

Lawlemmas

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Cases and Materials

James R. Acker



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*To Jenny, Elizabeth, Anna, Ethan, and Andy, and to students and readers
who partake of the struggles and rewards of unraveling and exploring
the fascinating lawlemmas that surround us all.*

Contents

Acknowledgments	xiii
Introduction	xv
Chapter 1 · The Goldfish Bowl: The Reach of the Law	3
A. Introduction	3
B. Civil Law	3
<i>Strickland v. Medlen</i>	4
Notes and Questions	9
C. The Criminal Law	10
1. Animal Cruelty	11
<i>People v. Garcia</i>	13
Notes and Questions	15
<i>People ex rel. The Nonhuman Rights Project v. Lavery</i>	17
Notes and Questions	19
2. Fair Notice and Vagueness	20
<i>People v. Knowles</i>	20
Notes and Questions	22
<i>State v. Witham</i>	23
D. Conclusion	24
Chapter 1 Endnotes	25
Chapter 2 · Confrontational Tactics: Face-to-Face Confrontation and the Criminal Trial Jury	27
A. Introduction	27
B. The Right to Confront Accusing Witnesses	27
<i>Maryland v. Craig</i>	29
Notes and Questions	33
C. The Criminal Trial Jury	36
D. Conclusion	46
Chapter 2 Endnotes	47
Chapter 3 · The Nullifier: Trial Decisions	49
A. Introduction	49
B. The Criminal Defendant and Trial Testimony	49
1. Remaining Silent: The Non-Testifying Defendant	49

<i>State v. Scutchings</i>	52
Notes and Questions	54
2. Impeachment of Testimony through Evidence of Prior Convictions	55
<i>United States v. Vasquez</i>	58
Notes and Questions	60
C. Jury Nullification	61
<i>United States v. Dougherty</i>	62
Notes and Questions	68
D. Jury Instructions: Troublesome Legalese and Dynamite Charges	71
1. Understanding Jury Instructions	71
2. Dynamite Charges	73
E. Conclusion	77
Chapter 3 Endnotes	77
Chapter 4 · Punishment	79
A. Introduction	79
B. Punishment for Crimes: Why and How Much?	79
<i>United States v. Irey</i>	81
<i>Cohee v. State</i>	85
<i>United States v. Brewer</i>	87
<i>People v. Golden</i>	90
C. Restorative Justice: An Alternative to Retributivism?	96
<i>State v. Pearson</i>	98
D. Shaming and Its Role in Punishment	101
<i>Goldschmitt v. State</i>	102
<i>People v. Letterlough</i>	103
E. Conclusion	106
Chapter 4 Endnotes	107
Chapter 5 · The Insanity Defense and Civil Commitment	109
A. Introduction	109
B. The Insanity Defense	109
<i>People v. Schmidt</i>	111
Notes and Questions	112
<i>State v. Herrera</i>	116
<i>Delling v. Idaho</i>	120
C. Civil Commitment	121
<i>Mayock v. Martin</i>	126
<i>State v. T.R.O.</i>	129
Notes and Questions	132
D. Conclusion	132
Chapter 5 Endnotes	133
Chapter 6 · Causing Harm and Guilty Minds	135
A. Introduction	135

B. Causing Harm and Guilty Minds	135
<i>State v. Hallett</i>	137
Notes and Questions	139
<i>State v. Bauer</i>	140
Notes and Questions	142
<i>State v. Dixon</i>	144
Notes and Questions	145
<i>People v. Brady</i>	147
<i>Brown v. Commonwealth</i>	150
Notes and Questions	151
<i>People v. Kibbe</i>	152
Notes and Questions	154
<i>State v. Dow</i>	155
Notes and Questions	156
C. Felony Murder	157
<i>People v. Stamp</i>	158
Notes and Questions	160
<i>Campbell v. State</i>	161
Notes and Questions	164
<i>Commonwealth v. Matchett</i>	165
Notes and Questions	167
D. Conclusion	170
Chapter 6 Endnotes	170
Chapter 7 · Prisms of Justice and Justification	171
A. Introduction	171
B. Justification and the Use of Force	171
1. Self-Defense	172
<i>People v. Goetz</i>	174
Notes and Questions	176
2. Use of Force in Law Enforcement	178
a. Police Use of Force to Arrest	178
Notes and Questions	180
b. Crossing the Line: Criminal Liability for the Police Use of Excessive Force	185
Notes and Questions	191
C. Race and the Seizure of Persons: Constitutional Issues	191
Notes and Questions	194
D. Conclusion	197
Chapter 7 Endnotes	198
Chapter 8 · The Death Penalty	201
A. Introduction	201
B. Is the Death Penalty a Cruel and Unusual Punishment?	201
C. Death-Qualified Juries	224

D. Conclusion	233
Chapter 8 Endnotes	233
Chapter 9 · Self-Incrimination and Bail	237
A. Introduction	237
B. Police Interrogation and Confessions	237
1. The Due Process “Voluntariness” Test	238
2. <i>Miranda v. Arizona</i>	242
3. Custodial Interrogation	242
a. Custody	243
b. Interrogation	244
4. The <i>Miranda</i> Warnings	248
5. Waiving <i>Miranda</i> Rights	253
6. Invoking <i>Miranda</i> Rights	256
7. The Public Safety Exception to <i>Miranda</i>	262
8. Trickery and Deception	264
C. Bail and Preventive Detention	267
1. Pretrial Incarceration and the Presumption of Innocence	267
2. Excessive Bail	269
3. Preventive Detention	271
D. Conclusion	275
Chapter 9 Endnotes	275
Chapter 10 · The Fourth Amendment: Privacy and Unreasonable Searches	277
A. Introduction	277
B. The 4th Amendment and Reasonable Expectations of Privacy	277
C. The Exclusionary Rule	288
D. A Note About Entrapment	294
<i>People v. Watson</i>	297
E. Conclusion	298
Chapter 10 Endnotes	299
Chapter 11 · The First Amendment Rights of Minors ... And a Few Additional Issues	301
A. Introduction	301
B. The First Amendment Rights of Minors	301
1. Violent and Sexually Explicit Expression	302
2. The 1st Amendment in the Public Schools	308
3. Off-Campus, School-Related Speech	316
C. Adrift in a Lifeboat: A Note on the Necessity Defense	320
<i>The Queen v. Dudley and Stephens</i>	320
D. A Note About School Suspensions and Due Process	324
E. Conclusion	326
Chapter 11 Endnotes	327

Chapter 12 · The Truth About Justice	329
A. Introduction	329
B. Deoxyribonucleic Acid (DNA) and the Criminal Law	329
C. Evidentiary Privileges	336
D. Truth, Justice, and the Passage of Time	346
1. Statutes of Limitations	346
2. Punishment: Is Justice Delayed Nevertheless Still Justice?	349
E. Conclusion	352
Chapter 12 Endnotes	352
Chapter 13 · Consent, the Criminal Law, and End-of-Life Decisions	355
A. Introduction	355
B. Consent and the Criminal Law	355
C. End-of-Life Decisions: Withdrawal of Life Support, Assisted Suicide, and Homicide	361
1. The Withdrawal of Life Support	361
2. Physician-Assisted Suicide	363
3. Criminal Homicide	370
D. Conclusion	376
Chapter 13 Endnotes	376
Chapter 14 · Alcohol-Related Crimes and Defenses; Guilty Pleas; and Special Needs	379
A. Introduction	379
B. Alcohol-Related Crimes and Defenses	379
1. Intoxication as a Defense	379
2. Alcoholism and the Criminal Law	384
3. Drunk Driving Fatalities	387
C. Guilty Pleas	390
D. Special Needs	395
E. Conclusion	404
Chapter 14 Endnotes	405
Chapter 15 · Justice Will Be Served	407
A. Introduction	407
B. Social Values and the Law: Differences Over Time	407
C. Social Values and the Law: Differences in Place	424
D. Conclusion	430
Chapter 15 Endnotes	431
Index	433

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Introduction

This volume is a companion to *Lawlemmas: In Search of Principled Choices in Law, Justice, and Life*. It lays bare the law at the foundation of the plot lines and often the dialogue of the characters within its predecessor and mate. Ironically, rules of law and their application can be laced with as many ambiguities, disputable premises, and contested conclusions as find voice in the fictional essays in the complementary reader. Yet it could hardly be otherwise. The law, after all, represents a complicated mix of values, politics, power, principle, and pragmatism. It is invoked to govern extraordinarily complex social and human relationships and actions. When courts resolve legal issues they do so through case decisions which produce winners and losers. We should not be surprised that the answers to many questions of law will be neither straightforward nor likely to satisfy everyone. To expose these richly nuanced dimensions of law, the present text relies on heavily edited judicial decisions and accompanying materials which parallel the essays in the companion volume.

Readers familiar with *Lawlemmas: In Search of Principled Choices in Law, Justice, and Life* will appreciate that “lawlemma” is not a real word but rather one invented to signify a difficult choice (as in “dilemma”) which resides at least in part within the elegant context of the law (one meaning of “lemma” is a subsidiary proposition in a theorem or logical argument; another is a bract or leaf which envelops the flower of a grass spikelet). They will also be acquainted with the protagonists in those essays, most notably Professor Ethan Jurus, an attorney and legal scholar who teaches an undergraduate seminar called Issues in Justice, and Prudence (“Pru”) Durham, one of the several precocious and opinionated students in that class. The current volume focuses on the traditional language and form of the law to explore issues reminiscent of those introduced by the essays. The chapters here are organized in conformity with the chapters in the volume of essays. The two books thus can be used in tandem by those wanting to take advantage of the complementary perspectives.

Chapter 1 raises basic questions about the interests protected by the criminal law, largely by contrasting the different protections afforded humans and non-human animal life. In doing so, it highlights differences between the criminal law and civil law, and offers an exercise in statutory interpretation. This exercise, in turn, invites consideration of fair notice principles, including vagueness and the maxim that all individuals are presumed to know the law.

Chapter 2 includes two primary issues. One involves the right of confrontation and specifically whether face-to-face confrontation between the accused and adverse witnesses should be required when young children are called to testify in criminal

cases. The other involves jury selection, including juror qualifications and the exercise of peremptory challenges. While the role of a criminal defense attorney is briefly introduced in the companion volume of essays, the defense lawyer's legal and ethical obligations are explored in fuller detail in Chapter 12 of the current text.

Chapter 3 touches on the right of criminal defendants to refrain from testifying at their trials and the proposition that if they do testify they may be subject to cross-examination about prior criminal convictions for the purpose of impeaching their veracity. The primary issue explored in the chapter is the legitimacy or illegitimacy of juror nullification. In addition, through presenting a complicated judicial charge, the chapter invites consideration of how likely jurors are to comprehend and follow the rules of law on which they are instructed. It also introduces the topic of an "*Allen* (or 'dynamite') charge," an instruction designed to encourage jurors to work through their differences when they risk being deadlocked.

Chapter 4 focuses on the purposes of criminal punishment. It invites discussion of retribution, deterrence, incapacitation, and rehabilitation, and how these traditional justifications of punishment might be prioritized and applied in a specific case. The chapter also introduces restorative justice as an alternative model to retributive justice, and asks whether shaming the offender is a legitimate or desirable objective of punishment.

Chapter 5 examines the justifications for the insanity defense and various rules that have been designed to govern it, including its abolition in a few jurisdictions. It also addresses the consequences of a verdict of not guilty by reason of insanity, including the possibility of automatic involuntary civil commitment, and examines involuntary civil commitment in other contexts.

Chapter 6 explores three principal topics, all in the context of criminal homicide: issues of causation ("but-for" and proximate cause); the different types of *mens rea* important to the criminal law; and the justifications and operation of the felony-murder rule.

Chapter 7 revolves around issues presented in the companion volume that concern the shooting of unarmed black citizens by a white police officer. In this context, it examines the operation of grand juries and explores the law of self-defense and the justifiable use of force in law enforcement. It invites consideration of larger social issues in the administration of justice concerning race and unreasonable searches and seizures.

Chapter 8 considers several issues related to the death penalty, including its principal justifications, issues and problems of administration (e.g., racial disparities, innocence), and the death-qualification of jurors. It briefly introduces issues concerning police interrogation of criminal suspects, including the possibility of eliciting false confessions.

Chapter 9 continues the consideration of interrogation issues, including measures designed to help guard against false confessions, the values underlying the constitutional right against compelled self-incrimination, and several issues associated with *Miranda v. Arizona* and follow-up decisions. It also examines pre-trial incarceration and issues relating to bail and preventive detention.

Chapter 10 explores issues associated with the 4th Amendment, focusing on the right of privacy and the often-competing interests of law enforcement and societal security. Attention is given to traditional privacy concerns and also those presented by developing technology, ranging from surveillance cameras to GPS-tracking and locational privacy. The policies behind the exclusionary rule are considered, and attention is given to the issuance of search warrants and the meaning of probable cause. The subject of entrapment is briefly introduced.

Chapter 11 raises several First Amendment free speech issues affecting minors. The issues include regulating adolescents' access to violent video games and to sexually explicit material on the Internet, limitations placed on students' free speech rights within public secondary schools, and the authority of public school officials to discipline students for communications made from home computers. The chapter also invites consideration of the necessity defense (relying on the famous lifeboat case, *The Queen v. Dudley and Stephens*, and its relevance to a tale told in the companion volume), and procedural rights associated with suspending students for misconduct in public secondary schools.

Chapter 12 explores several contexts in which the truth is in competition or tension with other values important to the administration of the criminal law. Issues explored include DNA databanks and testing; evidentiary privileges (a topic which allows consideration of additional issues pertaining to the attorney-client relationship and a defense lawyer's obligations to his or her client); statutes of limitations; and the pursuit of punishment in cases where considerable time has passed between offense and the infliction of punishment.

Chapter 13 begins by raising questions about whether consent (in different contexts, including riding a motorcycle without a helmet, fighting, and fraternity hazings) should be considered a defense to criminal charges. The principal focus of the chapter concerns issues related to euthanasia: exploring the arguments for and against, and the differences between, the withdrawal of life-sustaining treatment, assisted suicide, and criminal homicide (in the context of so-called mercy killings).

Chapter 14 invites consideration of three primary issues. The first involves how a defendant's use of or addiction to alcohol should affect criminal liability, including in the context of fatalities resulting from drunk driving. The second involves guilty pleas, including the inducements available to prosecutors to elicit guilty pleas, and the entry of *Alford* pleas (where the defendant maintains innocence while pleading guilty). The third involves the "special needs" doctrine associated with the Fourth Amendment, under which searches and seizures may be considered constitutionally reasonable absent individualized suspicion of wrongdoing.

Chapter 15, the concluding chapter, invites reflection on the meaning of justice. The chapter explores how law, social attitudes, and notions of justice evolve over time, and whether concepts of justice may (or should) have different meaning in different societies or cultures, including whether "cultural defenses" should be recognized in the administration of the criminal law.

