecture that emphasizes frightening residents instead of promoting openness. n95 Instead of seeing this architecture as the end-result of downtowns scarred by crime, it is worth asking whether that architecture helped produce such crimes in the first place. Yet the traditional focus in criminal law on the individual offender obscures these questions.

Computer crime, in contrast is a place where architectural considerations are obvious and omnipresent. n96 If music piracy is a problem, for example, a natural inquiry is whether the anonymous, end-to-end design of the Internet, is worth the cost. If child pornographers are using email to send images back and forth, it must be asked whether technical methods that attack the ability to send email anonymously using Internet Service Providers are appropriate. Some of these solutions may supplant the role of the criminal law altogether. They may require enforcement through tort or contract law with third parties, but they can have the advantage of preventing crimes before they happen. And once those questions are asked with the Internet, they may be asked, with greater frequency, in the offline context as well.

As has been evident, we do not seek here to resolve the thorny questions that arise from the new crimes involving computers. We pose them as examples of ways in which modern understandings of crime and punishment can be brought to bear on concrete problems with relevance to the lives of our students.

III. What Does Punishment Mean?

Scholars in recent years have devoted considerable attention to the expressive theory of punishment. n97 This theory is best understood as part of a [*1200] more general account of rationality, which says that we can't make sense of individual and group behavior without taking account of its social meaning. n98 Against the background of social norms, actions (including laws) express attitudes towards these goods. Behavior that evinces insufficient comment to the value of other persons or other important goods strikes us as morally wrongful. We are moved to punish individuals who engage in such behavior not just to inflict deserved suffering, or to deter like transgressions, but to show that we, unlike the offending actor, are committed to the good that their actions denigrate. n99

No popular casebook makes use of the expressive theory in a systematic way. Perhaps influenced by the recent scholarship on it, some include reference to it when introducing students to theories of punishments generally. n100 But none attempts to integrate the expressive theory into the presentation and analysis of substantive criminal law doctrines, which they continue to analyze (with varying degrees of explicitness) according to the conventional theories of "individual desert" and "deterrence." This approach, in our view, seriously limits students' capacities to understand and evaluate criminal law.

Consider, for example, intentional homicide gradations. Conventionally, jurisdictions distinguish between first degree "premeditated" murder; second degree intentional but unpremeditated murder; and voluntary manslaughter, which consists of an intentional killing committed in the "heat of passion" and caused by "adequate provocation." n101 On their surface, these doctrines appear to grade intentional homicides according to the quality of volition reflected in the act of killing. Jurists and commentators justify this feature of the doctrine on the ground that actors who freely "choose" to kill are either more deserving or more deterrable than those who kill impulsively. n102 Casebooks, if they offer any theoretical guidance at all, typically reflect this conventional wisdom.

But the conventional wisdom fails to survive even modest interrogation. "Premeditation," as any thoughtful instructor will acknowledge, is a legal [*1201] fiction; in most jurisdictions, a defendant can be found to have "premeditated" a killing in the time it takes her to form the "intent" to kill. n103 This approach not only completely obliterates any doctrinal distinction between first-degree and second-degree murder, it also affords juries complete discretion to treat impulsive, unplanned intentional killings as first-degree ones if they are so inclined. Voluntary manslaughter doctrine displays a similarly uneven sensitivity to the mitigating effects of compromised volition: Unprovoked killings can be every bit as impulsive as provoked ones, yet are completely outside the ambit of the doctrine. n104

It's much easier to understand intentional homicide gradations expressively. A person's impulses - or more colloquially, her "passions" - frequently inform our understanding of what her behavior means. n105 Even if unwilling, strong emotional states are hardly random psychic events: What enrages a person (a colleague's insulting remark), what scares her (a threat to her child), and whom she hates (persons of a certain sexual orientation or ethnicity) all tell us

what she cares about. And consistent with expressive rationality, we in turn judge the impassioned behavior in a manner that expresses our own attitudes toward the goods that their anger, their fear, or their hate appraise. n106

It's natural to evaluate the moral reprehensibility of intentional killings in this way. We are likely to condemn severely a man who kills a child to gratify a sexually sadistic urge precisely because his impulse, however difficult to control, reveals values we abhor. We are unlikely to condemn nearly so severely a mother who kills a child molester out of vengeance, even if she plans the killing in advance, precisely because her emotional motivation expresses values (including devotion to her daughter) we approve of. The "fiction" of premeditation reflects the predictable responsiveness of judges to this expressive style of appraisal. n107

The discriminating character of voluntary manslaughter doctrine can be made sense of in the same way. The anger of someone who kills without provocation can't express reasonable values, but the anger of someone who is adequately provoked can. Indeed, it's only when it denigrates an interest that social norms entitle an offender to value extremely highly that the victim's transgression will be deemed an "adequate provocation;" if the victim threatens [*1202] an interest that social norms don't permit the offender to value to the same degree, the offender's anger, no matter how destructive of his volition, won't make him eligible for mitigation. n108 Common law jurists, for example, treated the infidelity of a man's wife as "adequate provocation" on the ground that such behavior is "the gravest possible offence which a wife can commit against her husband" n109 and "the highest invasion of [his] property" by another man, n110 but the infidelity of an unmarried woman as inadequate on the ground that "the man has no such right to control [an unmarried] woman as a husband has to control his wife." n111

The expressive theory is similarly critical in understanding criminal law defenses. Conventional understanding, again reflected in most casebooks, divides defenses into "justifications" and "excuses." n112 The former, which include necessity and self-defense (and possibly duress), are said to defeat liability on the ground that the defendant's violation of the law generated socially desirable consequences. The latter, which include insanity (and possibly duress), are said to block conviction for an admittedly undesirable action that the defendant, because of compromised volition, was morally blameless for committing. n113 Conceived of in consequentialist and voluntarist terms that ignore the expressive dimension of criminal law, this framework again leaves students ill-equipped to make sense of the doctrine in action.

Consider duress, which defeats liability for a nonhomicide offense committed in response to a physical threat that a reasonable person couldn't have resisted. Commentators disagree about whether this defense is best understood as a justification, on the ground that the threatened state of affairs is worse in consequentialist terms than the criminal act; or an excuse, on the ground that the threat vitiates the defendant's choice capacities. n114

Neither conceptualization fits real cases particularly well. For example, whereas a woman who commits a series of armed robberies to avoid threatened [*1203] bodily harm to herself is likely to have a defense, a mother who fails to protect her child from abuse in order to avert the same harm is likely not to have one. n115 Both women submit to the same threat, so it's hard to understand the distinction between them on the basis of differences in their choice capacities. n116 Nor is it satisfying to try to explain the differences in consequentialist terms; if anything, the woman who assists in the armed robberies seems, in deterrence terms, to warrant more severe punishment than the woman who acquiesces in the abuse of her own child, since the former puts multiple persons at risk, and the latter only one.

The difference in results is in fact easy to appreciate in expressive terms. The fear of each woman expresses a preference for her own well-being over the well-being of one or more other persons. Preferring one's own well-being to that of strangers is (for better or worse) perfectly unobjectionable in most social contexts; it's not surprising, then, that decisionmakers are likely to feel sympathy toward the woman who assists the armed robberies. But it's definitely not unobjectionable in our culture for a mother to prefer her own welfare to her child's; the woman who acquiesces in abuse of her child in order to avoid personal injury is predictably condemned because her fear conveys insufficient commitment to values she is conventionally expected to have. n117

The expressive position not only makes it easier for students to explain doctrine but also to evaluate it. The expressive underpinnings of the doctrine expose the relationship between the law and prevailing norms. Selectively mitigating punishment for the cuckold under the voluntary manslaughter doctrine reflects, and arguably reinforces, norms that equate male virtue with devotion to patriarchal conceptions of honor; selectively denying a duress defense to a woman who prefers her own welfare to her child indicates norms that equate female virtue with a self-abnegating conception of motherhood. It might be inappropriate for the law to strike these stances; those who are studying the law should at least give that issue serious thought. Yet when the doctrine is conceived of and evaluated in conventional

deterrence and desert terms - ones that misleadingly focus on consequences and volition abstracted from social meaning - these issues never even come into view. n118

[*1204] In sum, explicit attention to the expressive theory of punishment, not just in some abstract discussion of "punishment" put throughout the examination of substantive doctrines, is essential to a sophisticated appreciation of the criminal law. By giving the expressive view short shrift, existing casebooks risk making students obtuse.

IV. Criminal Law and the Legislative Process

A final striking gap in existing casebooks is their inattention to the growing legal-academic literature on statutory interpretation. n119 This literature places special emphasis, in particular, on how techniques of statutory interpretation interact with the legislative process. n120 Such analysis is critical to criminal law, because it is a statutory field plain and simple, yearly migrating farther and farther from its common law origins. For that reason, no one who has failed to engage in sustained reflection on interpretation and the legislative process can hope to be a literate criminal lawyer or criminal law scholar.

To make this point sharply, we'll focus on one particular concept that figures centrally in the new field of legislation but that is absent from many criminal law casebooks: deliberation forcing. This concept shows that lawmaking is a dynamic process: Courts, to be sure, react to the policy judgments reflected in legislative enactments, but legislatures also react to the policy judgments made by courts when they interpret statutes.

Judicial interpretations provoke legislative reaction unevenly, however. Public choice dynamics, for example, suggest that a legislature will react sluggishly to judicial decisions that benefit intensely interested and well-organized interest groups at the expense of the general public. n121 Social psychology suggests that a legislature will react convulsively, in contrast, to decisions that touch an emotionally charged issue, even when the threat to the public is small or even nonexistent. n122 Conscious of these dynamics, a judge that desires to promote legislative attention to an issue (or alternatively to suppress it) might select a particular statutory interpretation not because she considers it the "best" in steady state, but because she regards it as the one best calculated to promote (or mute) legislative deliberations.

[*1205] Surprisingly, long before the current literature on dynamic statutory interpretation, the English philosopher Jeremy Bentham offered a "deliberation-forcing" rationale for construing criminal prohibitions narrowly. n123 Considered statically, he suggested, "The greatest danger" lies in a criminal prohibition that is insufficiently punitive rather than excessively so, "because in [the former] case the punishment is inefficacious." n124 But it's a mistake to evaluate the two types of defects statically.

[The] error [of insufficient punishment] is ... clear and manifest, and easy to be remedied. An error on the maximum side, on the contrary, is that to which legislators and men in general are naturally inclined: antipathy, or a want of compassion for individuals who are represented as dangerous and vile, pushes them onward to an undue severity. It is on this side, therefore, that we should take the most precautions, as on this side there has been shown the greatest disposition to err. n125

Bentham's insight - that fear of and revulsion toward criminals makes lawmakers reluctant to correct excessively punitive laws - plausibly explains why judicial interpretations that disadvantage criminal defendants are among the least likely to be overturned. n126 Those that advantage criminal defendants, in contrast, are regularly overruled, presumably because legislators see plenty of advantage in generating legislation that make their constituents feel safer and that gratify their resentment of criminals. If these political and psychological dynamics do indeed make excessively punitive measures less amenable to correction than excessively lenient ones, prodefendant interpretations of criminal statutes can be defended on deliberation-forcing grounds.

Introducing students to the maxim that courts should construe criminal statutes narrowly and resolve ambiguities in favor of defendants - sometimes known as the rule of lenity n127 - is unfortunately as close as most criminal law casebooks get to educating students on these issues of statutory interpretation. But as any thoughtful and candid instructor would bring out in the course of class discussion, the justifications for the rule, including "fair notice" for defendants and the promotion of "legislative supremacy," n128 are contemptibly weak.

[*1206] Consider the case that many textbooks use to present this canon, *Keeler v. Superior Court of Amador County*. n129 There, the California Supreme Court "strictly construed" the term "human being" in the state's murder

statute not to apply to a 35-week-old fetus. n130 It's absurd to suggest that a broad interpretation in Keeler would have deprived the defendant of "notice": like offenders who engage in the vast multitude of common offenses, those who intentionally assault pregnant women for the purpose of causing the death of their fetuses, probably don't perform legal research before acting. In addition, far from viewing expansive judicial readings as encroaching on its prerogatives, the California legislature had expressly repealed the rule of strict construction and replaced it with a directive to interpret criminal statutes "with a view to effect [their] objects and to promote justice." n131 Thus, like many other state legislatures, n132 California's legislature had authorized courts to construe statutes broadly to deter offenders from exploiting statutory loopholes and to minimize the legislatures' own burden in enacting unrealistically precise statutes. n133 Contrary to the platitudes invoked to support it, strict construction in fact defies legislative supremacy, at least if we take the legislature's own word for it.

Deliberation-forcing, however, furnishes a much more compelling rationale for strict construction in a case like Keeler. All right-thinking persons agree that this behavior is bad and that it is more serious and thus presumably worthy of more serious punishment than an ordinary assault. But exactly how bad, and how much worse? Should the law treat it as the moral equivalent of murder? Members of the public might disagree on this issue. Indeed, the question of how severely to punish feticide might provoke different responses from those who disagree about abortion, precisely because they disagree about whether a fetus is indeed a "human life." There's presumably some value in having contentious issues like this one resolved through the sort of democratic deliberation distinctively associated with the legislative process. If so, then a court deciding a case like Keeler ought to consider the following question: Which reading of the statute - a narrow one or a broad one - is most likely to provoke it?

The answer, for exactly the reasons Bentham gives, is narrow. A broad reading - one that treats the defendant in the case as guilty of murder - is very likely to stick, even if too severe relative to sound policy and public mores: What member of the legislature who is the least bit interested in his or her own reelection is likely to propose legislation making the law more lenient toward men who attack pregnant women for the purpose of causing them to miscarry? [*1207] A narrow reading, in contrast, is nearly certain to provoke public outrage and thus to provoke legislative action. The California legislature, for example, did act after Keeler, amending the state's murder statute to cover the "killing" of a "fetus," as well as a "human being." n134

But because not everyone agrees that feticide is as bad as murder, the legislature could at least conceivably have reacted more moderately. The Illinois legislature, for example, did: After a similar decision by the Illinois Supreme Court, n135 the legislature in that state didn't broaden the definition of murder; rather, it enacted the distinct offense of "intentional homicide of an unborn child." n136 Unlike the legislator who proposes ratcheting punishment down to some middling level after an antidefendant judicial interpretation, the legislator who favors ratcheting it up to that same point after a prodefendant interpretation gets full credit for being tough on crime. In sum, which interpretive default rule the court selects - narrow or broad - determines not only how likely the legislature is to deliberate after a judicial decision but also how likely the law is to end up in a position consistent with considered public judgments.

Indeed, the function of deliberation forcing can at least sometimes justify a contentiously broad construction of a criminal statute. Bentham's observation that legislatures are more attentive to insufficiently severe than to excessively severe criminal prohibitions assumes a particular theory of the psychological and political economies of criminal lawmaking. On this account, ordinary citizens are thought to worry more about insufficient than excessive severity because they themselves are afraid of becoming victims of crime and because they tend to hate criminals. Legislators, in turn, are thought to be responsive to this asymmetry in the attention and concern of their constituents and thus to be asymmetrically attentive to the problems of insufficient and excessive severity in criminal laws. These are plausible assumptions.

But these assumptions don't always pertain. In some instances, constituents might identify more with potential criminal defendants than with crime victims. Or they might sympathize with victims, but imagine the prospect that they will become a victim of that sort as essentially nonexistent, and thus not care enough to motivate legislative reaction to an insufficiently severe criminal prohibition. In at least some of these cases, an arguably overbroad reading of a criminal statute might more predictably generate a worthwhile legislative response.

For an example, consider the law of "omissions." The law punishes someone whose failure to act causes harm to another only in very narrow circumstances - essentially, when that person has a "legal duty" to care for the [*1208] victim founded either on a familial or some other fiduciary relationship or on contract or some other voluntary assumption of duty. n137 The traditional rationale for confining the circumstances in which a person has a duty to help another in need is rooted in a contentious view of individual liberty that immunizes individuals from obligations to

others unless they have assumed those obligations through choice. n138 Many commentators, and in our experience most students, find this rationale unconvincing in cases where individuals turn their back - often literally - on persons in distress who they could easily help with no real risk to themselves. Yet the traditional position persists.

Is the failure of legislatures to change the law evidence that the traditional individualist sensibility continues to resonate with common moral sensibilities? Not necessarily. Even if most members of society agree that the traditional position on omissions is inadequate - that individualistic renunciation of a duty to assist strangers in need is anachronistic and even offensive - we shouldn't expect legislatures to respond to judicial readings that apply it. The prototypical case in which the doctrine of omissions creates liability involves an abandoned or abused child who dies from neglect that a stranger could have prevented. As distressing and unfortunate as this scenario might strike her, the median voter is unlikely to worry much about it: She isn't an abandoned or neglected child herself, and she assumes that her child won't ever be abused or abandoned and thus won't ever have that unique need of protection from a stranger (a fate disproportionately visited on the children of persons much less financially secure and socially supported than the median voter). A legislator interested in perpetuating his term in office can attend to better issues. Indeed, because the median voter is much more likely to worry (without much reason, statistically) that a child molester might move into her suburban backyard and abduct her child as she plays in the backyard, a smart legislator might do well to sponsor legislation obliging local authorities to maintain a public registry of convicted pedophiles - even though this law will almost certainly do less to protect vulnerable children than would a law reinforcing the duty of individuals to give assistance to strangers in need.

If the traditional law of omissions persists not because it fits contemporary public values but because it generates harm that lacks sufficient emotional salience to grab public attention, then broad construction might be the right corrective from a deliberation-forcing standpoint. Members of the public might not be able to imagine their own children in a persistent state of vulnerability that only someone from outside of their immediate family could remedy, but they might well be able to imagine finding themselves, through sheer fortuity, [*1209] in a position where their intervention is essential to the well-being of a vulnerable child or other stranger in need. A judicial decision that imposed liability - perhaps for manslaughter - on a person who failed to intervene in that situation would put not just heinous criminals but the median voter herself at legal risk. Precisely for that reason, such a decision, especially if rendered in a high-profile case, might well prompt a legislative response, one that moved the law to some intermediate position between one that equates passive with active harming and one that excuses omissions altogether. Alternatively, legislative inaction in the wake of such a decision would furnish much more plausible evidence of congruence between law and public mores than inaction in the wake of decisions enforcing the traditional doctrine.

This analysis is admittedly conjectural. But the point of a casebook in criminal law is precisely to stimulate educational conjecture. The analysis of deliberation forcing is meant to illustrate just how generative of conjecturing it can be to apply the insights of the field of legislation to criminal law. By making students familiar with these insights, we hope to furnish them with a toolkit of techniques and dynamics that they can use to explain, predict, and criticize criminal law doctrine.

Conclusion

Our short review of the many ways in which the new criminal law scholarship can enrich the material taught in the criminal law classroom is by no means exhaustive. There is much more that could be done. Notably, one large area ripe for integration, touched upon only briefly in our Article, is addressed by several wonderful contributions to the Punishment and Its Purposes Symposium - race and punishment. n139

This novel area of scholarship is just one of a series of sweeping changes in method and focus that have convulsed the study of criminal law in the last decade. The classical economic conception of how the law regulates criminal behavior has been enriched (if not displaced) by a variety of insights drawn from social psychology, sociology, and behavioral economics. The long-standing academic interest in the classification of "property offenses" has been overtaken by the urgent need to adapt the law to forms of wrongdoing distinctive of the emerging information economy. The scholastic debate between "retributivists" and "utilitarians" has been displaced by a new, sociologically informed interest in the social meanings that law expresses. The historical (and still fully relevant) interest of scholars in how the criminal law is used to enforce racial domination has been supplemented by one in the [*1210] emerging demand of politically empowered innercity minorities for effective law enforcement. And just as there has been a recent reconfiguration of materials in criminal procedure to take account of changes in the scholarship, n140 we encourage contemporary criminal law scholars to extend their efforts to criminal law teaching materials.

Legal Topics:

For related research and practice materials, see the following legal topics:

Criminal Law & Procedure
Criminal Offenses
Controlled Substances
Delivery, Distribution & Sale
General Overview
Criminal Law & Procedure
Criminal Offenses
Controlled Substances
Possession
General Overview
Transportation Law
Private Vehicles
Bicycles

FOOTNOTES:

n1. Each of us has taught the basic criminal law course at our respective institutions and elsewhere over the last eight years. We have reviewed and used in our own courses some of the books cited below. The themes we will discuss in this Article have grown out of our own attempts to supplement the materials in the casebook we have adopted.

n2. It was notable that in her Keynote Speech for this Symposium, former Attorney General Janet Reno spoke of the great need for more in-depth empirical analysis of punishment. We believe that some of the questions posed by Attorney General Reno have begun to be answered in the literature. Our students should be exposed to such literature.

n3. "Society hopes to deter wrongdoing by posing specific punishments ... with the expectation that the punishment will have a double effect: both convincing the lawbreaker not to repeat his transgression and, at the same time, serving as a 'cautionary tale,' a warning deterrent to other members of society." Nicholas N. Kittrie & Elyce H. Zenoff, *Sanctions, Sentencing, and Corrections: Law, Policy and Practice* 15 (1981); *See United States v. Ursery*, 518 U.S. 267, 319 (1996) (Stevens, J., dissenting) ("Congress[] intended to punish ... those involved in drug trafficking' because 'the traditional criminal sanctions ... are inadequate to deter or punish the enormously profitable trade in dangerous drugs.'") (citation omitted); *Carmona v. Ward*, 576 F.2d 405, 415 (2d Cir. 1978) (upholding mandatory maximum life sentence for three women convicted of minor drug trafficking offenses under New York law, finding that the law's "stated purposes to achieve the isolation and the deterrence of drug traffickers are acceptable goals of punishment"); George James, 113 Officers To Fight Drugs At Queens Site, N.Y. Times, Mar. 8, 1988, at B1 (quoting Rudolph W. Giuliani, then U.S. Attorney for the Southern District of New York, saying that drug dealers "calculate the amount of money they make against the risk they are taking. Anyone who tells you the death penalty isn't a deterrent doesn't know the drug trade.").

n4. Gary S. Becker, *Crime and Punishment: An Economic Approach*, 76 J. Pol. Econ. 169 (1968).

n5. George J. Stigler, *The Optimum Enforcement of Laws*, 78 J. Pol. Econ. 526, 527 (1970). Stigler's observations track those of Beccaria and Bentham. Beccaria said that "if an equal punishment is laid down for two crimes which damage society unequally, men will not have a stronger deterrent against committing the greater crime if they find it more advantageous to do so." Cesare Beccaria, *On Crimes and Punishments*, in *On Crimes and Punishments and Other Writings* 21 (Richard Bellamy ed., Richard Davies trans., 1995). Bentham argued that the goal of a sanction is "to induce a man to choose always the least mischievous of two offences; therefore where two offences come in competition, the punishment for the greater offence must be sufficient to induce a man to prefer the less." Jeremy Bentham, *An Introduction to the Principles of Morals and Legislation* 168 (J.H. Burns & H.L.A. Hart eds., Athlone Press 1970) (1789) (emphasis omitted); see also Jeremy Bentham, *The Theory of Legislation* 201 (N. M. Tripathi Private Ltd. 1975) (1802) ("Where two offences are in conjunction, the greater offence ought to be subjected to severer punishment, in order that the delinquent may have a motive to stop at the lesser.") (emphasis omitted).

n6. For that reason, Stigler's solution to the marginal deterrence problem was to state that "expected penalties [should] increase with expected gains so there is no marginal net gain from larger offenses." Stigler, *supra* note 5, at 531.

n7. See John Kaplan, Robert Weisberg & Guyora Binder, *Criminal Law: Cases and Materials* 46 (4th ed. 2000) ("A consistent finding of empirical studies of deterrence is that increases in the certainty of punishment have a greater deterrent effect than increases in the severity of the punishment."); Wayne R. LaFave, *Criminal Law* 28-29 (4th ed. 2003) ("It does seem fair to assume, however, that the deterrent efficacy of punishment varies considerably, depending upon a number of factors The magnitude of threatened punishment is clearly a factor, but perhaps not as important a consideration as the probability of discovery and punishment."); Stephen A. Saltzburg, John L. Diamond, Kit Kinports & Thomas H. Morawetz, *Criminal Law* 102 (2d ed. 2000) ("The basic reasoning behind general deterrence is impeccable. It doesn't take much psychology or observation to know that persons are deterred from actions likely to have painful consequences. Jeremy Bentham left us common-sense guidelines for administering a system of this kind. For example, he suggested that there is an inverse relationship between the severity of the punishment and its certainty") (citation omitted); K. Greenawalt, *Moral Justifications and Legal Punishment*, in *Encyclopedia of Crime and Justice* 1337-42 (S. Kadish ed., 1983), reprinted in Paul H. Robinson, *Fundamentals of Criminal Law* 36-37 (2d ed. 1995) [hereinafter *Fundamentals of Criminal Law*] ("With a properly developed penal code, the benefits to be gained from criminal activity would be outweighed by the harms of punishment, even when those harms were discounted by the probability of avoiding detection. Accordingly, the greater the temptation to commit a particular crime and the smaller the chance of detection, the more severe the penalty should be The actual imposition of punishment creates fear in the offender that if he repeats his act, he will be punished again To deter an offender from repeating his actions, a penalty should be severe enough to outweigh in his mind the benefits of the crime.").

n8. Elizabeth Tison, *Amending the Sentencing Guidelines for Cocaine Offenses: The 100-to-1 Ratio Is Not As "Cracked" Up As Some Suggest*, 27 *S. Ill. U. L. J.* 413, 416 (2003) (describing rush to enact 1986 law).

n9. The base level under the U.S. Sentencing Guidelines for 5 grams of crack is level 26. U.S. Sentencing Guidelines Manual 2D1.1(c)(7) (1995). A level 26 offense earns between 63 and 78 months for the first offense. Five grams of crack is equivalent to 10 to 50 doses. See U.S. Sentencing Comm'n, *Cocaine and Federal Sentencing Policy* viii (1995) [hereinafter *Sentencing Comm'n Report*]. This 200-plus page report, which is dedicated to eliminating the disparity between crack and powder cocaine, does not breathe a word about the impact of high crack sentences on heroin use (or even powder cocaine use for that matter). See generally *id.*

n10. See, e.g., David Cole, *The Paradox of Race and Crime: A Comment on Randall Kennedy's "Politics of Distinction"*, 83 *Geo. L.J.* 2547, 2553-54 (1995) (discussing how many believe that the crack/powder difference is "racially discriminatory").

n11. For a first-time offender, the base levels are the following: 5-10 grams of heroin is base level 14, providing a sentence of 15-21 months (whereas one-quarter to one-half gram of crack receives that penalty); 10-20 grams of heroin is base level 16, providing a sentence of 21-27 months (whereas one-half gram of crack receives that penalty); 20-40 grams of heroin is base level 18, providing a sentence of 27-33 months (whereas 1 to 2 grams of crack receives that penalty); 40-60 grams of heroin is base level 20, providing a sentence of 33-41 months (whereas 2 to 3 grams of crack receives that penalty); 60-80 grams of heroin is base level 22, providing a sentence of 41-51 months (whereas 3 to 4 grams of crack receives that penalty); 80-100 grams of heroin is base level 24, providing a sentence of 51-63 months (whereas 4 to 5 grams of crack receives that penalty); 100-400 grams of heroin is base level 26, providing a sentence of 63-78 months (whereas 5 to 20 grams of crack receives that penalty); 400-700 grams of heroin is base level 28, providing a sentence of 78-97 months (whereas 20 to 35 grams of crack receives that penalty); and 700 to 1000 grams of heroin is base level 30, providing a sentence of 97-121 months (whereas 35 to 50 grams of crack receives that penalty). U.S. Sentencing Guidelines Manual 2D1.1(c) (2002), available at <http://www.ussc.gov/2002guid/2002guid.pdf> (last visited Mar. 11, 2004).

n12. This disparity is even greater, because a gram of heroin produces four to twenty times more doses than does a gram of crack. Compare *United States v. Kinder*, 64 *F.3d* 757, 764 *n.7* (2d Cir. 1995) (Leval, C.J., dissenting) (observing that single dose bags of heroin are generally 20 to 50 milligrams), and Office of Nat'l Drug Control Policy, *Heroin Users in New York, Chicago, and San Diego* 27 (1994) ("A bag of heroin in New

York typically contains around 25 milligrams of pure heroin."), with The U.S. Sentencing Commission and Cocaine Sentencing Policy: Hearing Before the Senate Comm. on the Judiciary, 104th Cong. 26 (1995) (statement of Michael Goldsmith, Commissioner, U.S. Sentencing Commission) (stating that crack dosages range from 100 to 500 milligrams), The U.S. Sentencing Commission and Cocaine Sentencing Policy: Hearing Before the Senate Comm. on the Judiciary, 104th Cong. 20 (1995) (statement of Judge Deanell Reece Tacha) (providing dosage information), Sentencing Comm'n Report, *supra* note 9, at viii (same), and Drug Enforcement Admin., United States Dep't of Justice, "Crack" Price Data, in *Drugs & Crime Data: Crack Facts and Figures* 50 (1996) (same). It is not clear to what extent these fractions control for purity.

n13. Univ. of Mich. Inst. for Soc. Research, *Monitoring the Future: National Results on Adolescent Drug Use* 17 (showing that the rate of crack cocaine use among 8th, 10th, and 12th graders was approximately one-third lower in 2002 than it was in 1988), 23 (finding that heroin use of 8th, 10th, and 12th graders doubled from 1988 to 2002) (2002), available at <http://monitoringthefuture.org/pubs/monographs/overview2002.pdf> (last visited Mar. 11, 2004).

n14. Even within the drug context, substitution may be at work in ways other than crack and heroin shifts. For example, the rise in so-called "designer drugs" might be explained by the criminalization of marijuana and other soft drugs. The dangers of designer drugs - many of which are made by amateur teenage chemists and are deadly - arguably dwarf the health dangers of marijuana use. A more obvious substitution may be excessive teenage cigarette smoking and drinking, perhaps in part the result of the high price of other types of drugs. Another somewhat less obvious form of substitution may be the increase in drug purity. Because the penalty structure uses the weight of a drug as the relevant factor in sentencing, drug dealers have compensated for the increased risk of sentences by increasing purity. For these reasons, the Supreme Court's decision in *Neal v. United States*, 516 U.S. 284 (1996), which held that the carrier medium for LSD would be weighed in determining a mandatory-minimum sentence, might exacerbate the drive to increase purity to reduce the expected punishment. Increased purity, for its part, might produce a great deal of harm, both in terms of addiction and accidental overdoses.

n15. See Herbert L. Packer, *The Limits of the Criminal Sanction* 41-42 (1968) (arguing that Bentham's rational-actor deterrence model helps analyze even "irrational" and "impulsive" crimes).

n16. See James Q. Wilson, *Thinking About Crime* 127 (Vintage Books, rev. ed. 1985) (1975) (quoting Herrnstein) [hereinafter Wilson, *Thinking About Crime*].

n17. Because substitution effects are a response to both the preferences of an actor and the relative price of different criminal acts, the effects can be pronounced even when preferences or relative prices are quite lopsided. To take a simple economic example, when filet mignon is five times as expensive as McDonald's hamburgers, some will substitute the hamburgers, but some will not - despite the lower price for the latter. But when the price of the hamburger drops to nearly zero, greater substitution will occur. Similarly, while the current lower penalty for solicitation (as opposed to rape) may already engender positive substitution effects, lowering the penalty for solicitation even further could produce greater amounts of substitution.

n18. Consider, for example, the potential complementarity between legalized prostitution and rape and the harm legalized prostitution might do to the status of women. See generally Neal Kumar Katyal, *Men Who Own Women: A Thirteenth Amendment Critique of Forced Prostitution*, 103 *Yale L.J.* 791 (1993) (discussing such possibilities).

n19. See, e.g., 18 U.S.C. 3559 (1994); *Cal. Penal Code* 1170.12 (West 1997).

n20. See, e.g., William Tucker, *Three Strikes and You're Dead*, *Am. Spectator*, Mar. 1994, at 22, 26 ("Three-strikes-you're-out will only turn more victims of violent crime into murder victims. Dead men tell no

tales."); Thaa Walker, Police Concerned About "3 Strikes' Law: Crooks Facing Stiff Sentence May Become More Violent, S.F. Chron., Mar. 14, 1994, at A15 (reporting a similar concern by police officers).

n21. The possibility of being caught may not be constant, as it might increase if the murders take a particular pattern, or if the murders are committed in one place, because the police may devote more resources to such a crime. But then, the logical response might be to simply substitute other crimes that have nothing to do with the initial one.

n22. See Victoria Churchville, Elusive Jamaican Drug Gangs Frustrate Police; Underworld Protects Newest and Most Violent Organized Crime Posses, Officials Say, Wash. Post, Feb. 23, 1988, at A1 (stating that "law enforcement authorities here and elsewhere began to notice a pattern of public shootings between competing gangs of young Jamaicans who they believed were selling marijuana"); Maria Elena Fernandez & Bill Miller, 10 Members of SW Gang Indicted on Drug Counts, Wash. Post, Sept. 23, 1998, at B1 ("Standing beside a chart that listed the names of 31 victims of shootings - including 13 homicides - attributed to the K Street Crew, [U.S. Attorney Wilma A.] Lewis said: "This is a clear example of why marijuana use and dealing cannot - I repeat, cannot - simply be viewed as a harmless activity or a victimless crime.").

n23. For absence of such commentary, see, for example, Joshua Dressler, *Understanding Criminal Law* (2d ed. 1995); Kaplan et al., *supra* note 7; LaFave, *supra* note 7; Saltzburg et al., *supra* note 7. See also Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690 5011, 102 Stat. 4181, 4296 (1988) ("The Congress finds that legalization of illegal drugs, on the Federal or State level, is an unconscionable surrender in a war in which, for the future of our country and the lives of our children, there can be no substitute for total victory.").

n24. See Kenneth G. Dau-Schmidt, An Economic Analysis of the Criminal Law as a Preference-Shaping Policy, *1990 Duke L.J.* 1, 4 n.21 (making this argument); Cass R. Sunstein, Legal Interference with Private Preferences, *53 U. Chi. L. Rev.* 1129, 1146 (1986) ("It is hard to imagine a preference not shaped in part by legal arrangements.").

n25. One study tested this prediction by offering groups of students hypothetical choices between two CD players on a one-day clearance sale. Eldar Shafir, Itamar Simonson & Amos Tversky, Reason-Based Choice, *49 Cognition* 11 (1993) [hereinafter Shafir et al., Reason-Based Choice]. The "popular SONY player" cost only \$ 99 while a "top-of-the-line AIWA player" cost \$ 169. *Id.* at 22. An equal number of students, 27%, picked each brand, and 46% chose to wait until they learned more about the various models. *Id.* On the other hand, a second group of students was posed the hypothetical without the AIWA model. *Id.* This time, 66% of people picked the SONY, and only 34% selected the deferment choice. *Id.* The third group of students was presented with a choice between the SONY, "an inferior AIWA player for the regular list price of \$ 105," or the deferment choice. *Id.* at 23. This time, 73% picked the SONY player and only 24% picked deferment. *Id.* The introduction of the cheap AIWA should not have influenced the choice between deferment and the SONY, but it did. More people were willing to buy the SONY, which looked like a better deal once the cheap AIWA was shown. See *id.* at 22-23; see also Amos Tversky & Eldar Shafir, Choice Under Conflict: The Dynamics of Deferred Decision, *3 Psychol. Sci.* 358, 360-61 (1992) (describing similar findings).

n26. See generally Joel Huber, John W. Payne & Christopher Puto, Adding Asymmetrically Dominated Alternatives: Violations of Regularity and the Similarity Hypothesis, *9 J. Consumer Res.* 90 (1982) (describing asymmetric dominance); Douglas H. Wedell, Distinguishing Among Models of Contextually Induced Preference Reversals, *17 J. Experimental Psychol.* 767 (1991) (same).

n27. Itamar Simonson & Amos Tversky, Choice in Context: Tradeoff Contrast and Extremeness Aversion, *29 J. Marketing Res.* 281, 287 (1992).

n28. See generally Itamar Simonson, Choice Based on Reasons: The Case of Attraction and Compromise Effects, 16 J. Consumer Res. 158 (1989) (describing extremeness aversion). For example, subjects in one study were shown five cameras varying in quality and price. Shafir et al., Reason-Based Choice, *supra* note 25, at 25. One group was given a choice between a \$ 170 Minolta and a higher quality \$ 240 Minolta. The second group was given the additional option of an even higher quality \$ 470 Minolta. In the first group, subjects were split between the two cameras, but, in the second group, 57% chose the middle option and the remaining subjects were equally divided between the two extremes. *Id.*

n29. See generally Johannes Andenaes, Punishment and Deterrence (1974).

n30. See Richard J. Bonnie, Anne M. Coughlin, John C. Jeffries, Jr. & Peter W. Low, Criminal Law 14 (1997) (excerpting from John DiIulio's Journal of Economic Perspectives article, Help Wanted: Economists, Crime and Public Policy, 10 J. Econ. Persp. 3, 10, 17 (1996), the claim that "the extraordinary degree to which today's young street criminals are present oriented, and the extent to which they do crime for fun as well as for profit, has yet to be taken fully into account by economists. 'You never think about doing thirty,' one young prisoner told me, 'when you don't expect to live to thirty.'"); Arnold J. Loewy, Criminal Law: Cases and Materials 9 (2d ed. 2000) (quoting *Leuch v. State*, 633 P.2d 1006 (Alaska 1981), where the court observed that "the superior court also expressed the view that the deterrent effect of a sentence on the general community is negligible in practically any case because, in the superior court's view, sentences are not significantly publicized to have any significant impact"); Wilson, Thinking About Crime, *supra* note 16, at 118 ("The reason there is a debate among scholars about deterrence is that the socially imposed consequences of committing a crime, unlike the market consequences of shopping around for the best price, are characterized by delay, uncertainty, and ignorance.").

n31. Andenaes, *supra* note 29.

n32. James Fitzjames Stephen, A General View of the Criminal Law of England 99 (1863).

n33. And for this reason, Stephen claimed that "the sentence of the law is to the moral sentiment of the public in relation to any offence what a seal is to hot wax." *Id.* at 81.

n34. Dau-Schmidt, *supra* note 24, at 18 n.88.

n35. Erving Goffman, Stigma: Notes on the Management of Spoiled Identity (1963).

n36. *Id.* at 9-10, 23-25.

n37. *Id.* at 20.

n38. Consider what one criminal said:

And I always feel this with straight people - that whenever they're being nice to me, pleasant to me, all the time really, underneath they're only assessing me as a criminal and nothing else. It's too late for me to be any different now to what I am, but I still feel this keenly, that that's their only approach, and they're quite incapable of accepting me as anything else.

Tony Parker & Robert Allerton, The Courage of His Convictions 111 (1962).

n39. See William Y. Baker & Lauren H. Smith, Facial Disfigurement and Personality, *112 JAMA* 301, 303 (1939) (describing how such physical deformities become "unconsciously all embracing").

n40. Some support exists for the claim that the stigma imposed by criminal sentences precludes lawful employment. See Herbert S. Miller, The Closed Door: The Effect of a Criminal Record on Employment with State and Local Public Agencies (Manpower Admin., U.S. Dep't of Labor Contract No. 81-09-70-02, 1972).

n41. Parker & Allerton, *supra* note 38, at 109 (internal quotation marks omitted).

n42. See Frederick K. Beutel, Some Potentialities of Experimental Jurisprudence as a New Branch of Social Science 365-67 (1957). Some studies show, moreover, that one effect of three-strikes laws is that prosecutors tend not to use them. See Henry J. Reske, Hardly Hardball: Prosecutors in Most of 22 States Studied Are Not Using Three-Strikes Laws Against Repeat Offenders, *82 A.B.A. J.* 26 (1996). Other evidence shows that those who are charged under three-strikes laws refuse to plea bargain and clog the courts, which in turn prevents the administration of swift sentencing. See Cyndee Fontana, "Three Strikes' Law is Bearing Down on Fresno Courts, Fresno Bee, Jan. 21, 1996, at A1.

n43. Beutel, *supra* note 42, at 366-67.

n44. *Id.*

n45. See Michel Foucault, Discipline and Punish: The Birth of the Prison 14 (Alan Sheridan trans., Vintage Books 2d ed. 1995) (1977). Within the economic tradition, James Q. Wilson has pointed out that high sentences also mean that defendants are unlikely to plead guilty, which may reduce the speed with which sentences are imposed, itself an important factor in enhancing deterrence. Wilson, Thinking About Crime, *supra* note 16, at 134-35.

N46. U.S. Prison Population Tops 2 Million, at <http://usgovinfo.about.com/cs/censusstatistic/a/aaprisonpop.htm> (last visited Mar. 11, 2004) (noting that the American prison population topped 2 million in June of 2002).

n47. This is not to say that additional factors such as a concern for incapacitation or retribution do not also influence our current punishment practice. These factors also clearly have an important role. The recent rise in "three-strikes" legislation is obviously driven by incapacitation concerns, and there has been a long-standing role for retribution in sentencing. See, e.g., U.S. Sentencing Guidelines Manual 3 (1998) (discussing various rationales for sentencing including retribution in the form of just deserts).

n48. See generally Deterrence and Incapacitation: Estimating the Effects of Criminal Sanctions on Crime Rates (Alfred Blumstein, Jacqueline Cohen & Daniel Nagin eds., 1978) (collecting research on deterrent effects). See also Philip J. Cook, Research in Criminal Deterrence: Laying the Groundwork for the Second Decade, in 2 Crime and Justice: An Annual Review of Research 211 (1980) (discussing the relative impact of the criminal justice system and "root causes" of crime); Lawrence W. Sherman, Douglas A. Smith, Janell D. Schmidt & Dennis P. Rogan, Crime, Punishment, and Stake in Conformity: Legal and Informal Control of Domestic Violence, *57 Am. Soc. Rev.* 680, 687-88 (1992) (reviewing research on the impact of arrest on reduction of domestic violence).

n49. See Kirk R. Williams & Richard Hawkins, Wife Assault, Cost of Arrest, and the Deterrence Process, *29 J. Res. Crime & Delinq.* 292, 305 (1992) (showing that the social and personal costs of violence are greater when an individual's violent behavior is disclosed to neighbors or coworkers).

n50. See *id.*

n51. Jeffrey Fagan & Richard B. Freeman, *Crime and Work*, 25 *Crime & Just.* 225 (1999).

n52. See *id.* at 245-54 (comparing returns from legal and illegal work).

n53. See William Julius Wilson, *When Work Disappears: The World of the New Urban Poor* 57-72 (1996) [hereinafter Wilson, *When Work*] (discussing the incentives of individuals to turn to illegal work in communities of concentrated poverty where rates of joblessness are high).

n54. See Jeff Grogger, *Market Wages and Youth Crime*, 16 *J. Lab. Econ.* 756, 777-79 (1998) (presenting mathematical models of the relationship between work and youth crime and discussing "tastes" for crime); Sudhir Alladi Venkatesh, *The Social Organization of Street Gang Activity in an Urban Ghetto*, 103 *Am. J. Soc.* 82, 85, 108 (1997) (discussing alternative income structure of ghettos and explaining the importance of noneconomic motivations behind involvement in the drug economy); W. Kip Vicusi, *The Risks and Rewards of Criminal Activity: A Comprehensive Test of Criminal Deterrence*, 4 *J. Lab. Econ.* 317 (1986).

n55. See generally Clifford R. Shaw & Henry D. McKay, *Juvenile Delinquency and Urban Areas: A Study of Rates of Delinquency in Relation to Differential Characteristics of Local Communities in American Cities* (rev. ed. 1969) (developing an ecological model of the persistence of crime rates in urban areas over time).

n56. It is clear from the data included in this volume that there is a direct relationship between conditions existing in local communities of American cities and differential rates of delinquents and criminals Delinquency - particularly group delinquency, which constitutes a preponderance of all officially recorded offenses committed by boys and young men - has its roots in the dynamic life of the community.

Id. at 315.

n57. See *id.* at 174, 316-21.

n58. Shaw and McKay found that the relationship between structural community factors and delinquency was substantial. They found a correlation of .89 between delinquency rates and Chicago community areas and a proxy measure for poverty - the number of families on relief. *Id.* at 146-47. They found a correlation of .60 between delinquency and population heterogeneity ("percentage of foreign-born and Negro heads of families"). *Id.* at 153. Both of these correlations are quite strong. See Lawrence C. Hamilton, *Modern Data Analysis: A First Course in Applied Statistics* 481 tbl.14.5 (1990) (explaining the interpretation of correlation strength).

n59. See Robert J. Bursik, Jr. & Harold G. Grasmick, *Neighborhoods and Crime: The Dimensions of Effective Community Control* 25-27 (1993) (explaining scholarly disagreement over Shaw and McKay's findings when they were published and alternative explanations for high crime rates in urban areas).

n60. The research is "ecological" rather than "psychological." A fundamental assumption of ecological research is that social systems exhibit structural properties that can be examined apart from the personal characteristics of their members. See Brian J. L. Berry & John D. Kasarda, *Contemporary Urban Ecology* 13 (1977) (explaining this point).

n61. See, e.g., Douglas S. Massey, *Getting Away with Murder: Segregation and Violent Crime in Urban America*, 143 *U. Pa. L. Rev.* 1203 (1995) (describing how race and class segregation concentrates violent crime in poor, minority neighborhoods); Robert J. Sampson & Janet Lauritsen, *Violent Victimization and Offending:*

Individual-, Situational-, and Community-Level Risk Factors, in *Understanding and Preventing Violence* 48-63 (A. Reiss & J. A. Roth eds., 1994) (summarizing the recent work applying social-ecological theory to explanations of the variation of criminal violence).

n62. See, e.g., Wilson, *When Work*, supra note 53, at 20 (offering these three characteristics); Robert J. Sampson & W. Byron Groves, *Community Structure and Crime: Testing Social-Disorganization Theory*, 94 *Am. J. Soc.* 774, 777-82 (defining community social organization this way); Robert J. Sampson & William Julius Wilson, *Toward a Theory of Race, Crime, and Urban Inequality*, in *Crime and Inequality* 45 (John Hagan & Ruth D. Peterson eds., 1995) (same).

n63. Tracey L. Meares, *Social Organization and Drug Law Enforcement*, 35 *Am. Crim. L. Rev.* 191, 204 (1998) [hereinafter Meares, *Social Organization*].

n64. See generally Jeffrey D. Morenoff, Robert J. Sampson & Stephen W. Raudenbush, *Neighborhood Inequality, Collective Efficacy, and the Spatial Dynamics of Urban Violence*, 39 *Criminology* 517 (2001) (demonstrating empirically that friendship networks, neighborhood organizations, and participation in voluntary associations appear to reduce violence by the promotion of collective efficacy); Sampson & Groves, supra note 62, at 788-89 (demonstrating that supervision of teenage peer groups is associated with lower crime rates and suggesting that friendship networks reinforce such supervision).

n65. See generally Meares, *Social Organization*, supra note 63, at 205-10; Dina R. Rose & Todd R. Clear, *Incarceration, Social Capital, and Crime: Implications for Social Disorganization Theory*, 36 *Criminology* 441 (1998).

n66. An estimated 12% of black males in their twenties and early thirties were in prison or jail in 2002, compared to 1.6% of white and 4.3% of Hispanics. Paige M. Harrison & Jennifer C. Karberg, *United States Dep't of Justice, Prison and Jail Inmates at Midyear 2002* (2002).

n67. See Todd R. Clear, Dina R. Rose, Elin Waring & Kristen Scully, *Coercive Mobility and Crime: A Preliminary Examination of Concentrated Incarceration and Social Disorganization*, 20 *Just. Q.* 33 (2003).

n68. See James P. Lynch & William J. Sabol, *Assessing the Effects of Incarceration on Informal Social Control in Communities*, 3 *Criminology & Pub. Pol'y* (forthcoming 2004) (reviewing quantitative and qualitative research on community effects of incarceration).

n69. See *id.*

n70. See generally Tracey L. Meares, *Praying for Community Policing*, 90 *Cal. L. Rev.* 1593 (2002) (explaining three-levels of social control - individual, parochial, and public - and noting the ways in which parochial controls enhance informal norms of law-abidingness).

n71. See Lynch & Sabol, supra note 68.

n72. Donald Braman, *Families and Incarceration*, in *Invisible Punishment* 10 (Marc Mauer & Meda Chesney-Lind eds., 2002).

n73. See *id.* at 4.

n74. See Adrian Nicole Le Blanc, *Random Family* 164 (2003) (describing in addition to the costs just mentioned, the expenses one young mother incurred for the purchase of new clothes for her children so the father would see them "dressed - stylishly"); Braman, *supra* note 72, at 4-5.

n75. The direct annual expenses one family incurred resulting from a family member's incarceration came to \$ 12,680. See Donald Braman, *Doing Time on the Outside: The Hidden Effects of Incarceration on Families and Communities* 151 tbl.2. (forthcoming 2004). This amount is borne by a handful of people, none of whom earned more than \$ 20,000 per year.

n76. Donald Braman, *Families and the Moral Economy of Incarceration*, in *Criminal Justice: Retribution vs. Restoration* 27-50 (Eleanor Judah & Michael Bryant eds., 2004).

n77. It is difficult to cite to the absence of material. I reviewed several criminal law casebooks including, Sanford H. Kadish & Stephen J. Schulhofer, *Criminal Law and its Processes: Cases and Materials* (7th ed. 2001); Kaplan et al., *supra* note 7; LaFave, *supra* note 7; *Fundamentals of Criminal Law*, *supra* note 7; Saltzburg et al., *supra* note 7. Professor Paul Robinson's treatise is a noteworthy exception. He gives fleeting attention to the research discussed in this section. See Paul H. Robinson, *Criminal Law* 21 (1997). Of course few professors use treatises as primary texts for teaching.

n78. See, e.g., Tom R. Tyler, *Why People Obey the Law* 3-4 (1990) [hereinafter Tyler, *Why People Obey*].

n79. *Id.* at 24.

n80. *Id.*

n81. See, e.g., John W. Thibaut & Harold H. Kelley, *The Social Psychology of Groups* (1959) (developing a theory of social behavior called social exchange theory which posits outcomes as a major determinant of perceived fairness).

n82. See E. Allan Lind & Tom R. Tyler, *The Social Psychology of Procedural Justice* 230-41 (1988) (developing the group value model to explain instances in which people confer legitimacy even when outcomes do not accrue to their benefit).

n83. See Joel Brockner & Phyllis Siegel, *Understanding the Interaction Between Procedural and Distributive Justice: The Role of Trust*, in *Trust in Organizations: Frontiers of Theory and Research* 390, 404 (Roderick M. Kramer & Tom R. Tyler eds., 1996).

n84. Tom R. Tyler & E. Allan Lind, *A Relational Model of Authority in Groups*, 25 *Advances in Experimental Soc. Psychol.* 115, 158-59 (1992).

n85. See *id.* at 153 (collecting studies); see also Tom R. Tyler, *What Is Procedural Justice?: Criteria Used By Citizens to Assess the Fairness of Legal Procedures*, 22 *Law & Soc'y Rev.* 103, 129 (1998) (discussing importance of recognition of citizen's rights).

n86. Tyler & Lind, *supra* note 84, at 157.

n87. See Tom R. Tyler, *Trust and Democratic Governance*, in *Trust and Governance* 269-70 (Valerie Braithwaite & Margaret Levi eds., 1998).

n88. Specifically, the regression estimates are .11 for legitimacy and .02 (not significant) for deterrence. Tyler, *Why People Obey*, supra note 78, at 59, tbl.5.1. Both of these estimates of reliability were adjusted. To put these estimates in perspective, note that the estimates for the impact of age and sex on compliance are .24 and .26, respectively. *Id.*

n89. See generally E. Allan Lind, Carol T. Kulik, Maureen Ambrose & Maria deVera Park, *Outcome and Process Concerns in Organizational Dispute Resolution* (Am. Bar Found., Working Paper No. 9109, 1991) (finding that the decisions of parties to accept or reject arbitration awards were strongly related to procedural justice (legitimacy) judgments and that outcome favorability judgments operated only through procedural justice judgments); Robert J. MacCoun, E. Allan Lind, Deborah R. Hensler, David L. Bryant & Patricia A. Ebener, *Alternative Adjudication: An Evaluation of the New Jersey Automobile Arbitration Program* (1988) (finding that the probability of litigants in cases involving auto claims in New Jersey courts accepting arbitrator's award correlated with legitimacy and outcome favorability).

n90. See generally P. Christopher Earley & E. Allan Lind, *Procedural Justice and Participation in Task Selection: The Role of Control in Mediating Judgments*, 52 *J. Personality & Soc. Psychol.* 1148 (1987) (examining the influence of the fairness of task assignment procedures on individual's acceptance of assignments and finding acceptance influenced by procedural justice measures); T.R. Tyler & R. Schuller, *A Relational Model of Authority in Work Organizations: The Psychology of Procedural Justice* (1990) (unpublished manuscript, on file with the authors) (noting that procedural justice was the most consistent predictor of decision acceptance, rule following, turnover intention, and grievance filing).

n91. See, e.g., Raymond Paternoster, Ronet Bachman, Robert Brame & Lawrence W. Sherman, *Do Fair Procedures Matter? The Effect of Procedural Justice on Spouse Assault*, 31 *Law & Soc'y Rev.* 163, 1922 (1997) (demonstrating that when police treated arrestees with more respect, such as not handcuffing them in front of the victim, recidivism rates were lower).

n92. Pew Internet and American Life Project Survey 4-5 (July 2003), available at http://www.pewinternet.org/reports/pdfs/PIP_Copyright_Memo.pdf (last visited Mar. 11, 2004):

Young adults continue to dominate downloading - more than half of all Internet users between the ages of 18 and 29 have ever downloaded music and almost 10% of those in that age group are online downloading music on any given day ... students are also more likely to be music downloaders than non-students. Fifty-six percent of full-time students and 40% of part-time students report downloading music files to their computer ... Seventy-two percent of online Americans aged 18 to 29 say they do not care whether the music they download onto their computers is copyrighted or not

see also Meredith Amdur, *Downloading Dips*, *Variety*, Aug. 25-31, 2003, at 106 ("Investment bank Bear Stearns estimates the actual dollar figure of the pirated market, including downloaded files, to be \$ 9 billion-\$ 14 billion annually."); Lev Grossman, *It's All Free!; Music! Movies! TV shows! Millions of People Download Them Every Day. Is Digital Piracy Killing the Entertainment Industry?*, *Time*, May 5, 2003, at 60 (according to the article, each month 2.6 billion files are illegally downloaded "and that's just music. That number doesn't include the movies, TV shows, software and video games that circulate online").

n93. *17 U.S.C. 506* (2004).

n94. Harvey Stark, *eVirus Signs Marketing and Sales Contract and Readies for Expansion*, *Bus. Wire*, Aug. 1, 2000, 8/1/00 BWIRE 09:21:00 ("The "I Love You' virus caused estimated damages of US\$ 11 billion worldwide in May, 2000.").

n95. See generally Neal Kumar Katyal, *Architecture as Crime Control*, 111 *Yale L.J.* 1039 (2002).

n96. See generally Neal Kumar Katyal, *Digital Architecture as Crime Control*, 112 *Yale L.J.* 2261 (2003).

n97. See, e.g., Robert Nozick, *Philosophical Explanations* 370-74 (1981); Marc Galanter & David Luban, *Poetic Justice: Punitive Damages and Legal Pluralism*, 42 *Am. U. L. Rev.* 1393, 1432-38 (1993) (applying theory to punitive damages); Jean Hampton, *An Expressive Theory of Retribution*, in *Retributivism and Its Critics* (Wesley Cragg ed., 1992); Dan M. Kahan, *What Do Alternative Sanctions Mean?*, 63 *U. Chi. L. Rev.* 591 (1996) [hereinafter Kahan, *Alternative Sanctions*]; Igor Primoratz, *Punishment as Language*, 64 *Philosophy* 187 (1989).

n98. For general treatments of the expressive theory, see Elizabeth Anderson, *Value in Ethics and Economics* 17-43 (1993); Lawrence Lessig, *The Regulation of Social Meaning*, 62 *U. Chi. L. Rev.* 943 (1995). For expressive theories of punishment, see Joel Feinberg, *Doing and Deserving: Essays in the Theory of Responsibility* 95-118 (1970); Jeffrie G. Murphy & Jean Hampton, *Forgiveness and Mercy* (1988); Nozick, *supra* note 97, at 370-74; Henry M. Hart, Jr., *The Aims of the Criminal Law*, 23 *Law & Contemp. Probs.* 401 (1958); Kahan, *Alternative Sanctions*, *supra* note 97, at 597-606.

n99. Hampton, *supra* note 97, at 6.

n100. See, e.g., Kadish & Schulhofer, *supra* note 77, at 105-06 (7th ed. 2001) (excerpting Feinberg, *supra* note 98).

n101. See, e.g., 18 *U.S.C.* 1111-12 (2004).

n102. See, e.g., *Bullock v. United States*, 122 *F.2d* 213, 214 (*D.C. Cir.* 1941).

n103. See, e.g., *Commonwealth v. Drum*, 58 *Pa.* 9, 16 (1868); see also Dressler, *supra* note 23, at 195-97 (discussing fictional nature of premediation).

n104. Dan M. Kahan & Martha C. Nussbaum, *Two Conceptions of Emotion in Criminal Law*, 96 *Colum. L. Rev.* 269, 306 (1996).

n105. See generally *id.* at 285-97 (describing the evaluative conception of emotion).

n106. *Id.* at 314-15. This account not only captures the way in which ordinary persons think of emotions; it is consistent, too, with contemporary research in the social sciences, which treats evaluations as integral to the experience and individuation of emotions. See *id.* at 291-92 (discussing sources).

n107. *Id.* at 324.

n108. See *id.* at 305-09.

n109. *Rex v. Greening*, 3 *K.B.* 846, 849 (1913) (U.K.).

n110. *Regina v. Mawgridge*, 84 *Eng. Rep.* 1107, 1115 (*Q.B.* 1707) (U.K.).

n111. *Greening*, 3 K.B. at 849.

n112. See, e.g., Dressler, *supra* note 23, at 435-41.

n113. See generally George P. Fletcher, *Rethinking Criminal Law* 759-875 (1978); J.L. Austin, *A Plea for Excuses*, 57 *Proc. Aristotelian Soc'y* 1 (1956-1957), reprinted in J.L. Austin, *Philosophical Papers* 175, 175-76 (J.O. Urmson & G.J. Warnock eds., 3d ed. 1979); Paul H. Robinson, *A Theory of Justification: Societal Harm As a Prerequisite for Criminal Liability*, 23 *UCLA L. Rev.* 266, 274-75 (1975) (explaining the theoretical distinction between justification and excuse). For a challenge to the utility of the distinction, see Kent Greenawalt, *The Perplexing Borders of Justification and Excuse*, 84 *Colum. L. Rev.* 1897, 1897 (1984).

n114. Compare Fletcher, *supra* note 113, at 830 (excuse), Joshua Dressler, *Exegesis of the Law of Duress: Justifying the Excuse and Searching for Its Proper Limits*, 62 *S. Cal. L. Rev.* 1331, 1373 (1989) (same), and Paul H. Robinson, *Criminal Law Defenses: A Systematic Analysis*, 82 *Colum. L. Rev.* 199, 221-22 (1982) (same), with Wayne R. LaFare & Austin W. Scott, Jr., *Criminal Law* 5.3(a) (2d ed. 1986) (justification).

n115. Compare *People v. Romero*, 13 *Cal. Rptr. 2d* 332, 340 (*Cal. Ct. App.* 1992) (holding that there was "a reasonable probability" that expert testimony on "Battered Wife Syndrome" would have persuaded jury to accept duress defense), with *United States v. Webb*, 747 *F.2d* 278, 283-84 (5th Cir. 1984) (no defense), and *State v. Lucero*, 647 *P. 2d* 406, 408-09 (N.M. 1982) (no defense).

n116. Indeed, the cases are likely to come out differently even if the offenders are both suffering from the volition-debilitating consequences of "battered woman syndrome." Compare *Romero*, 13 *Cal. Rptr 2d* at 340 (suggesting viability of defense in case in which woman participated in crimes against strangers), with *Webb*, 747 *F.2d* at 283-84 (finding no defense in case in which woman acquiesced in child abuse).

n117. See Kahan & Nussbaum, *supra* note 104, at 335.

n118. See Victoria Nourse, *The New Normativity: The Abuse Excuse and the Resurgence of Judgment in the Criminal Law*, 50 *Stan. L. Rev.* 1435, 1451-61 (1998) (arguing that critics of the "abuse excuse" phenomenon obtusely ignore the contribution that social norms and meanings make to perception of how much self-control violent offenders possess and how dangerous they are).

n119. William Eskridge is recognized as having initiated this wave of scholarship. See William N. Eskridge, Jr., *Dynamic Statutory Interpretation* (1994).

n120. William N. Eskridge, Jr., Philip P. Frickey & Elizabeth Garrett, *Cases and Materials on Legislation: Statutes and the Creation of Public Policy* (3d ed. 2001).

n121. See William N. Eskridge, Jr., *Politics Without Romance: Implications of Public Choice Theory for Statutory Interpretation*, 74 *Va. L. Rev.* 275 (1988).

n122. See Timur Kuran & Cass R. Sunstein, *Availability Cascades and Risk Regulation*, 51 *Stan. L. Rev.* 683 (1999).

n123. Jeremy Bentham, *Principles of Penal Law*, pt. II, bk. 1, ch. 6, in *The Works of Jeremy Bentham* 401 (John Bowring ed., 1843).

n124. Id.

n125. Id.

n126. See William N. Eskridge, Jr., *Overriding Supreme Court Statutory Interpretation Decisions*, 101 *Yale L.J.* 331, 413-14 (1991).

n127. See, e.g., *Bell v. United States*, 349 U.S. 81, 83 (1955) (Frankfurter, J.) ("It may fairly be said to be a presupposition of our law to resolve doubts in the enforcement of a penal code against the imposition of a harsher punishment."). See generally Dan M. Kahan, Lenity and Federal Common Law Crimes, 1994 *Sup. Ct. Rev.* 345 (1994) [hereinafter Kahan, Lenity] (describing and critiquing this rule).

n128. See, e.g., *United States v. Bass*, 404 U.S. 336, 349 (1971).

n129. 470 P.2d 617 (Cal. 1970).

n130. *Keeler*, 470 P.2d at 631.

n131. *Cal. Penal Code* 4 (2004).

n132. Livingston Hall, *Strict or Liberal Construction of Penal Statutes*, 48 *Harv. L. Rev.* 748, 752-54 (1935).

n133. Kahan, Lenity, *supra* note 127, at 382-84.

n134. *Cal. Penal Code* 187(a) (2004).

n135. See *People v. Greer*, 402 N.E.2d 203, 209 (Ill. 1980) (holding a fetus is not a human being for purposes of state homicide statute).

n136. Ill. Rev. Stat. ch. 38, P 9-1.2 (2004).

n137. See *Jones v. United States*, 308 F.2d 307 (D.C. Cir. 1962) (recognizing the law of omissions); Model Penal Code 2.01(3) (Proposed Official Draft 1962) (same).

n138. See generally John Kleinig, *Good Samaritanism*, 5 *Phil. & Pub. Aff.* 382 (1976); Daniel B. Yeager, *A Radical Community of Aid: A Rejoinder to Opponents of Affirmative Duties to Help Strangers*, 71 *Wash. U. L.Q.* 1 (1993).

n139. See Paul Butler, *Much Respect: Toward a Hip-Hop Theory of Punishment*, 56 *Stan. L. Rev.* 983 (2004); Pamela S. Karlan, *Convictions and Doubts: Retribution, Representation, and the Debate over Felon Disenfranchisement*, 56 *Stan. L. Rev.* 1147 (2004); Dorothy E. Roberts, *The Social and Moral Cost of Mass Incarceration in African American Communities*, 56 *Stan. L. Rev.* 1271 (2004).

n140. See Stephanos Bibas, *The Real-World Shift in Criminal Procedure*, 93 *J. Crim. L. & Criminology* 789 (2003) (reviewing criminal procedure casebooks, Ronald Jay Allen, William J. Stuntz, Joseph L. Hoffman & Debra A. Livingston, *Comprehensive Criminal Procedure* (2001) and Marc L. Miller & Ronald F. Wright,

Criminal Procedures: Cases, Statutes, and Executive Materials (2001), and noting a nascent shift from a focus on Supreme Court cases to real world topics such as politics, race, and real-world prosecutorial practices).