Criminal Law
Law 230
Professor Murray

We will meet on Tuesday, August 21 at 2:30 p.m. in Room 145 to briefly get acquainted. Our first full class will be on Wednesday, August 22, at 11:20 a.m. in Room 145. The casebook for this course is Dressler, Cases and Materials on Criminal Law (5th ed. 2009). The casebook is available for purchase at the bookstore. For the first class meeting, please read pages 1-5 ("Nature, Sources, and Limits of the Criminal Law") of the casebook.

If you have not yet purchased the casebook, a copy of the first reading assignment is attached. It is also available for download from the class website, which is hosted through Bspace.

I am looking forward to meeting you. Welcome to Boalt!

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CASES AND MATERIALS ON
CRIMINAL LAW

Fifth Edition

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CHAPTER 1

INTRODUCTION: SETTING THE STAGE

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A. NATURE, SOURCES, AND LIMITS OF THE CRIMINAL LAW

HENRY M. HART, JR.—THE AIMS OF THE CRIMINAL LAW

23 Law and Contemporary Problems 401 (1958), 402–406

* * * What do we mean by "crime" and "criminal"? Or, put more accurately, what should we understand to be "the method of the criminal law," the use of which is in question? This latter way of formulating the preliminary inquiry is more accurate, because it pictures the criminal law as a process, a way of doing something, which is what it is. * * *

What then are the characteristics of this method?

1. The method operates by means of a series of directions, or commands, formulated in general terms, telling people what they must or must not do. Mostly, the commands of the criminal law are "must-nots," or prohibitions, which can be satisfied by inaction. "Do not murder, rape, or rob." But some of them are "musts," or affirmative requirements, which can be satisfied only by taking a specifically, or relatively specifically, described kind of action. "Support your wife and children," and "File your income tax return."

2. The commands are taken as valid and binding upon all those who fall within their terms when the time comes for complying with them, whether or not they have been formulated in advance in a single authoritative set of words. They speak to members of the community, in other words, in the community's behalf, with all the power and prestige of the community behind them.

3. The commands are subject to one or more sanctions for disobedience which the community is prepared to enforce.

Thus far, it will be noticed, nothing has been said about the criminal law which is not true also of a large part of the noncriminal, or civil, law. The law of torts, the law of contracts, and almost every other branch of private law that can be mentioned operate, too, with general directions prohibiting or requiring described types of conduct, and the community's

tribunals enforce these commands. What, then, is distinctive about the method of the criminal law?

Can crimes be distinguished from civil wrongs on the ground that they constitute injuries to society generally which society is interested in preventing? The difficulty is that society is interested also in the due fulfillment of contracts and the avoidance of traffic accidents and most of the other stuff of civil litigation. The civil law is framed and interpreted and enforced with a constant eye to these social interests. Does the distinction lie in the fact that proceedings to enforce the criminal law are instituted by public officials rather than private complainants? The difficulty is that public officers may also bring many kinds of "civil" enforcement actions—for an injunction, for the recovery of a "civil" penalty, or even for the detention of the defendant by public authority. Is the distinction, then, in the peculiar character of what is done to people who are adjudged to be criminals? The difficulty is that, with the possible exception of death, exactly the same kinds of unpleasant consequences, objectively considered, can be and are visited upon unsuccessful defendants in civil proceedings.

If one were to judge from the notions apparently underlying many judicial opinions, and the overt language even of some of them, the solution of the puzzle is simply that a crime is anything which is *called* a crime, and a criminal penalty is simply the penalty provided for doing anything which has been given that name. So vacant a concept is a betrayal of intellectual bankruptcy. * * * [A] conviction for crime is a distinctive and serious matter—a something, and not a nothing. What is that something?

4. What distinguishes a criminal from a civil sanction and all that distinguishes it, it is ventured, is the judgment of community condemnation which accompanies and justifies its imposition. As Professor Gardner wrote not long ago, in a distinct but cognate connection:[13]

> The essence of punishment for moral delinquency lies in the criminal conviction itself. One may lose more money on the stock market than in a court-room; a prisoner of war camp may well provide a harsher environment than a state prison; death on the field of battle has the same physical characteristics as death by sentence of law. It is the expression of the community's hatred, fear, or contempt for the convict which alone characterizes physical hardship as punishment.

If this is what a "criminal" penalty is, then we can say readily enough what a "crime" is. It is not simply anything which a legislature chooses to call a "crime." It is not simply antisocial conduct which public officers are given a responsibility to suppress. It is not simply any conduct to which a legislature chooses to attach a "criminal" penalty. It is conduct which, if

13. Gardner, *Bailey v. Richardson and the Constitution of the United States,* 33 B.U.L.Rev. 176, 193 (1953). * * *

duly shown to have taken place, will incur a formal and solemn pronouncement of the moral condemnation of the community.

5. The method of the criminal law, of course, involves something more than the threat (and, on due occasion, the expression) of community condemnation of antisocial conduct. It involves, in addition, the threat (and, on due occasion, the imposition) of unpleasant physical consequences, commonly called punishment. But if Professor Gardner is right, these added consequences take their character as punishment from the condemnation which precedes them and serves as the warrant for their infliction. Indeed, the condemnation plus the added consequences may well be considered, compendiously, as constituting the punishment. Otherwise, it would be necessary to think of a convicted criminal as going unpunished if the imposition or execution of his sentence is suspended.

In traditional thought and speech, the ideas of crime and punishment have been inseparable; the consequences of conviction for crime have been described as a matter of course as "punishment." The Constitution of the United States and its amendments, for example, use this word or its verb form in relation to criminal offenses no less than six times. Today, "treatment" has become a fashionable euphemism for the older, ugly word. * * * [T]o the extent that it dissociates the treatment of criminals from the social condemnation of their conduct which is implicit in their conviction, there is danger that it will confuse thought and do a disservice.

At least under existing law, there is a vital difference between the situation of a patient who has been committed to a mental hospital and the situation of an inmate of a state penitentiary. The core of the difference is precisely that the patient has not incurred the moral condemnation of his community, whereas the convict has.

NOTES AND QUESTIONS

1. Two scholars have defined a crime as "any social harm defined and made punishable by law." Rollin M. Perkins & Ronald N. Boyce, Criminal Law 12 (3d ed. 1982). Is this definition helpful? Why, or why not? What do you think Professor Hart, supra, would say about this definition?

2. *The increasingly thin line between the "criminal" and "civil" methods of the law.* According to the preceding extract from Professor Hart's article, what is it that distinguishes a crime and the criminal process, on the one hand, from other legal directives and the civil process, on the other hand?

The criminal/civil divide has narrowed in the years since Hart's article was published. The civil law has taken on characteristics of the criminal law, and vice-versa. As you proceed with your studies, you should take note of those features of the law that seem to have blurred the criminal/civil distinction. Ask yourself whether there is good reason to preserve the distinct nature of criminal liability as it is described by Hart.

3. *Sources of American criminal law: the common law beginning.* The roots of American criminal law are found in English soil. The early colonists

brought to this country, and in large part accepted as their own, the judge-made law, i.e., common law, of England. Over time, however, the American common law of crimes diverged in key respects from the English version.

Beginning in the late nineteenth century, many state legislatures asserted authority to enact criminal statutes. At first, they used their power to supplement the common law, but eventually they replaced it by legislation. Today, in every state and in the federal system, legislators, rather than judges, exercise primary responsibility for defining criminal conduct and for devising the rules of criminal responsibility.

4. *The legislature's role.* Professor Hart, supra, at 412, has explained the legislature's perspective in criminal lawmaking as follows:

> A legislature deals with crimes always in advance of their commission * * *. It deals with them not by condemnation and punishment, but only by threat of condemnation and punishment, *to be imposed always by other agencies*. It deals with them always by directions formulated in *general terms*. The primary parts of the directions have always to be interpreted and applied by the private persons—the potential offenders—to whom they are initially addressed. In the event of a breach or claim of breach, both the primary and the remedial parts must be interpreted and applied by various officials—police, prosecuting attorneys, trial judges and jurors, appellate judges, and probation, prison, and parole authorities—responsible for their enforcement. The attitudes, capacities, and practical conditions of work of these officials often put severe limits upon the ability of the legislature to accomplish what it sets out to accomplish.
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> If the primary parts of a general direction are to work successfully in any particular instance, otherwise than by fortunate accident, four conditions have always to be satisfied: (1) the primary addressee who is supposed to conform his conduct to the direction must know (a) of its existence, and (b) of its content in relevant respects; (2) he must know about the circumstances of fact which make the abstract terms of the direction applicable in the particular instance; (3) he must be able to comply with it; and (4) he must be willing to do so.

Beyond the matter of efficacy, is it *fair* to convict a person if one or more of these conditions are not satisfied? Why, or why not?

5. *Limits on legislative lawmaking: the Constitution.* Legislators do not have unlimited lawmaking power. Their actions are subject to federal and state constitutional law. For example, the United States Constitution prohibits *ex post facto* legislation (Article 1, §§ 9 and 10) and cruel and unusual punishment (Eighth Amendment), and provides that persons may not be deprived of life, liberty or property without due process of law (Fifth and Fourteenth Amendments). The study of the criminal law, therefore, necessarily includes consideration of these and other constitutional provisions.

Constitutional issues raise competing policy concerns. On the one hand, the doctrine of federalism teaches that each State has sovereign authority to promulgate and enforce its own criminal laws; and, pursuant to the doctrine of separation of powers, the legislative branch of government, rather than the judiciary, is now considered the appropriate lawmaking body. Therefore, when

a *federal* court declares that a *state* statute is unconstitutional, it runs the risk of violating principles of federalism and of usurping legislative authority. On the other hand, President (later Chief Justice) William Howard Taft once pointed out that "[c]onstitutions are checks upon the hasty action of the majority. They are self-imposed restraints of a whole people upon a majority of them to secure sober action and a respect for the rights of the minority." H.R.J.Res. 4, 62nd Cong., 1st Sess., 47 Cong.Rec. 4 (1911). Since legislative bodies typically represent the will of the majority, it is usually the responsibility of the judiciary to ensure that the rights of the minority are respected. Therefore, if courts defer too readily to legislatures, they run the risk of abdicating their responsibility for enforcing the Constitution.

6. *The present-day role of the judiciary.* Modern courts do not simply pass upon the constitutionality of legislation. They also play a vital role in the ascertainment of guilt in individual cases by interpreting criminal statutes. This role comes into play when a legislature has drafted a statute that is subject to reasonable dispute as to its meaning. In such circumstances there have developed a number of "presumptions with which courts approach debatable issues of interpretation." Hart, supra, at 435. As you proceed through this coursebook you will become familiar with some of these "presumptions."

7. *Model Penal Code.* Until relatively recently, most state "criminal codes" were little more than collections of statutes, enacted by legislators in piecemeal fashion over many decades, defining various crimes and the punishments therefor.

These penal codes left much to be desired. First, not all common law crimes and defenses were codified, which meant that courts had to determine whether these gaps were intended or inadvertent. Second, many statutory systems were silent regarding essential penal doctrines, such as accomplice liability. Third, criminal codes typically included overlapping, even conflicting, penal statutes. Fourth, many codes applied internally inconsistent penological principles.

In order to bring coherence to the criminal law, the American Law Institute, an organization composed of eminent judges, lawyers, and law professors, set out in 1952 to develop a model code. A decade later, the Institute adopted and published the Model Penal Code and Commentaries thereto. Key portions of the Code are set out in the appendix to this casebook.

The Model Penal Code has greatly influenced criminal law reform. Some states have adopted major portions of the Code. In other jurisdictions, courts look to it for guidance to fill holes in their own statutory systems. Perhaps most usefully, the Commentaries to the specific provisions of the Model Penal Code have shaped the reform debate in many state legislatures. For a fuller discussion of the status of the criminal law before the adoption of the Model Penal Code, see Sanford H. Kadish, *The Model Penal Code's Historical Antecedents,* 19 Rutgers L.J. 521 (1988). For a critical analysis of modern criminal codes, including an effort to rank them in terms of effectiveness, see Paul H. Robinson, Michael T. Cahill, & Usman Mohammad, *The Five Worst (and Five Best) American Criminal Codes,* 95 Nw. U. L. Rev. 1 (2000).