Uncommon Law: America's Excessive Criminal Law & Our Common-Law Origins

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Abstract: This essay explores the role that U.S. criminal courts play in shaping the uniquely punitive social order of the United States. U.S. courts have long been defined against the common law of England, from which they emerged. In this essay, I consider the English legacy and suggest that while the United States does draw heavily from common-law traditions, it has also innovated to alter them, a process that has established a criminal justice system even more punitive than that of England.

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Comparative analysis of incarceration rates, an imperfect albeit ready measure of national punitiveness, shows common-law countries at the top of the distribution of wealthy liberal democracies. Within this group, the United States stands apart, incarcerating nearly three times the percentage of its population than does England, the next most punitive common-law nation.[1] How the United States arrived at this state is the subject of its own considerable literature.[2] Among the leading sociological factors are the unresolved legacies of slavery and racial discrimination, the weakening of the welfare state as a framework for politics and governance, comparatively high rates of violent crime (homicide in particular), and the politicized nature of criminal justice in the highly decentralized U.S. criminal justice system – especially the political influence of home-owning middle-class voters and the power of prosecutors to use their enormous discretion for political advancement. Here I want to focus on how the criminal trial courts, both in their common-law inheritance and in their long-term evolution, have contributed to the rapid emergence of severe U.S. punitiveness.

U.S. criminal courts – the most visible in the world in no small part because of popular crime television

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shows like *Law & Order* – are often thought to provide a comparatively protective environment for the defendant, who is presumed innocent, given a lawyer, and subject to punishment only if a jury of his or her peers finds the government's case overwhelmingly persuasive. Of course, empirical research on courts has long shown this to be a highly idealized picture at best, since the delivery of these promises is obstructed by overwhelmed public defenders, plea-bargaining, and inadequate opportunity for pretrial release. While all of these certainly contribute to the scale of mass incarceration in the United States, it is the very structure of the U.S. criminal trial court that has transformed the United States into the punitive juggernaut we find today at the start of the twenty-first century.

Rooted both in their English origins and in their many innovations since independence, U.S. criminal trial courts have evolved to grant local politicians and prosecutors extraordinary power of exclusion against citizens or residents whose presence in the community may alarm electorally significant or majority populations. While many readers are familiar with the "war on crime," "mandatory sentencing," plea-bargaining, and other harshly punitive or discriminatory features of contemporary criminal justice, this essay suggests that the roots of America's mass-incarceration state extend back further than the founding of the nation itself. Prosecutorial power has steadily grown since independence through new legislation that has improved the prospects of state prosecutors in proving guilt or, as is more common, avoiding trial altogether through plea-bargaining. As we will see, the criteria of certain crimes have been redefined and refocused in order to make them more easily proven in court, and prosecutorial and judicial procedures have been smoothed or simplified to eliminate possible sources of resistance. And why not? The prosecution, called "the People" in court, represents the public interest as much as the legislature itself does, and perhaps more so.

Televised portrayals of the U.S. criminal trial may bear little resemblance to routine practice in criminal courts, but they do bear a close resemblance to the form described in the U.S. Constitution and Bill of Rights, both of which are predicated on a highly idealized, indeed contentious, conception of trial practice in the late eighteenth century. By the time of the American Revolution, English practice of law was partway through a remarkable transformation away from what legal historian John Langbein has memorably called the "accused speaks" trial, in which defendants were compelled to confront the prosecutor's witnesses and evidence in a summary hearing before a judge and jury, and toward a "lawyer conducted trial," a duel over evidence and elements, complete with cross-examinations of key prosecution and defense witnesses by professional lawyers.[3] The accused-speaks trial, which remained the dominant practice in both England and colonial America until well into the nineteenth century, hardly exemplified the model of the fair contest that we pay homage to today. Defendants, typically ripe from a period in jail, were left to their own devices to explain away the accusations against them, with a judge and jury looking on and at times joining in the questioning.

The new English trial model adapted to the rise of defense lawyers, who had gradually sought and won the rights to earn fees through cross-examination and objection to the prosecution's evidence. These changes first took hold in political cases with high-status defendants, but because defense counsels hoped to build their professional reputations through flashy style and victories in long-shot cases (much as

they still do today), these changes also spread to the cases of more common criminals.

America's revolutionary elite embraced the new paradigm. The 1791 Bill of Rights instituted a panoply of criminal trial rights associated with the lawyer conducted trial, such as the right to remain silent, to confront witnesses testifying against you, and most centrally, to be represented by a defense lawyer who could replace the defendant as challenger to the prosecution. Historians agree that few ordinary criminal defendants in the new republic, or in England for that matter, enjoyed anything like this constitutionally guaranteed model before the modern era. Until the 1960s, in criminal trial courts across the United States, something closer to the accused-speaks trial method prevailed, but the image of the lawyerly duel, in which the prosecution is forced to prove the evidence to a jury over the fierce opposition of a defense lawyer, enshrined in the Constitution and in popular culture, has long served as an emblem of legitimacy.

Trial by jury – specifically by a jury of peers – was the core feature of English criminal trials. In colonial America, even before independence, this practice translated to a jury of local citizens whose unanimous verdict was necessary for a finding of guilt. In contrast, most Continental legal systems placed a judge (or committee of judges) as the finder of both fact and law.

The English system gave the jury the authority to decide the facts, though under the strict governance of a judge who instructed them in the law and at times dictated the verdict. Further, if the judge believed that the jury had misapplied the law to the facts of the case, he could order summary penalties against them. From the very beginning, the American jury was far more populist than its English cousin, and less subject to judicial reprisal; indeed, in the many districts with elected judgeships, it was in the judges' best interest to appease and appeal to their juries, who also composed their base of voters. Trial before one's peers in England did not mean a jury made of common residents of your community; rather, the jury was typically made up of local gentlemen eager to see potentially dangerous members of the lower classes removed from society through either hanging or exile to the colonies (known as transportation), first to North America and later to Australia. In the United States, race and gender remained grounds for exclusion from the jury, though property ownership was not a decisive factor. The criminal-trial jury eventually became just as potent a symbol of U.S. democracy as the voting booth. Not surprisingly, disenfranchisement and exclusion from jury service together became central fronts in U.S. civil rights legal battles since the nineteenth century.

The constitutional requirement of due process – which mandates that the prosecution carry the burden of persuading the jury of each fact necessary to prove the crime beyond a reasonable doubt – places the authority of the American jury at the core of trials. This simple and widely known right actually comes with a set of expectations. When a judge refuses to admit evidence submitted by the defense, rejects the defense's instruction to the jury, or instructs the jury in a manner that the defense objects to – leading to the conviction of the defendant – the defendant may appeal the conviction on the grounds that the judge's actions relieved the state of some part of the burden of proof. And the court must order a new trial if it finds that a reasonable juror could have reached a different verdict had the evidence or instructions been different.[4]

Whether or not the jury right operates as a bulwark to protect individuals is, in fact, dependent on the conceptions of

crime to which legal judgments can attach. Common-law crimes consisted mostly of manifestly criminal acts: difficult to rationalize without criminal intent, but also within the realm of jurors' understanding. Modern criminal law is legislation-based, although that legislation is sometimes but a copy of common-law rules. The principle of proof beyond a reasonable doubt is the foundation for what is popularly known in the United States as the presumption of innocence. That same value extends into the penal phase, limiting punishments to only when authorized by a jury's finding of fact. However, during the twentieth century, many statutes were amended to lighten that burden on the prosecution.

But if proof beyond a reasonable doubt is deservedly celebrated as a shield for defendants, it also validates the highly punitive attitude toward those who *are* convicted. Indeed, as a legal principle, proof beyond a reasonable doubt is the flipside of the extraordinary discretion legislatures have to criminalize – through statutes defining the elements – conduct they view as socially harmful. The elements of a crime and the burden they pose for the prosecution render the jury the guarantor of the appropriateness of the punishment. In this way, the American jury, even more than its English predecessor, legitimizes the whole of the penal system. The freedom of juries to reject the elements of the prosecution's proof (should defendants exercise their rights and demand a test of that proof), removes for most Americans any serious consideration of the equity of our comparatively severe penal sanctions, including the death penalty. The extreme length of U.S. prison sentences, coupled with the prosecution's unprecedented power to influence that length by rewarding cooperation, has reduced the historically small portion of criminal cases resolved by trial to the single digits.

The highly adversarial style of the lawyer-conducted trial model that was enshrined in our Constitution (if imperfectly realized) has also fueled punitiveness. The Anglo-American criminal trial is built on the model of the private battle or litigation between two rival and equal parties. In contrast, the inquisitorial procedure embraced by Continental Europeans features a scientist-like judge or magistrate who investigates the crime and then presents legal proof to a still higher-ranking judge. While the English procedure hides the public role in investigating and prosecuting the crime, with the crown represented primarily through the judge as an only sporadically active umpire, the Continental procedure invites state restraint and paternalism. On the Continent, punishment is the result of a procedure thoroughly shaped and marked by the presence of state power, while the English adversary system makes state punishment appear as the prosecution's prize.

The U.S. innovation on the English adversary system was to preserve the emotional affectation of the victim and the accused as contestants locked in struggle, while altogether dispensing with the fiction that the prosecution represents strictly private interests. Until the reforms of the twentieth century, English criminal cases were formally private prosecutions brought by victims. The crown's prosecution service operated only in the trials of state crimes. While prosecution associations allowed many victims to be represented by professional counsel, the structure of trials, specifically the role of judges and the royal prerogative of mercy, kept the role of the state at arm's length until the legal process was complete.

The American colonies, by contrast, were quick to adopt the practice of electing a local public prosecutor.[5] The creation of a unique political office with the mandate and exclusive authority to bring criminal

charges for a jurisdiction has had a number of profound consequences. By professionalizing state prosecution, the United States accelerated the shift already taking place in eighteenth-century England, where professional lawyers had begun to appear in significant numbers for both parties in criminal trials, though especially on the prosecution's side.

Professionalizing and empowering state prosecutors in the United States not only increased the government's advantage over frequently unrepresented defendants, but it also created a distinctive class of lawyer-prosecutors with a shared interest in redefining the elements of crimes, making guilt easier to prove in court, and revising laws to increase the severity of punishments. This new interest found a receptive audience in state legislators, many of whom had themselves been prosecutors earlier in their political careers. By the twentieth century, these increasingly organized prosecutors were instrumental in passing waves of reform legislation designed to address crime generally as well as specific criminal threats with populist resonance, like recidivists or sex offenders.[6]

The creation of strong felony murder rules in the majority of U.S. states is a powerful example of the influence of professional prosecutors on criminal law development. These rules relieve the prosecution of the burden of proving the mental element of intent to kill in cases where the defendant caused the death in the course of certain felony crimes. While felony murder in the United States has long been thought an archaic vestige of common-law murder, legal scholar Guyora Binder has shown that English law actually had no clear doctrine under which a clearly accidental killing became murder simply because it was caused during another felony. Rather, felony murder charges were a creation of U.S. legislatures in the nineteenth century. By removing the necessity of proving premeditation and deliberation in murder prosecutions, this new classification of murder gave prosecutors a potent tool for inducing plea bargaining.[7]

America's second innovation on the adversary trial model was the standardization of defense counsel. The English had legally excluded defense representation in felonies until the nineteenth century. The U.S. Constitution, in contrast, guarantees the right to counsel in "all criminal prosecutions," though in practice, until the mid-twentieth century, representation was available only to those who could either hire a lawyer or secure a volunteer. Only in capital cases were defendants routinely appointed counsel if they could not afford one. But the 1963 Supreme Court decision in *Gideon v. Wainright* required all states to provide assistance of counsel to defendants who are too poor to pay for one, and the overwhelming majority of criminal defendants in the U.S. system are now, in fact, represented.[8]

The quality of that guaranteed representation, however, is far less assured. In 2013, on the fiftieth anniversary of the *Gideon* decision, a spate of reports suggested that in many parts of the country, underfunded public defender agencies struggle to provide legally adequate representation. Defendants facing felony charges typically are represented at trial, but the tens of thousands of defendants facing misdemeanor charges that dominate large urban courts are not; and even in felony cases, defendants may not have access to counsel in the early stages of the process, when lack of access to bail may have significant consequences for the case. Yet the myth of an egalitarian lawyerly battle grants America's hyper-punitive system an ethos of sporting fairness, wrongly celebrated and reinforced in television trials that imply that criminal defendants face a sentence carefully calibrated to the criminal acts they have been convicted of, and

only after the evidence has been carefully validated in a fair fight.

In recent decades, the U.S. criminal justice system has operated as a system of de facto racial segregation, with overwhelmingly African-American and Latino male defendants, and prisons that often operate explicitly on color lines to avoid gang conflict.[9] The racial concentration in criminal court has its origins in the great migrations that, from World War I through the Vietnam era, brought African Americans from the South and Latinos from Mexico to large U.S. industrial cities, where they were more exposed to professionalized policing and prosecution systems than in the rural districts from whence they came.[10] This racialization of crime has been exacerbated by the "war on crime" that has, since the 1970s, introduced a heavy investment by state and federal government to reduce urban crime through arrest-oriented policing and aggressive felony prosecution. Inside these courts, defendants face a powerful blend of English common-law crimes, such as robbery or burglary, focused on the most overt violations of personal rights, and modern statutory measures designed to criminalize preparatory conduct, such as possession of controlled substances.

Despite the strong influence of English penal reformers like Jeremy Bentham on revolutionary-era Americans, early U.S. criminal law most prominently carried the stamp of English criminal law conservatives like William Blackstone. With the famous exception of murder, reforms were procedural; the basic common-law definitions of crimes were left intact, and were frequently codified into statute law wholesale, where they remain the textual foundations for our definitions of many significant crimes today.

The English common law of crimes – so venerated by American lawyers and jurists as a source of the distinctive Anglo-American criminal-law values of both autonomy and the vigorous response to criminal offenses – was already heavily supplemented by crimes legislated in Parliament. These parliamentary crimes were sometimes variations of common-law crimes and sometimes new crimes entirely. The penalties for parliamentary crimes could be as harsh as common-law crimes, and the differences were almost certainly favorable to the prosecution. Beginning in the seventeenth century, the production of such laws reflected the increasing influence of money over the legal process, especially when modern competitive elections became more common in the nineteenth century.

In the United States, eighteenth- and nineteenth-century state legislatures, many of them filled with men who began their political careers as elected county prosecutors, adopted common-law crimes whole cloth from Blackstone, but then liberally supplemented them to increase conviction rates of suspected criminals. The example of felony murder (enormously important in securing guilty pleas by making more homicide cases eligible for the death penalty) has already been given. More recently, burglary has gone through a major evolution from its Blackstonian origins as a crime of near-violence – suggested by the memorable phrase "breaking and entering" – to a mere trespass combined with intent to commit a crime.

All of these changes have tended to bend the law in U.S. criminal courts even more in favor of the prosecution, producing over time a qualitative adjustment in favor of conviction.[11] If the common-law trial once operated like a colonial flintlock rifle, deadly if fired close enough but inaccurate and generally limited to one shot, modern U.S. criminal procedure works more like a fully automatic machine gun, with which the prosecution is able to spread a stream of fire sufficient to suppress almost any resistance.

The classification of degrees of murder, first adopted in Pennsylvania at the turn of the nineteenth century and shortly thereafter widely copied across the United States, is perhaps the most famous and consequential of all U.S. innovations on the substantive law of criminal courts, and through it, on the course of the common-law trial. It is especially effective in contrasting the differences in Anglo and U.S. criminal procedure, given the consistently much higher rate of intentional killing in the United States than in England, as well as the fact that proposals to adopt the degrees of murder have been repeatedly rejected in England, including as recently as 2009.[12]

Pennsylvania's pioneer statute essentially split the common-law crime of murder into two crimes. Second-degree murder was a killing done intentionally, or with an extreme contempt and disregard for the lives of others, but without premeditation and deliberation. First-degree murder was originally an intentional killing committed with stealth, such as by using poison or lying in wait for a victim, as well as any other intentional killing done with premeditation and deliberation. Some states would later add new "theories" of both first-degree and second-degree murder, most significantly the theory of felony murder.

This innovation has almost universally been treated as an American advance in leniency, but significantly, it has also contributed to penal severity. The connection between extreme punitiveness and degrees of murder stems from the evolution of attitudes toward capital punishment. In England, until its abolition in the 1960s, death by hanging was the mandatory penalty for murder; after abolition, life imprisonment became the mandatory penalty. In U.S. states, those convicted of second-degree murder were spared any consideration of death and faced a term of years in prison, while those convicted of first-degree murder faced a possibility of death at the discretion of the jury, not the mandatory death penalty as was practiced in England.

Although consistent with an American desire to tame capital punishment,[13] the degrees of murder have helped constitute a structure of punishment that is, in overall terms, severe rather than lenient, especially when we look from capital punishment toward imprisonment. First, second-degree murder opened an alternative not only to the possibility of hanging, but also to conviction of the lesser homicide crime of manslaughter. In the late eighteenth and early nineteenth century, manslaughter was often punished with the mostly symbolic sentencing of branding on the thumb combined with several months in jail before and after the trial. English jurors reluctant to sentence a defendant to the mandatory death penalty had to choose manslaughter, if not outright acquittal. American jurors, in contrast, could choose second-degree murder, assuring that the person convicted would not die, but also assuring that he or she would not return to the community for many years.

In the nineteenth and twentieth century, the jury's freer conscience about conviction and punishment meant that U.S. criminal courts were producing lengthy prison sentences in cases that, had they been tried in England, would have demanded that the jury either sentence the convicted to death or spare him or her from any significant punishment at all. Meanwhile, U.S. parole laws that developed in the twentieth century ensured that this dual-murder structure did not create too many unreasonably long prison sentences. However, as states moved away from parole and toward longer determinate sentences in the 1980s and 1990s, the tiered structure of murder convictions became the anchor for the modern U.S. sentencing system, producing ex-

cessive prison sentences on a scale never before seen in a liberal society.

In much the same way, the constitutional regulation of the practice of the death penalty in U.S. criminal courts since the 1970s (America's latest innovation on the laws of murder) has actually contributed to the severe punitiveness of prison terms while purporting to reduce recourse to capital punishment. With the death penalty for capital murder replaced by, or competing with, life-without-parole sentences, thousands of American prisoners now face permanent imprisonment; such sentences are virtually non-existent in politically comparable countries and have recently been declared a violation of the European Convention on Human Rights. Even for non-capital-second- and first-degree murder cases, sentences can be extraordinarily long by international standards. Most states now have mandatory minimums of fifteen, twenty, or twenty-five years, sentences that are typically extended by five or ten years if a gun was involved in the crime. In some states, parole is uncommon following mandatory minimum sentencing.[14]

Thus, while from the late eighteenth century on England executed more of its convicted murderers than did the United States, its overall structure of punishment – especially considering the increasing dominance of punishment by imprisonment – was certainly no more punitive, and was likely somewhat less punitive, than its former colony's. In the mid-nineteenth century until capital punishment was abolished by Parliament in 1964, English prisoners sentenced to death who ultimately received a royal pardon were either transported to Australia (a practice that ended in 1868) or released from English prison after approximately ten years. Since the 1990s, as a result of the politicization of crime policy, there has been considerable pressure to raise murder sentences, but the European Court of Human Rights has intervened to sharply limit these legislative efforts.

Incarceration is the end result of criminal court processing for an astounding portion of Americans, especially men of color; but it also plays an enduring role at the beginning of the process. America inherited from England the system of imprisoning pretrial detainees, as well as prisoners awaiting the execution of their sentences, in local jails, often managed for a fee by local entrepreneurs. At the time of the American Revolution, the English jail system was excoriated by the pioneer penal reformer John Howard, whose book *State of the Jails* portrayed jails as places of disease in which people in various statuses and conditions were locked and largely uncared for amidst all manner of moral and organic contamination.[15] Howard's critique helped launch the penitentiary system in both England and the United States, though they did not replace the vilified local jails so much as they built on them an even broader structure of incarceration.

In both pre–American Revolution England and colonial North America, jails played a largely invisible but crucial adjunct to the common-law trial, coloring defendants – through the miseries of confinement – with characteristics of criminality that allowed the jury to confidently form its judgment. Remarkably, despite many changes in the scale and bureaucratic form of criminal justice across the ensuing centuries, jail still plays this structural role. In the accused-speaks trials in Revolution-era England and North America, a tenure in jail assured that most defendants would show up for their ordeal weakened and possibly ill, looking and acting a disreputable person.[16] For the modern form of common-law criminal trial, in which the accused is represented by counsel and rarely speaks, jail plays a different series of roles, primar-

ily pressuring defendants to bargain with prosecution by offering their testimony in other cases. In this way, modern jails help produce the evidence that prosecutors need to build a case on the "elements" that can deliver the verdict of guilt.

In a 2012 decision that extended the constitutional guarantee of effective assistance of counsel to the lawyer's performance of negotiating a guilty plea, Justice Anthony Kennedy wrote that "criminal justice today is for the most part a system of pleas, not a system of trials," citing the fact that 97 percent of federal convictions and 94 percent of state convictions go through a negotiated plea of guilt.[17] But this system of pleas remains anchored in the common-law trial, with its adversary contest over whether the elements of the crime have been proven and its system of moralistic common-law crimes, layered with large portions of statutory laws that support the prosecution.

Of course, this inheritance has endured for a long time, through periods of high and low incarceration. It does not drive us toward extreme punishment, like some kind of dead hand, so much as it facilitates our periodic swings between optimistic and pessimistic perceptions of crime and criminal defendants. Nor is it easy to replace. The 1962 Moral Penal Code, the last major effort at revising U.S. criminal law, ultimately carried over most of the features of the common law.[18] Systematic, substantive criminal law reform has been on the political agenda since the 1970s, but it was overtaken, first by procedural reforms that did little to restrain criminalization and then by the unrestrained war on crime.

If almost every move toward independence from England has, in fact, made U.S. criminal courts more punitive, we may need to look beyond the Anglo-American dialectic for legal solutions. England's own growing conflict with the European Court of Human Rights, the Committee for the Prevention of Torture, and the Committee of Ministers on the European Prison Rules may suggest a more promising course for the United States.[19] In recent years, England has suffered numerous rebukes by the European Court of Human Rights, including rejections of its blanket ban on prisoners voting and its use of whole-life-term sentences.[20] The latter decisions included striking down the previous Labour government's signature "imprisonment for public protection" law that allowed for life sentences for dangerous felons, and also declared that the English equivalent of life-without-parole sentences is a violation of the convention. These rulings have drawn considerable condemnation from English politicians – who debate the U.K.'s relationship to Europe in part through conflicts about such cases – calling into question whether compliance is forthcoming. While the United States is not a signatory to the European Convention, it is a signatory to several United Nations treaties that cover much of the same ground.[21]

In the United States, after a period of constitutional retrenchment, the Supreme Court has shown a broad interest in reconsidering the constitutional significance of core features of the common-law trial and its penal consequences. Because it cuts across the Court's typical ideological divide, this recent line of Supreme Court cases presents one particularly interesting area of inquiry. The Court has held that the Sixth Amendment right to a jury trial requires that the prosecution prove every fact necessary to increase punishment.[22] Also under the Sixth Amendment, the Court has invigorated the meaning of competent counsel in a series of mostly capital cases,[23] and has asserted the Eighth Amendment as a more robust limit on extreme punishments[24] and prison conditions, citing human dignity as a core value

of that amendment.[25] These decisions offer promising avenues to engage the democratic forces that have historically set limits on penal excesses, but that became badly misaligned through the intense crime politics of the late twentieth century.

ENDNOTES

1 Michael Cavadino and James Dignan, "Penal Policy and Political Economy," *Criminology and Public Policy* 6 (2006): 435 – 456.

2 For a summary, see Mona Lynch, *Sunbelt Justice: Arizona and the Transformation of American Punishment* (Stanford, Calif.: Stanford University Press, 2010).

3 John Langbein, "The Historical Origins of the Privilege Against Self-Incrimination at Common Law," *Michigan Law Review* 92 (1994): 1047 – 1085.

4 *In re Winship*, 397 U.S. 358 (1970).

5 Angela Davis, *Arbitrary Justice: The Power of the American Prosecutor* (New York: Oxford University Press, 2009), 10 – 11.

6 William Stuntz, "The Pathological Politics of Criminal Law," *Michigan Law Review* 100 (2001): 505 – 600; and Jonathan Simon, *Governing through Crime: How the War on Crime Transformed American Democracy and Created a Culture of Fear* (New York: Oxford University Press, 2007).

7 See Guyora Binder, *Felony Murder* (Stanford, Calif.: Stanford University Press, 2012).

8 *Gideon v. Wainwright*, 372 U.S. 335 (1963).

9 Michelle Alexander, *The New Jim Crow: Mass Incarceration in the Age of Colorblindness* (New York: New Press, 2010).

10 Kahil Gibran Muhammed, *The Condemnation of Blackness: Race, Crime, and the Making of Modern Urban America* (Cambridge, Mass.: Harvard University Press, 2011).

11 In the 1980s, some states introduced mental illness as an element defense (something the prosecution must disprove once evoked), and more recently – as an outgrowth of the successful gun-rights political movement – some states have adopted "stand your ground" laws that purport to expand self-defense by permitting people in public space to use lethal violence without the need to retreat, even if retreat were possible with minimal risk. These are among what I would estimate to be a small category of exceptions to the rule that legislation favors the prosecution. See William Stuntz, "The Pathological Politics of Criminal Law," *Michigan Law Review* 100 (2001): 505 – 600.

12 The Coroners and Justice Act of 2009 adopted some recommendations on partial defenses, but rejected the recommendation of the Royal Commission on Law Reform that England and Wales adopt degrees of murder.

13 The survival of the modern death penalty regime in the United States – in contrast to England, where it has been abolished – is, in many respects, a monument to the taming enterprise of U.S. law, with complex rules of aggravating and mitigating factors, weighing, and appeals. See David Garland, *Peculiar Institution: America's Death Penalty in an Age of Abolition* (Cambridge, Mass.: Belknap Press, 2010).

14 Findings from behavioral economics, as well as Supreme Court precedents, suggest that high sentences for murder have an inflationary effect on penal sentences down the scale of offenses. If death or life without parole is the most severe sentence for murder, it becomes plausible to sentence robbers and burglars to ten, twenty, or thirty years. Whereas if current death-penalty cases were sentenced with a maximum of thirty years, lengthy sentences for lesser crimes would almost certainly seem excessive to more of the public, and perhaps even to the Supreme Court. See *Graham v. Florida*, 560 U.S. 48 (2010).

15 Jonathan Simon, "The Return of the Medical Model: Disease and the Meaning of Imprisonment from John Howard to *Brown v. Plata*," *The Harvard Civil Rights-Civil Liberties Law Review* 48 (2013): 217 – 256.

16 Contemporary criminal procedure rules would protect trial defendants from the harmful influences of jails (which violate both the Eighth Amendment and the Sixth Amendment), although they would not protect defendants from *all* disadvantages (such as the enormous pressure to plea bargain while in jails, whose conditions are often worse than prisons').

17 *Missouri v. Frye*, 132 S.Ct 1399 (2012).

18 A new draft is underway but has yet to take up substantive criminal law.

19 For a comprehensive account of the human rights framework for penal law in Europe, see Dirk van zyl Smit and Sonja Snacken, *Principles of European Penal Law and Policy* (Oxford: Oxford University Press, 2009).

20 See *Hirst v. United Kingdom*, Application nos. 74025/01, 2005 ECHR 681 (2006) 42 EHRR 41 [voting ban case]; and *Vinter and others v. United Kingdom*, Application nos. 66069/09, 130/10 and 3896/10 ECHR (9 July 2013) [whole term life sentence case].

21 See UN General Assembly, *The Universal Declaration of Human Rights*, December 10, 1948, resolution 217 A (III); and UN General Assembly, *The International Covenant of Civil and Political Rights*, December 16, 1966, Treaty Series, vol. 999, 171.

22 *Apprendi v. New Jersey*, 530 U.S. 466 (2000).

23 *Lafler v. Cooper*, 566 U.S. (2012); and *Missouri v. Frye*, 1399.

24 *Graham v. Florida*, 130 S.Ct. 2011 (2010).

25 *Brown v. Plata*, 131 S.Ct. 1910 (2011).