

# Criminal Law Outline<sup>1</sup>

Joseph Mornin  
Berkeley Law School  
joseph@mornin.org

Fall 2012

<sup>1</sup>For Criminal Law with Professor Melissa Murray, Berkeley Law School, Fall 2012.

# Contents

<b>1</b>	<b>Basic Principles of Criminal Law</b>	<b>2</b>
1.1	Introduction . . . . .	2
1.2	Principles of Punishment . . . . .	3
1.2.1	Utilitarianism . . . . .	3
1.2.2	Retributivism . . . . .	4
1.2.3	Justifying Punishment . . . . .	4
1.2.3.1	<i>The Queen v. Dudley and Stephens</i> . . . . .	4
1.2.3.2	<i>People v. Du</i> . . . . .	4
1.3	Proportionality of Punishment . . . . .	5
1.3.1	General Principles . . . . .	5
1.3.2	Constitutional Principles . . . . .	6
1.3.2.1	<i>Coker v. Georgia</i> . . . . .	6
1.3.2.2	<i>Ewing v. California</i> . . . . .	6

# 1 Basic Principles of Criminal Law

## 1.1 Introduction

1. Henry Hart argues that criminal law is a method with five features:
  - (a) It operates by a series of commands (“don’t kill or steal”).
  - (b) A community makes the commands binding.
  - (c) There are sanctions for disobeying the commands.
  - (d) The distinction between civil and criminal sanctions is that criminal violations draw a community’s moral condemnation.
  - (e) Violations are punished.
2. Murray: laws are framed as conditions (“if you do x, then y”—e.g., punishment), emphasizing agency and choice.
3. *nulla poena sine lege*: no punishment without law authorizing it.
4. Sources of criminal law:
  - (a) Codification (statutes, administrative rules, etc.).
  - (b) Common law (based on the English system, as distinct from a civil-law system).
  - (c) Case law.
  - (d) Model Penal Code.
5. What distinguishes criminal punishment?
  - (a) Criminal penalties can restrain personal liberty (but civil penalties don’t).
  - (b) Moral stigma.
  - (c) Judgment is collective—it isn’t about two parties.<sup>1</sup>
6. **Probable cause** is necessary to make an arrest.
7. **Indictment** by a grand jury is usually necessary before a case can go to trial.
8. Sixth Amendment guarantees a right to a speedy and public trial, by an impartial jury.
9. **Due process clauses** in the Fifth and Fourteenth amendments guarantee persuasion **beyond a reasonable doubt** (as determined by the factfinder).

---

<sup>1</sup>See Schelling, “Ethics, Law, and the Exercise of Self-Command.”

10. What does it mean to prove something “beyond a reasonable doubt?”  
*Owens v. State*: Driver was found drunk and asleep behind the wheel of a running car in a private driveway. Circumstantial evidence gives equal weight to two interpretations of the facts: either he had just arrived (guilty) or had not yet left (not guilty). If each interpretation is equally likely, the factfinder could not fairly choose the guilty option beyond a reasonable doubt. But after analyzing the evidence, the court finds “the totality of the circumstances are, in the last analysis, inconsistent with a reasonable hypothesis of innocence.” The court affirms the conviction of driving while intoxicated.
11. Can you satisfy the burden of proof with only circumstantial evidence?
12. What is required to meet the reasonable doubt standard?
13. How should a judge instruct a jury on the definition of “reasonable doubt”?

## 1.2 Principles of Punishment

1. Some types of punishment: prison, fines, community service, shaming.
2. Two key questions:
  - (a) Who should be punished?
  - (b) How much punishment is appropriate?
3. Two predominant (and non-mutually-exclusive) theories of punishment: **retributivism** and **utilitarianism**

### 1.2.1 Utilitarianism

Punishment is justified because it’s useful.

1. Jeremy Bentham: the **principle of utility** evaluates actions in light of their effect on the happiness of the interested party. Laws aim to augment a community’s total happiness.
2. Kent Greenawalt: “Since punishment involves pain, it can be justified only if it accomplishes enough good consequences to outweigh this harm.”<sup>2</sup> The consequences of an action determine its morality.
3. Benefits of utilitarian punishment:
  - (a) General deterrence (i.e., discourage an action from occurring in a community).
  - (b) Specific deterrence (i.e., discourage a specific person from doing something).
  - (c) Incapacitation.
  - (d) Reform.

---

<sup>2</sup>Casebook p. 35.

### 1.2.2 Retributivism

Punishment is justified because criminals deserve it.

1. Michael Moore: “the desert of an offender is a sufficient reason to punish him or her.”<sup>3</sup>
2. Immanuel Kant: penal law is a categorical imperative.
3. James Fitzjames Stephen: **assaultive retribution** holds that hatred and vengeance in the name of morality are socially beneficial; criminals are “noxious insects.”<sup>4</sup>
4. Herbert Morris: **protective retribution** holds that rules exist to provide collective benefit; they guards against unfair advantage for freeriders; if somebody cheats, punishment evens the score.
5. Jeffrey G. Murphy & Jean Hampton: wrongdoers implicitly place their own value above their victims’; “retributive punishment is the defeat of the wrongdoer at the hands of the victim.”<sup>5</sup>

### 1.2.3 Justifying Punishment

**1.2.3.1 *The Queen v. Dudley and Stephens*** Dudley, Stephens, Brooks, and Parker were castaways on a boat 1600 miles from the Cape of Good Hope. They quickly ran out of food and water. After twenty days, Dudley and Stephens decided to kill and eat Parker (with Brooks dissenting). They ate Parkers body for four days, at which point they were rescued and brought to trial for murder.

The case highlights the differences between retributive and utilitarian theories of justice. Parker was weak and unlikely to have survived the last four days if he hadnt been killed. Dudley and Stephens likely wouldnt have survived, either. Moreover, Dudley and Stephens had family responsibilities, while Parker was a drifter. A retributive response would hold that Dudley and Stephens are morally culpable and should be found guilty regardless of the mitigating factors. A utilitarian response would find them not guilty on the recognition of a net benefit for all parties involved.

**1.2.3.2 *People v. Du*** The defendant, Soon Ja Du, a 51-year-old woman, owned a liquor store in LA. A 15-year-old girl, Latasha Harlins, in the store put a bottle of orange juice in her backpack. It’s not clear whether she intended to pay. A fight ensued, in which Du was injured. As Harlins was leaving, Du pulled out a gun (which had been previously stolen, heavily modified, and then recovered) and shot Harlins in the back of the head. She testified that she did not intend to kill Harlins. The jury rejected this defense, convicting her of voluntary manslaughter.

---

<sup>3</sup>Casebook p. 39

<sup>4</sup>Casebook p. 42.

<sup>5</sup>Casebook p. 46.

Du's probation officer concluded "would be most unlikely to repeat this or any other crime." The sentencing court sentenced Du to ten years, but suspended the sentence and placed her on probation. She wrote, "it is my opinion that justice is never served when public opinion, prejudice, revenge or unwarranted sympathy are considered by a sentencing court in resolving a case." She tests Du's case against seven goals of sentencing:

1. Protect society.
2. Punish the defendant.
3. Encourage the defendant to lead a law-abiding life.
4. Deter others.
5. Incapacitation.
6. Secure restitution for the victim.
7. Seek uniformity in sentencing.

None of these reasons is sufficient to justify prison time. The only somewhat convincing motivation for prison time is the strong presumption against probation when guns are involved. But this is an unusual case, she concludes, "which overcomes the statutory presumption against probation."

## 1.3 Proportionality of Punishment

### 1.3.1 General Principles

1. Kant: The "right of retaliation" (*jus talionis*) is "the only principle which in regulating a public court...can definitely assign both the quality and the quantity of a just penalty."<sup>6</sup> Murderers must be punished with death.
2. Bentham: Punishment has four goals:
  - (a) General deterrence.
  - (b) Encourage criminals to choose the lesser of two offenses.
  - (c) Encourage criminals to do no more mischief than necessary.
  - (d) Punish cheaply.
3. ...and five rules:
  - (a) To effectively deter, the value of the punishment must be greater than the value of the offense.
  - (b) The greater the mischief, the greater the punishment.
  - (c) Punishment must be sufficient to induce criminals to choose the lesser of two crimes.
  - (d) Punishment must be adapted to each offense.
  - (e) Punishment should not be greater than necessary.

---

<sup>6</sup>Casebook p. 70.

### 1.3.2 Constitutional Principles

**1.3.2.1 *Coker v. Georgia*** The defendant escaped from prison, where he was serving time for multiple violent felonies. He broke into the Carvers' house, tied up Mr. Carver, and kidnapped and raped Mrs. Carver. The Supreme Court held that the Georgia jury's death sentence violated the Eighth Amendment, because rape is a crime "not involving the taking of life." In their dissent, Justices Burger and Rehnquist argue that the Eighth Amendment does not prohibit states from taking prior behavior into account. While the death penalty may be disproportionate to the current crime, it can act as an effective deterrent.

A related case, *Kennedy v. Louisiana*, involved the rape of a child. The court narrowly upheld that the death penalty was "grossly disproportionate" for rape, but Alito issued a scathing dissent questioning the argument that every murder is more "morally depraved" than every rape.

**1.3.2.2 *Ewing v. California*** Ewing stole three golf clubs from a pro shop. With multiple prior felony convictions, California's three strikes law required a minimum sentence of 25 years, which Ewing argued violated the Eighth Amendment. The court's opinion, written by Justice O'Connor, relies on Justice Kennedy's opinion in *Harmelin v. Michigan*, where he lays out a set of principles for determining proportionality:

1. The primacy of the legislature.
2. The variety of legitimate penological schemes.
3. Federalism.
4. Objectivity.
5. **The Eighth Amendment does not require strict proportionality. It only forbids "grossly disproportionate" sentences.**

The court upheld Ewing's 25-year sentence, arguing that "Ewing's sentence is justified by the State's public-safety interest in incapacitating and deterring recidivist felons..."<sup>7</sup>

Scalia concurs, but argues that the justification for the sentence has nothing to do with proportionality and everything to do with the idea that "punishment should reasonably pursue the multiple purposes of the criminal law" (incapacitation, deterrence, retribution, rehabilitation).

The dissenters compare two prior cases, *Rummel* and *Solem*, which both involved major prison sentences for recidivist felons who committed relatively small crimes. In *Solem*, the court found the sentence to be too long, and upheld the sentence in *Rummel*. *Ewing* falls in the "twilight zone" between the two. Given that ambiguity, 25 years to life is grossly disproportionate to the crime of shoplifting golf clubs.

---

<sup>7</sup>Casebook p. 85.