

CRIMINAL LAW-OFFENCES, PROCEDURE, SENTENCING, AND EMERGING CRIMINAL-JUSTICE QUESTIONS

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CHAPTER 1: FOUNDATIONS AND PRINCIPLES OF CRIMINAL LAW

1. Introduction

Criminal law defines what is considered to be sufficiently undesirable for society to take action against. It explains what acts or failures to act are criminal offences, when a person may be held responsible, and what subsequent procedures and penalties may follow. In contrast to a dispute between private parties, a criminal case is brought by the state on behalf of the public, and the punishments may include imprisonment, fines, restrictions on liberty, and social censure. Consequently, it is necessary to both protect the public and safeguard the rights of the accused.

The exact nature of criminal law varies between jurisdictions. The definitions of criminal offences, available defences and sentencing guidelines will be determined by a particular jurisdiction's statutes and case law. However, there are a number of principles that are generally recognised.¹

¹ Model Penal Code § 2.02 (Am. L. Inst. 1962).

2. The purposes and scope of criminal law

There are several purposes of criminal law:

- public protection – by making conduct that threatens individuals, property, public safety or important institutions illegal;
- deterrence – by imposing sanctions that will discourage the offender and others from future criminal conduct;
- accountability/retribution – by ensuring that the punishment fits the seriousness of the offence and expressing disapproval of the conduct;
- rehabilitation – by encouraging offenders to change their behaviour;
- restoration – by encouraging offenders to repair the harm caused to victims;
- maintaining public order – through establishing proscribed conduct and providing a method of responding to it.²

Criminal law is not designed to punish every undesirable act – some are dealt with through other methods such as civil law, regulation or social disapproval. A dispute, even one which harms another party is usually a civil matter, as is a failure to uphold a contract. Other breaches of conduct are regulated through other mechanisms such as workplace safety laws and breach of these may result in regulatory sanctions.

It is the state which prosecutes criminal law offences. Consequently, criminal law liability is personal – it is the state that must prove that a particular individual committed the crime in question, unless it is a crime of the limited categories for which it is not (see 3.2). Criminal law procedures are designed to safeguard the rights of individuals as the state has considerable power over an individual.

3. The elements of an offence: *actus reus* and *mens rea*

In order to be guilty of a criminal offence, a person must perform or fail to perform a particular activity and have the correct state of mind. These are referred to as *actus reus* and *mens rea* respectively.³

² Model Penal Code § 5.01 (Am. L. Inst. 1962).

³ Model Penal Code § 5.03 (Am. L. Inst. 1962).

3.1 Actus reus

Actus reus is the physical element of an offence, and can be any of the following:

- voluntary act – for example, stealing another person's property;
- omission – failure to perform a duty;
- prohibited result – such as injury or damage;
- specific circumstances surrounding a prohibited act – for example, possession of an illegal item.

The prosecution must prove the accused's actus reus to the applicable standard of proof, which is generally beyond reasonable doubt. The particular actus reus of an offence is defined by statutes or common law.

Not all omissions are prohibited. Generally, to owe a duty of care is a prerequisite for a crime of omission, and this can be set out in statutes, come about through a particular relationship (for example, a parent-child relationship), exist as a contractual obligation, or be assumed intentionally. The nature and existence of such duties will vary depending on the jurisdiction.

The actus reus of a crime must be voluntary. The actus reus of a crime is not voluntary if it is caused by an external factor or particular types of unconscious movement, although the exact position depends on the applicable law.⁴

3.2 Mens rea

Mens rea literally means 'wrong mind'. It refers to the state of mind of the accused at the time of the offence. It is not one specific state of mind, but can include the following:

- intention – where the accused acts in order to achieve a particular result;
- knowledge – where the accused is aware of a particular fact or situation;
- recklessness – where the accused appreciates that there is a risk of a particular consequence occurring but proceeds anyway;
- negligence – where the accused falls below a standard of care expected of a reasonable person.

Criminal negligence implies a much lower standard of care than mere negligence.⁵

⁴ 18 U.S.C. § 1111 (2024) (murder).

In some cases, an offence's elements require proof that the accused had a particular state of mind (such as intention to cause grievous bodily harm). In other cases, the law places liability on the accused without proof of a particular mens rea in relation to particular elements of an offence. These latter types of offences are sometimes referred to as strict- or absolute-liability offences (although this terminology can vary) and although they tend to be imposed in regulatory areas, the punishments are often not as severe as for other offences. The existence and applicability of such offences will be determined according to the law which creates them.

The prosecution must generally prove any required state of mind relevant to the elements of the offence. An accused cannot be convicted of an offence simply based on thoughts or intentions – a physical act or omission (*actus reus*) must occur simultaneously. Likewise, an intention to perform an act that is not prohibited (or a 'wrongful intention') is not sufficient for conviction in itself.⁶

4. Causation

Where offences require an illegal result (such as death, injury or damage to property) the prosecution must generally prove that the defendant's actions caused it. There are two aspects to causation which courts consider.

4.1 Factual causation

Factual causation is concerned with whether the result would not have occurred 'but for' the defendant's actions or whether the defendant's actions were a substantial contribution to the result.

4.2 Legal causation

Legal causation considers whether the link between the act and the result is close enough for legal responsibility to be placed on the defendant. A further event which occurs after the accused's conduct may affect this assessment. For example, a separate intervening event, an unforeseen medical complication, or the victim's involvement may all be relevant. The fact that

⁵ 18 U.S.C. § 2113 (2024) (bank robbery and related offences).

⁶ 18 U.S.C.371 (2024) (conspiracy to commit an offence or defraud the United States).

an event occurs after the defendant's conduct does not mean that it is not a substantial cause of the result. The court will assess the relevant legal tests and circumstances to determine causation⁷.

5. Attempt, participation and complicity

5.1 Attempt

An attempt is an act or omission which goes beyond preparation towards the commission of an offence, and has a guilty mind towards its accomplishment. There are various stages of an offence, and preparation alone will not constitute an attempt. The point at which an offence becomes an attempt depends on the jurisdiction.

Responsibility for an attempted offence allows the law to intervene before a harmful result occurs, but must be restricted so as not to convict people for mere thoughts or lawful preparations.⁸

5.2 Participation in crime and other forms of complicity

Participation can take several forms and in each case the accused is considered to have committed the crime as if they had personally done it, or the liability is otherwise directly applicable. The particular elements will vary depending on the law of a particular jurisdiction, but can include:

Aiding or assisting – providing assistance, equipment, information or other help;

Encouraging or counselling – verbally or physically encouraging or giving advice;

Conspiring – agreeing with others to carry out an offence when conspiracy is an offence in itself;

Joint participation – participating alongside another person with the same criminal objective.

Participation in an offence requires the same mental element as for the offence in question. The law requires proof that the accused intentionally provided assistance, encouragement or counselling, or knew the relevant circumstances. Merely being present or associating with the offender(s) is not enough to be found guilty. The prosecution must prove that the accused took a step which significantly contributed to the crime, and had the correct mens rea.⁹

⁷ 18 U.S.C.1343 (2024) (wire fraud).

⁸ 18 U.S.C.1030 (2024) (computer fraud and related activity).

⁹ United States v. Alvarez-Machain, 504 U.S. 655, 660–62 (1992).

6. Defences and justifications

A defence may prevent conviction, reduce the level of the offence, or reduce a sentence. The burden of proof and type of defence will depend on the applicable law.

6.1 Justifications

A defence of justification argues that the conduct was appropriate in the circumstances. An example is self-defence. A defendant may argue that they used force to defend themselves or another person, or to protect property, a body or a person. In many cases, it is a defence where the person honestly believed that force was necessary, and the force used was reasonable given the situation.

Other potential justifications could include justification by necessity, or by lawful authority, but these must meet strict criteria.

6.2 Excuses

A defence of excuse argues that although the conduct was legally wrong, the accused should not be held responsible due to their personal or mental state. Examples of this include:

Duress – acting under pressure of threats, to a degree beyond that accepted by law;

Mental disorder – legally defined incapability to understand the wrongfulness of one's actions;

Intoxication – the impact of this depends on the circumstances and the nature of the offence;

Mistake – this can negate mens rea if it is a reasonable mistake of fact, but a mistake of law is generally not an excuse.¹⁰

Defences cannot be used interchangeably, and each one negates particular elements of an offence or provides an excuse based on a particular legal justification. There may also be limitations or exclusions depending on the nature of the offence.

7. Legality, proportionality and fair treatment

7.1 Legality

Legality is the principle that individuals are only criminally responsible for conduct which was prohibited by a law in existence at the time that the conduct occurred. The principle is frequently

¹⁰ Ruan v. United States, 597 U.S. 450, 457–58 (2022).

summarised by the Latin phrase ‘no crime or punishment without law’. Legality is important in criminal law because it ensures that:

- laws are clear enough to give people guidance;
- there is no discrimination in the application of the law;
- laws are not retrospective – they should not be passed with the specific intent of criminalising past conduct.

7.2 Proportionality

The principle of proportionality requires that punishments and other sanctions fit with the seriousness of the offence, and other relevant factors such as the offender’s culpability. Proportionality applies to several aspects of criminal law, including:

The definition of offences – making sure that the conduct criminalised is appropriate in scope;

Investigatory and law enforcement powers – making sure that these powers and sanctions are not overly intrusive or wide-ranging;

Sentencing – ensuring that it reflects the seriousness of the offence and other relevant factors.

By applying the principle of proportionality, a criminal law system can ensure that punishments are neither excessively harsh nor unreasonably lenient in relation to the gravity of the offence.

This principle also facilitates consistency in sentencing while taking into account the nuances of particular cases.¹¹

7.3 Fair treatment and procedural safeguards

Fair treatment in criminal law processes requires that the state respects the rights of those who are suspected or accused of crimes. Procedural safeguards in criminal law ensure that these rights are not usurped by the state, either intentionally or inadvertently. Rights that fall under this category include:

- the presumption of innocence;
- the burden of proof being on the prosecution;
- the right to know the allegations and to challenge evidence;
- the right to legal representation, where available;

¹¹ Riley v. California, 573 U.S. 373, 386, 401–03 (2014).

- a fair trial;
- protection against arbitrary arrest and unlawful search;
- the right to remain silent, or to not give evidence and testimony that could incriminate them if such rights are available;
- the right to appeal or to challenge a conviction or sentence in a higher court, where appropriate.

These procedural safeguards do not limit the ability of the state to investigate and prosecute criminal law offences – they are essential for protecting people from an overweening state.¹²

CHAPTER 2:

OFFENCES AND CRIMINAL LIABILITY

1. Introduction

Criminal offences are acts or omissions prohibited by law, which are punishable by the state. Criminal liability generally requires proof of a prohibited act or omission and a required state of mind. The onus of proof of each element is generally on the prosecution, who must prove each beyond a reasonable doubt, according to specific rules of law¹³

Offences may be grouped according to the interests protected, such as persons, property, systems, or public order, or in accordance with their gravity and different procedural treatment. A proper understanding of these categories is fundamental to understanding how criminal law protects different public and private interests, as well as establishing the various liabilities of natural or juridical persons.¹⁴

2. Offences Against Persons

Offences against persons aim to protect life, bodily integrity, and personal freedom, as well as personal security, both physical and moral. Their seriousness generally depends on the severity of consequences, the subjective aspect of the offender, and whether the offence was intentional or not.

¹² United States v. O'Hagan, 521 U.S. 642, 650–53 (1997).

¹³ United States v. Nosal, 676 F.3d 854, 857–58 (9th Cir. 2012) (en banc).

¹⁴ United States v. Skilling, 561 U.S. 358, 408–09 (2010).

Homicide

Homicide embraces all the various forms of unlawful causing of death of another person. Depending on the jurisdiction, distinctions are drawn between forms of murder, as well as between murder and manslaughter.

Generally, murder embodies an especially serious state of mind, such as intent to kill or cause serious harm, or a specific form of recklessness. Manslaughter may comprise unlawful killings for which no element of mens rea for murder is present, or for which an element of mitigation is present. In some jurisdictions, homicide may also be committed by causing death by dangerous or negligent driving.

The prosecution must generally prove that the accused's conduct has caused the death, either factually or legally. The tests for establishing factual and legal causation vary.¹⁵

Assault and bodily injury

Offences such as assault and bodily injury comprise a wide range of conducts, from unlawful threats and attempts of using force, to the actual infliction of injury. Some jurisdictions make a distinction between assault (which may involve causing the victim to believe that an immediate unlawful force is about to be used) and battery (unlawful force used against the victim). Other jurisdictions use different classifications, such as assault and bodily harm

The seriousness of the assault may depend on the severity of the injury, the use of weapons or the vulnerability of the victim, and the relative position of the victim and the offender. A distinction is generally drawn between assault with consent and any other assault, although consent may not exclude criminal liability if the victim is placed at risk of serious harm.

Sexual offences

Sexual offences generally comprise a wide range of conducts, from unlawful sexual relations, to the exploitation and harassment of a person. Sexual offences generally focus on the use of a person for sexual pleasure without consent, and the use of force or pressure to obtain consent. In

¹⁵ New York v. United States, 505 U.S. 144, 166–68 (1992).

many jurisdictions, the sexual offence relies on a determination of whether consent was given, whether it was possible for the victim to give consent, and whether it was withdrawn. Different distinctions can be drawn according to the jurisdiction, such as the presence of a sexual element, the involvement of children, or the use of force. Some sexual offences may criminalize the exploitation of children or harassment, and the publication or distribution of images without consent.¹⁶

Offences against liberty and personal security

Some offences target the personal liberty and security of a person, such as kidnapping, unlawful detention, stalking, threats, and harassment. In addition to the mens rea and actus reus elements, liability depends on whether the offender acted with a specific purpose or not.

3. Offences Against Property

Offences against property protect possession, ownership and the right to use property. These offences generally involve deprivation of the property, its misuse or destruction, or the unlawful appropriation of it.

Theft and related offences

Theft comprises the unlawful appropriation of the property of another, generally with an intention of depriving the victim of it. Some jurisdictions require proof that the accused had the intention to permanently deprive the victim of the property, while others may use a different formulation. Theft may be committed by various means, such as robbery, which generally comprises the taking of the property of another by force or by threatening them with force, or burglary, which embraces the unlawful entering or remaining in a building with the intention of committing an offence or committing an offence there. The elements of these offences vary greatly from one jurisdiction to the other.¹⁷

¹⁶ *Gerstein v. Pugh*, 420 U.S. 103, 114 (1975).

¹⁷ *County of Riverside v. McLaughlin*, 500 U.S. 44, 56–57 (1991).

Fraud and deception

Fraud and deception offences involve the use of deception to induce someone to deliver property, or to cause them to suffer some detriment. Fraud offences may include false statements, misrepresentation, abuse of a position of trust, or the dishonest failure to disclose information where there is a legal obligation to do so. Deception by fraud may involve various elements, depending on the jurisdiction, such as dishonest intention to gain or cause loss, and actual or attempted gain or loss.

Criminal damage

Criminal damage encompasses the intentional or reckless destruction or damage of the property of another, usually without lawful excuse. The seriousness of the offence may vary depending on the value of the property, the manner in which it was destroyed or damaged and the risks to people's safety.

4. Public-Order, Economic, and Cyber Offences

Public-order offences

Public-order offences criminalize conduct that threatens the safety of the public, or causes major disruptions. These types of offences may comprise rioting, unlawful assembly, or disorderly conduct, and various forms of threats or harassment. These offences are generally limited to those acts where such disorder is not protected by a constitutionally guaranteed right to protest, and laws should ensure that such disorders are restricted to the minimum in accordance with human rights standards.¹⁸

Economic and regulatory offences

¹⁸ Gideon v. Wainwright, 372 U.S. 335, 344–45 (1963).

Economic offences range from bribery and corruption to money laundering and market abuse. These may seriously undermine institutions and markets, and have an adverse effect on many individuals. Some of these offences require proof of dishonesty or an intent to commit them, while others criminalize breaches of regulatory duties, without proof of mens rea. Other economic offences criminalize misconduct at the workplace, such as health and safety breaches, and can involve various liabilities of the organization, depending on their role in the harm.¹⁹

Cyber offences

Cyber offences involve the use of computers or networks, data or online services, and encompass a wide range of conduct, from unlawful access to computer systems or data, to online fraud and the distribution of prohibited material. Many of these offences relate to identity theft, and computer or online fraud. Data and online services can also be used to facilitate other offences, such as stalking and extortion. Issues relating to searches, privacy and data retention, the authenticity of evidence and records, and cross-border issues are generally complex and must be carefully regulated by law, given technological developments.²⁰

5. Inchoate Offences and Group Criminality

Inchoate offences are those where liability is incurred for an act that was intended to lead to the commission of an offence but was not completed. Inchoate offences criminalize conduct that is towards the commission of an offence, and allow intervention before a prohibited act is completed. Such offences must be carefully formulated to ensure that no one can be penalized for merely thinking about an offence, or for associating with persons who intend to commit one.

Attempt

Attempt generally comprises an act or omission with the intention to commit a specific offence, where preparations have gone beyond what is reasonable. Courts should consider whether the

¹⁹ Brady v. Maryland, 373 U.S. 83, 87 (1963).

²⁰ United States v. Bagley, 473 U.S. 667, 682 (1985).

accused has gone beyond the preparation for the offence, in accordance with statutory tests. Abandonment or renunciation may be considered as possible defences depending on the jurisdiction and the situation.

Conspiracy

Conspiracy generally comprises an agreement to commit an offence, which requires proof that the accused had the intention that the offence be committed. The accused must generally agree to commit an offence, and to be of the view that it will in fact occur, though some jurisdictions may require that some conduct towards its commission has occurred.²¹

Encouraging or assisting crime

A person may be penalized for encouraging, assisting, or otherwise facilitating an offence, even if they do not commit it directly. The liability generally depends on the statutory requirements and their knowledge of the situation.

Complicity and joint participation

A person who aids, abets, advises, or procures an offence, or who conspires with others to commit it, or facilitates it, may be treated as if they themselves had committed it. Generally, the prosecution must prove that the accused has in fact aided or encouraged an offence, and that they had the required mens rea for the offences committed. The liability of a person for a crime that they have not themselves committed may depend on various factors, such as the extent to which they encouraged or assisted in the commission of the offence, or the level of control that they had over its commission. A person's mere presence at the scene of the crime may not be sufficient to incriminate them, but other conduct or surrounding circumstances may be relevant to determining criminal liability.²²

²¹ Crawford v. Washington, 541 U.S. 36, 59 (2004).

²² In re Winship, 397 U.S. 358, 364 (1970).

6. Corporate and Organizational Liability

Organizations can commit crimes through their employees, agents, or senior officers. Corporate liability is significant to many crimes, as companies may cause serious harm to the environment, to individuals and other companies, and to public finances. There are different ways to criminalize the conduct of an organization, such as identifying the acts and mental state of the senior officers to which the company is bound or held out as its directors, or holding it liable for an offence committed by an employee within the scope of their employment, subject to statutory conditions. Additionally, some regulatory offences may impose a strict or vicarious liability, and allow the defense that reasonable steps were taken to prevent or detect it. Organizations may also have duties to take steps to prevent certain forms of misconduct, and its failure to do so may be relevant to whether it is held liable for the crime committed, or whether it can be sentenced more leniently.²³

Individuals who authorize, direct, conceal, or fail to prevent misconduct, or whose negligence causes it may be held personally liable. Corporations may be penalized with a fine, compensation, compliance undertakings, restrictions of their activities, or other measures.

7. Classification of Offences and Factors Affecting Liability

The classification of an offence depends on the jurisdiction. In some jurisdictions, offences are classified as either summary (where the punishments and procedures are less serious) or indictable (where more stringent procedures apply), or as offences that may be tried summarily or on indictment. The classification may affect the court where the defendant may be brought before, the rules of procedure that must be followed, as well as penalties, limitation periods and the right to appeal.²⁴

The liability of a person for a crime generally depends on several factors, including:

²³ Apprendi v. New Jersey, 530 U.S. 466, 490 (2000).

²⁴ Blakely v. Washington, 542 U.S. 296, 303–04 (2004).

Actus reus and mens rea: conduct or failure to act, and mental state or fault; Conduct and consequences: what the accused has done or failed to do, and if that has resulted in harm;

Causation: whether the accused's act or omission was in fact and legally responsible for the harm;

Participation: whether the accused has acted alone or with others, and to what extent;

Defences: if the accused can rely on any defence, such as self-defence, duress, necessity, mistake, or lack of mens rea or capacity;

Other personal circumstances;

Statutory factors: some crimes require proof of certain elements, or fault, or may incur strict liability.²⁵

CHAPTER 3:

CRIMINAL PROCEDURE AND THE ADMINISTRATION OF JUSTICE

1. Introduction

Criminal procedure refers to the rules and processes by which the State investigates, prosecutes and adjudicates alleged offences. It aims to facilitate effective law enforcement and protect individual rights and the administration of justice. It is an important issue because even the most compelling case may be defeated by unlawfully obtained evidence, inadequate disclosure or the risk of an unfair trial.

Procedural steps commonly include investigation, arrest or summons, charging decisions and pre-trial procedures, trial, sentencing or appeal. The process is often iterative and some steps may be absent, for example, if charges have been dropped, or a case concluded on a plea.

2. Investigation, Arrest and Search

Investigation

²⁵ Booker v. United States, 543 U.S. 220, 245 (2005).

An investigation is undertaken to determine whether an offence has been committed and who has committed it. It is a process of gathering information and evidence, interviewing witnesses, examining physical and digital material, video and audio surveillance, forensic analysis and accessing records. The powers of investigators are usually limited by laws which may safeguard individual rights, such as privacy, and the right to liberty, including protection from arbitrary arrest and detention.²⁶

Investigators should consider evidence which may support and which may undermine the allegations and the role of a suspect. An investigative process which favours one party is likely to result in an accused person being wrongly convicted and may also impede the right of a defence to a fair trial. Interviews should be conducted with any safeguards provided for by applicable law, such as recording, and right to independent legal and other assistance, and the special protection of vulnerable individuals.

Arrest and detention

An arrest is a serious interference with liberty. It should be based on law, which often requires arrest or detention to be authorised by a warrant or order or to be justified by specific grounds for detention, as provided for by law.

An arrested person should be informed of the reason for the arrest and of their rights, including rights to remain silent, to legal assistance and to notify a third party of their arrest and detention. Detention of an individual must also be provided by law and subject to specific safeguards, for example time limits on initial detention and production of the detained person before a court. Where detention is unlawful or safeguards not followed, a court may exclude evidence and provide other remedies by law.²⁷

Search and seizure

²⁶ Strickland v. Washington, 466 U.S. 668, 687–88 (1984).

²⁷ 18 U.S.C.3553(a) (2024).

Searching a person or premises for evidence is an intrinsically invasive measure and therefore often requires a warrant or be justified by specific grounds for a search, for example, urgency. Warrants will often specify the place and the items which may be searched for. Rules also often apply to the seizure, preservation and inspection of evidence. Searches of digital devices may raise additional concerns due to the significant amount of personal information they may hold and the potential for proportionality issues. Courts may consider whether such searches comply with safeguards and proportionality requirements.²⁸

3. Charging Decisions and Pre-trial Procedures

Charging decisions

A charging decision is a decision as to whether an accused person is to be brought to trial, and if so what charge is to be proven at trial. Prosecutors, police or both (depending on the jurisdiction) usually make charging decisions. Prosecutors may weigh up whether the evidence is sufficient and whether the prosecution is in the public interest.

Charges should reflect the alleged offence and available evidence. Over-charging may place an accused person under undue pressure, while under-charging may fail to punish the harm caused. Prosecutors may seek to amend or withdraw charges as the evidence develops and the lawfulness of the charges may be reviewed by courts.²⁹

First appearance and preliminary matters

Following a charge being laid, the accused is brought before a court (in some cases, this may be done on several occasions). A court may confirm identity, decide on legal representation, and whether to release or detain the accused and fix trial dates as appropriate, depending on the system. In some systems a plea, or response to the charge, is taken at this stage, while in others it will be a later step.

²⁸ U.S. Sent'g Guidelines Manual § 1B1.1 (U.S. Sent'g Comm'n 2023).

²⁹ Gall v. United States, 552 U.S. 38, 46, 51 (2007).

Pre-trial proceedings may also examine jurisdiction, whether the charge is appropriate, the admissibility of evidence, witness issues, issues of disclosure and matters of dismissal or narrowed issues. Such procedures aim to ensure the issues are properly framed and the trial is fair and not unduly prolonged.

Case management and delay

Courts may deal with case-management issues, for example setting timetables, identifying issues on which evidence may be in dispute, and ensuring disclosure of evidence is timely. Delay in criminal proceedings may cause unwarranted distress for the accused and witnesses, affect the ability to give evidence and be prejudicial to the administration of justice. Courts often have procedures to review unreasonably lengthy proceedings and may impose sanctions, for example, where the delay is attributable to one party.³⁰

4. Bail, Disclosure and Plea Processes

Bail and pre-trial release

Bail is the release of an accused person from custody before trial. A bail determination is a decision as to whether an accused can be released on certain conditions which will ensure that the accused appears at trial and is not likely to commit further offences or interfere with witnesses. Such release should be ordered if the risks can be addressed appropriately through conditions of release, and the court must balance the need for release against such risks, which include the seriousness of the alleged offence and the personal circumstances of the accused.³¹

Conditions of release may include reporting obligations, restrictions on residence and movement, a ban on contacting witnesses, and potentially a deposit which is at risk of forfeiture if conditions are breached. Conditions should be necessary and proportionate if risks are to be addressed. If risks cannot be addressed through conditions of release, detention on bail may be required, subject to review and applicable legal standards. Inappropriate pre-trial detention may undermine

³⁰ Rita v. United States, 551 U.S. 338, 347 (2007).

³¹ United States v. Booker, 543 U.S. 220, 259–60 (2005).

the presumption of innocence and the rights of the accused to liberty and security, particularly where an accused person cannot afford bail.

Disclosure

Disclosure is the exchange of information between the parties about the issues and evidence in the case. Prosecutors must provide disclosure to the accused about evidence which they rely on, and in many systems, about information relevant to the case which may assist the defence or undermine the prosecution evidence, such as witness statements or expert reports and evidence, recording, and the basis of evidence.

Disclosure ensures that the accused has an opportunity to investigate the case, challenge evidence, and choose whether to proceed to trial or not, on the balance of probabilities. Disputes may arise, for example, about the relevance and admissibility of evidence, and potential concerns of privacy, confidential sources and the use of sensitive information. Courts may inspect disputed evidence and impose safeguards but fairness to the accused requires that they have the opportunity to respond to evidence.³²

Plea processes

An accused person may plead guilty or not guilty. A plea of guilty, where acceptable to the court, will usually allow the case to be determined more quickly and without trial. A court should be satisfied that any guilty plea is not an unfair admission of guilt and that the accused has understood the nature of the charge and its potential sentencing consequences, and that any agreement on evidence has the necessary basis, where appropriate.

Plea negotiations may take place, for example, on charges, agreements on facts and potential sentences, depending on the jurisdiction. Such negotiations fall under the supervision of the courts which will ensure that they are carried out fairly, transparently and in the interests of justice. A plea may save resources, and reduce the need for witnesses to give evidence. However the process may be unduly persuasive, or involve inadequate advice, and must be overseen by a

³² *Mistretta v. United States*, 488 U.S. 361, 412 (1989).

court to ensure that an accused person can make an appropriately informed choice as to whether to plead guilty.³³

5. Trial Rights, Evidence and Burden of Proof

Fair-trial rights

A trial in a court must be fair, and usually means an independent tribunal exercising power conferred by law which may be judicially reviewed. Important fair-trial rights include the presumption of innocence, the right to know the offence, to be prepared for trial, to have legal representation if the accused wishes to have it, and the right to challenge prosecution witnesses. The accused may have a right to attend and remain silent and to give evidence. The principle of the right to silence usually means that the prosecution has the burden of proving the charge, although variations may exist. Trials must be open to the public, subject to specific exceptions to protect children, the vulnerable or sensitive issues.³⁴

Evidence and admissibility

Evidence may take many forms, including testimony, documentary evidence, physical and digital items. The court will determine whether it may be used at trial and whether it is reliable, privileged, unfair and prejudicial or obtained unlawfully. Expert evidence will be admissible if it addresses an issue which is outside the knowledge of the trier of fact and is based on reliable principles.

The weight of evidence is a matter for the judge or jury who will decide on its credibility, the opportunity of witnesses to observe events and their potential bias and reliability. Forensic evidence must be considered with regard to principles of methodology and the potential of human error. Digital evidence may raise issues of authenticity and integrity.

Burden and standard of proof

³³ *Graham v. Florida*, 560 U.S. 48, 74 (2010).

³⁴ *Maneka Gandhi v. Union of India*, (1978) 1 S.C.C. 248 (India).

The prosecution must prove all elements of the offence and any defences, where applicable, beyond reasonable doubt, or to the standard required by the relevant jurisdiction. A defendant does not usually bear the burden of proving their innocence, although some jurisdictions may require a defendant in some circumstances to prove matters on which they rely against the findings of fact of the prosecution.

At the end of proceedings the fact-finder must assess whether the evidence supports the finding of fact and must acquit if it does not meet the standard.³⁵

6. Appeals and Post-conviction Review

An appeal is a process by which a higher court reviews a conviction, sentence or other ruling to decide whether there were legal errors, the verdict was unreasonable, evidence was wrongly admitted or excluded, or the proceedings were unfair. An appeal is not necessarily a retrial. A court will examine facts on the record at trial and apply specific tests to determine whether the verdict or sentence should stand.

Possible remedies include dismissing the appeal, ordering a new trial, varying the conviction or the sentence. The right to appeal may be limited, with leave to appeal required, and there may also be time limits. Other processes may also apply to fresh evidence, wrongful convictions and other matters in appropriate cases.³⁶

Post-conviction review includes sentence reviews, parole, correction of records or fresh evidence. It enables matters of law and issues of miscarriage of justice to be reviewed, subject to the finality of convictions and sentences.

CHAPTER 4:

SENTENCING AND CRIMINAL SANCTION

³⁵ D.K. Basu v. State of West Bengal, (1997) 1 S.C.C. 416 (India).

³⁶ Arnesh Kumar v. State of Bihar, (2014) 8 S.C.C. 273 (India).

1. Meaning and purpose of sentencing

Sentencing means the process by which a court determines what sentence to pass on a person found guilty of an offence. Sentencing follows a finding of guilt, whether at trial or following a guilty plea. A sentence must be proportionate to the offence and the offender, and within the law and the rights of all concerned.³⁷

Sentencing systems commonly aim to achieve some or all of the following purposes:

retribution – passing a sentence that reflects the seriousness of the offence. Retribution is not vengeance; it must be measured against legality and propriety;

deterrence – putting the offender or others off repeating the offence;

incapacitation and protection of the public – preventing the offender committing further offences;

rehabilitation – tackling underlying problems which lead an offender to commit offences, such as drug addiction, lack of education or anti-social attitudes;

reparation – repairing the harm caused or suffered as a result of the offence;

denunciation – expressing society's disapproval of the offence.

These purposes are not necessarily mutually exclusive, but may conflict. For example, a long prison sentence may achieve general deterrence and protection of the public but may undermine rehabilitation and family life. A community sentence may be used as an opportunity for rehabilitation, but may not give sufficient weight to the harm caused by the offence. The courts must apply the law and the factors stated in the law to sentencing purposes and priorities.

2. Principles governing a sentence

Proportionality

The sentence imposed must be appropriate to the seriousness of the offence. Courts will therefore take into account the harm or risk caused or likely to be caused by or as a result of the

³⁷ Joginder Kumar v. State of Uttar Pradesh, (1994) 4 S.C.C. 260 (India).

offence, and the defendant's level of responsibility. A lesser penalty should not be imposed on an offender in a more serious category of offence unless there is a lawful basis for doing so.³⁸

Individualisation and consistency

Sentences should reflect the personal circumstances of the case and the offender, while being consistent with sentences in similar cases. Personal or case-related factors relevant to individualisation or the need for consistency may include the defendant's age and physical or mental health, previous convictions, role in the offence, potential for rehabilitation, and whether the sentence will have an adverse effect on dependants. Consistency between similar offenders does not mean that identical sentences must be imposed in identical circumstances.³⁹

Legality and fairness

Courts must impose sentences that are lawful and that take account of relevant factors and avoid irrelevant ones. The defendant must have a real opportunity to challenge the sentence or any information supporting it. Decisions on sentencing, particularly where the penalty is to be severe, should include reasons for any decision.

Least restrictive appropriate sanction

To the extent permitted by statute and the seriousness of the offence, courts should consider whether a less restrictive sanction than might first appear appropriate will suffice to achieve the relevant purposes of sentencing, including rehabilitation and the protection of the public.⁴⁰

3. Sentencing guidelines and judicial discretion

³⁸ Lalita Kumari v. Government of Uttar Pradesh, (2014) 2 S.C.C. 1 (India).

³⁹ Hussainara Khatoon v. Home Secretary, State of Bihar, (1980) 1 S.C.C. 81 (India).

⁴⁰ United Nations Office on Drugs & Crime, Handbook on Restorative Justice Programmes 6–8, U.N. Sales No. E.20.V.1 (2d ed. 2020).

Many jurisdictions have statutes, guidelines, tables or appellate decisions for sentencing. These may indicate, for example, a range of sentences for different categories of offences taking into account seriousness, culpability, possible harm and previous convictions. The law may require specific penalties for particular offences or set out minimum or maximum sentences.

Guidelines can enable greater consistency, but can also be restrictive and may lack flexibility. Judicial discretion enables a judge to consider the unique situation of the defendant and the circumstances. Discretion should also be exercised when an offence falls outside the parameters of a guideline. A sentence that departs from a guideline must be justified if the law allows.⁴¹

A judge will often proceed by:

identifying the offence and the statutory maximum or mandatory penalty; considering the seriousness of the offence, including risk or harm, the planning and role of the defendant; considering aggravating and mitigating features; reviewing the defendant's personal and criminal record; reviewing the available sanctions and the purposes to which each can be applied; applying any reduction for a guilty plea or other factors; Explaining the sentence.

Pre-sentence reports may give information about the defendant, including risk assessment and needs, and whether community-based sanctions are appropriate. The court should assess the reliability of such information and consider the ability of the parties to challenge any disputed allegations.⁴²

4. Common forms of sanction

Imprisonment

Imprisonment involves the offender being held in custody away from the community for a period of time. It can offer protection to the public, denounce serious offending, deter, and protect individuals likely to be harmed by the offender. It is the most restrictive form of ordinary criminal sanction. Imprisonment can have a significant impact on the offender's family,

⁴¹ Digital Personal Data Protection Act, No. 22 of 2023 (India).

⁴² National Legal Services Authority v. Union of India, (2014) 5 S.C.C. 438 (India).

employment prospects, housing and health, and can expose the offender to physical and psychological harm and put their re-entry into the community at risk.

The sentence and type of custody will depend on the offence, statutory maximum and minimum or any requirements of a suspended sentence, plus the risk to the public and the jurisdiction. Some jurisdictions allow suspended sentences, whereby a sentence may be passed which is to be served in custody if the defendant fails to comply with certain conditions during a period of supervision or commits a further offence. Pre-sentence custody may be deducted from a custodial sentence if local law permits.⁴³

Fines

A fine is a sum of money payable to the state. Fines can punish and deter without deprivation of liberty, but a fine imposed as a fixed sum may have a very different impact on an offender's finances depending on their ability to pay. Some jurisdictions have fines on a graduated income-related scale or take into account an offender's ability to pay, or provide for instalments or alternative methods of payment and enforcement. Courts should avoid imposing an unrealistic fine or one which causes hardship to dependants.

Probation and community supervision

Probation is supervision in the community of an offender, either as a sentence or as a condition of a suspended sentence. Supervision may involve the offender attending appointments and providing information to a supervising officer, and/or complying with conditions such as a curfew, attending programmes or other treatment, and avoiding certain people or places. Conditions should be appropriate and realistically achievable. Breach of supervision or conditions can lead to warnings, variation of conditions or a more serious penalty, following procedural safeguards.⁴⁴

Community sanctions

⁴³ In Re: Inhuman Conditions in 1382 Prisons, (2016) 3 S.C.C. 700 (India).

⁴⁴ Hussain v. Union of India, (2017) 5 S.C.C. 702 (India) (speedy trial and undertrial detention).

Community sanctions are sanctions in the community, which may be imposed as a sentence or as a condition of probation. Sanctions can take many forms, including unpaid work, curfews, electronic monitoring, treatment, restrictions on activities, and supervision. They can be an effective and fair way of holding the offender to account and ensuring they are in a position to contribute towards repairing the harm done, while minimising the impact on the offender's family, employment and other areas of life, and avoiding exposure to the potentially damaging effects of imprisonment. However, the effectiveness of a sanction will depend on the availability of services, fair supervision and conditions that do not place unrealistic expectations, particularly where there are obstacles to compliance such as disability or a lack of transport.⁴⁵

5. Aggravating and mitigating factors

Aggravating factors make the offence or the offender's role more serious or culpable.

Aggravating factors appropriate to the offence and jurisdiction may include:

serious injury, loss or risk to others;
planning, persistence, or use of position of trust;
use of a weapon or targeting of a vulnerable person;
prejudice as a motive for the offence;
committing the offence despite a court order or supervision;
relevant previous convictions, particularly for similar types of offences.

A factor should not be counted twice if it is implicit in the elements of the offence or in a guideline starting point.

Mitigating factors

Mitigating factors are those that reduce the seriousness of the offence or the culpability of the offender. Factors that may act as mitigation include:

limited role, opportunity or planning;

⁴⁵ Legal Services Authorities Act, No. 39 of 1987, § 12 (India).

remorse and opportunity for reparation;
early guilty plea, where relevant;
absence of previous conviction;
youth, immaturity or coercion;
physical or mental illness or disorder relevant to the offence or its consequences or to the sentence;

prospects of rehabilitation or changes in circumstances.

Mitigating should not be ignored just because it is presented in a stereotyped way, but it should not automatically be assumed either. A factor's relevance, and the weight to be given to it, will depend on the circumstances and the connection to the offence and the sentence. The courts should seek to avoid stereotyping, and should not treat similar factors inconsistently.⁴⁶

6. Restorative justice and reparation

Restorative justice focuses on addressing the needs of all who have been harmed by crime, and taking responsibility. Restorative justice can be appropriate where victims wish to be involved; however, participation should always be voluntary and informed. Restorative justice can take many different forms including face-to-face meetings, letters exchanged, community conferences or agreements to repair the harm. It is not always appropriate or possible and should not be forced upon victims.⁴⁷

Restitution or compensation to victims may be an important part of repairing the harm. Compensation orders should be realistic, and should not be used to replace an appropriate sentence where the offence warrants such a sentence.⁴⁸

7. Rehabilitation and alternatives to custody

⁴⁶ Common Cause v. Union of India, (2018) 5 S.C.C. 1 (India).

⁴⁷ Mental Healthcare Act, No. 10 of 2017, §§ 18, 115 (India).

⁴⁸ Shilpa Mittal v. State (NCT of Delhi), (2020) 2 S.C.C. 787 (India).

Rehabilitation aims to tackle underlying problems contributing to offending and to ensure that the offender has access to the support and services needed for their rehabilitation. Effective rehabilitation is likely to be individually tailored and based on need and risk, not imposed as a generic package. Rehabilitation can take many forms such as tackling substance misuse, physical or mental health, addressing anti-social behaviour, and other education and training, depending on the needs of the offender.⁴⁹

Alternatives to custody can help reduce the impact of the sentence on the offender's life, promoting their re-entry and resettlement into society and ensuring that any harm to others is addressed. Alternatives to custody should be used where appropriate to a sentence, but should not be overly intrusive or go beyond what is necessary to achieve rehabilitation or hold the offender to account in place of a lesser response.

CHAPTER 5: EMERGING ISSUES IN CRIMINAL JUSTICE

1. Artificial technology, digital evidence, and cybercrime

Artificial intelligence

There is no generally accepted definition of artificial intelligence (AI). Simplified, it refers to computer programs that can perform tasks such as pattern-recognition or generate recommendations, predictions or decisions. Criminal justice agencies could use AI to assist investigations and prosecutions, to target resources, and to manage court and corrections systems.⁵⁰

AI could allow faster analysis of huge quantities of data, identify patterns or connections that might not be evident to humans, and carry out mechanical tasks with consistency. However, the outputs of AI are only as good as the programming and data inputs, which can introduce errors and biases. Tools that claim to make predictions should be regarded as such, and should not be used to justify disproportionate or discriminatory action. The use of predictive policing could result in self-fulfilling prophecies if police attention increases suspicion and activity in an area.

⁴⁹ Salil Bali v. Union of India, (2013) 7 S.C.C. 705 (India).

⁵⁰ Information Technology Act, No. 21 of 2000, §§ 43, 66 (India).

Risk-assessment tools used during bail or sentencing discussions should also be regarded with caution. A defendant is not inherently high-risk simply because an algorithm says so; individual circumstances should always be reviewed by humans with no reliance on unactionable recommendations. Agencies considering the use of AI should ensure that there are mechanisms in place for transparency, accountability, public scrutiny, human oversight, and redress.⁵¹

AI should not replace human judgment or criminal responsibility. Wherever possible, investigations and case preparation should be carried out by trained and accountable individuals.

Digital evidence⁵²

Digital evidence includes text, images and other data held or transmitted electronically. It can take many forms such as messaging records, web addresses visited, social-media posts and photographs, location data and phone records. Evidence can be used to prove facts such as time and place, connections between accused and victims, intention, and opportunity. It can also be misleading, fragmented, fabricated or wrongly attributed.

A key concern is authenticity – can the source of a piece of digital evidence be identified and verified? This may require specialist investigation to prove that the item was created, sent or stored by the person believed to have done so, and has not been altered. Data integrity refers to whether the item has remained intact and has not been modified – investigators may need to take steps to confirm this, for example by using certified copying processes and examining storage locations and access logs.

The chain of custody refers to procedures carried out by people authorised to handle items of evidence. This includes physical possession when collecting, submitting, storing or examining items, and recording any processing steps. Incomplete or unknown custodies are not necessarily a problem but may affect the evidential value of an item. The preferred approach where possible is to preserve digitally stored messages and information in their original form, retaining audit trails and records of procedures. Physical evidence items may be examined without compromising integrity.⁵³

A further issue is that of disclosure – relevance, volume and proportionality. There may be a large volume of information, and potential exculpatory information such as files or messages

⁵¹ Information Technology Act, No. 21 of 2000, § 66C (India) (identity theft).

⁵² Information Technology Act, No. 21 of 2000, § 66D (India) (cheating by personation using computer resources).

⁵³ Bharatiya Nagarik Suraksha Sanhita, No. 46 of 2023, § 35 (India) (arrest without warrant).

may be scattered across several sources. Law-enforcement agencies should take reasonable steps to identify all relevant materials proportionate to the seriousness of the crime. Prosecutors should not select desirable items or remove undesirable items; messages and clips should be placed in context wherever possible.

Cybercrime

Cybercrime covers a range of offences, both those that are committed using digital technology and those that target digital systems and data. This includes unauthorised access and hacking; online scams and extortion; identity theft and cyberstalking; ransomware and assaults on critical infrastructure; and potentially even traditional offences such as harassment that take place online. A similar issue arises when existing crimes are facilitated using online platforms, such as threats or the distribution of illegal material.⁵⁴

Cybercrime investigations may involve international elements. Evidence or data may reside in digital systems operated overseas, or be vulnerable to rapid deletion. Cross-border cooperation between law-enforcement agencies and technology companies may be required but should be carried out through appropriate legal means and safeguarding privacy and human rights.

Authorities should be afforded a range of investigative powers to tackle serious cybercrime. These should be subject to proportionality and safeguards, to prevent national security or policing powers overriding other rights.

2. Privacy, surveillance and technology

Law-enforcement agencies can utilize numerous forms of surveillance and technology. These include CCTV, facial recognition and automated number-plate recognition; location monitoring devices and mobile phone tapping; drone use, and internet traffic monitoring tools. Such technologies can support serious-crime investigations or locate missing persons. They can also gather information on persons not under suspicion.

Surveillance technologies should be adopted consistently with legality, necessity and proportionality. This means that there must be a clear legal basis, legitimate aim, and a degree of authorisation and scrutiny that is commensurate with the level of intrusiveness. For example,

⁵⁴ Bharatiya Nagarik Suraksha Sanhita, No. 46 of 2023, § 173 (India) (information in cognizable cases).

peering into private online messages and emails would require greater safeguards than examining material that is publicly available.⁵⁵

Facial-recognition technology can produce false positives, and accuracy rates are likely to vary depending on the technology and the characteristics of the person. Where there is a match, it should always be treated as an indication rather than conclusive evidence. Human scrutiny and verification should take place, and accuracy rates disclosed to courts if such technology is to be used in investigations.

A key component of privacy protection is limiting access to data, and ensuring that storage, use and disclosure practices follow appropriate safeguards. Technology use policies should include restrictions, auditing, inspection, independent oversight and reporting. The aim should be to ensure that powerful and intrusive surveillance tools do not become normalised or accepted as routine.

3. Bias, inequality and accountability

Inequality can affect many stages in the criminal justice process. Some groups may be disproportionately stopped or searched; charged, remanded or denied bail; offered or refused diversion; convicted; or sentenced to a custodial term compared to others. This can be due to a lack of access to services or education, discriminatory practices, and other social factors. Inequality does not always indicate a causal link but should always be subjected to further scrutiny.

Biases can be conscious or unconscious. They can be embedded in decision-making processes or systems used in criminal justice. For example, existing arrest data should be analysed with caution if it reflects patterns of disproportionate policing of certain groups in relation to offending levels. If historic data is used in AI-powered predictive policing, this may perpetuate or exacerbate inequalities.⁵⁶

The question of accountability involves issues such as transparency, scrutiny, remedies and redress. Agencies should review practices to identify and address sources of bias. This may involve evaluating sentencing outcomes of particular groups while ensuring that disclosure

⁵⁵ Bharatiya Nagarik Suraksha Sanhita, No. 46 of 2023,187 (India) (investigation and remand).

⁵⁶ Bharatiya Nagarik Suraksha Sanhita, No. 46 of 2023,193 (India) (police report on completion of investigation).

practices do not compromise privacy or confidentiality. Other steps could include reviewing existing or proposed procedures, such as body-worn cameras, to ensure that they will not have a disparate impact.⁵⁷

Training can support awareness but should be combined with a review of processes and structures that may embed discrimination or disadvantage. Equality Impact Assessments and independent oversight can contribute to this goal.

The provision of justice needs to be fair in theory and practice, taking cultural and social factors into account. Everyone should have appropriate access to information about criminal justice processes, competent advice, and remedies. This may include interpreting or translation services, reasonable adjustments for illnesses or impairments, and readily available counsel and support.

4. Youth justice, mental health and diversion

Youth justice systems are based on the fact that children and young people are not fully developed, and have distinctive needs and risks. Many jurisdictions have different procedures or sentencing guidelines for youth defendants. These generally aim to promote a balance between rehabilitation and due process, and to ensure that sentences are not custodial wherever possible, unless the risk to the community outweighs the personal circumstances of the accused.

Diversion can be an effective alternative to prosecution for eligible offences. Diversion options may include issues such as warnings or restorative justice; treatment or education plans; or community service or drug programs.

Diversion can reduce the negative impacts of a criminal record and promote rehabilitation. It should not be compulsory or used to impose more onerous conditions than would be the case otherwise. Access should be considered on a case-by-case basis and not be unduly dependent upon geographic location, financial status or the ability to comply with lengthy conditions.

Mental illnesses, impairments or risks such as trauma, chemical dependency or intellectual disabilities can impact a person's engagement with the criminal justice system. These may relate to risks to the community, the defendant's personal circumstances or other factors such as the ability to participate fully in proceedings. The relevant legal requirements should be examined to determine whether these issues can be considered in matters such as determining criminal

⁵⁷ Indian Penal Code, No. 45 of 1860, § 302 (India) (repealed, subject to savings).

responsibility or sentencing. Courts and police may require access to treatment and alternative measures.

A mental illness should not be used to override a defendant's responsibility for unlawful acts, should it be considered to increase risks to the community without due consideration. Similar considerations apply to risk assessments for a dangerousness finding.

Community-based alternatives to incarceration can be appropriate where there is a need for specialist treatment or where a defendant cannot effectively engage with the courts. These should be considered as part of a balanced risk-benefit assessment.

5. Criminal justice reform and future challenges

Reform can take many forms and may focus on reducing unnecessary incarceration, increasing opportunities for rehabilitation, and strengthening communities. The options may include greater diversion to alternatives to punishment; better access to legal aid; reforms to bail practices; investment in community-based services; and victim support and engagement.

Reforms should be evidence-based and consider safety, proportionality, cost-benefit analyses and future consequences.

A crucial tension is the balancing of community safety with the rights of the accused and convicted persons. New laws and policies may utilize emergency powers to respond to specific events or prevent threats to society. Where such measures continue beyond their initial use, safeguards should be in place to ensure that they are reviewed and that rights protections remain in place.

There are also challenges in combatting disinformation, encryption and other technologies, and ensuring appropriate evidence gathering and sharing across jurisdictions. Overcrowding of prisons, challenges in access to justice, and differences in social and economic resources may also impact the system's ability to respond to crises such as climate change and pandemic control.

An appropriate strategy should involve a combination of investigative and due-process strengths. Technology should be trialled, scrutinised and regulated; decision-making should be reviewable;

sanctions should be proportionate; and opportunities for redress should exist for all who engage with the system.

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