

Fifty Years of Criminal Law: An Opinionated Review

Sanford H. Kadish†

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Fifty Years of Criminal Law: An Opinionated Review

Sanford H. Kadish

In this preview of what is to come in the California Law Review's December 2000 Twentieth Century Symposium Issue, Professor Kadish reflects back on what he considers the past half-century's most significant developments in the substantive criminal law. The most significant, Kadish argues, is the 1962 promulgation of the Model Penal Code—a document that inspired important scholarly inquiry and a wave of criminal law codification in the states, and continues to provide highly persuasive authority to common law judges. Next, Kadish traces developments in the broad area of “ascertaining blame.” The author laments the persistence of notions of strict liability in the criminal law, including the survival of the felony-murder rule. Kadish also follows the circular path of the insanity defense from the early prevalence of the M’Naghten rule through various reforms and then back again. Also highlighted is an important development that wasn’t: the failure of the Supreme Court to constitutionalize a fault requirement in criminal law. In the next Part, Kadish identifies areas in which the criminal law has either advanced or retreated, focusing on both the decline in “morals” offenses such as prosecutions of consensual sexual activity, and the great expansion of federal crimes, including Congress’s enactment of the RICO statute and the nation’s war on drugs. Kadish then turns to the impact of feminism, noting the effect of that social movement on the law of rape and the emergence of the “battered woman’s syndrome” defense. Last, Kadish notes with disapproval the recent trend away from rehabilitation and toward severe and retributive punishment for those convicted of crimes.

INTRODUCTION

In the retrospective spirit of the approaching millennium, I propose to reflect on what’s been happening in the criminal law—most assuredly not in the criminal law of the whole millennium and not even in the whole of the criminal law—just in the part of each I can claim to have lived through and with—the substantive criminal law of the past half-century. Some may regard events in the substantive law as sideshows compared to the big-top events elsewhere. Consider, for example, the acute and sustained public fear of crime and the concomitant emergence of crime as a national

political issue; the persistence of racial prejudice in the administration of justice; the perplexities of the racial demographics of crime; the constitutionalization of police practices and criminal procedure by the Supreme Court; the growing attention to the issue of the rights of crime victims; the discovery of endemic discretion in criminal justice as a threat to rule-of-law values; the American Bar Foundation's path-breaking studies of the realities of the workings of the criminal justice system; the emergence of plea bargaining from the closet and its validation by the Supreme Court; and the disappearance and reappearance of capital punishment, as the Supreme Court backed and filled in its struggle with the constitutional issues.

These developments in the phenomenology of crime and in the administration of criminal justice are indeed the big-top events; they have captured the public's attention and their impact on people's lives has been dramatic and consequential. Next to them, issues of the substantive criminal law may seem to some mere professorial distractions. But that would be mistaken. For in the end it is the substantive law that bounds and channels the exercise of state power to condemn and punish individuals. An enlightened substantive law does not guarantee justice; it will not by itself foreclose the brutal, unfair, and incompetent administration of the laws. But a grossly defective substantive law invites all these evils.

A word about my choice of matters to include in this survey. The event of looming significance this past half-century was the promulgation of the Model Penal Code. I start, therefore, with its three chief contributions: the codification of American criminal law, the maturation of American criminal law scholarship, and the advancement in our understanding of the requirement of *mens rea*. The next group of developments I discuss is notable not because the developments represent important change but because they reflect the law's continued grappling with the most distinctive and fundamental feature of the criminal law, the ascertainment of blame. The subjects in this group include the persistence of liability without fault (or appropriate fault); the developments in legal insanity and other excuses; the failure to constitutionalize the general part of the criminal law; and the law of justification. The two items that follow I've included because they are products of important changes in the larger American social scene: developments in criminalization (notably the reduction of morals offenses and the expansion of federal crime) and the impact of feminism on the law. The final event I discuss is by any measure my one big-top event: the displacement of reform and correction by severe retributive punishment and the resulting skyrocketing of prison populations.

These developments aren't everything by any means; they are simply what strike me as the matters most worth commenting on. I try to say why

in the body of this Essay. I do recognize, however, that others might with equal reason have chosen differently. Still, as my title announces, this is an opinionated review. One more thing. There's nothing new here for those who till these fields. But after all, that's the point of this enterprise. Perhaps there is perspective to be gained by a long backward look, and maybe even a lesson or two. And even if not, the parade of yesterdays offers the occasion for hurrahs and harrumphs as the floats go by. At all events, concern with our past is a human indulgence never known to be dangerous to health.

I

THE MODEL PENAL CODE

Criminal code drafting has been a project in this country almost from its founding. Even Thomas Jefferson took a hand at it,¹ followed in 1826 by Edward Livingston of Louisiana who produced the first code in the Bentham mold—a reforming, root-and-branch, comprehensive rethinking.² Regrettably, however, to no avail; Louisiana wasn't ready for it. Later in the century David Dudley Field's codification efforts, part of a broad-ranging movement to codify the entire law of the United States, produced a criminal code (which was more than a systematic restatement of existing law, but not much more) that was adopted in many of the new Western states, as well as New York (and in California we're still living under it).³ Thereafter, no states adopted codes until after the war, except for Louisiana, which adopted a new criminal code in 1942.⁴

This long neglect revealed itself in a substantive criminal law that was often archaic, inconsistent, unfair, and unprincipled,⁵ and was saved from disaster only by the sensible exercise of discretion by prosecutors and judges. This state of affairs was well recognized early on by academic commentators and commissions of inquiry,⁶ but state legislatures remained indifferent. Things began to move in the thirties. New York and Wisconsin commissions, for example, undertook projects of reform, and most significantly, it turned out, the American Law Institute, acting on a suggestion from President Roosevelt, approved the preparation of a model criminal

1. See Charles McClain, *Criminal Law Reform: Historical Development in the United States*, in 2 *ENCYCLOPEDIA OF CRIME AND JUSTICE* 501 (Sanford H. Kadish ed., 1983).

2. See Sanford H. Kadish, *Codifiers of Criminal Law: Wechsler's Predecessors*, 78 *COLUM. L. REV.* 1098, 1099 (1978).

3. See *id.* at 1137; see also *infra* note 14.

4. See Dale E. Bennett, *The Louisiana Criminal Code: A Comparison with Prior Louisiana Criminal Law*, 5 *LA. L. REV.* 6 (1942).

5. See Herbert Wechsler, *The Challenge of a Model Penal Code*, 65 *HARV. L. REV.* 1097, 1100-01 (1952).

6. See, e.g., *CRIMINAL JUSTICE IN CLEVELAND* 588, 604-05 (Roscoe Pound & Felix Frankfurter eds., 1922); William E. Mikell, *The Proposed Criminal Code of Pennsylvania*, 71 *U. PA. L. REV.* 99 (1923).

code.⁷ And then in 1937 Professors Wechsler and Michael produced their seminal and now classic article, *A Rationale of the Law of Homicide*,⁸ which offered the kind of systematic re-examination of the law that was the indispensable first step to comprehensive reform. Unfortunately, however, first the Depression and then World War II interrupted further progress.

After the war the American Law Institute resumed its consideration of a model criminal code, and finally, assisted by financial support from foundations, it undertook the enterprise that was to produce the most consequential criminal law code in the history of Anglo-American law—the Model Penal Code. Herbert Wechsler was its Chief Reporter; Louis B. Schwartz its Associate Reporter. Recalling Lord Radcliffe's counsel that "every system of jurisprudence needs . . . a constant preoccupation with the task of relating its rules and principles to the fundamental moral assumptions of the society to which it belongs," Wechsler observed that the code would encourage legislatures to "determine the content of the penal law, the prohibitions it lays down, the excuses it admits, the sanctions it employs, and the range of authority that it confers, by a contemporary reasoned judgment."⁹ The project got underway at the beginning of our fifty-year period and, assisted by cadres of legal and social science scholars, the Reporters submitted their final product in 1962.¹⁰ The Code made many contributions, but three stand out: its contributions to codification, to scholarship, and to the understanding of *mens rea*.

A. *The Codification of American Criminal Law*

The success of the Code in stimulating American jurisdictions to codify or recodify their criminal law was unprecedented. Spurred by the continuing output of the Reporters' drafts and commentary and finally by the appearance of the Proposed Final Draft of the Model Penal Code in 1962, a wave of criminal law codification ensued. Between 1962, when the Illinois Code became effective, and 1983, when the Wyoming Code was adopted, thirty-four revised codes were enacted.¹¹ Not all of the revised state codes were equally reformative. Some made only modest reforms, but others, like the codes of New Jersey, New York, Pennsylvania, and Oregon, adhered more closely to the reformative spirit as well as the text of the Model Penal Code. In all cases, however, the issues of the criminal law were systematically re-examined at last. The Code also had significant impact on

7. See AMERICAN LAW INSTITUTE, REPORTS IN RELATION TO FUTURE WORK OF THE INSTITUTE 10 (1935). A brief account appears in Herbert Wechsler & Jerome Michael, *A Rationale of the Law of Homicide I*, 37 COLUM. L. REV. 701, 701 n.1 (1937).

*8. Wechsler & Michael, *supra* note 7.

9. Herbert Wechsler, *The Model Penal Code and the Codification of American Criminal Law*, in CRIME, CRIMINOLOGY AND PUBLIC POLICY 419, 424-25 (Roger Hood ed., 1976).

10. See *id.* at 420-21.

11. See Herbert Wechsler, *Foreword to MODEL PENAL CODE* at xi (1985).

judge-made law. State and federal courts commonly came to use its text and commentary as persuasive, if not authoritative, even in the absence of legislative reform.¹²

With all this success there had to be some failures. The greatest disappointment was Congress's inability to enact a new proposed federal code, which had been produced by the National Commission on Reform of Federal Criminal Laws under the leadership of Professor Louis B. Schwartz.¹³ But there were other failures as well. A California legislative committee, for example, summarily dismissed its professorial code drafters (myself included) under pressure from representatives of the State District Attorneys Association, who thought our proposals were too progressive for the times.¹⁴ Still, what is most surprising is that the failures were so few.

What accounts for the success of the Code? No doubt many factors. Perhaps a postwar spirit of rebuilding, public optimism, and economic recovery. Perhaps also the race riots and antiwar protests of the sixties and early seventies, which drew public, legislative, and media attention to the criminal law in all its guises. Recall the Ford Foundation grants in the criminal law area, the American Law Institute's Model Pre-Arrest Code, the American Bar Foundation reports on the administration of criminal justice. In short, the criminal law became hot. But one further reason for the Code's success was the character of the Code itself—not just its high competence, but what has been called its "principled pragmatism."¹⁵ It sought to be critical and reformist, but more Fabian than radical, and it was drafted with acute awareness that it was to serve as a model for American legislatures in the late twentieth century, not as a visionary code for Erewhon. In this respect it was far more like Macaulay's code for India than Livingston's for Louisiana.

12. Between 1959 and 1984, provisions of the Code were cited by appellate courts in almost 1700 cases. *See id.* at xi-xii.

13. *See* NATIONAL COMMISSION ON REFORM OF FEDERAL CRIMINAL LAWS, STUDY DRAFT OF A NEW FEDERAL CRIMINAL CODE (1970). These proposals stimulated over a decade of extensive congressional consideration only to founder in the end, leaving the disarray of archaic and illogical criminal laws as they were. *See* Robert H. Joost, *Viewing the Sentencing Guidelines as a Product of the Federal Criminal Code Effort*, 7 *FED. SENTENCING REP.* 118 (1994).

14. *See* Philip Hager, *Fired Scholars Defend Penal Code Revisions*, L.A. TIMES, Sept. 22, 1969, at 3. Since the proposals largely followed those of the Model Penal Code the hostility may perhaps be explained by the apprehensions of Governor Reagan's administration over the civil disturbances of the sixties. Senator Grunsky, the chairman of the committee, was quoted as saying: "[W]e have strong objections from law enforcement about the direction they were taking. . . . Knowing how Gov. Reagan feels on some of these points . . . I was a little nervous that the governor might blue-pencil our budget." *Id.* Those "points" were, according to Senator Grunsky, our proposals to decriminalize deviant sex acts between consenting adults, to reduce the punishment for marijuana possession, and to allow "a defendant's mental state to influence the decision on guilt or innocence." Letter from Herbert L. Packer, Professor, Stanford University School of Law, to *Stanford Law Review*, available in Letters, 22 *STAN. L. REV.* 160, 162 (1969).

15. Herbert L. Packer, *The Model Penal Code and Beyond*, 63 *COLUM. L. REV.* 594, 594 (1963). Wechsler warmly embraced that characterization in *Foreword*, 63 *COLUM. L. REV.* 589, 590 (1963).

B. *The Coming of Age of Criminal Law Scholarship*

Beyond its impact on reform and codification of state law, the Code served to reorient scholarship from a preoccupation with chronicling the criminal law toward a critical legislative perspective. At least up until the early eighties the Code and its commentaries remained at the center of criminal law scholarship.¹⁶ Moreover, its commentaries constituted the first comprehensive treatise in this country devoted to rethinking the premises and principles of the criminal law. Other areas of law have had their great legal treatises—*Wigmore on Evidence*, *Williston on Contracts*, *Seavey on Agency*, *Prosser on Torts*—but the few criminal law treatises were not up to those models.¹⁷ The Code's commentaries did for American criminal law what Glanville Williams's treatises¹⁸ did for English criminal law—it raised the study of the substantive criminal law to a new plane. In the words of Herbert Packer, it made the subject of the substantive criminal law once more "intellectually respectab[le]."¹⁹

The Model Penal Code project and the revival of state code writing that it caused made for heady days for criminal law teaching and scholarship in the late fifties and sixties. The writing that the Code stimulated had primarily a legislative direction, a sort of dialogue with the Code (or its earlier drafts), and its commentaries on how the various problems of the criminal law should be resolved and formulated in a new code. Much of the writing also bore the imprint of the intellectual style of the Code's commentaries and of the earlier work of Herbert Wechsler that laid its foundations²⁰—Bentham-like rational instrumental means-ends assessments of how the common good could be furthered by deterring undesirable behavior and incapacitating dangerous actors.²¹

A quite different style of criminal law scholarship, which has come to be known as criminal law theory, focuses on the moral and philosophical features of the practice of blaming and punishing. Unlike research produced by codification efforts, its primary objective is not instrumental, but understanding the complexities of such concepts as responsibility,

16. As Peter Low observed, the Code defined "the terms of debate on virtually every significant issue involved in the definition of crime and the recognition of defenses." Peter W. Low, *The Model Penal Code, The Common Law, and Mistakes of Fact: Recklessness, Negligence, or Strict Liability?*, 19 RUTGERS L.J. 539, 542 (1988).

17. See Wechsler, *supra* note 5, at 1098-99.

18. See GLANVILLE WILLIAMS, *THE CRIMINAL LAW: THE GENERAL PART* (1953); GLANVILLE WILLIAMS, *THE CRIMINAL LAW: THE GENERAL PART* (2d ed. 1961) [hereinafter WILLIAMS, *CRIMINAL LAW* (2d ed.)].

19. Packer, *supra* note 15, at 594 ("No treatise (for that is what the Code is) has so advanced thought about its subject, not even Wigmore's. The reporters and their associates have restored intellectual respectability to the substantive criminal law, in general and in detail.")

20. See Wechsler & Michael, *supra* note 7; Jerome Michael & Herbert Wechsler, *A Rationale of the Law of Homicide II*, 37 COLUM. L. REV. 1261 (1937).

21. See, e.g., Wechsler & Michael, *supra* note 7, at 730.

accountability, imputability, excusing, and justifying in an institutional framework. Traditionally there was little of this in the American scene.²² It is almost literally true that it began in this century with the appearance of essays by H.L.A. Hart in the late fifties and early sixties—essays compiled in his 1968 book, *Punishment and Responsibility—Essays in the Philosophy of Law*.²³ Since then it has become an established genre of criminal law scholarship.

George Fletcher has ventured the interesting speculation that theory fell into the doldrums in the seventies and eighties (only now making a comeback) and that the culprit was the Model Penal Code, which in his view stifled theoretical inquiry by seeming to offer in “codified black letter” a definitive solution to the hard questions of the criminal law.²⁴ Not guilty, I think. First, there was a good deal of theoretical work in this period, work of real consequence, which includes Fletcher’s own acclaimed work, *Rethinking the Criminal Law*.²⁵ Second, while there was a falling off of academic interest in the criminal law, it was across the board, not confined to theory; and I don’t think the cause was the stifling effect of the Code’s formulations. Just as the excitement and energy of the Code effort and the state and federal codification projects that followed brought criminal law scholarship to life—including theoretical scholarship, of which there surely was precious little before the Model Penal Code—so as those enterprises spent themselves young scholars turned to other fields where more seemed to be going on, fields like environmental law, civil rights law, and law and economics. Rather than the image of the Code’s solutions stifling theory, I find it more plausible to think of the Code as a tide that captured the attention of new cadres of scholars as it flooded, and that lost it as it ebbed. In fact, criminal law theory would probably have remained as dormant as all the rest of criminal law scholarship without the sustained attention that the Code project brought to the criminal law.

22. An exception is JEROME HALL, *GENERAL PRINCIPLES OF CRIMINAL LAW* (1947).

23. Only almost, of course. There were other important contributions in the early days, for example, JOEL FEINBERG, *DOING & DESERVING* (1970); EDMUND L. PINCOFFS, *THE RATIONALE OF LEGAL PUNISHMENT* (1966); Henry M. Hart, Jr., *The Aims of the Criminal Law*, 23 *LAW & CONTEMP. PROBS.* 401 (1958).

24. George P. Fletcher, *The Fall and Rise of Criminal Theory*, 1 *BUFF. CRIM. L. REV.* 275, 278 (1998). This is just one reason Fletcher has emerged as a rare academic enemy of the whole enterprise of systematic criminal law codification. For other reasons, see his *Dogmas of the Model Penal Code*, 2 *BUFF. CRIM. L. REV.* 3 (1998). Compare the reply of Paul H. Robinson, *In Defense of the Model Penal Code: A Reply to Professor Fletcher*, 2 *BUFF. CRIM. L. REV.* 25 (1998).

25. GEORGE P. FLETCHER, *RETHINKING THE CRIMINAL LAW* (1978). In addition there were the following books by lawyers: PETER BRETT, *AN INQUIRY INTO CRIMINAL GUILT* (1963); HYMAN GROSS, *A THEORY OF CRIMINAL JUSTICE* (1979); MICHAEL S. MOORE, *LAW AND PSYCHIATRY* (1984); HERBERT MORRIS, *ON GUILT AND INNOCENCE* (1976). And by philosophers: JOEL FEINBERG, *THE MORAL LIMITS OF THE CRIMINAL LAW* (1984-1988); DOUGLAS N. HUSAK, *PHILOSOPHY OF CRIMINAL LAW* (1987); ANTHONY KENNY, *FREEWILL AND RESPONSIBILITY* (1978); C.L. TEN, *CRIME, GUILT, AND PUNISHMENT* (1987).

C. *The Clarification of Mens Rea*

Harmful acts may be done innocently; hence the long tradition of requiring proof of a culpable state of mind, a *mens rea*, in order to convict. But there has been an equally long tradition of dizzying uncertainty over "the variety, disparity and confusion . . . [of] definitions of the requisite but elusive mental element."²⁶ Often courts used epithets to identify the culpable state required, epithets such as willfully, maliciously, wantonly, or corruptly. Moralistic interpretations of the *mens rea* doctrine became prevalent, such as the so-called lesser wrong or lesser crime doctrines, which allowed conviction for a non-culpable action where the actor was culpable of a lesser crime or even just because his action was thought to be immoral.²⁷ Porous doctrines were invoked to clothe a result that analysis could not sustain, doctrines such as the distinction between general and specific intent.²⁸ The defense of mistake was often seen as a defense only if it were reasonable regardless of how the *mens rea* of the crime were defined.²⁹

The Code's *mens rea* proposals dissipated these clouds of confusion with an astute and perspicuous analysis that has been adopted in many states and has infused thinking about *mens rea* everywhere.³⁰ We have been taught to eschew the traditional epithetical and moralistic jurisprudence of *mens rea*.³¹ Instead, we now inquire whether the crime requires that the defendant have acted purposely, knowingly, recklessly, or negligently in doing the action prohibited.³² Moreover, where necessary, we may also have to ask as to each component of a described action—the action itself, the

26. *Morrisette v. United States*, 342 U.S. 246, 252 (1952).

27. See, e.g., *United States v. Collado-Gomez*, 83 F.2d 280 (2d Cir. 1937) (upholding an enhanced sentence for possession of crack cocaine with intent to sell—even though defendant had no reason to know that the drug he possessed was crack—on the theory that he knew he possessed some controlled substance); *White v. State*, 185 N.E. 64 (Ohio 1933) (upholding conviction of defendant for abandoning pregnant woman despite his lack of knowledge of the pregnancy, on the grounds that the abandonment of his wife was wrong in itself); see also WAYNE R. LAFAVE & AUSTIN W. SCOTT, JR., *CRIMINAL LAW* § 5.1(e) (2d ed. 1986).

28. See, e.g., *People v. Hood*, 462 P.2d 370, 377 (Cal. 1969) ("Specific and general intent have been notoriously difficult terms to define and apply, and a number of text writers [have] recommended that they be abandoned altogether."); see also MODEL PENAL CODE AND COMMENTARIES § 2.08 cmt. 1, at 353-54 (1985).

29. See, e.g., LA. REV. STAT. ANN. § 16 (West 1998) ("[R]easonable ignorance of fact or mistake of fact which precludes the presence of any mental element required in that crime is a defense to any prosecution for that crime."); 18 PA. CONS. STAT. § 304 (1998) (mistake that negatives a *mens rea* is a defense if "there is reasonable explanation or excuse" for the mistake).

30. See Packer, *supra* note 15; see also Ronald L. Gainer, *The Culpability Provisions of the Model Penal Code*, 19 RUTGERS L.J. 575, 580 (1988) ("[I]t may well be that everything else done in the Code is secondary.").

31. See Gainer, *supra* note 30, at 575 ("[T]he drafters succeeded in removing from the law the vestiges of language employed for the condemnation of evil, and in making it apparent that doing so was a virtue. They excised the righteous and substituted the correct.").

32. See MODEL PENAL CODE § 2.02 (1985).

circumstances of its commission, its result—which of these culpable states is required.³³

This is all old hat now, the standard stuff of the first-year criminal law class. But it was a breakthrough to articulate so lucidly and powerfully a conception of culpability requirements comprehending all crime definitions, and it has been transforming in its impact on the law and on legal education and scholarship.³⁴ Not all developments in American criminal law are looked upon with envy by our colleagues in other common law jurisdictions—hardly!—but this is surely one.

The Model Penal Code, then, taught us to think clearly about the mens rea elements of crime. But getting our concepts right doesn't solve our problems, it merely identifies them. We are left to decide whether to require any elements of culpability in defining criminal conduct, and which ones, and for what crimes and defenses, and how far to permit excusing conditions to bar conviction. I turn now to questions of this kind.

II

ASCERTAINING BLAME

Both external and internal influences shape the criminal law. The external are straightforward: Events in the world—social, cultural, economic, and political—affect how the law is made by courts and legislators. The concern with protecting the environment, which produced an expansion of federal regulatory law, much of it in the form of strict criminal liability, is an influence of this sort.³⁵ So is the rise of feminism, which changed the law of rape in America. And so is the surge in violent crime in the cities, which moved the law toward retribution and incapacitation and away from rehabilitation as sentencing objectives.³⁶ But in addition to external influences there is an influence that is internal to the criminal law system, a product of the inevitable tension, some would say contradiction,³⁷ of institutionalizing a blaming and punishment system as a means of social control—the tension between achieving the preventive purposes of the system, while at the same time adhering to the requirement of personal blameworthiness as a condition of liability. How the balance is struck is influenced by external forces, of course. But the external forces are working against an internal one—the inherent requirement of any blaming

33. See *id.* §§ 1.13(a), 2.02; see also Paul H. Robinson & Jane Grall, *Element Analysis in Defining Criminal Liability: The Model Penal Code and Beyond*, 35 STAN. L. REV. 681 (1983).

34. This is not to suggest that the Code's analysis and proposals were beyond criticism. See PAUL H. ROBINSON, *STRUCTURE AND FUNCTION IN CRIMINAL LAW* 49 (1997).

35. See *infra* Section III.B.2.

36. See *infra* Part V.

37. See, e.g., Mark Kelman, *Interpretive Construction in the Substantive Criminal Law*, 33 STAN. L. REV. 591 (1981).

system, if it is to remain one, that blame must be deserved. How has this tension worked out in the fifty years under review?

A. *The Persistence of Liability Without Fault*

Our law has long contained doctrines permitting conviction without proof of an appropriate fault. The past fifty years have seen much agonizing over these doctrines but little retreat from them.

Consider first liability without fault in its most readily recognizable form, strict liability, where no mens rea is required as to some element of the offense. Justice Jackson's opinion-essay in *Morissette*³⁸ at the inception of our period sounded the judicial themes that have not materially changed since. Strict liability was an unwelcome departure from the principles of the common law and not to be extended, but regrettably it had a place in regulatory offenses where the penalties were light and usually monetary and where the imperative of regulation was great.³⁹ Efforts to rid the law of it have not been successful. The Model Penal Code attempted a bold assault upon strict liability⁴⁰ and academic commentators have continued to rail against its use,⁴¹ pointing to alternatives that have been employed with apparent success in other jurisdictions, such as using mere negligence as the culpability element, or placing the burden on the defendant to establish the absence of any culpability.⁴² But all without success.

Indeed, it seems a fair surmise, given the expansion of governmental regulation, particularly in the new federal areas of business and industrial activity (environmental regulation is a notable example), that the number of strict liability regulatory crimes has in fact increased over the years of our concern.⁴³ Of course the responsibility is shared with the courts to the

38. *Morissette v. United States*, 342 U.S. 246 (1952) (holding that defendant may not be convicted of knowingly converting government property when he believed government had abandoned the property).

39. *See id.* at 252-56.

40. It provided that legislative silence on a culpability requirement should be construed as a requirement of recklessness, and further that any use of strict liability for regulatory purposes outside the penal code would convert the offense to a merely finable "violation." *See* MODEL PENAL CODE §§ 2.02(3), 2.05 (1985).

41. *See* HERBERT L. PACKER, *THE LIMITS OF THE CRIMINAL SANCTION* 121 (1968); Hart, *supra* note 23; Laurie L. Levenson, *Good Faith Defenses: Reshaping Strict Liability Crimes*, 78 CORNELL L. REV. 401 (1993).

42. *See, e.g.*, *Proudman v. Dayman* (1941) 67 C.L.R. 536, 540 (Austl.) (holding that the prosecution need not prove that a defendant charged with permitting unlicensed driver to operate vehicle knew that the driver lacked a license, but that defendant was entitled to present a defense of an honest and reasonable belief that driver was licensed); *Regina v. City of Sault Ste. Marie* [1978] D.L.R. 161, 172 (Can.) (proposing that a defendant be given the opportunity to prove, by a preponderance of evidence, that he exercised reasonable care); *Queen v. Strawbridge* [1970] N.Z.L.R. 909 (N.Z.) (holding that the prosecution need not prove that a defendant accused of cultivating marijuana knew that her act was illegal; but also holding that defendant may present evidence that she honestly believed her act was not unlawful); *see also* Levenson, *supra* note 41.

43. *See infra* Section III.B.2.

extent (a very large extent indeed) that statutes leave room for interpretation on the issue of strict liability. But there is some ground for believing that courts, particularly federal courts, have been less inclined than they once were to find strict liability. At least the United States Supreme Court, in interpreting federal statutes, has shown a reassuring tendency to weigh heavily against a strict liability interpretation that might sweep many innocents into the criminal net⁴⁴ (although the Justices have often disagreed on how great that danger was).⁴⁵

A less direct way of ridding the law of a culpability requirement has a certain Alice-in-Wonderland quality: retain a mens rea requirement in the definition of the crime, but keep the defendant from introducing evidence to rebut its presence. This inaneuver was used chiefly to deflect the defense that the defendant was too drunk or too mentally deficient to have possessed the required intent.

Courts have long balked at allowing evidence of intoxication as a defense, even when it was relevant to the presence of a required mens rea (as, for example, in crimes requiring an intent to do some act, like killing or robbing). The reasons appear to have been partly the aura of immorality in drinking at all, the natural reluctance to find a ground for mitigation in the choice of the defendant to put himself in the way of wrongdoing by making himself drunk, and the high association between intoxication and crimes of violence. The befuddling distinction between general and specific intent was an early doctrinal innovation to block the defense—characterizing a required intent as “general,” in contrast to “specific,” served to render the defendant’s intoxication irrelevant.⁴⁶

Most courts in our half-century have clung tenaciously to the distinction.⁴⁷ There were two main kinds of defection, however. The first came from courts who found it unacceptable to admit evidence of intoxication even in trials of specific intent crimes like assault with intent to rob. For

44. See, for example, *United States v. X-Citement Video, Inc.*, 513 U.S. 64, 72 (1994), in which the Court observed that “*Morrisette* . . . instructs that the presumption in favor of a scienter requirement should apply to each of the statutory elements that criminalize otherwise innocent conduct,” and *Liparota v. United States*, 471 U.S. 419, 426 (1985), in which the Court stressed the importance of not construing a statute as dispensing with mens rea where doing so would “criminalize a broad range of apparently innocent conduct.”

45. Compare *United States v. Freed*, 401 U.S. 601 (1971) (upholding an indictment for conspiracy to possess unregistered hand grenades despite failure of indictment to charge that defendant knew the grenades were unregistered), with *Staples v. United States*, 511 U.S. 600 (1994) (reversing conviction for possession of unregistered automatic weapon where trial judge had refused to instruct the jury that a conviction required the prosecution to prove that the defendant knew the gun would fire automatically).

46. See David McCord, *The English and American History of Voluntary Intoxication to Negate Mens Rea*, 11 J. LEGAL HIST. 372 (1990).

47. See, e.g., *People v. Hood*, 462 P.2d 370 (Cal. 1969). For a survey of the law of American jurisdictions, see Mitchell Keiter, *Just Say No Excuse: The Rise and Fall of the Intoxication Defense*, 87 J. CRIM. L. & CRIMINOLOGY 482 app. at 518 (1997).

these courts, the preferred move was the forthright rejection of intoxication evidence to rebut the mens rea required for any crime.⁴⁸ The other was the move of the Model Penal Code, which makes intoxication evidence irrelevant only on the issue of recklessness.⁴⁹ A fair number of states and federal courts came to accept that solution.⁵⁰ In the upshot, hardly any jurisdiction still allows the intoxication of the defendant its full logical evidentiary import.⁵¹

The defense of diminished capacity, like intoxication, is that the defendant lacks a required mens rea, though due to lessened mental capacity, rather than intoxication. While both defenses are equally unassailable in logic and principle,⁵² the defense of diminished capacity has proven somewhat less unpalatable to the courts than intoxication: Many courts, especially in capital cases, came to accept psychiatric evidence to show the defendant's incapacity to have acted with the required mens rea, at least where the mens rea was a specific intent.⁵³ But the issue was highly controversial and a somewhat larger number of courts, giving priority to practicalities over logic, came to reject the evidence.⁵⁴ The decisions reflect the traditional judicial distrust of the vagaries, uncertainties, and mysteries of psychiatric explanations, particularly when invoked to assess varying shades of capacity to perform such basic functions as intending and believing.⁵⁵ Another judicial irritant was the tendency of some psychiatric

48. See, e.g., *State v. Stasio*, 396 A.2d 1129 (N.J. 1979). The decision in *Stasio* was superseded by New Jersey's new code, N.J. STAT. ANN. § 2C:2-8 (West 1998), but a number of other states adhere to this position. See *State v. Bias*, 653 So. 2d 380, 384 (Fla. 1995) (Grimes, C.J., concurring); see also ARK. CODE ANN. § 41-207 (Michie 1998); PA. STAT. ANN. tit. 18, § 308 (West 1997).

49. See MODEL PENAL CODE § 2.08(2) (1985).

50. See Keiter, *supra* note 47, at 495 n.77.

51. See *id.* at 520 (indicating just two states).

52. "If states of mind are accorded legal significance, psychiatric evidence should be admissible when relevant to prove or disprove their existence to the same extent as any other relevant evidence." MODEL PENAL CODE § 4.02 cmt. at 219 (1985). The limits of this logic are revealed in the decision of the Code to go the other way with respect to evidence of intoxication to disprove recklessness. See *supra* note 49 and accompanying text.

53. See LAFAYE & SCOTT, *supra* note 27, § 4.7, at 370.

54. See *Chestnut v. State*, 538 So. 2d 820, 821 (Fla. 1989) (declining to adopt a diminished capacity defense); *State v. Wilcox*, 436 N.E.2d 523, 526 (Ohio 1982) (same); Travis H.D. Lewin, *Psychiatric Evidence in Criminal Cases for Purposes Other Than the Defense of Insanity*, 26 SYRACUSE L. REV. 1051, 1055 (1975).

55. See, e.g., *Bethea v. United States*, 365 A.2d 64, 90 (D.C. 1976) (expressing fear that adoption of a diminished capacity defense "would discard the traditional presumptions concerning mens rea without providing for a corresponding adjustment in the means whereby society is enabled to protect itself from those who cannot or will not conform their conduct to the requirements of the law"); *Wilcox*, 436 N.E.2d 523. Taking aim at psychiatric testimony, a California statute purported to abolish the diminished capacity defense pioneered by the California Supreme Court by excluding evidence of mental disorder only where used to negate capacity to form the mens rea, but not where used otherwise to show the actual absence of mens rea. See CAL. PENAL CODE § 28 (West 1998); see also Stephen J. Morse, *Undiminished Confusion in Diminished Capacity*, 75 J. CRIM. L. & CRIMINOLOGY 1, 42-43 (1984).

witnesses to testify in terms of their own psychiatric definition of mens rea rather than the law's.⁵⁶

I turn now to the two oldest common law doctrines that attenuate the fault requirement—the mistake of law and the felony-murder rules. Here there's little of interest to report beyond the failure of significant reform. When even the Model Penal Code declines to allow a fully reasonable mistake of law to count as a defense, it is hardly to be expected that state legislatures would.⁵⁷ But there were some things to cheer. The first was the increasing acceptance of the defense where the defendant is misled by official governmental statements,⁵⁸ a move formalized in the Model Penal Code⁵⁹ and adopted as a due process requirement by federal courts under the label "entrapment by estoppel."⁶⁰ The second was the increasing readiness of some courts, notably the Supreme Court, to construe a willfulness or scienter requirement as extending to the definition of the crime.⁶¹

As for the felony-murder rule, it was more of the same.⁶² The Model Penal Code eliminated it,⁶³ but the great majority of new state codes

56. See, e.g., *United States v. Basic*, 592 F.2d 13, 21 (2d Cir. 1978) (defendant lacked intent to appropriate an aircraft because he lacked "free will"); *State v. Sikora*, 210 A.2d 193, 198 (N.J. 1965) (defendant lacked capacity to premeditate because he had "unconscious impulses").

57. Though it has happened at least once. See N.J. STAT. ANN. tit. 2C, § 2-4(c)(3) (West 1995); see also *Long v. State*, 65 A.2d 489 (Del. 1949) (reversing bigamy conviction where trial court had refused to admit evidence that defendant reasonably believed that his Arkansas divorce rendered him free to marry again).

58. A few early cases had already recognized the defense. See, e.g., *People v. Ferguson*, 24 P.2d 965 (Cal. Ct. App. 1933); *State v. O'Neil*, 126 N.W. 454 (Iowa 1910); *State v. Godwin*, 31 S.E. 221 (N.C. 1898). Glanville Williams called this development "one of the most important developments in criminal law in modern times," WILLIAMS, *CRIMINAL LAW* (2d ed.), *supra* note 18, at 303—a bit of hyperbole in the interest of taking a swipe at the House of Lords for having rejected the defense with the dismissive assertion that they could find no authority for it.

59. See MODEL PENAL CODE § 2.04 (1985).

60. See, e.g., *United States v. Pennsylvania Indus. Chem. Corp.*, 411 U.S. 655 (1973) (holding that defendant company may introduce evidence that it reasonably relied on Army Corps of Engineers regulations in determining that it was complying with the law); *Raley v. Ohio*, 360 U.S. 423 (1959) (holding that defendants were entitled to rely on opinion by a state legislative commission that they lawfully could invoke a state privilege against self-incrimination); see also Sean Connelly, *Bad Advice: The Entrapment by Estoppel Doctrine in Criminal Law*, 48 U. MIAMI L. REV. 627 (1994); John T. Parry, *Culpability, Mistake, and Official Interpretations of Law*, 25 AM. J. CRIM. L. 1 (1997).

61. See, e.g., *Ratzlaf v. United States*, 510 U.S. 135 (1994) (reversing conviction of defendant accused of willful violation of statute prohibiting "structuring" of cash transactions to avoid reporting requirements, on the grounds that the prosecution had not proved that the defendant undertook such structuring with the knowledge that it was illegal); *Cheek v. United States*, 498 U.S. 192 (1991) (holding that defendant's honest, though objectively unreasonable, belief that he was not violating tax laws was relevant to the question whether his violation of those laws was willful). But compare *United States v. Int'l Minerals & Chem. Corp.*, 402 U.S. 558 (1971) (holding that "willful" does not require knowledge of the illegality of the conduct), with *Liparota v. United States*, 471 U.S. 419 (1985) (holding that "knowingly" does require such knowledge, in view of the danger to innocent conduct of a contrary holding). See also Michael Vitiello, *Does Culpability Matter? Statutory Construction Under 42 U.S.C. § 6928*, 6 TUL. ENVTL. L. REV. 187 (1993).

62. See James J. Tomkovicz, *The Endurance of the Felony Murder Rule: A Study of the Forces that Shape Our Criminal Law*, 51 WASH. & LEE L. REV. 1429 (1994).

retained it.⁶⁴ The courts have always been somewhat more sensitive to the eccentricities of the rule, and their efforts to avoid its worst excesses have continued—the proximate cause limitation,⁶⁵ the limitations of the rule to inherently dangerous felonies as defined,⁶⁶ and to felonies not already included in the homicide.⁶⁷ Lastly, a more recent limitation confines the rule to homicides committed by the felon or his co-felon and excludes innocent killings by others that were caused by the felon.⁶⁸ This appears to be the most prevalent view today.⁶⁹ It has never been clear to me what's to be said for it—except that it reduces the scope of a hateful doctrine.

B. *Excuses—Motion Without Change*

I adverted earlier to the tensions in any blaming system between maintaining a single standard for all in the interest of crime prevention, and varying the standard for those who cannot be fairly blamed. But there is also a tension built into our conception of who can be fairly blamed. This second tension exists between a voluntaristic conception that sees it fair to blame an actor for his uncoerced choices, and a deterministic conception of human action that remains more sensitive to the myriad psychological forces that operate upon the actor's choices with, as it were, a will of their own. These tensions are most clearly evident in the law of excuses, defenses based on the claim that some circumstance or incapacity peculiar to the individual should exculpate an otherwise guilty defendant.

63. It did so by reducing the force of the rule to a rebuttable presumption of extreme recklessness. See MODEL PENAL CODE § 210.2(b) (1985).

64. Sometimes with some modest limitations, for example, by confining it to named dangerous felonies, or allowing as an affirmative defense the existence of specified circumstances demonstrating that the killing was accidental. See, e.g., N.Y. PENAL LAW § 125.25(3)(a)-(d) (Gould 1993). The principal exception is Michigan, whose Supreme Court read the doctrine out of the law where it had been for over a century. See *People v. Aaron*, 299 N.W.2d 304, 326 (Mich. 1980).

65. See, e.g., *King v. Commonwealth*, 368 S.E.2d 704 (Va. 1988) (reversing felony murder conviction of pilot of plane transporting marijuana after plane crash killed co-pilot; holding that the drug distribution was not the proximate cause of the accident since the crash was not the foreseeable result of the crime and was not made more likely by the fact that the cargo was contraband); *Regina v. Horsey*, 176 Eng. Rep. 129 (1862).

66. See, e.g., *People v. Phillips*, 414 P.2d 353 (Cal. 1966) (holding felony-murder rule cannot be used where the underlying felony is not inherently dangerous in the abstract).

67. See, e.g., *People v. Smith*, 678 P.2d 886 (Cal. 1984) (holding felony-murder rule does not apply where the underlying felony merges with the resulting homicide).

68. The article that was highly influential in turning the tide this way was Norval Morris, *The Felon's Responsibility for the Lethal Acts of Others*, 105 U. PA. L. REV. 50 (1956).

69. See, e.g., *People v. Washington*, 402 P.2d 130 (Cal. 1965); *State v. Hoang*, 755 P.2d 7 (Kan. 1988); *State v. Branson*, 487 N.W.2d 880 (Minn. 1992); *State v. Bonner*, 411 S.E.2d 598 (N.C. 1992); *Jackson v. State*, 589 P.2d 1052 (N.M. 1979). Some statutes, however, have rejected it. See, e.g., CONN. GEN. STAT. § 53A-54(c) (1958); N.Y. PENAL LAW § 125.25(3)(a)-(d) (Gould 1993); OR. REV. STAT. § 163.115 (1998).

1. *The Revolving Legal Insanity Defense*

An excuse of long standing is the defense of legal insanity, the one solid beachhead that psychological determinism captured in the otherwise hostile terrain of the law. The path of change in our half-century followed a rather spirited but futile trajectory—up and away from *M’Naghten*⁷⁰ and finally back to it. In the interim there was first what came to be known as the *Durham* Rule, formulated by Chief Judge Bazelon for the D.C. Circuit Court of Appeals in 1954.⁷¹ Instead of specifying the symptoms of a mental disease that would exculpate, the *Durham* Rule would allow the defense whenever the jury should find that the criminal act was a product (whatever that meant) of the defendant’s mental disease (whatever that was). This had the support of important segments of the psychiatric community and got play in the law review literature, achieving a sort of political correctness, as we might now say. But it attracted virtually no support in the courts or legislatures of the country⁷²—any more than had a similar test in the previous century⁷³—and was later abandoned by the court that parented it.⁷⁴

Meanwhile, the Model Penal Code was at work. It rejected *Durham* in favor of a more conservative line. First it reformulated the concept of cognitive incapacity in the *M’Naghten* rule,⁷⁵ and then, more daringly, proposed the addition of volitional incapacity as a further basis for a defense.⁷⁶ This new formulation enjoyed a warm reception, having been adopted by about half the state legislatures,⁷⁷ by some state courts on their own initiative,⁷⁸ and by virtually all the United States Courts of Appeals.⁷⁹ Then in

70. *M’Naghten’s Case*, 8 Eng. Rep. 718 (H.L. 1843) (establishing the basic test for criminal responsibility as whether the accused, at the time of the act, was suffering from a mental disease that made him unable to know the nature of his act or that it was wrong).

71. See *Durham v. United States*, 214 F.2d 862 (D.C. Cir. 1954), *overruled by United States v. Brawner*, 471 F.2d 969 (D.C. Cir. 1972) (en banc).

72. Well, one. The New Hampshire legislature adopted it. See N.H. REV. STAT. ANN. § 628.2 (II) (1955).

73. See *State v. Pike*, 49 N.H. 399 (1870) (approving an instruction that if the accused’s act of killing was the product of mental disease, all symptoms and tests of mental disease were matters of fact to be considered by the jury), *overruled on other grounds by Hardy v. Merrill*, 56 N.H. 227 (1875).

74. See *Brawner*, 471 F.2d at 971. Even *Durham*’s author, Chief Judge Bazelon, concluded that it left too much to what psychiatrists might from time to time decide what was and was not a “mental disease.” *Id.* at 1017-19 (Bazelon, C.J., concurring in part and dissenting in part).

75. The Model Penal Code used the language “[l]acks substantial capacity . . . to appreciate the criminality [wrongfulness] of his conduct,” MODEL PENAL CODE § 4.01 (1985), rather than “not to know the nature and quality of the act he was doing.” *M’Naghten*, 8 Eng. Rep. at 722.

76. See Model Penal Code § 4.01 (1985) (stating the test as whether the defendant “lacks substantial capacity . . . to conform his conduct to the requirements of law”).

77. See, e.g., ILL. COMP. STAT. ANN. ch. 38, § 6 (West 1964); MD. ANN. CODE art. 59, § j(9)(a) (1957); VT. STAT. ANN. tit. 13, § 4801 (1959).

78. See, e.g., *State v. White*, 456 P.2d 797, 802 (Idaho 1969); *Commonwealth v. McHoul*, 226 N.E.2d 556, 563 (Mass. 1967); see also Barbara A. Weiner, *Mental Disability and Criminal Law*, in THE MENTALLY DISABLED AND THE LAW 693, 712 (Samuel J. Brakel et al. eds., 3d ed. 1985) (discussing Model Penal Code test’s broad acceptance among states).

1982 a District of Columbia jury (by then that Circuit too had adopted the Model Penal Code test)⁸⁰ acquitted John Hinckley,⁸¹ a person whom millions of television watchers had seen shooting President Ronald Reagan, on grounds of insanity. That released a deluge of criticism of what seemed to so many a palpable injustice.⁸² August bodies such as the American Psychiatric Association and the American Bar Association joined the fray with critical pronouncements.⁸³ The main target of the attack was the volitional prong of the Model Penal Code's formulation. Apparently it's easier to accept that a person's mental impairment may disable him from knowing what he did than that it prevents him from willing the criminal action he performed. The latter cuts too deeply into how we conceive of human behavior.

When the dust cleared, the sun of the Model Penal Code test had set. Enough states reverted to *M'Naghten* that it displaced the Code's formulation as the states' majority rule,⁸⁴ and Congress saw fit to dump the Model Penal Code test for all federal prosecutions, substituting another version of *M'Naghten*.⁸⁵ But that was not all. The move to restrict the insanity defense included procedural changes in many jurisdictions, such as shifting the burden of proof of insanity to the defendant⁸⁶ (a reform adopted now by most jurisdictions),⁸⁷ making it harder for insanity acquittees to obtain their release,⁸⁸ introducing a new "guilty but mentally ill" verdict,⁸⁹ and even, in

79. See *United States v. Lyons*, 731 F.2d 243, 253 & n.3 (5th Cir. 1984) (Rubins & Williams, JJ., concurring in part and dissenting in part) (recognizing universal acceptance of the Model Penal Code test among federal courts).

80. See *United States v. Brawner*, 471 F.2d 969 (D.C. Cir. 1972) (en banc).

81. See *United States v. Hinckley*, 525 F. Supp. 1342 (D.D.C. 1981), *aff'd*, 672 F.2d 115 (D.C. Cir. 1982).

82. See Michael L. Perlin, *Unpacking the Myths: The Symbolism Mythology of Insanity Defense Jurisprudence*, 40 CASE W. RES. L. REV. 599, 635-36 (1990) (discussing the public outcry following the Hinckley acquittal); David B. Wexler, *Redefining the Insanity Problem*, 53 GEO. WASH. L. REV. 528, 529 (1985) (noting that the Hinckley trial "galvanized national attention to the task of reforming the insanity defense").

83. See AMERICAN BAR ASSOCIATION, CRIMINAL JUSTICE MENTAL HEALTH STANDARDS § 7-6.1(a) (approved Feb. 9, 1983); American Psychiatric Association, *Statement on the Insanity Defense*, 140 AM. J. PSYCHIATRY 6 (1983).

84. See, e.g., CAL. PENAL CODE § 25(b) (West 1982) (abandoning the Model Penal Code test for the *M'Naghten* test); see also Lisa Callahan et al., *Insanity Defense Reform in the United States—Post-Hinckley*, 11 MENTAL & PHYSICAL DISABILITY L. REP. 54, 55 (1987) (documenting pervasive state insanity defense reform following the Hinckley acquittal).

85. Congress did away with the Model Penal Code test when it passed the Insanity Defense Reform Act as part of the Comprehensive Crime Control Act of 1984, 18 U.S.C. § 17 (1985) (creating an affirmative defense where "the defendant, as a result of a severe mental disease or defect, was unable to appreciate the nature and quality of the wrongfulness of his acts").

86. See *id.* § 17(b).

87. See H.R. REP. NO. 98-577, at 14 (1983).

88. See Samuel Jan Brakel, *After the Verdict: Dispositional Decisions Regarding Criminal Defendants Acquitted by Reason of Insanity*, 37 DEPAUL L. REV. 181, 202-21 (1988).

the case of a few states, abolishing the defense entirely.⁹⁰ In the end, one can but wonder at the enormous expenditure of time and energy given over to a defense that is rarely raised and even more rarely successful, and that has no significance for the great problems of crime and its control in the United States.

2. *An Abundance of New (but Largely Rejected) Excuses*

There was little change in the law of other excuses, although not for want of trying. Defense lawyers have always been keen to propose new and ingenious excuses on behalf of their clients. They didn't disappoint in our era. Indeed, I doubt that the rate of proffered new excuses was ever greater. For example, we have seen urged excuses based on a person's different culture; on genetic abnormalities of some kind; on some syndrome, be it pre-menstrual, post-traumatic Vietnam disorder, or from some past victimization or misfortune.⁹¹ All of these came to nothing, except the defense of the "battered woman syndrome," which I defer to the discussion of feminism.⁹² But two of these failed defenses bear comment since they are products of two of the scourges of our era, racism and drugs—the so-called "rotten social background" excuse (RSB, for short) and the excuse of addiction.

a. *"Rotten Social Background"*

The inelegantly named "rotten social background" defense argues that the defendant should be excused because he or she was reared in the criminogenic circumstances of the inner city.⁹³ Though it has made no headway in the law, the controversy it engendered thrust into prominence the disquieting issue of the justice of punishing people whose actions we know were powerfully influenced by growing up in deplorable conditions of life for which society at large bears at least some measure of responsibility.⁹⁴

89. Michigan was the first of some dozen. See Sharon Morey Brown & Nicholas J. Wittner, *Criminal Law*, 25 WAYNE L. REV. 335, 355-64 (1979); Christopher Slobogin, *The Guilty But Mentally Ill Verdict: An Idea Whose Time Should Not Have Come*, 53 GEO. WASH. L. REV. 494, 494-95 (1985).

90. See, e.g., *State v. Korell*, 690 P.2d 992 (Mont. 1984); see also IDAHO CODE § 18-207 (1982); UTAH CODE ANN. § 76-2-305 (1990).

91. See ALAN M. DERSHOWITZ, *THE ABUSE EXCUSE* (1994); JAMES Q. WILSON, *MORAL JUDGMENT* (1997); Peter Arenella, *Demystifying the Abuse Excuse: Is There One?*, 19 HARV. J.L. & PUB. POL'Y 703 (1996); Richard J. Bonnie, *Excusing and Punishing in Criminal Adjudication: A Reality Check*, 5 CORNELL J.L. & PUB. POL'Y 1 (1995); Joshua Dressler, *Reflections on Excusing Wrongdoers: Moral Theory, New Excuses and the Model Penal Code*, 19 RUTGERS L.J. 671 (1988); Stephen J. Morse, *The "New Syndrome Excuse Syndrome"*, 14 CRIM. JUST. ETHICS 3 (1995).

92. See *infra* Section IV.B.

93. See Richard Delgado, *"Rotten Social Background": Should the Criminal Law Recognize a Defense of Severe Environmental Deprivation?*, 3 LAW & INEQ. J. 9 (1985).

94. See *id.* at 15; see also David L. Bazelon, *The Morality of the Criminal Law*, 49 S. CAL. L. REV. 385 (1976); George Vuoso, Note, *Background, Responsibility, and Excuse*, 96 YALE L.J. 1661 (1987).

As an excuse of non-responsibility the defense got nowhere.⁹⁵ True, children brought up in these circumstances are more likely when they grow up to commit certain crimes (street crimes especially) than children from the suburbs. That's a statistical fact.⁹⁶ But it doesn't follow that the child once grown who commits a crime has been disabled from making a responsible choice. If it did, then it is hard to see who couldn't claim a comparable excuse. So the case for the excuse has to rest on the particular nature of this criminogenic influence, namely its roots in the historic injustice of American slavery and the failure to remedy its dire consequences. Even though growing up in criminogenic circumstances does not itself render the person irresponsible, may justice not require exculpation when the State itself is responsible for the perpetuation of those circumstances? The question is not unique to our period. Karl Marx, for example, believed that no capitalist society could justly punish offenders in view of the criminogenic influence of poverty that capitalism produces.⁹⁷ But the perdurability of the fallout from slavery and the racism that followed it has made the problem acutely relevant to our times.

Practically speaking it would be hopeless for society to exculpate a major class of offenders just because the deleterious environmental circumstances that influenced their behavior were products of that society. The hardest question is the moral one: What policies would the nation be obliged in good conscience to pursue toward ameliorating the criminogenic conditions of life for inner city offenders in order to make punishing them morally sustainable?⁹⁸ I fear we will not soon be relieved of the moral burden this question imposes.

b. Addiction

Another novel defense that emerged in our period was the defense of addiction,⁹⁹ an inevitable product of the prevalence of drug use and the efforts of law enforcement to combat it. Should addiction to a drug once voluntarily consumed constitute a defense to illegal possession on the ground that the defendant has since lost the power to resist the drug? Indeed, should it also be a defense to other crimes committed by the addict in order to obtain the drug? The argument for the defense built on an empirical

95. See, e.g., *United States v. Alexander*, 471 F.2d 923, 959, 968 (D.C. Cir. 1973) (upholding the trial judge's instruction to the jury precluding consideration of the rotten social background defense).

96. See *id.* at 965 & n.122 (recognizing demonstrated causal connection between disadvantaged social backgrounds and violent street crime).

97. See Jeffrie G. Murphy, *Marxism and Retribution*, 2 PHIL. & PUB. AFF. 217 (1973).

98. See generally R. George Wright, *The Progressive Logic of Criminal Responsibility and the Circumstances of the Most Deprived*, 43 CATH. U. L. REV. 459 (1994) (exploring the relationship between deprivation and moral responsibility).

99. See generally Phillip Hassman, Annotation, *Drug Addiction or Related Mental State as Defense to Criminal Charge*, 73 A.L.R.3d 16 (1991) (reviewing cases considering the addiction excuse).

assertion and a normative proposition. The former was that persons addicted to certain drugs are powerless to restrain themselves from acquiring and using them.¹⁰⁰ The latter was that the law's pattern of recognized defenses, notably the defense of legal insanity, authenticated a general defense of incapacity to conform regardless of the causes of the incapacity.¹⁰¹

The defense got nowhere. Its factual premise was never established to the satisfaction of its critics or the courts.¹⁰² The evidence seemed rather to support the proposition that the appeal of drugs was in many cases extremely insistent rather than irresistible.¹⁰³ And the normative premise seemed to invite a dangerous enlargement of the law of excuses that threatened the volitional presuppositions of the criminal law: If addicts were excused because it was hard for them to comply with the law then why wouldn't such difficulty be a defense for any offender who found compliance similarly challenging?¹⁰⁴

But should the empirical claim be established for some drugs, the normative claim would have to be faced. The claim would be strong where the addiction was no fault of the defendant, as in cases of congenital drug addiction or unpredicted reactions to prescribed medicine. But these are rare. In the typical case the defendant at some earlier point chose to put himself in the way of the danger, so that his situation is like others in the law where a person's earlier fault forfeits a defense he might otherwise claim. For example, the defense of duress is lost to one who wrongfully exposed himself to the danger of being forced at some future time to commit the crime,¹⁰⁵ and the defense of a temporary drunken condition equivalent to legal insanity fails if the defendant drank himself into that condition, though not if his intoxication was involuntary.¹⁰⁶ On the other hand, some notion of moral laches may be applicable where the addiction is long-standing and the choice buried in the distant past. So much seems

100. See, e.g., *United States v. Moore*, 486 F.2d 1139, 1144-48 (D.C. Cir. 1973) (en banc) (rejecting defendant's contention that his addiction to heroine should excuse his possession of it); *Commonwealth v. Sheehan*, 383 N.E.2d 1115, 1118-19 (Mass. 1978) (rejecting defendant's contention that drug addiction may be a mental disease that should excuse criminal behavior).

101. See *Moore*, 486 F.2d at 1178-85 (Leventhal, J., concurring) (rejecting a broad principle of excuse when criminal conduct results from an impairment of behavioral control).

102. See *id.* at 1180; see also Richard C. Boldt, *The Construction of Responsibility in the Criminal Law*, 140 U. PA. L. REV. 2245, 2285-94 (1992) (discussing almost universal judicial hostility accorded a broadly-defined involuntariness defense).

103. At least for alcohol and heroin. See HERBERT FINGARETTE, *HEAVY DRINKING* 109-13 (1988); JOHN KAPLAN, *THE HARDEST DRUG* 15-51 (1983).

104. See MODEL PENAL CODE § 2.09 cmt. 2 (1985) (stating that the law cannot "vary legal norms with the individual's capacity to meet the standards they prescribe, absent a disability that is both gross and verifiable, such as the mental disease or defect that may establish irresponsibility").

105. See, e.g., *State v. Clay*, 264 N.W. 77, 83 (Iowa 1935) (rejecting duress defense where defendant appeared to allow herself to become involved in criminal conduct); *People v. Merhige*, 180 N.W. 418, 422 (Mich. 1920) (holding duress defense unavailable where it was defendant's fault that compulsion arose).

106. See LAFAYE & SCOTT, *supra* note 27, § 4.10(f), at 558.

suggested by the law of intoxication, which allows a defense of insanity caused by drink where the condition has become permanent from a life of excess begun many years before.¹⁰⁷

C. *The Constitutional Revolution that Failed*

Another development in the requirement of blame was a non-event—the failure of the Supreme Court to constitutionalize personal culpability as a condition for conviction. It happened in Canada in the eighties when the Canadian Supreme Court used the due process-like language of its recently enacted Charter of Rights and Freedoms¹⁰⁸ to establish fault as a necessary condition of criminal conviction, thereby invalidating strict and vicarious criminal liability and putting in doubt other non-fault doctrines of the law.¹⁰⁹ It could have happened here, but it never did.

At one time all the stars seemed to favor it. In the early sixties the Warren Court used the Bill of Rights to create a network of constitutional restraints on law enforcement practices intended to assure justice for the accused. Many thought at the time that the same concern would support a comparable articulation of the minimum conditions of culpability required for conviction and punishment. After all, how could the Court pursue this commitment to procedural justice but not to substantive justice? True, there were fewer specific textual directives in the Constitution to work with than in the criminal procedure area, but there were some, like the Eighth Amendment's cruel and unusual punishment clause, and there was always that protean pinch hitter of last resort, the due process clause in its substantive persona, which the Court in other settings was able to rehabilitate from a generation in Coventry.¹¹⁰ Yet it never happened, much to the regret of many in the academia who had long urged it.¹¹¹

Strict liability would have been a natural candidate with which to begin a constitutional assault. But the early challenges occurred before the

107. See *id.* § 4.10(g), at 561.

108. CAN. CONST. (Constitution Act, 1982) pt.1 (Canadian Charter of Rights and Freedoms) § 7 ("Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.").

109. See, e.g., *Regina v. Logan* [1990] 2 S.C.R. 731 (Can.) (holding a minimum degree of mens rea constitutionally required for an attempted murder conviction); *In re Const. Question Act & In re Reference Re § 94(2) of the Motor Vehicle Act* [1985] 2 S.C.R. 486 (Can.) (declaring strict liability offenses unconstitutional). For a general discussion of these holdings, see DON STUART, *CHARTER JUSTICE IN CANADIAN CRIMINAL LAW* (2d ed. 1996); Bruce P. Archibald, *The Constitutionalization of the General Part of Criminal Law*, 67 CAN. BAR REV. 403 (1998). Some believe there has been less than meets the eye in these holdings. See Alan Brudner, *Guilt Under the Charter: The Lure of Parliamentary Supremacy*, 40 CRIM. L.Q. 287 (1998).

110. See, e.g., *Roe v. Wade*, 410 U.S. 113 (1973) (abortion); *Griswold v. Connecticut*, 381 U.S. 479 (1965) (contraception).

111. See, e.g., Hart, *supra* note 23, at 430-36; Herbert L. Packer, *Mens Rea and the Supreme Court*, 1962 SUP. CT. REV. 107, 127. For a fresh renewal of the case, see William J. Stuntz, *Substance, Process and the Civil-Criminal Line*, 7 J. CONTEMP. LEGAL ISSUES 1, 31-34 (1996).

days of the Warren Court when substantive due process was still a bad word. So for Justice Frankfurter in *Dotterweich*¹¹² it sufficed to say that the burden on the innocent was justified in the interest of the public good. By the time the Court next faced the issue directly in *Morissette*,¹¹³ early in our period, perhaps strict liability had become too widespread to reverse, for all the Court felt able to do was to articulate its concern and narrowly interpret the statute to retain some element of fault as a condition of guilt.¹¹⁴

Justice Douglas's 1957 opinion in *Lambert v. California*¹¹⁵ seemed to promise a complete turnaround. It held unconstitutional the conviction of a defendant who failed to register with the county of Los Angeles as a convicted felon because the law did not allow as a defense that most people, including the defendant, could not reasonably have been expected to be aware of the requirement.¹¹⁶ Did this mean the Court would invalidate all laws denying a defense that the defendant acted reasonably? Was there to be an end to strict liability in all its forms? Logic and principle notwithstanding, the answer was no. Justice Frankfurter predicted that the decision would become "a derelict on the waters of the law."¹¹⁷ And so it has.¹¹⁸

Five years later the Court again offered the promise of making fault a constitutional requirement. In 1962—the year after *Mapp*,¹¹⁹ the Warren Court's opening gun in the constitutionalizing of criminal procedures—the Court held in *Robinson v. California*¹²⁰ that it was cruel and unusual punishment to punish a person for addiction to narcotics. Justice Stewart's opinion for the Court was not altogether clear, but it did suggest that it would be unconstitutional to punish a person for having a disease, which he seemed to concede that narcotics addiction was.¹²¹ Justice White saw the portent and objected, for he thought Justice Stewart's opinion would logically demand that it must also be cruel and unusual punishment to punish an addict for using the narcotic to which he is addicted.¹²²

The *Robinson* decision could plausibly have been seen as a vital opening toward establishing lack of self-control as a constitutional bar to punishment. But not for long. Just a half dozen years later the Court closed

112. *United States v. Dotterweich*, 320 U.S. 277 (1943) (holding that the president of a company distributing adulterated or misbranded drugs could be held strictly liable if his company failed to obtain a guaranty from the drugs' manufacturer).

113. *Morissette v. United States*, 342 U.S. 246 (1952).

114. *See id.* at 256, 273; *see also supra* notes 38-39 & 44 and accompanying text.

115. 355 U.S. 225 (1957).

116. *See id.* at 229-30.

117. *Id.* at 232 (Frankfurter, J., dissenting).

118. *See* the exchange between Steven B. Duke and Sanford H. Kadish in "HE SHALL NOT PASS THIS WAY AGAIN": THE LEGACY OF JUSTICE WILLIAM O. DOUGLAS 137, 150 (Stephen L. Wasby ed., 1990).

119. *Mapp v. Ohio*, 367 U.S. 643 (1961).

120. 370 U.S. 660 (1962).

121. *See id.* at 666.

122. *See id.* at 685-86 (White, J., dissenting).

the door, holding in *Powell v. Texas*¹²³ that it was not cruel and unusual punishment to convict an alcoholic for the crime of public drunkenness. Justice Marshall's plurality opinion limited *Robinson* to the kind of crime there in issue, namely one that made mere status—a propensity to abuse drugs—a crime.¹²⁴ It rejected the broader reading of *Robinson* that one could not be punished for what is beyond one's power of control. For the plurality, the consequences of such a holding were perilous and unwelcome; it would involve the Court as a partner in criminal code writing, inviting it to adjudicate in the speculative and controversial realms of the mainsprings of human action—in effect, to determine whether compliance with the law was impossible for this defendant or just very, very hard.¹²⁵ Is the scientific evidence for the will-destroying impact of alcoholism and addiction reliable enough for the law? If alcoholism and addiction are judged to compel the defendant's actions, what of all other cases in which psychiatrists can give deterministic accounts of the defendant's conduct? All this was far more than those who joined the Marshall opinion were ready to take on, especially with the finality of a constitutional mandate.

Powell turned out to be the end of the Court's flirtation with the possibility of a constitutional criminal law doctrine.¹²⁶ How should we now view this episode? As a missed opportunity or as a close call? Like many, I'm of two minds. One is naturally uncomfortable with nine appointed lawyers calling the moral shots for the rest of us in deciding which criminal law doctrine should pass muster. Yet they've been known to do just that in other areas and to do so here might have served to temper the promiscuous legislative passion for punishment.

D. Justifications

Blame, of course, may be inappropriate not only where the person's criminal action is excused, but also where it is privileged or justified. There were two notable developments in the law of justification during our period: the explicit acceptance of an open-ended defense of justification, and the acceptance of an additional specific justification for health workers to permit permanently comatose patients to die.

1. The "Lesser Evil" Defense

Some have thought that even absent an established specific justifying circumstance the common law would permit a defense in unusual

123. 392 U.S. 514 (1968).

124. See *id.* at 532 (Marshall, J., plurality opinion).

125. See *id.* at 533.

126. For a more optimistic account of the role of the Supreme Court in substantive criminal law, emphasizing the process-oriented decisions of the Court, see Louis D. Bilionis, *Process, The Constitution, and Substantive Criminal Law*, 96 MICH. L. REV. 1269 (1998).

situations where the action, though criminal, was in some sense the right thing to do.¹²⁷ The reluctance to recognize the defense explicitly stemmed from fears that it would encourage people to take the law into their own hands in inappropriate situations, and from the recognition that formulating its conditions would prove elusive.¹²⁸ Nonetheless the Model Penal Code took the plunge, creating a defense for an actor who avoided a greater harm than he caused by his action—in other words, where he chose the lesser evil.¹²⁹ Many of the revised state codes followed suit,¹³⁰ though their formulations were often more restrictive than the Model Penal Code's, for example, by confining the defense to emergency situations.¹³¹ Of equal significance, courts, including federal courts, recognized the defense as part of their common law.¹³² The lesser-evil principle in some form is now part of American criminal law.

The defense enjoyed a flurry of activity in the courts. It came too late for the civil rights movement, but it appealed to many defense lawyers as a possible legal justification for later acts of civil disobedience. Defendants invoked it to justify sit-ins, vandalism, and similar crimes committed in behalf of causes ranging from nuclear disarmament to abortion rights.¹³³ But the courts were unreceptive.¹³⁴ Where the law expressed value judgments different from those of the protesters, where there were other ways and adequate time for the protesters to press their case for changing the law, in short, where there was no necessity, the courts regularly found the lesser-evil defense inapplicable.¹³⁵ Lawyers also resorted to the defense in a rash of prison escape cases and with somewhat more success, at least in obtaining favorable jury instructions.¹³⁶ But even this approach petered out

127. See WILLIAMS, CRIMINAL LAW (2d ed.), *supra* note 18, at 724.

128. See James Fitzjames Stephen, quoted in Glanville Williams, *Necessity*, in *The Law Commission's Report No. 83*, 1978 CRIM. L. REV. 128, 130; 2 N.J. CRIMINAL LAW REVISION COMMISSION, FINAL REPORT, THE NEW JERSEY PENAL CODE, Commentary 80 (1971); see also Louis B. Schwartz, *Reform of the Federal Criminal Laws: Issues, Tactics and Prospects*, 1977 DUKE L.J. 171, 217.

129. See MODEL PENAL CODE § 3.02 (1985) (allowing a justification defense for "conduct that the actor believes to be necessary to avoid a harm or evil . . . provided that: (a) the harm or evil sought to be avoided by such conduct is greater than that sought to be prevented by the law defining the offense charged . . .").

130. The total comes to fourteen according to one recent report. See Robert Batey, *Paul Robinson's Criminal Law*, 73 NOTRE DAME L. REV. 781, 791 n.93 (1998) (book review).

131. See, e.g., N.Y. PENAL CODE § 35.05 (Gould 1993).

132. See, e.g., *United States v. Schoon*, 971 F.2d 193, 196-97 (9th Cir. 1991) (accepting the principle though rejecting its application on the facts).

133. See Matthew Lippman, *The Necessity Defense and Political Protest*, 26 CRIM. L. BULL. 317, 317 (1990); Laura J. Schulkind, Note, *Applying the Necessity Defense to Civil Disobedience Cases*, 64 N.Y.U. L. REV. 79, 93-108 (1989).

134. See Lippman, *supra* note 133, at 317.

135. See *id.* at 334-35.

136. See, e.g., *People v. Unger*, 362 N.E.2d 319 (Ill. 1977) (holding that a defendant's testimony about threats and sexual assaults from fellow inmates entitled him to raise a necessity defense); see also

when most courts came to insist that the prisoner have made a bona fide effort to surrender or return in order to claim the defense.¹³⁷

In the end, then, the lesser evil defense has not made much of a practical difference. Nor is it likely ever to do so, except in very rare and compelling circumstances where, even without the explicit defense, few prosecutors would indict and few juries would convict. The case for explicitly including the defense will have little appeal to bottom-liners; it serves principally to maintain intellectual and moral integrity of the law.

2. *Letting Patients Die*

Detaching a mechanism that is keeping a patient alive intending, or at least knowing, that death will follow is, on the face of it, a culpable homicide. So is the deliberate failure of a physician to use readily available means to keep a patient alive. But the increasing ability of the medical profession to maintain at least the signs of life in patients functionally dead (in permanent comatose states, for example) created pressure to modify traditional doctrine, for hospitals and physicians were routinely withholding or withdrawing life support in these cases. Courts and commentators, therefore, experimented with a variety of distinctions in support of such actions, such as the distinction between killing and letting die, between withholding and withdrawing treatment, and between ordinary and extraordinary treatment.¹³⁸ In time these justificatory distinctions lost their appeal and were replaced by the principle of patient consent as the legal basis for these actions.¹³⁹ But consent was often largely fictional and prevailing doctrine has come to allow health workers to remove life support for permanently comatose patients so long as the decision is conscientiously made.¹⁴⁰ The current doctrine, therefore, amounts to another legal justification for causing, or failing to prevent, an avoidable death. It has not been customary to think of the defense in those terms, but that is only because doing so accepts, at least in these cases, the legality of taking the lives of the innocent, and that carries us too close for comfort to the raging controversy over assisted suicide and euthanasia.

Martin R. Gardner, *The Defense of Necessity and the Right to Escape from Prison—A Step Towards Incarceration Free from Sexual Assault*, 49 S. CAL. L. REV. 110 (1975).

137. See, e.g., *United States v. Bailey*, 444 U.S. 394 (1980).

138. See PRESIDENT'S COMM'N FOR THE STUDY OF ETHICAL PROBLEMS IN MED. AND BIOMEDICAL AND BEHAVIORAL RESEARCH, *DECIDING TO FOREGO LIFE-SUSTAINING TREATMENT* 60-90 (1983).

139. See, e.g., *In re Conroy*, 486 A.2d 1209, 1233-37 (N.J. 1985).

140. See Sanford H. Kadish, *Letting Patients Die: Legal and Moral Reflections*, 80 CALIF. L. REV. 857, 870-71 (1992).

III CRIMINALIZATION

The issue of how far it is prudent and wise to employ the criminal law as the preferred sanction for undesirable activities was vigorously debated in our half-century, both in governmental reports and legal commentary generally. The upshot was a draw: The use of the criminal sanction to enforce moral behavior abated, but there was more than a compensating increase in the federal use of criminal law as an instrument of regulation.

A. *The Waning of Morals Offenses*

During the fifties and early sixties, it was widely argued that morals offenses—the so-called victimless crimes, such as unconventional sex, adultery, and gambling—served principally to express the majority's moral disapproval of the conduct, and were therefore an affront to personal autonomy.¹⁴¹ Later, critics invoked a more pragmatic argument against overuse of the criminal law, one that applied to a broad range of crimes. They argued that the criminal law was sacrificing effectiveness in combating real harms by indiscriminately resorting to punishment as the medicine of choice for whatever ails.¹⁴² Amazingly to many of us at the time, the venerable morals offenses, which had long been a well-rooted presence in the law, began to fall.

Again the Model Penal Code led the way with its proposal to exclude criminal penalties for adult consensual homosexual conduct.¹⁴³ Illinois was the first to follow this lead¹⁴⁴ and since then half the states have repealed their anti-sodomy laws.¹⁴⁵ And while the United States Supreme Court declined to hold such laws unconstitutional,¹⁴⁶ several state courts did so

141. See SECRETARY OF STATE FOR THE HOME DEP'T & SECRETARY OF STATE FOR SCOTLAND, SCOTTISH HOME DEP'T, REPORT OF THE COMM'N ON HOMOSEXUAL OFFENSES AND PROSTITUTION (Wolfenden Report) (1957). Ten years after the Wolfenden Report, Parliament passed the Sexual Offenses Act, pt. II, ch. 60 (1967), which repealed criminal penalties for homosexual acts committed in private by consenting adults. See PATRICK DEVLIN, *THE ENFORCEMENT OF MORALS* (1965) (defending the punishment of morals offenses); H.L.A. HART, *LAW, LIBERTY AND MORALITY* (1963) (replying to Devlin's 1959 lecture). The debate was soon picked up in America. See Ronald Dworkin, *Lord Devlin and the Enforcement of Morals*, 75 YALE L.J. 986 (1966).

142. See NORVAL MORRIS & GORDON HAWKINS, *THE HONEST POLITICIAN'S GUIDE TO CRIME CONTROL* 1 (1969); PACKER, *supra* note 41, at 249; Sanford H. Kadish, *The Crisis of Overcriminalization*, 374 ANNALS AM. ACAD. POL. & SOC. SCI. 157 (1967).

143. See MODEL PENAL CODE AND COMMENTARIES § 213.2, at 362 (1980).

144. See Criminal Code of 1961 §§ 11-2, 11-3, 1961 Ill. Laws 1985-2006 (codified as amended at ILL. ANN. STAT. ch. 38, §§ 11-2, 11-3 (Smith-Hurd 1979 & Supp. 1983)).

145. See Yao Apasu-Gbetsu et al., Note, *Survey on the Constitutional Right to Privacy in the Context of Homosexual Activity*, 40 U. MIAMI L. REV. 521, 524 (1986); Comment, *The Right of Privacy and Other Constitutional Challenges to Sodomy Statutes*, 15 U. TOL. L. REV. 811, 886-75 (1984); Kevin Sack, *Georgia's High Court Voids Sodomy Law*, N.Y. TIMES, Nov. 24, 1998, at A14.

146. See *Bowers v. Hardwick*, 478 U.S. 186 (1986).

under their state constitutions.¹⁴⁷ Intimacies between married partners have been decriminalized almost everywhere and the old crimes of adultery and fornication are now rarities.¹⁴⁸ Moreover, the offenses of vagrancy, disorderly conduct, and public drunkenness became much less common as a result of Supreme Court decisions invalidating laws of this kind because of their potential for discriminatory enforcement.¹⁴⁹

B. *The Flood of Federal Crime*

At the time, some thought that this success in decriminalizing morals offenses might herald a movement on a broader front to withdraw the reach of the criminal law. But that hope has vanished, especially in the last few decades. During this time Congress has entered the criminal law picture as a major player, enacting a spate of legislation on three fronts—corruption, governmental regulations, and drugs¹⁵⁰—of such magnitude and complexity that federal criminal law now requires a course for itself in many law school curriculums.¹⁵¹

1. *RICO and Its Progeny*

Congress responded to organized crime and related corruption with the Organized Crime Control Act of 1970 which, among other innovations, presented the world with the Racketeer Influenced and Corrupt

147. See, e.g., *Powell v. State*, No. S98A0755, 1998 WL 804568 (Ga. Nov. 23, 1998); *Commonwealth v. Wasson*, 842 S.W.2d 487 (Ky. 1992); *Gryczan v. State*, 942 P.2d 112 (Mont. 1997); see also Recent Case, 106 HARV. L. REV. 1370 (1993); Sack, *supra* note 145, at A14.

148. MODEL PENAL CODE AND COMMENTARIES, § 213.6 at 439 (Note on Adultery and Fornication) (1980).

149. See, e.g., *Papachristou v. City of Jacksonville*, 405 U.S. 156 (1972) (holding unconstitutional a vagrancy ordinance that encouraged arbitrary and discriminatory enforcement); see also Caleb Foote, *Vagrancy-Type Law and its Administration*, 104 U. PA. L. REV. 603 (1956). With the increasing acceptance of order-maintenance policing, however, the pendulum has recently begun to swing the other way. See Debra Livingston, *Police Discretion and the Quality of Life in Public Places: Courts, Communities, and the New Policing*, 97 COLUM. L. REV. 551 (1998). The Supreme Court has now granted certiorari to an Illinois decision that invalidated an anti-gang, loitering ordinance on the authority of *Papachristou* and similar precedents. See *Chicago v. Morales*, 687 N.E.2d 53 (Ill. 1997), *cert. granted*, 118 S. Ct. 1510 (1998).

150. For recent symposia on the subject, see Symposium, *Federalization of Crime*, 46 HASTINGS L.J. 965 (1995); Symposium, *Federalism and the Criminal Justice System*, 98 W. VA. L. REV. 757 (1996); Symposium, *The Federal Role in Criminal Law*, 543 ANNALS AM. ACAD. POL. & SOC. SCI. 15 (1996). This development has been comprehensively and critically reviewed in TASK FORCE ON THE FEDERALIZATION OF CRIMINAL LAW, AM. BAR ASS'N CRIMINAL JUSTICE SECTION, THE FEDERALIZATION OF CRIMINAL LAW (James A. Strazzella ed., 1998) [hereinafter ABA TASK FORCE ON THE FEDERALIZATION OF CRIMINAL LAW]. The ABA Task Force on the Federalization of Criminal Law observes, "The Task Force's research reveals a startling fact about the explosive growth of federal criminal law: More than 40% of the federal criminal provisions enacted since the Civil War have been enacted since 1970." *Id.* at 7. For a comprehensive bibliography on the subject, see *id.* at 59-77.

151. See, e.g., NORMAN ABRAMS & SARAH BEALE, *FEDERAL CRIMINAL LAW AND ITS ENFORCEMENT* (2d ed. 1993); KATHLEEN F. BRICKEY, *CORPORATE AND WHITE COLLAR CRIME* (2d ed. 1995); PAMELA H. BUCY, *WHITE COLLAR CRIME* (2d ed. 1998); HARRY FIRST, *BUSINESS CRIME* (1990); JEROLD ISRAEL ET AL., *WHITE COLLAR CRIME* (1996).

Organizations Statute (RICO).¹⁵² RICO constitutes a new approach in defining crime.¹⁵³ Traditionally a crime is defined in terms of an action at some particular time and place. But RICO makes it a crime for a person associated with an "enterprise" ("any group of individuals associated in fact")¹⁵⁴ to participate in its affairs, directly or indirectly, through a "pattern of racketeering activity" (defined as committing any two or more of an expansive list of federal and state crimes within a ten year period).¹⁵⁵ The vagueness, uncertainty, and expansiveness of this legislation has drawn strong criticism from those who worry about rule-of-law values.¹⁵⁶ What makes matters worse is that Congress enacted a variety of related legislation—for example, laws criminalizing money laundering¹⁵⁷ and enterprises engaged in financial crimes¹⁵⁸—which adopted the basic RICO innovations, and, in the case of money laundering, even expanded them.¹⁵⁹

2. Criminal Regulations

Heightened federal concern for enforcing a variety of regulatory schemes, such as those for environmental protection, led Congress to vastly expand the use of criminal sanctions against undesirable business practices.¹⁶⁰ One need only glance at the headings in reviews of yearly developments in white-collar crime to get a sense of the flood of federal crime: Antitrust Violations, Computer Crimes, Environmental Crimes, Financial Institutions Fraud, Foreign Corrupt Practices Act, and Securities Fraud.¹⁶¹

152. 18 U.S.C. §§ 1961-1968 (1994).

153. See Gerard E. Lynch, *RICO: The Crime of Being a Criminal, Parts I & II*, 87 COLUM. L. REV. 661 (1987).

154. 18 U.S.C. § 1961(4) (1994).

155. *Id.* § 1961(1), (5). The RICO model has proved attractive to state legislatures. A recent study finds that thirty-three states have enacted versions of RICO. See Susan W. Brenner, *RICO, CCE, and Other Complex Crimes: The Transformation of American Criminal Law?*, 2 WM. & MARY BILL RTS. J. 239, 273 & n.172 (1993). Professor Brenner points to a further feature of these laws, namely, that they represent a dramatic increase in the use of what she refers to as "compound liability," making a single action the basis for multiple offenses rather than for a single offense. *Id.* at 241.

156. See FRANCIS A. ALLEN, *THE HABITS OF LEGALITY* 88 (1996).

157. See 18 U.S.C. § 1956 (1994) (laundering of monetary instruments).

158. See 18 U.S.C. § 225 (1994) (continuing financial crimes enterprise).

159. Unlike RICO, 18 U.S.C. § 1956 allows for prosecution without Justice Department approval; moreover, its list of predicate crimes is even more extensive. See the comment quoted in Barry Tarlow, *RICO Report*, 14 THE CHAMPION 29, 32 (1990) ("[Section] 1956 gets you everything that RICO gets you, and more.").

160. See, e.g., Toxic Substances Control Act, Pub. L. No. 94-469, § 16, 90 Stat. 2003, 2037 (1976) (codified as amended at 15 U.S.C. § 2615 (1994)) (providing for criminal fines of up to \$25,000 a day); Water Quality Act of 1987, Pub. L. No. 100-4, § 312, 101 Stat. 7, 43 (codified as amended at 33 U.S.C. § 1319 (1994)) (same); Hazardous and Solid Waste Amendments of 1984, Pub. L. No. 98-616, § 232, 98 Stat. 3221, 3257 (codified as amended at 42 U.S.C. § 6928 (1994)) (same); Clean Air Act Amendments of 1990, Pub. L. No. 101-549, 104 Stat. 2399, 2676 (codified at 42 U.S.C. § 7413 (1994)) (providing for criminal fines of up to \$1 million and prison terms of up to 15 years).

161. See, e.g., *Thirteenth Survey of White Collar Crime*, 35 AM. CRIM. L. REV. 425 (1998).

The expansion of corporate criminal liability is largely a product of this development. It held a beachhead in American jurisprudence at the inception of our period, but in the years since it has become a well-entrenched feature of the landscape. Arguments about its utility and fairness continue, but the legal battle is mostly over. With increasing frequency statutes explicitly impose criminal liability on corporations,¹⁶² and courts find it appropriate to hold corporations liable without benefit of statute, even for common law crimes like manslaughter.¹⁶³ As Kathleen Brickey has observed, corporate criminal liability "has come to enjoy legitimacy alongside established criminal law doctrines . . . [and] thrives in a regulatory climate eager to affix responsibility for a widening range of social and economic ills."¹⁶⁴

Much of this federal regulatory legislation relies on the criminal law to do the work traditionally done by the civil law.¹⁶⁵ Developments under the Mail¹⁶⁶ and Wire Fraud Acts¹⁶⁷ provide a vivid example.¹⁶⁸ The lower federal courts led the way here by interpreting the prohibition of fraud to encompass breaches of fiduciary duties.¹⁶⁹ When this interpretation was rejected by the Supreme Court,¹⁷⁰ Congress responded with an amendment defining fraud to include depriving another of the intangible right to honest services.¹⁷¹ This expansive view of criminal fraud as well as the criminalization of other kinds of civil wrongs opened a sea of vaguely defined crimes.¹⁷² What adds to the baleful import of these laws is that they often employ strict or vicarious liability for good measure.¹⁷³

162. See KATHLEEN F. BRICKEY, *CORPORATE CRIMINAL LIABILITY* (2d ed. 1992-94).

163. See Kathleen F. Brickey, *Death in the Workplace: Corporate Liability for Criminal Homicide*, 2 NOTRE DAME J.L. ETHICS & PUB. POL'Y 753 (1987); Donald J. Miester, Jr., Comment, *Criminal Liability for Corporations That Kill*, 64 TUL. L. REV. 919 (1990).

164. Kathleen F. Brickey, *Rethinking Corporate Liability Under the Model Penal Code*, 19 RUTGERS L.J. 593, 596 (1988).

165. See John C. Coffee, Jr., *Does "Unlawful" Mean "Criminal"? Reflections on the Disappearing Tort/Crime Distinction in American Law*, 71 B.U. L. REV. 193 (1991).

166. 18 U.S.C. § 1341 (1994).

167. 18 U.S.C. § 1343 (1994).

168. See Peter R. Ezersky, Note, *Intra-Corporate Mail and Wire Fraud: Criminal Liability for Fiduciary Breach*, 94 YALE L.J. 1427 (1985); see also ALLEN, *supra* note 156, at 86-88, 91; John C. Coffee, Jr., *From Tort to Crime: Some Reflections on the Criminalization of Fiduciary Breaches and the Problematic Line Between Law and Ethics*, 19 AM. CRIM. L. REV. 117 (1981); John C. Coffee, Jr., *Paradigms Lost: The Blurring of the Criminal and Civil Law Models—And What Can be Done About It*, 101 YALE L.J. 1875 (1992).

169. See, e.g., *United States v. Siegel*, 717 F.2d 9 (2d Cir. 1983).

170. See *McNally v. United States*, 483 U.S. 350 (1987) (holding that the mail fraud statute is limited in scope to the protection of property rights). The *McNally* decision, however, was tempered by *Carpenter v. United States*, 484 U.S. 19 (1987), which held that an "intangible interest" was "property" and therefore within the scope of the mail fraud statute.

171. See Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, § 7603, 102 Stat. 4181, 4508 (codified at 18 U.S.C. § 1346 (1994)).

172. See ALLEN, *supra* note 156, at 86-88, 91-92; Francis A. Allen, *A Crisis of Legality in the Criminal Law? Reflections on the Rule of Law*, 42 MERCER L. REV. 811 (1991); Francis A. Allen, *The*

3. *The War on Drugs*

Finally drugs, our national affliction. The federal government has been in the business of drug interdiction for a long time, but never in as big and sustained a way since 1970, the year of the Comprehensive Drug Abuse Prevention and Control Act.¹⁷⁴ That and other legislation in the eighties¹⁷⁵ produced the most profound expansion of federal criminal jurisdiction in our history. Federal drug filings rose 550 percent between 1987 and 1997¹⁷⁶ and constituted nearly forty percent of all federal felony filings in 1997.¹⁷⁷ In 1997 sixty percent of all federal prisoners were being held for drug offenses.¹⁷⁸ Moreover, when one compares the changing nature of the federal criminal caseload over the past fifty years (our period) the numbers are more stark: Between 1947 and 1997 the number of drug cases disposed of in the federal courts rose 1085 percent.¹⁷⁹ Much of this activity did not arise from large-scale importation and interstate shipments of drugs, but from ordinary drug-related street crimes in the cities.¹⁸⁰

Few would regard this fevered federal activity as having done much to solve the drug problem in this country.¹⁸¹ And beyond the enormous expense of apprehending, prosecuting, and jailing drug offenders, the effort has greatly clogged federal court dockets, to the serious detriment of the administration of justice overall, as is evident in the recurrent cries of pain

Erosion of Legality in American Criminal Justice: Some Latter-Day Adventures of the Nulla Poena Principle, 29 ARIZ. L. REV. 385 (1987).

173. See *supra* Section II.A.1.

174. Pub. L. No. 91-513, 84 Stat. 1236 (1970) (codified as amended at 21 U.S.C. §§ 801-971 (1994)); see also Kathleen F. Brickey, *Criminal Mischief: The Federalization of American Criminal Law*, 46 HASTINGS L.J. 1135, 1149-51 (1995).

175. Most notable are the Anti-Drug Abuse Act of 1986, Pub. L. No. 99-570, 100 Stat. 3207, which was aimed at crack-cocaine offenses, amended 21 U.S.C. § 841 (1994) (requiring minimum sentences), and created 21 U.S.C. § 856 (new drug offense for manufacturing a controlled substance); and the Anti-Drug Abuse Act of 1988, Pub. L. No. 102-690, 102 Stat. 4181, which amended 21 U.S.C. § 844 (1994) (requiring a minimum five-year sentence for crack-cocaine possession offenses).

176. See BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, 1997 SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS 413 tbl.5.36 (1997).

177. See *id.* at 381 tbl.5.9.

178. See *id.* at 505 tbl.6.51.

179. See ABA TASK FORCE ON THE FEDERALIZATION OF CRIMINAL LAW, *supra* note 150, app. B § 3, at 89.

180. So much is consistent with the tendency of other federal criminal legislation to reach down into the traditional areas of state and local concern; for example, federal statutes against domestic violence, guns in school, drive-by shooting, and armed carjacking. See *id.* at 7, 18-19, 43-45 (noting and criticizing this trend); Sanford H. Kadish, *Comment: The Folly of Overfederalization*, 46 HASTINGS L.J. 1247, 1249 (1995). It remains to be seen how much the Supreme Court's more restrictive view of the federal commerce clause power will stem the tide. See *United States v. Lopez*, 514 U.S. 549 (1995).

181. See, e.g., William F. Buckley, Jr. et al., Symposium, *The War on Drugs is Lost*, 48 NAT'L REV. 34 (Feb. 12, 1996); see also NATIONAL CRIMINAL JUSTICE COMMISSION, *THE REAL WAR ON CRIME* 115-20 (Steven R. Donziger ed., 1996).

of federal judiciary and bar representatives from the Chief Justice on down.¹⁸²

IV

THE IMPACT OF FEMINISM

There were several significant social or intellectual movements in the fifty years under our review that affected the law. The Law and Economics approach had an enormous impact upon all of private law, though efforts to apply its analytical models to the doctrines of the substantive criminal law proved feeble.¹⁸³ Critical Legal Studies flashed across the legal skies before fading, but even at its apogee it produced little that was directly applicable to the criminal law.¹⁸⁴ The Civil Rights Movement, the major social protest movement of our times, left a heavy imprint on statutory and constitutional law and figured prominently in the administration of criminal justice, notably in unmasking areas of racial discrimination by police, prosecutors, and juries and in influencing reform. But it too had little effect on the substantive criminal law, except for giving rise, fruitlessly, to the "rotten social background" defense I discussed earlier.¹⁸⁵ Feminism, on the other hand, is the one major movement of the period that has had a significant impact on the shape of the criminal law.

Feminism has mightily roiled the waters over the traditional doctrine that a reasonably provoked killing is manslaughter rather than murder. The widely influential Model Penal Code proposals rejected common law limitations on the defense and expanded it to make it suffice simply that there was reasonable explanation for the defendant's extreme emotional disturbance, from whatever cause.¹⁸⁶ But yesterday's reforms can quickly become today's rejects. Today feminist critics have attacked the defense of provocation, particularly in its enlarged Model Penal Code form, seeing in it a defense that works disproportionately and unjustly in favor of men and

182. Compare the 1991 and 1997 reports of Chief Justice Rehnquist: 138 CONG. REC. § 441-01 (Jan. 27, 1992); 1997 *Year-End Report on the Federal Judiciary*, 62 CRIM. L. RPTR. 1301, 1302 (Jan 7, 1998). See also Sara Sun Beale, *Federalizing Crime: Assessing the Impact on the Federal Courts*, 543 ANNALS AM. ACAD. POL. & SOC. SCI. 39 (1996); Sara Sun Beale, *Too Many and Yet Too Few: New Principles to Define the Proper Limits for Federal Criminal Jurisdiction*, 46 HASTINGS L.J. 979, 983 (1995).

183. Richard Posner himself, a major figure in the law and economics movement, conceded as much. See Richard A. Posner, *An Economic Theory of the Criminal Law*, 85 COLUM. L. REV. 1193, 1193-94 (1985); see also Claire Finkelstein, *Mens Rea and Other Criminal Inefficiencies*, 8 CRIM. L.F. 143, 145 (1997) (reviewing LEO KATZ, *ILL-GOTTEN GAINS: EVASION, BLACKMAIL, FRAUD, AND KINDRED PUZZLES OF THE LAW* (1996)).

184. An exception is Mark Kelman's article, *Interpretive Construction in the Substantive Criminal Law*, 33 STAN. L. REV. 591 (1981).

185. See *supra* Section II.B.2.a.

186. See MODEL PENAL CODE § 210(3)(1)(b) (1985).

against their women victims.¹⁸⁷ Thus far this critique has not seriously affected the law, though my guess is that it will in the future. The common law restrictions are more consonant with the law's usual hostility to claims of loss of self-control, and the feminist position now makes the common law position *à la mode*. In two areas, however, feminist thought has already changed the law materially: in the law of rape and the law of self-defense.

A. Rape Law Reform

Modern rape law reform began with the Model Penal Code's first proposals in 1955. Their major innovation was to define rape as occurring simply when the man compels submission by force or threat of great force. This served to eliminate the traditional requirements of non-consent and physical resistance by the victim from the formal definition of the crime.¹⁸⁸ The Code declined to make non-consent the essence of the crime in order to avoid what were seen as the intractable problems of proof in assessing the nuances of consent in many sexual encounters.¹⁸⁹ It omitted the requirement of victim resistance because resistance risks personal danger to the woman, and, in any event, where the man compels submission "the failure of a weak or fearful victim to display 'utmost' or even 'earnest' resistance should not excuse the man."¹⁹⁰ In addition, the Code divided rape into several crimes with graduated punishment levels. Finally, the Code boldly enlarged the concept of rape beyond its traditional character as a crime of force by also making it a crime of lesser severity to compel a woman's submission by other kinds of threats, provided they "would prevent resistance by a woman of ordinary resolution."¹⁹¹

These proposals had some success, notably in inducing many states to limit, if not eliminate, the formal requirement of physical resistance and to define the crime in terms of the defendant's use of force rather than in terms of the woman's non-consent.¹⁹² But the Code's proposals were overtaken by feminist demands for more radical reform in the seventies and

187. See Victoria Nourse, *Passion's Progress: Modern Law Reform and the Provocation Defense*, 106 YALE L.J. 1331, 1334 (1997) ("In this upside-down world of gender relations, it should not be surprising to learn that the common law approach toward the provocation defense, deemed an antique by most legal scholars, provides greater protection for women than do purportedly liberal versions of the defense."); see also JEREMY HORDER, PROVOCATION AND RESPONSIBILITY 192-94 (1992); Donna K. Coker, *Heat of Passion and Wife Killing: Men Who Batter/Men Who Kill*, 2 S. CAL. REV. L. & WOMEN'S STUD. 71, 78 (1992).

188. See MODEL PENAL CODE § 213.1 cmt. at 306 (1985) ("Compulsion plainly implies non-consent, just as resistance is evidence of non-consent.").

189. See *id.* at 302-03.

190. *Id.* at 306.

191. *Id.*

192. See AMERICAN LAW INSTITUTE, MODEL PENAL CODE AND COMMENTARIES § 213.1, cmts. 1-8, at 299 (1980).

eighties when the crime of rape attracted great public attention. The major concerns were the notorious under-reporting of rape, the ordeal that women who did complain had to suffer, the under-enforcement of the law, the tendency of police to discredit the woman's account, and the difficulty of securing convictions.¹⁹³ But while some of these concerns were beyond the reach of the substantive law, not all were, and both the Code and the prevailing law came under heavy criticism for retaining the doctrine of spousal immunity, the requirement of independent corroboration of the woman's testimony, and the requirement of prompt complaint, as well as for failing to shield the complaining witness from searching cross examinations of her prior sex life.¹⁹⁴

The feminist reform agenda found a receptive environment in the growing public concern with crime and the rights of victims—this was an era for criminalizing and punishing. As a consequence legislators were more sympathetic than they otherwise might have been to making the law tougher on rape defendants. In time virtually all states eliminated the traditional corroboration requirements¹⁹⁵ and most enacted rape shield statutes.¹⁹⁶ They were slower to respond to marital immunity, but the doctrine was eventually abolished in many states and widely limited and qualified in most.¹⁹⁷ Legislators have been slowest to respond to the proposal to broaden the crime to include imposition by threats other than the use of force.¹⁹⁸ This will probably be high on the agenda of reformers in the decades to come.

How much difference have these legal reforms made? Have rape reporting, arrests, and convictions increased significantly? The evidence is sparse, but there is reason to believe that the answers to these questions may be more negative than reformers had hoped, and that changes in the law have not produced the hoped for changes in social reality, or at least not directly, and not in the short run.¹⁹⁹ Still there are other grounds to

193. See Leigh Bienen, *Rape III—National Developments in Rape Reform Legislation*, 6 WOMEN'S RTS. L. REP. 170, 209-13 (1980).

194. See, e.g., STEPHEN J. SCHULHOFER, UNWANTED SEX 20 (1998).

195. See Note, *The Rape Corroboration Requirement: Repeal Not Reform*, 81 YALE L.J. 1365, 1367 (1972); see also Vitauts M. Gulbis, Annotation, *Modern Status of Rule Regarding Necessity for Corroboration of Victim's Testimony in Prosecution for Sexual Offense*, 31 A.L.R.4th 120 (1982).

196. See Harriett R. Galvin, *Shielding Rape Victims in the State and Federal Courts: A Proposal for the Second Decade*, 70 MINN. L. REV. 763, 768-70 (1986).

197. See DIANA E.H. RUSSELL, RAPE IN MARRIAGE 375 (2d ed. 1990); *Developments in the Law—Domestic Violence*, 106 HARV. L. REV. 1498, 1533 (1993).

198. See SCHULHOFER, *supra* note 194, at 82.

199. See David P. Bryden & Sonja Lengnick, *Rape in the Criminal Justice System*, 87 J. CRIM. L. & CRIMINOLOGY 1194, 1283 (1997). Empirical studies fail to disclose any significant increase in prosecution and conviction except in a handful of jurisdictions. See Ronet Bachman & Raymond Paternoster, *A Contemporary Look at the Effects of Rape Law Reform: How Far Have We Really Come?*, 84 J. CRIM. L. & CRIMINOLOGY 554, 566 (1993); Julie Horney & Cassia Spohn, *Rape Law Reform and Instrumental Change in Six Urban Jurisdictions*, 25 L. & SOC'Y REV. 117, 149 (1991).

justify legal change, and if the reforms in the law have contributed to increasing public sensitivity to the crime of rape and to a changed attitude toward women and sexuality, they would, even on that account alone, have earned their keep.

B. *The Battered Woman Syndrome*

Wife beating didn't begin in our period, nor did the defense tactic of putting the victim on the stand. The innovation in our period was the use of expert evidence to show the jury that the man's persistent physical and psychological abuse of the woman induced in her a psychological disability, which came to be called the "battered woman syndrome" (BWS). Its gist is that repeated beatings occurring in a cyclical pattern of mounting tension, battering, and contrition induce a state of "learned helplessness"—often accompanied by economic and social dependency—thereby explaining the abnormal action of the woman in remaining with her batterer despite the beatings, and in finally killing him.²⁰⁰ The significance of denominating the condition a "syndrome" continues to be obscure and the scientific credentials of the evidence have been disputed.²⁰¹ But starting with a decision of the New Jersey Supreme Court in 1984,²⁰² BWS evidence gradually gained acceptance either by judicial decision or by statute until it became admissible in the majority of American jurisdictions.²⁰³

BWS evidence was typically used to buttress a claim of self-defense, but was it a disguised plea for exculpation for women who kill their batterers, on the theory either that the sympathetic predicament of the woman made it acceptable for her to kill, or on the theory that the batterer got what he deserved, or both? It was a concern for some that the evidence could have the effect of inviting a jury to acquit on these grounds. Indeed, occasional holdings that juries might consider the syndrome in determining whether the defendant's response was reasonable raised that concern most acutely, since they seem to conflate what is sympathetic with what is reasonable.²⁰⁴ While most courts have not gone so far, they have routinely

200. See LENORE E. WALKER, *TERRIFYING LOVE: WHY BATTERED WOMEN KILL AND HOW SOCIETY RESPONDS* 42-53 (1989).

201. Note, *The Battered Woman Syndrome and Self-Defense: A Legal and Empirical Dissent*, 72 VA. L. REV. 619 (1986).

202. See *State v. Kelly*, 478 A.2d 364 (N.J. 1984).

203. See LAFAYE & SCOTT, *supra* note 27, § 5.7 n.41 (Supp. 1999) (noting that more than thirty states allow BWS evidence); see also CYNTHIA K. GILLESPIE, *JUSTIFIABLE HOMICIDE* 160-79 (1989); Hugh Breyer, *The Battered Woman Syndrome and the Admissibility of Expert Testimony*, 28 CRIM. L. BULL. 99, 107-13 (1992); Regina A. Schuller & Neil Vidmar, *Battered Woman Syndrome Evidence in the Courtroom: A Review of the Literature*, 16 LAW & HUM. BEHAV. 273, 273 (1992).

204. See, e.g., *People v. Humphrey*, 921 P.2d 1 (Cal. 1996).

come to admit the evidence to support the credibility of the defendant's claim that she killed out of fear for her life.²⁰⁵

Non-confrontational killings—where the woman kills the man while he is asleep, for example—raise special problems. Since the woman in these cases had no fear of an *imminent* attack (a traditional requirement for self-defense) and had time to escape, the relevance of BWS testimony is doubtful here and a number of courts have rejected it.²⁰⁶ It would therefore take some loosening of the imminency requirement to settle doubts about the admissibility of this evidence in these cases. Perhaps the Model Penal Code's formula of "necessary on the present occasion" would suffice, since the purport of the expert's testimony is precisely that the woman believes herself to be without escape from the inevitable attack.²⁰⁷ Yet this may not be enough. The Model Penal Code formulation would presumably justify a preemptive strike by a defendant who is *physically* confined with one she reasonably believes will soon attack her. But if the battered woman is somehow trapped, it is by virtue of her abnormal psychological condition, not because she is physically restrained. Hence a finding that she was reasonable in believing she had to kill the batterer while he slept would have to rest on the standard of the reasonable sufferer of the battered woman syndrome, which, as I said, conflates the sympathetic with the reasonable. Courts taking this tack would one day have to confront the claims of the reasonable drunk or the reasonable neurotic and harassed New York subway assault victim (Mr. Goetz, of course).²⁰⁸ So the relevance of BWS evidence in these cases continues to be problematic. Nonetheless the general acceptance of the evidence as adequately grounded in science and relevant at least in confrontational settings constitutes a significant feminist accomplishment.

V

SENTENCING—THE RESURGENCE OF RETRIBUTIVE AND SEVERE PUNISHMENT

Until the late 1960s the dominant view was that punishment should serve rehabilitative and preventive purposes and therefore should be tailored to the individual circumstances of each offender.²⁰⁹ This theory was reflected in the prevailing sentencing laws. Some, like the federal laws, offered the judge a wide range of choices with which to individualize

205. See *Moran v. Ohio*, 469 U.S. 948, 950 (1984) (Brennan, J., dissenting from denial of certiorari) (noting that BWS has gained increasing support as a self-defense theory).

206. See, e.g., *State v. Norman*, 378 S.E.2d 8 (N.C. 1989).

207. MODEL PENAL CODE § 3.04(1) (1985).

208. See *People v. Goetz*, 497 N.E.2d 41 (N.Y. 1986).

209. See, for example, Justice Black speaking for the Court in *Williams v. New York*, 337 U.S. 241, 248 (1949): "Retribution is no longer the dominant objective of the criminal law. Reformation and rehabilitation of offenders have become important goals of criminal jurisprudence."

punishment.²¹⁰ Others, like California, required that sentences be indeterminate (e.g., larceny up to five years, embezzlement one to ten years, arson two to twenty years), the place and duration of incarceration to be determined by correctional agencies.²¹¹

All this changed dramatically. Beginning in the early 1970s, a widespread disaffection with rehabilitation as a theory and in practice took hold, which revolutionized sentencing laws in this country.²¹² The individualization of punishment had run its course, yielding to the sentiment that those who commit crime should be punished because they deserve it, and in an amount determined by the seriousness of their crime.²¹³ The reasons for this shift in ideology were deep and far reaching, as Francis Allen has instructed us.²¹⁴ But successful translation of this change of sentiment into a new pattern of sentencing laws was in important measure the product of an unlikely coincidence of views between two historically antagonistic schools of thought.²¹⁵

On one side were those who had long-opposed policies of individualization and rehabilitation because they coddled offenders and promptly put them back on the streets to commit more crimes, failed justice in not giving the offender the punishment he deserved, and did both these things deceptively by ostensibly allowing long terms of imprisonment while at the same time authorizing behind-the-scene bureaucrats to release offenders early on parole.²¹⁶ On the other side were the traditional supporters of individualization and rehabilitation, those who tended to see offenders as themselves victims of social injustices and their own pathologies. But they had become disillusioned with the way the theory of individualized punishment had

210. See Louis B. Schwartz, *Options in Constructing a Sentencing System—Sentencing Guidelines Under Legislative or Judicial Hegemony*, in REFORM AND PUNISHMENT 71, 82 (Michael Tonry & Franklin E. Zimring eds., 1983).

211. See *Ex parte Lee*, 171 P. 958 (Cal. 1918) (upholding constitutionality of California's indeterminate sentencing law). For other jurisdictions, see Note, *Statutory Structures for Sentencing Felons to Prison*, 60 COLUM. L. REV. 1134 (1960).

212. See MICHAEL TONRY, SENTENCING MATTERS 6 (1996); Michael Tonry, *Twenty Years of Sentencing Reform: Steps Forward, Steps Backward*, 78 JUDICATURE 169 (1995).

213. As the late Jean Hampton observed, "There has been a steady rise in the popularity of retributivism over the last decade, which is surprising given its near death in the 1950's and 1960's." Jean Hampton, *Correcting Harms Versus Righting Wrongs: The Goal of Retribution*, 39 UCLA L. REV. 1659, 1659 (1992).

214. See FRANCIS A. ALLEN, THE DECLINE OF THE REHABILITATIVE IDEAL (1981).

215. See Sheldon L. Messinger & Phillip D. Johnson, *California's Determinate Sentence Statute: History and Issues*, in NAT'L INST. OF LAW ENFORCEMENT AND CRIMINAL JUST., DETERMINATE SENTENCING—REFORM OR REGRESSION? 13, 17-29 (1978) (describing the coalition of law enforcement and penal reform advocates that helped enact California's determinate sentencing laws in 1976); Kate Stith and Steve Y. Koh, *The Politics of Sentencing Reform: The Legislative History of the Federal Sentencing Guidelines*, 28 WAKE FOREST L. REV. 223, 225-30 (1993).

216. See Jonathan Casper, *Dominant Sentencing and Prison Overcrowding in Illinois*, 1984 U. ILL. L. REV. 231, 236-37; J. Edgar Hoover, *The Dire Consequences of the Premature Release of Dangerous Criminals Through Probation and Parole*, 27 F.B.I. L. ENFORCEMENT BULL. 1 (1958).

worked out in practice. It was often invidiously exercised against minorities; it produced indefensible inequalities in punishment of people convicted of the same offense; it permitted offenders to be held for unconscionably long terms on the unreviewable judgment of correctional agencies; and it never received the financial resources needed to make it work.²¹⁷

The alliance of these forces produced a radical departure in sentencing laws and policies. The transition is exemplified by the change in California, which had been at the forefront of states committed to individualized and rehabilitative punishment. In 1976, the legislature replaced its elaborate system of indeterminate sentencing with a determinate sentencing law that opened with this ringing commitment:

The Legislature finds and declares that the purpose of imprisonment for crime is punishment. This purpose is best served by terms proportionate to the seriousness of the offense with provision for uniformity in the sentences of offenders committing the same offense under similar circumstances.²¹⁸

The law went on to command the judge to impose a specific sentence for each major felony, permitting only a specified higher or lower sentence if the judge found aggravating or mitigating circumstances, as the case might be. It also abolished parole as inconsistent with the principles of truth in sentencing and just deserts.²¹⁹

Other jurisdictions, including the federal, chose to implement determinate sentencing programs through a system of sentencing guidelines rather than fixed sentences. The Federal Sentencing Guidelines have been the most consequential. In 1984, Congress created a commission to promulgate sentencing guidelines that judges would be bound to follow.²²⁰ The law required the commission to establish sentencing categories based on specific combinations of offense and offender characteristics and to identify a narrow range of authorized sentences for each category. And in determining the need for a sentence, it enjoined judges to consider first "the just punishment for the offense."²²¹ The failure of federal substantive criminal law codification and the success of the federal sentencing guidelines thus yield a marked irony: we retain archaic, imprecise, disorganized, and uncertain definitions of crime on which we superimpose exquisitely

217. See AM. FRIENDS SERV. COMM., *STRUGGLE FOR JUSTICE—A REPORT ON CRIME AND PUNISHMENT IN AMERICA* (1971); TWENTIETH CENTURY FUND TASK FORCE ON CRIMINAL SENTENCING, *FAIR AND CERTAIN PUNISHMENT* (1976).

218. CAL. PENAL CODE § 1170(a)(1) (1998).

219. See Messinger & Johnson, *supra* note 215, at 35.

220. See Comprehensive Crime Control Act of 1984, Pub. L. No. 98-473, tit.2, § 217, 98 Stat. 1976, 2017-26 (codified as amended at 28 U.S.C. §§ 991-998 (1994)); see generally KATE STITH & JOSÉ CABRANES, *FEAR OF JUDGING: SENTENCING GUIDELINES IN FEDERAL COURTS* (1998) (discussing the origins, application, and shortcomings of the Federal Sentencing Guidelines).

221. 18 U.S.C. § 3553(a)(2)(A) (1985).

refined distinctions in aggravating and mitigating circumstances, themselves constituting an administrative code of sub-categories of crime.²²²

The supplanting of indeterminate individualized sentencing with determinate or guideline sentencing was, in a way, the product of an implicit bargain between the retributive punishers and the disillusioned reformers. It has turned out, however, to be a Faustian bargain for the reformers. They wanted more uniformity, less discretion, less imprisonment, and shorter prison terms, and embraced a desert theory of punishment thinking it would serve these purposes. But perhaps they should have seen that what is "deserved" rises with the tide of public resentment and anxiety. In the upshot, they got the greater uniformity and less discretion that they wanted, but at the cost of vastly longer terms of imprisonment, a proliferation of mandatory and repeat offender sentences (the infamous "three strikes" laws, for example), and an unprecedented explosion of the prison population, producing a "level of incarceration . . . unprecedented in this country's history and throughout the world today."²²³ Nowhere have we failed more disastrously than in our sentencing law and policy.

CONCLUDING OBSERVATIONS

What did it all come to in the end? How will this half-century be viewed by future generations? I believe the world will most note and longest remember the Model Penal Code and its impact upon the substance and structure of American criminal law. Nothing approaching its significance occurred in the previous half-century, or indeed in the half-century before that. This is not to say that the Code has finally solved the problems of the substantive criminal law. But as a result of the Code, American criminal law has been systematically thought through from a legislative perspective for the first time since Edward Livingston, and is now substantially codified in most states, even though many of those codes fail to achieve the distinction of the model that inspired them. The fog that surrounded centuries of controversy over the requirement of *mens rea* has been lifted, one hopes, permanently. And scholarship in the criminal law was finally raised to a level comparable to that in other basic areas of law. Feminism is another development that promises to be remembered. Although its impact

222. See Gerald E. Lynch, *The Sentencing Guidelines as a Not-so-Model Penal Code*, 7 FED. SENTENCING REP. 112, 113 (1994) ("Splitting some offenses into what are in effect multiple degrees . . . , and combining others under the same guideline provision, the guidelines create, in effect, a simplified codification of the behavior criminalized by federal law.").

223. John J. Donohue III & Peter Siegelman, *Allocating Resources Among Prisons and Social Programs in the Battle Against Crime*, 27 J. LEGAL. STUD. 1, 3 (1998); see also Fox Butterfield, *Prison Population Growing Although Crime Rate Drops*, N.Y. TIMES, Aug. 9, 1998, at 18, who writes,

In a new report, the Justice Department said the number of Americans in local jails and in state and Federal prisons rose to 1,725,842 in 1997, up from 1.1 million in 1990. During that period, the incarceration rate in state and Federal prisons rose to 445 per 100,000 Americans in 1997, up from 292 per 100,000 in 1990.

on the substantive criminal law has been limited, that can easily change in the years ahead. That aside, all the rest is bad news or no news at all.

The repeal of criminal sanctions for deviant sexual practices was welcome, if long overdue, but its significance as a start toward reversing the overuse of the criminal law was drowned in the flood of federal criminal law. In the set of issues central to the domain of the criminal law, the ascertainment of blame, the bad news is that things are much as they were. As between protecting the blameless and facilitating the preventive purposes of the criminal law, it's a zero sum game. Each era will strike its own balance. For those dissatisfied with the balance that has traditionally prevailed in this country, the past half-century will be a disappointment. The long-standing compromises with the requirement of blame have continued largely unchanged: strict liability, exclusions of *mens rea* evidence, the felony-murder rule, the mistake-of-law rule. Even the legal insanity defense, which underwent substantial re-examination and change at one point, ended up as it started—with *M'Naghten*. Nor did the Supreme Court offer any comfort to those preferring a greater tilt toward the requirement of blame, finally declining to constitutionalize the substantive criminal law.

But perhaps the greatest disappointment has been the wholesale rejection of rehabilitation and its displacement by punishment that is not simply retributive but also staggeringly severe and inflexible. The irony of the triumph of the retributivist view is that the law at the same time declined to rid itself of doctrines that, by dispensing with the requirement of blame, invite punishment that is not deserved. And the practical consequences have been disastrous. Never before have we incarcerated more or held prisoners longer than we now do, and never before have we expended a greater share of our wealth on doing so.²²⁴ We can't know the future but in this area it's a fair guess that it won't be good. It is controversial and as yet not demonstrable whether the increase in penal severity has been a major factor in falling crime rates. If it turns out to be so, we should be left with the baleful reality that we live in a society that can't keep the peace without keeping huge segments of its population incarcerated. If it turns out not to be so, we should be faced with the equally baleful reality that we live in a society that misguidedly diverts shocking amounts of its wealth to imprisoning its people in the futile pursuit of its greater security. Paradoxically, the only good news may be bad news—a serious economic downturn that would make it no longer bearable to maintain the profligate expense of our penal policies.

224. See FRANKLIN E. ZIMRING & GORDON HAWKINS, *THE SCALE OF IMPRISONMENT* 137-55 (1991); Franklin E. Zimring, *More Jail Cells, Fewer Classrooms*, L.A. TIMES, May 31, 1991, at B5.