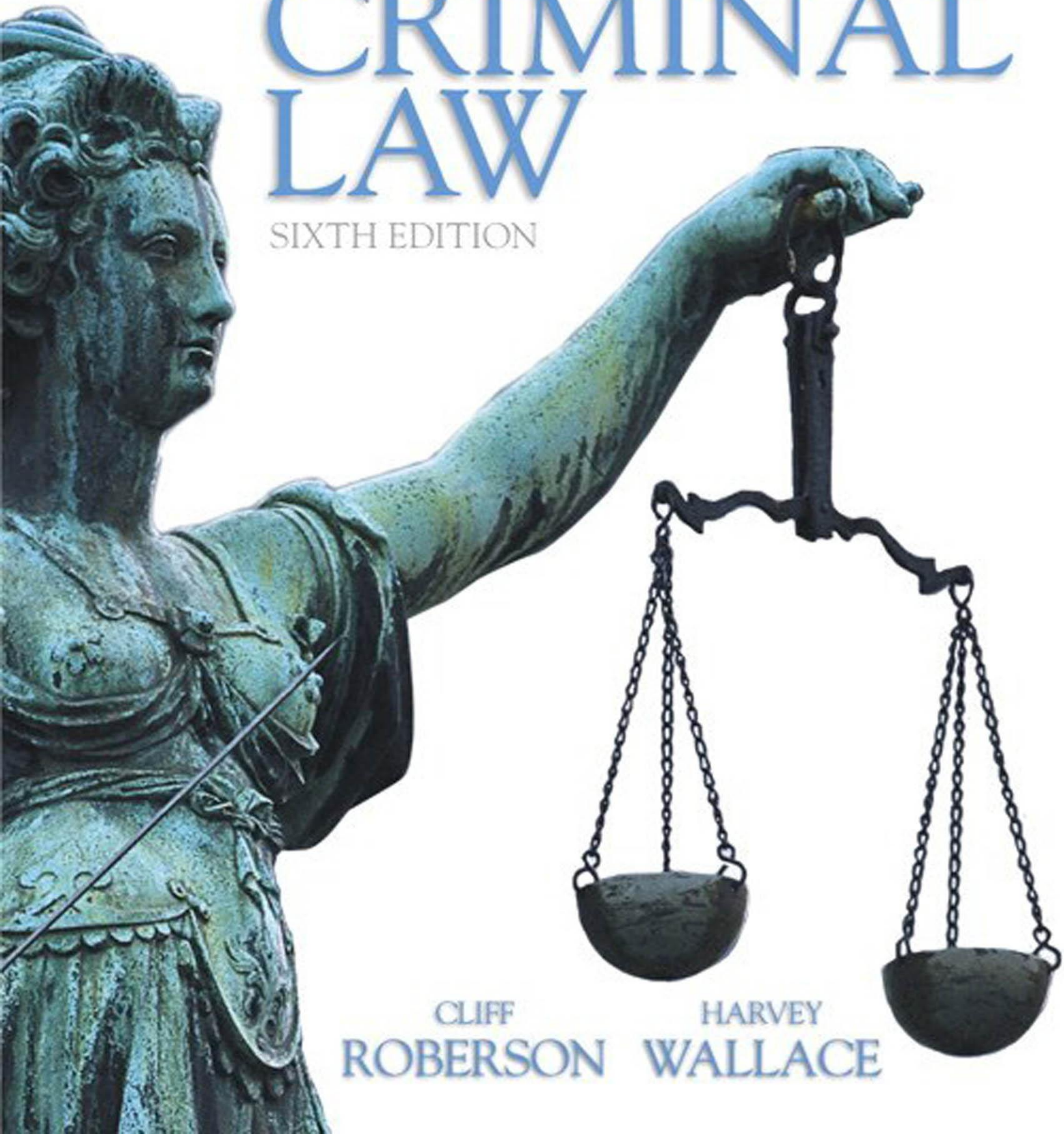
PRINCIPLES OF CRIMINAL LAW

SIXTH EDITION



CLIFF ROBERSON
HARVEY WALLACE

SIXTH EDITION

PRINCIPLES OF CRIMINAL LAW

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Preface

The study of substantive criminal law is actually a study of human behavior. It is more than a study of specific crimes; it is also an examination of the rules of human behavior and criminal responsibility. Criminal law is based on moral values, and many of our crimes are also violations of our moral standards. The study of criminal law is controversial and exciting. For example, what subject is more controversial than the issue of whether abortion is the exercise of a woman's right to privacy or simply murder? As with many other criminal law issues, the answer to that question depends on one's values and beliefs. As for being exciting, notice how many of our movies and television programs are based on criminal behavior (e.g., *Criminal Minds, NCIS, Law and Order,* and *CSI*).

An important but seldom mentioned function of criminal law for social scientists is to define the subject matter of criminology. Criminology is the sociological and psychological study of the causes of crime, the control of crime, and the reasons for crime. Accordingly, defining certain acts as criminal and others as noncriminal directly affects the subject matter of criminology. As a comedian once stated, the only way to eliminate crime is to abolish our criminal laws—then there could be no crime.

Too often, books on general criminal law devote a considerable portion of the text to comparing majority and minority positions on specific issues. The result is that most readers are confused and lack a general understanding of settled concepts. For the most part, we have presented the prevailing positions with only an occasional reference to the majority–minority conflicts.

This book is designed as an introductory text on criminal law and not as a research book. Accordingly, to reduce its size and enhance its readability, endnotes are used sparingly in chapters involving noncontroversial subjects. The text presents basic concepts or principles of criminal law in definitions, focus boxes, and practicums. All of these features are designed to assist the student in understanding this often confusing area of the law.

We have chosen to present this material in a narrative form rather than approach it from a traditional law school casebook perspective. While we believe both techniques may be used to teach criminal law, our goal is to present a clear, concise text that discusses background information necessary to understand the principles involved in criminal law and sets forth the elements of the major crimes.

New to This Edition

The sixth edition contains several significant changes. Those changes include:

- New material on crimes involving the continuous sexual abuse of young children
- Discussions on freedom of speech and harassment of police and judicial personnel

- Expanded discussions on criminal negligence, common inchoate crimes, solicitation crimes, the requirements of a voluntary act, the mens rea requirements, and accessories to crimes
- Discussion on legal duties imposed by law
- New section on the general requirements of culpability
- Discussion on the mental status of persons sentenced to death
- New section on "stand your ground laws"
- New section on "diminished responsibility"
- New material on when a fetus may be considered as a human being
- New section on child prostitution
- Update on materials defining terrorism
- Expanded section on larceny by trick
- Expanded section on criminal trespass
- Discussion on the changing laws regarding marijuana use

Comments, corrections, or suggestions for improvement of the text should be forwarded to Cliff Roberson at cliff.roberson@washburn.edu. Enjoy the fascinating world of criminal law.

▶ Instructor Supplements

Instructor's Manual with Test Bank

Includes content outlines for classroom discussion, teaching suggestions, and answers to selected end-of-chapter questions from the text. This also contains a Word document version of the test bank.

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eBooks

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▶ Acknowledgments

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—Cliff Roberson

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1 Sources of Criminal Law

KEY TERMS
common law
crimes
criminal code
customs
felony
folkways
infractions
jail
misdemeanors
mores
police power
procedural criminal law
stare decisis
statutory law
substantive criminal law

CHAPTER OUTLINE

LEARNING OBJECTIVES

What you should know about the sources of criminal law. After reading this chapter, you should know

1. *The origins of criminal law.*
2. *The definition of the term* crime.
3. *The basic theoretical concepts of punishment.*
4. *The principles of criminal responsibility.*
5. *Difference between moral lapses and crimes.*
6. *The concept of administrative crimes.*
7. *The differences between crimes and torts.*
8. *The importance of case law.*
9. *The sources of criminal law.*
10. *Development of the Model Penal Code*
11. *The classification of crimes.*
12. *Police powers of the government.*
13. *The development of common law.*
14. *The principles involved in the reform of criminal statutes.*

> *The study of criminal law is a study of crimes, moral principles, and common law.*

In this chapter, we will examine the sources of criminal law. The study of criminal law is a study of crimes, moral principles, and common law. Our system of criminal law should be viewed not as a set of rules for memorization, but as a cluster of ideas, principles, and values about which reasonable persons can and do disagree. The system is not fixed in stone; it is changing and flexible. Understanding our concept of justice requires a thoughtful comprehension of the historical background, social values, moral standards, and political realities that give direction to our system.

Criminal law is used to fully define and to establish the limits of prohibited criminal behavior. Roscoe Pound describes two needs that can be considered the controlling force behind most philosophical thinking in the area of criminal law.[1] First is society's need to maintain security in the community by regulating and controlling governmental and individual activity. Second is the need to provide for and allow changes in the law in response to changes in the society.

What is a crime? As noted by a federal court in 1847, it is not enough to constitute an act a crime, that it is opposed to some law or the Constitution, unless Congress declares it to be criminal or punishable. It often is but a civil injury or wrong. [*United States v. New Bedford Bridge,* 27 F. Cas. 91 (C.C.D. Mass. 1847)]

Crime is conduct that has been prohibited by law and subjects the offender to criminal punishment.

A simple definition is that a crime is any act that has been so designated by the lawmakers. For our purposes, we will define crime as conduct that has been prohibited by law and that subjects the offender to criminal punishment. To understand our criminal law, it is necessary to focus on the one characteristic that differentiates it from civil law. That characteristic is punishment.[2]

CRIMINAL LAW IN ACTION

WHAT IS YOUR OPINION—SHOULD WARNING DRIVERS OF A SPEED TRAP BE A CRIME OR IS THIS CONDUCT PROTECTED BY "FREEDOM OF SPEECH" AS SET FORTH IN THE FIRST AMENDMENT TO THE U.S. CONSTITUTION?

Flashing your headlights is a traditional method of alerting oncoming motorists of the presence of a speed trap. Several jurisdictions in the United States have enacted ordnances that punish such conduct by fines and assessment of points against your driver's license.

In 2012, Michael, a Missouri resident, flashed his headlights to warn an oncoming car of a radar set up by the police in Ellisville, Missouri. A police officer observed the flask and pulled Michael over and arrested him. The city later dropped the charge. Michael then sued the city in federal district court claiming that the arrest violated his First Amendment right to free speech. In February, 2014, the federal judge ruled that drivers have a First Amendment right to flash their headlights to warn other motorists of nearby police and speed traps. [*Elli v. City of Ellisville* (E.D. Mo. Feb. 3, 2014)] State courts in Florida and Tennessee have issued similar rulings. [*State v. Walker*, No. I-9507-03625 (Florida, 2013) and Williamson City. (Tenn.) (Cir. Ct. Nov. 13, 2003)].

Do you agree that a driver has a First Amendment right to warn speed law violators that the police are using radar? Or, do you think that the First Amendment right to free speech does not apply in situations where the individual is interfering with legitimate police functions?

There are restrictions to free speech. As former Supreme Court Justice Oliver Wendell Holmes, Jr., stated in an opinion in *Schenck v. United States* [249 U.S. 47 (1919)], free speech does not mean you have the right to yell "fire in a crowded theater."

Punishment

One of the core functions of criminal law is to punish wrongdoers.

One of the core functions of criminal law is to punish wrongdoers. This section presents a brief introduction to the concepts of punishment. Chapter 15 discusses punishment in greater depth. While almost everyone advocates that criminals should be punished for their criminal behavior, any definition of punishment can be criticized as being arbitrary. Joshua Dressler defines punishment as the suffering imposed on a defendant by an agent of the government pursuant to the authority given to that agent by reason of the defendant's criminal conviction.[3]

All societies punish those who have committed crimes. There is a lack of agreement, however, on the purposes of punishment, which may include rehabilitation, incapacitation, retribution, and deterrence.

The belief that punishment will cause a wrongdoer to reform is a noble one, but is it realistic? Most criminologists contend that punishment generally does not reform. This conclusion is supported by the high degree of recidivism among those persons presently serving time in jails and prisons.

Rehabilitation is based on the concept that punishment should help a criminal to restore to useful life, as through therapy and education. The assumption of rehabilitation is that people are not permanently criminal and that it is possible to restore a criminal to a useful life, to a life in which they contribute to themselves and to society. Rehabilitation seeks to bring a criminal into a more peaceful state of mind or into an attitude which would be helpful to society, rather than be harmful to society.

Incapacitation as the rationale for punishment is based on denying the criminal the opportunity to commit other crimes by virtue of his or her restraint (confinement). It incapacitates the prisoner by physically removing them from the society against which they are deemed to have offended.

The theory of punishment for **retribution** purposes is different from the other theories in that its goal is to take revenge on the individual rather than to reform an offender or restrain the would-be criminal. Under the concept of retribution, the criminal has committed a wrong to society and, therefore, must pay his or her debt to society. As one nineteenth-century scholar wrote in support of retribution, "criminal law thus proceeds upon the principle that it is morally right to hate criminals . . . and that it is highly desirable that criminals should be hated . . ."[4]

There are **two types of deterrence: general and specific**. General deterrence is based on the idea that punishment of a criminal will cause other people to forgo criminal behavior in the future. Special deterrence is the punishment of a wrongdoer to deter that individual from misconduct in the future.

In many cases, one of these purposes would suggest severe punishment, whereas another purpose would suggest limited or no punishment. The concepts involving punishment are explored in depth in Chapter 15.

Factors to be considered in imposing a sentence:

18 U.S. Code § 3553. Imposition of a sentence

(a) The court shall impose a sentence sufficient, but not greater than necessary, to comply with the purposes set forth in paragraph (2) of this subsection. The court, in determining the particular sentence to be imposed, shall consider—
  (1) the nature and circumstances of the offense and the history and characteristics of the defendant;
  (2) the need for the sentence imposed—
    (A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense;
    (B) to afford adequate deterrence to criminal conduct;
    (C) to protect the public from further crimes of the defendant; and
    (D) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner;
  (3) the kinds of sentences available;
  (4) the kinds of sentence and the sentencing range established for [the crime].

Principles of Criminal Responsibility

The criminal law of a state includes not only the statutes that designate certain types of conduct as crimes, but also a body of principles that help us to decide under what circumstances individuals should be considered criminally responsible for their conduct. These principles are also used to determine when it is fair to impose criminal sanctions on individuals. In general, a person is criminally responsible only for

voluntary acts of misconduct. There are, however, some rules that hold persons guilty for nonvoluntary acts. In addition, the rules regarding self-defense and justification are used to excuse certain behavior that would otherwise be criminal. The principles of criminal responsibility determine which acts will be considered criminal and under what circumstances the law will excuse an otherwise criminal act. The principles of criminal responsibility include the following:

- There are some defenses that excuse conduct that would otherwise be criminal—for example, insanity, self-defense, and necessity
- The requirements for *actus reus* and *mens rea*
- The requirement for joinder of intent and act

Morals Versus Law

As a general rule, the standards that we set for moral and ethical reasons are higher than the standards required by our criminal laws.

While the criminal statutes are in general a reflection of our moral codes and values, there is often a difference between what is morally wrong and what is legally prohibited. Many acts that are considered criminal may not be morally wrong. For example, insider trading on the stock market is a statutory crime that does not violate everyone's moral code. In addition, some acts that most of us would consider morally wrong are not illegal. If you are standing on a boat dock and see a young man (a stranger) drowning, you are normally under no duty to rescue him even if you could without endangering yourself. There may, however, be a moral duty to do so. Crimes that are also violations of our moral and ethical codes receive the strongest condemnation from the public—for example, rape, murder, and child sexual abuse. As a general rule, the standards that we set for moral and ethical reasons are higher than the standards required by our criminal laws. This is based on the fact that our moral and ethical codes attempt to establish perfect personal character, whereas the criminal codes tend to establish minimal levels of conduct. In addition, criminal conduct is ordinarily considered unjustifiable and inexcusable.

PRACTICUM 1.1

ISSUE: WHAT CONSTITUTES VOYEURISM?

In 2014, the Massachusetts Supreme Court in the case of *Commonwealth v. Michael Robertson* (March 5, 2014) ruled that snapping unauthorized photos under a woman's dress or skirt was legal in Massachusetts, according to the ruling of the court, undercurrent state law which prohibits voyeurism of a subject who is completely or partially nude was not violated because those being photographed were wearing clothing, The individual concerned contended that he had a constitutional right to take pictures in public. He was arrested and charged with two counts of attempting to photograph a person in a state of partial nudity after he was caught pointing a cellphone video camera up an undercover police officer's dress. Another woman claimed that a man took a picture up her dress with a camera attached to his shoes.

QUESTION: While this conduct was legal at the time it was committed, is it morally correct?

Within days after the court decision, the Massachusetts legislators revised the statute to ban "upskirting" in response to the ruling by the state's highest court. By this action, the state has criminalized additional conduct. With continued criminalization of various types of conduct, can we expect an increase in crime rates?

Use of Sanctions to Regulate Morality and Societal Rules

Before the American Revolution, the American colonies were subject to the law handed down by the English judges. Accordingly, the common law of England with its Anglo-Saxon concepts became the basic criminal law of the colonies. After the revolution, the common law was modified and changed by the state legislatures. During the modifications, the colonies' religious beliefs became a part of our **criminal code**, and criminal law was used to regulate morality. Two prominent researchers, Norval Morris and Gordon Hawkins, contend that our present criminal codes in the United States are some of the most moralistic criminal laws in history.[5]

criminal code The codification of the criminal law of the jurisdiction into one code that allows the criminal law to be more accessible and more democratically made and amended.

Societal rules—norms—are used by society to regulate behavior in a given situation and at a given time. Norms are also considered as rules of conduct and approved blueprints for behavior. Norms have great power to motivate behavior. They carry with them positive and negative sanctions: When we behave according to norms, we are rewarded; when we behave in ways that do not meet normative expectations, we may be punished. Most people do not obey norms just because of the sanctions. There would never be enough police officers to enforce all laws if everyone was determined to break them.

Formal norms are imposed on us from above or outside and are often codified or written down. Criminal law is an example of a formal norm. Categories of norms include mores, customs, and folkways. **Mores** are behaviors that arouse intense feelings and are subject to extreme consequences. They involve the basic moral judgments and ethical rules of a society. They are the strongest norms and have great power over us. An example of a more is the belief that we should not kill other people.

mores Social rules of conduct or norms that arouse intense feelings and are subject to extreme consequences when violated.

Customs do not arouse the intensity of feelings that mores do, and generally their violation will result in less severe reactions. Usually people will react with disgust, repulsion, and shock to the violation of a custom. An example of a violation of a custom would be using vulgar language in a chapel.

customs Social rules of conduct or norms that do not arouse the intensity of feelings that mores do; generally, their violation will result in less severe reactions.

Folkways are norms that, when violated, carry with them the least intense feelings. Folkways are trivial conventions and are generally concerned with taste and good manners, dress, politeness, and speech. They do not involve feelings of disgust or repulsion.

folkways Social rules of conduct or norms that, when violated, carry the least intense feelings when compared to customs and mores.

▶ Classification of Crimes

Mala prohibita crimes are wrong simply because they are prohibited by statutes.

Crimes may be classified in many ways. First, they are classified as either *mala in se or mala prohibita. Mala in se* crimes are those acts that are not only crimes but are also considered morally wrong—for example, rape, murder, and theft. Generally, all common law crimes are considered *mala in se* crimes. *Mala prohibita* crimes are those that are not considered morally wrong even though they are crimes—for example, insider trading or failure to have a business license. *Mala prohibita* crimes are wrong simply because they are prohibited by statutes.

crimes Violations of existing societal rules of behavior as expressed in criminal statutes, for which criminal punishments may be imposed.

Crimes are also classified as crimes against the person, crimes against property, sex crimes, victimless crimes, professional or white-collar crimes, and crimes against public order.

White-collar crime is a term originated by Edwin Sutherland in the 1930s to describe nonviolent crimes of personal or corporate gain committed by people in their work, occupation, or business or in defrauding other people or the government.[6]

White-collar crimes are also called business crimes, commercial crimes, or occupational crimes.

Victimless crimes are those in which there are no direct victims, such as gambling, prostitution, and using drugs. Unlike murder, rape, or robbery, a victimless crime is usually committed by two or more people, all of whom readily participate in the crime. In some cases, it is also called a "public order" crime. While many of these offenses are called "victimless crimes," some authorities believe that society is the victim. Additionally, some crimes, such as drug use, lead certain people to commit other crimes, such as prostitution, to pay for their addiction.

Substantive or Procedural Law

Criminal law is divided into substantive criminal law and procedural criminal law. **Substantive criminal law** refers to that part of the criminal law that creates and defines crimes and specifies punishment. It can be found generally in the penal codes of each state and the federal government. **Procedural criminal law** is that part of the criminal law that establishes the rules by which the accused is brought to trial. Procedural criminal law includes the rules related to searches, seizures, arrests, interrogations, and the manner in which the case is tried and appealed. Procedural criminal law does not establish crimes or prescribe punishments.

substantive criminal law The part of criminal law that establishes what conduct constitutes a crime and prescribes the punishment for violations of the crime.

procedural criminal law That part of the criminal law that specifies the methods to be used in enforcing substantive criminal law.

Felony or Misdemeanor

The most popular classification of crimes uses four categories: treason, felonies, misdemeanors, and infractions. Treason, since it threatens the very existence of the nation, is considered the most serious. Because of its rarity, treason will not be further discussed in this text. The majority of our crimes are classified as either felonies or misdemeanors. The key to distinguishing between a felony and a misdemeanor is not the punishment actually given in court but the punishment that could have been imposed. For example, X commits the crime of burglary and could receive ten years in prison. The judge sentences him to only six months in the local **jail**, the sentence typically given for a misdemeanor. X has been convicted of a felony even though he received only a jail sentence.

jail A local place of confinement for those awaiting trial and those who have been convicted of misdemeanors.

In common law, a **felony** was considered any crime for which the offender would be compelled to forfeit property to the king. Most common law felonies were punishable by the death penalty. The common law felonies include murder, rape, assault and battery, larceny, robbery, arson, and burglary. Presently, only aggravated murder may subject the offender to the death penalty.

felony A serious crime for which the accused, if convicted, may be sentenced to a prison term or the death penalty.

Most states distinguish between **misdemeanors** and felonies on the basis of place of incarceration. If the offense carries a punishment of incarceration only in a local jail, then the offense is a misdemeanor. Felony offenders can be imprisoned in prisons or correctional institutions. Other states use a combination of place of incarceration and character of offense to make the distinction between felonies and misdemeanors. The Model Penal Code (MPC) provides that a crime is a felony if it is so designated, without regard to the possible penalty. In addition, any crime for which the permissible punishment includes imprisonment in excess of one year is also considered a felony under the code. All other crimes are misdemeanors.

misdemeanors Crimes that are punishable by fine and/or jail confinement. Less serious than a felony.

Several states, such as California, have crimes that are referred to as "wobblers" based on the fact that the court can treat them as either a felony or a misdemeanor.

Felonies and misdemeanors are frequently subdivided into classes. For example, in Texas misdemeanors are subdivided into classes A, B, and C, and felonies are subdivided into classes of first, second, and third degree. Under this classification, promotion of prostitution is a felony of the third degree, and forcing someone to commit prostitution is a felony of the second degree. The burglary of an inhabited

building is a felony of the first degree, whereas the burglary of an uninhabited building is a burglary of the second degree. The MPC also creates degrees of felonies. A first- or second-degree felony under the MPC carries a $10,000 fine plus imprisonment and a third-degree felony carries a $5,000 fine plus imprisonment.

In many states, **infractions** are the lowest level of criminal activity. An infraction is an act that is usually not punishable by confinement, such as a traffic ticket. In several states, the term *petty misdemeanor* is used in lieu of infraction.

infractions The least serious violations of criminal statutes, normally punishable only by a fine. In many states, minor traffic offenses are considered infractions.

Similar to infractions are violations of municipal ordinances. In some states, ordinance violations are not considered crimes based on the theory that a crime is a public wrong created by the state and thus prosecuted in the name of the state. An ordinance is a rule created by a public corporation (the municipality) and prosecuted in the name of the municipality.

The classification of a crime as a felony or misdemeanor is important for several reasons. First, a felony conviction on a person's record can prevent the individual from entering many professions and obtaining certain jobs. A felony conviction has been used to deny a person the right to enter the armed forces or obtain employment with a law enforcement agency, and it may even affect one's ability to obtain credit or adopt a child. In one state, a felon (a person who has been convicted of a felony) may not obtain a license to sell chickens wholesale. In addition, conviction of a felony can be grounds to impeach a public official. At one time, many states did not allow a convicted felon to vote, hold office, or serve on a jury. Today, in all but eight states, many of the disabilities commonly associated with a felony conviction have been abolished.

Administrative Crimes

The Supreme Court, in *United States v. Grimaud*, held that Congress could delegate to an administrative agency the power to make regulations that may be enforced by criminal penalties.[7]

Today, state legislatures and the U.S. Congress have delegated to certain administrative agencies the power to make rules and enforce them by criminal penalties. For example, a private airplane pilot may be subject to criminal penalties for violation of the Federal Aviation Administration's regulations regarding flying rules. In delegating the authority to an agency, the legislature must provide specific guidelines to be observed by the agency. The delegation of such authority is generally constitutional if the following steps or guidelines are followed:

- The legislative delegation of authority must be limited and contain sufficient standards to guide the actions of the agency.
- The agency must operate within the specific guidelines established by the legislature.
- The agency rules must be explicit and unambiguous and within the standards established by the legislature.

Crimes and Torts Distinguished

> *A crime is a public wrong which involves the violation of the peace and dignity of the state.*

Not all legal wrongs are crimes. Private wrongs are usually considered either a tort or a breach of contract. A crime is a public wrong, since it involves the violation of the peace and dignity of the state. In theory, it is committed against the interest of all of the people of the state. Accordingly, crimes are prosecuted in the name of the "State," the "People," or the "Commonwealth."

A tort is a wrong that violates a private interest and thus gives rise to civil liability. The same conduct, however, may be both a crime and a tort. For example, if a woman is forcibly raped by a neighbor, the criminal aspect of the conduct is a violation of the peace and dignity of the state. It is, therefore, a crime against all the people in the state. It is also a violation of the private interest of the victim, and she may file a civil suit and obtain civil damages against the offender.

An offender may be acquitted at a criminal trial, where proof of his or her guilt is required to be established beyond a reasonable doubt, yet may be held accountable at a civil trial, where the degree of proof required is much lower.

Public and Private Laws and Wrongs

Our laws are also classified as either public or private laws. Generally, private laws deal with relationships between people, in which the government has only an indirect interest. Family law (marriage, divorce, etc.), real property law, and probate law (wills and trusts) primarily regulate the relationships between individuals and companies. The government has only an indirect interest. Public laws are those in which the government has a more direct interest. Public laws include constitutional law, criminal codes, vehicle codes, and public health laws.

At one time in early England, rules prohibiting crimes against the individual, such as rape, robbery, and theft, were considered private laws, on the theory that these crimes did not affect the state. Eventually, English law recognized that crime was not a personal affair but a wrong against society, a violation of the peace and dignity of the people.

A few public wrongs are, however, prosecuted in civil court. Usually, the statutes that establish certain crimes provide the state or federal government the option to proceed civilly rather than criminally. The matters in which the government has this option include civil rights, antitrust, obscenity, and consumer fraud. In civil court, the offender may be found civilly liable and ordered to pay compensatory and punitive damages.

▶ Origins of Criminal Law

> *The first requirement of a sound body of law is, that it should correspond with the actual feelings and demands of the community, whether right or wrong.*
>
> JUSTICE OLIVER WENDELL HOLMES, THE COMMON LAW, 1881

American criminal law has been described as "English in heritage and judicial in its origin." Our present criminal codes grew out of custom, tradition, and actual written codes. One of the first known criminal codes was the Code of Hammurabi. This code was a comprehensive series of laws covering not only crime but property rights, family law, and other civil matters. The Code of Hammurabi also contained rules protecting victims of crimes. The concept of "an eye for an eye and a tooth for a tooth" was first introduced by King Hammurabi with his *lex talionis* (punishment by retaliation) based on the premise that the punishment should fit the crime. As we will discuss later, our criminal law was in large measure adopted from the English common law, which was first recorded by judges. Today, however, criminal law is formulated by the legislatures rather than judges. Accordingly, in both state and federal jurisdictions, to be a crime the conduct must be prohibited by a criminal statute, and there must be some form of prescribed punishment that may be imposed on a person who is convicted of a violation of the prohibited act.

The two major legal systems are the common law and the civil law systems. The common law system is used primarily in England and North America. The civil law system, known as Roman law, is the predominant system used in the rest of the world today. Under civil law, the laws are written and codified by the rules of the state.

Common Law

The common law is nothing else but statutes worn out by time . . .

ENGLISH CHIEF JUSTICE JOHN WILMOT, 1686, *REX V. CLEMENT*, 4 BARN. & AID. 218, 233, 106 ENG. REP. 918, 923 (K. B. 1686)

Common law developed from the customs of the people. Certain customs became so entrenched that they were considered accepted norms of behavior. As the courts developed in England, judges made their decisions based on customs and recorded them. Other judges looking for assistance started following those decisions.

common law Early English law, developed by the judges, into which were incorporated Anglo-Saxon tribal customs, feudal rules, and everyday rules of the villages. Common law became the standardized law of the land in England and later in the United States.

Since the original source of common law was the customs of the people, it is often stated that common law was developed by the common people and imposed on the kings. On the contrary, civil law, since it was based on rules published by the state, was handed down to the common people by the rulers.

Most people consider the legal systems of all states except Louisiana to be common law systems. They are, however, a mixture of the common law and civil law systems. Acts that are considered crimes are written and codified as in civil law, but courts rely on the common law concept of *stare decisis* to interpret the meanings of the written statutes. Even in those states that have expressly abolished common law, prior case law is still examined for definition purposes.

Development of Common Law

> *Common law is that body of law and juristic rules which was originated, developed, formulated, and administered in England . . . common law comprises the body of principles and rules of action . . . which are derived from usages and customs of immemorial antiquity.*[8]

As we noted earlier, most of our criminal law principles are traceable to the common law of England. This is especially true of the underlying philosophy of criminal law. There are, however, no "common law crimes" in most states. Accordingly, there must usually be in existence some statute, ordinance, or regulation prohibiting the conduct in question prior to the commission of the act. The common law principles regarding the interpretation of criminal statutes are still used. For example, in defining a crime, the legislature may use words that are well known and defined by criminal law.

The first known English code was written in the seventh century by King Aethelbert. The proclamations of the code were called dooms, which were related to social class. For example, theft was punishable by fines that varied widely in magnitude according to the status of the victim. Stealing from the king was punishable by a fine equal to nine times the value of the property stolen. Theft from a person of the holy order was punishable by a fine three times the value of the property taken. Crimes committed in the presence of the king were considered a violation of the "king's peace," which increased the punishment. The code was rewritten in the ninth and eleventh centuries, but little new was added.

Most historians trace the common law of England to William the Conqueror, who invaded England in 1066. At the time of the invasion, each county was controlled by a sheriff (shire-reeve), who also controlled the courts in that county. Accordingly, there was no uniform English system. William took over the courts

and made them royal courts, that is, under the control of the king. He sent representatives to the many courts in England to record their decisions and distributed selected decisions to all the judges to use in making their own decisions. As the routine of these courts became firmly established, it was possible to forecast their decisions by reference to similar cases they had decided in the past. From this the doctrine of stare decisis developed in the eighteenth century.

William also compiled the law of crimes that most areas of the kingdom observed in common. These crimes became the common law crimes of England. Later, new statutory crimes were added by the king and Parliament. The concept of common law crimes was so ingrained in England that the traditional crimes of burglary, larceny, murder, and so forth were not defined by statute in England until the 1960s.

During William's time, very few people could read or write. The king, the judges, and the church authorities determined the elements and the scope of criminal offenses. In some cases, they even created new crimes. As William made England a unified nation rather than a collection of isolated villages, the judges developed familiarity with the general customs, usages, and moral concepts of the people. Judicial decisions began to be based on these general customs, usages, and moral concepts.

THE TRIAL OF WILLIAM PENN

WILLIAM PENN TO JUDGE: I desire you would let me know by what law it is you prosecute me, and upon what law you ground my indictment.

JUDGE: Upon the common law.

PENN: Where is that common law?

JUDGE: You must not think that I am able to run up so many years, and over so many adjudged cases, which we call common law, to answer your curiosity.

PENN: This answer I am sure is very short of my question, for if it be common, it should not be so hard to produce.

JUDGE: The question is, whether you are guilty of this indictment?

PENN: The question is not, whether I am guilty of this indictment, but whether this indictment is legal. It is too general and imperfect an answer to state that it is the common law, unless we knew both where and what it is. For where there is no law, there is no transgression and that law which is not in being, is so far from being common, that it is no law at all.

JUDGE: You are impertinent, will you teach the court what the law is? It is "Lex non scripta," that which many have studied 30 or 40 years to know, and would you have me tell you in a moment?

PENN: Certainly, if the common law be so hard to understand it is far from being common.

Trial of William Penn as reported in 6 How. St. Trials 951 (1670).

By the 1600s, the primary criminal law of England was based on the mandatory rules of conduct laid down by the judges. These rules became the common law of England. Prior decisions were accepted as authoritative precepts and were applied to future cases. When the English settlers came to America in the 1600s, they brought with them the English common law. With a few modifications, English common law became the common law of the colonies. During the American Revolution, there was a great deal of hostility toward the English in America. This hostility extended to the common law system. Thus, most of the new states enacted statutes defining criminal acts and establishing criminal procedures. The statutes, however, basically enacted what was formerly English common law.

As we noted earlier, many aspects of our present criminal law system are based upon English common law. All states except Louisiana can trace their legal systems to the English common law system. In 1805, Louisiana, whose system was originally

based on French and Spanish legal concepts, officially embraced the common law of England as a further basis for its system.

Case Law

A substantial majority of "law" is case law.

Case law is the term used to indicate appellate court interpretations of the law.[9] A substantial majority of "law" is case law, that is, court opinions that interpret the meaning of constitutions and statutes. Case law also helps clarify and apply statutory law. For example, the U.S. Constitution (Fourteenth Amendment) provides that no state shall deprive any person of life, liberty, or property without due process of law. What constitutes "due process of law" is decided almost daily in the courts. Hundreds of opinions on this subject are issued by federal and state appellate and supreme courts each year.

A court decision on a code provision may interpret its scope and effect, the meaning of the words, the legislative intent, its relationship to other laws, and whether it violates any constitutional restrictions.

Precedent

A court decision on a legal principle may be a precedent (guide) for similar situations. There are two basic types of precedent—mandatory and persuasive. Mandatory precedent means that when a higher appellate court renders a decision on an issue, the lower courts under its supervision must follow the ruling or face reversal on appeal.[10] For example, if the Arizona Supreme Court decides an issue, state courts in Arizona must follow that precedent. Persuasive precedent means that, although a court decision is not legally binding on a second court, its analysis may be persuasive. For example, a court in New Mexico is faced with an issue that has never been decided by a New Mexico court. There is, however, a court in Nevada that has considered the same issue. The Nevada court decision is not binding on the New Mexico court, but it may have some persuasive authority. Precedent is based on the principle of stare decisis, which is discussed next.

Stare Decisis

The common law practice of following precedents (other court decisions) is termed **stare decisis**, which means to abide by or adhere to decided cases.[11] The original version of stare decisis was *stare decisis et non quieta movere*, which means to adhere to precedents and not to unsettle things that are established. Blackstone, in his famous commentaries, described the process as one in which the older cases are examined to find whether the same points are once again being questioned. He contended that this practice keeps the scales of justice even and steady and does not allow them to waver with each new judge.[12]

stare decisis The legal principle that binds courts to stand by prior decisions and use them as the standards by which to judge subsequent cases.

The doctrine provides that, when a court has once laid down a principle of law as applicable to a certain state of facts, it will adhere to that principle and apply it to all future cases where the facts are substantially the same.[13] Stare decisis is founded on the theory that security and certainty require following established legal principles, under which rights may accrue.[14]

Statutory Law

Statutory law is law that is enacted by legislative bodies of government. The primary statutory laws dealing with crimes and criminal procedure are the state penal codes. Other statutes that set forth crimes include the vehicle, government,

statutory law Law created by legislative bodies to meet changing social conditions, customs, and public opinion.

and business codes. Under our democratic system, the legislative branch enacts the criminal laws, the executive branch administers and enforces them, and the judicial branch determines the guilt or innocence of defendants and their punishment, if any.

Legislatures frequently give the following reasons for designating certain acts as crimes:

- To protect the public from violent conduct by others
- To safeguard property rights
- To maintain public order
- To protect public health
- To protect our concepts of public morality
- To protect the right of privacy

Reasons that are commonly given for not making certain acts criminal include the following:

- Inability of the state to control the acts
- Constitutional protection for the acts
- Political considerations
- Lack of demand by influential people or groups
- Economic infeasibility
- Voter opposition

Model Penal Code

The Model Penal Code was developed by a group of judges, lawyers, and scholars and is designed to reflect in general the criminal law of the United States.

The American Law Institute, a nonprofit organization sponsored by the American Bar Association, drafted the Model Penal Code (MPC). This code was developed by a group of judges, lawyers, and scholars and is designed to reflect in general the criminal law of the United States. The project was started in 1952, its rationale being that states enacted criminal laws in a piecemeal fashion, often based on public perceptions of need without a thorough examination of the situation. The project was basically completed in 1962 after thirteen tentative drafts. Since 1962, approximately two-thirds of the states have adopted new criminal codes greatly influenced by the MPC. While some states have adopted this code with slight changes, other states refer to it when redrafting criminal laws.

▶ Reform of Criminal Law

Criminal law is constantly changing as our moral values change.

As we noted in the preface, criminal law is constantly changing as our moral values change. Reform of criminal law is guided by several principles. Andrew Ashworth divides those principles into two groups: the virtues of codification (including the values of certainty, consistency, comprehensibility, and accessibility of the criminal law) and the social and moral issues that are being raised by the changing values of our society.[15] What acts constitute crimes changes as the result of changes in society, but generally, the changes are slower and take years to match society's changing values, morals, and beliefs.

Certainty is important because it provides a foundation on which to base our conduct. If the definition of criminal behavior changed daily, we would be unable to conform our conduct to the expected norm, because the norm would always be shifting. Therefore, we expect that our rules of conduct will be consistent and that each of us will be required to conform to the same rules of conduct. In order to be law-abiding citizens, we need to have access to our criminal laws and be able to comprehend them. Regarding the social and moral issues that are being raised, we should not forget that our criminal laws are to a great extent a codification of our social and moral beliefs.

According to Ashworth, in any reform of criminal law, there are certain questions about the shape and form of the criminal legislation that we should be concerned with. First is the choice between defining the offense as a result of crime or defining it in an inchoate mode.[16] The former would prohibit an act causing X, whereas the latter would prohibit the doing of an act with the intent to cause X. Second is the choice of whether to use one or a few broad-based crimes to cover a sphere of criminal activity or to establish a number of narrowly defined subdivided offenses. Third is whether to impose strict criminal liability and allow conviction without proof of fault (an exception to the usual principle of *mens rea*). Fourth is the allocation of the burden of proof. Despite the presumption of innocence, many statutes place the burden of proving certain facts on the defendant. For example, in most states, the defendant has the burden of establishing self-defense.

William J. Chambliss and Thomas F. Courtless state that the process of creating criminal laws (or reforming present ones) can be understood as a function of one or more of the following processes[17]:

- The act of describing prevailing values and norms of a society
- The act of looking at the historical context in which the laws are created
- An arbitrary decision of those in power
- A reflection of the changing needs of society
- A reflection of the desires of those with the power to get inside the heads of the lawmakers

PRACTICUM 1.2

ISSUE: WHEN IS A PERSON IN PHYSICAL CONTROL OF A MOTOR VEHICLE?

Ramsey County deputy sheriffs responded to a report of a car in the ditch near Gem Lake in Minnesota. The car was stuck in a snow-filled ditch. The headlights were on, but the motor was not running. As the deputy approached the driver's side of the car, he found the defendant Sandra Starfield sitting in the driver's seat. The deputy opened the car door and asked Sandra for her driver's license. She could not find her purse. From the odor of alcohol and bloodshot eyes, the deputy concluded that Sandra was intoxicated. He noticed that the keys were not in the ignition. He asked Sandra for the keys. She stated she could not find them. The Minnesota statute made it a crime to "drive, operate, or to be in 'physical control' of a motor vehicle while under the influence of alcohol" (Minn. stat. 169.121).

At her trial, Sandra stated that her son had driven the car into the ditch and had gone for help when the police arrived. While deliberating, the jury returned with the following question: "Does the car have to be able to be moved for a person to have physical control of the vehicle?" The trial judge responded by repeating the below instruction: A person is in physical control of a motor vehicle when he or she is present in a vehicle and is in a position to either direct the movement of the vehicle or keep the vehicle moving. It is not necessary for the engine to be running in order for a person to be in physical control of a motor vehicle.

QUESTION: Should Sandra be convicted of being in physical control of a motor vehicle while intoxicated in violation of the Minnesota statute?

The Supreme Court of Minnesota upheld Sandra's conviction and held that the statute includes a motor vehicle so stuck in a snow-filled ditch that it cannot move and that the state is not required to prove operability of the motor vehicle. The court also remarked that "Drunk-driving cases, especially those where the officer comes upon a stationary car with an inebriated person inside, seem to provoke a remarkable variety of explanations to test the fact-finder's credibility-determining powers."

State v. Starfield, 481 N.W. 2d 834 (Minn. 1992).

▶ Police Powers of Government

Police power of a government is the authority it has to enact legislation to protect the public health, safety, order, welfare, and morality.

police power The authority of a state to enact and enforce a criminal statute.

The **police power** of a government is the authority of that government to enact legislation to protect the public health, safety, order, welfare, and morality. Under the U.S. system of federalism, the police power of government is primarily vested in the state legislatures. States have comprehensive power to adopt laws regulating the activities of individuals and business entities as long as those laws do not violate limitations contained in the state and federal constitutions. State legislatures, in turn, may delegate some of this power to local governments, which enact ordinances defining crimes within their jurisdiction.

CASE ON POINT

RAICH V. GONZALES

Throughout our history, the several States have exercised their police powers to protect the health and safety of their citizens. Because these are primarily, and historically, . . . matter[s] of local concern, the States traditionally have had great latitude under their police powers to legislate as to the protection of the lives, limbs, health, comfort, and quiet of all persons.

Source: 2007 U.S. App. LEXIS 5834 (9th Cir. Cal. Mar. 14, 2007).

Under our system of federalism, the U.S. Congress does not possess plenary legislative authority except in the District of Columbia and federal territories. The U.S. Constitution enumerates certain powers that it grants to the U.S. Congress. These enumerated powers include the power to establish rules governing immigration and naturalization, to "define and punish piracies and felonies committed on the high seas," and "to provide for the punishment of counterfeiting the securities and current coin of the United States."

The U.S. Congress is also granted certain implied powers by the "Necessary and Proper Clause" of Article I, Section 8, of the U.S. Constitution. While the implied powers expand the legislative authority of the Congress, they do not confer on Congress the general police powers that are possessed by the states. To qualify as a valid implied power, the federal legislation must be "plainly adapted" to the goal of furthering one or more of Congress's enumerated powers.

In the area of criminal law, Congress's most significant power is enumerated power to regulate the "commerce between the states." While Congress cannot make prostitution a crime, it can make it a crime to transport a person across state lines

for "immoral purposes." Congress has expanded the concept of interstate commerce to justify broader authority to enact criminal statutes, but the authority is not unlimited. Criminal laws enacted by the U.S. Congress under the Commerce Clause include the following:

- Interstate transportation of stolen automobiles, 18 U.S. Code 2312
- Interstate transportation of kidnapped persons, 18 U.S. Code 1201
- Computer crimes, 18 U.S. Code 1030
- Environmental crimes
- Loan sharking, 18 U.S. Code 891
- Carjacking, 18 U.S. Code 2119
- Manufacture, sale, distribution, and possession of controlled substances, 21 U.S. Code 801 et seq.
- Racketeering and organized crime, 18 U.S. Code 1961–1963

HOW WOULD YOU DECIDE?

Defendant Burch appealed the decision of the United States District Court for the Southern District of Texas, which imposed the maximum prison term allowable under 21 U.S.C.S. § 846, following his plea of guilty to one count of conspiracy to possess marijuana with the intent to distribute.

The court justified the sentence on two stated reasons? Burch's social history and his criminal past. The court noted Burch's education, apparent intelligence, maturity, and social background. The court contrasted Burch with "people who are 17 years old and don't know better," and stated, "the system has not been harsh with you . . ." The court described Burch as "one of the top persons, scholastically speaking, all your education pursuits, an extremely gifted, talented individual. You are not the ordinary person who walks through here." The district court also noted Burch's previous involvement in drug activities. It was on the basis of these factors that the court imposed the maximum statutory punishment.

Question: Was it proper to consider the high educational level of the defendant as one of the reasons to impose the maximum statutory punishment?

See: United States v. Burch, 873 F.2d 765 (5th Cir. Tex. 1989)

Summary

The study of criminal law is a study of crimes, moral principles, and common law. Our system of criminal law involves ideas, principles, and values about which reasonable persons can and do disagree. The system is a flexible one. Criminal law defines and establishes the limits of prohibited criminal behavior.

A crime may be defined as any act that has been designated a crime by lawmakers. We will define crime as conduct that has been prohibited by a statutory code and that subjects the offender to punishment. One of the core functions of criminal law is to punish wrongdoers. Almost everyone advocates that criminals should be punished for their criminal behavior. Any definition of punishment can be criticized as being arbitrary.

The criminal law of a state includes principles that indicate under what circumstances individuals should be considered criminally responsible for their conduct. The principles are also used to determine when it is fair to impose criminal sanctions on individuals. While the criminal statutes in general reflect our moral codes and values, there is often a difference between what is morally wrong and what is legally prohibited. Many acts that are considered criminal may not be morally wrong.

Crimes may be classified in many ways. First, they are classified as either *mala in se* or *mala prohibita*. *Mala in se* crimes are those acts that are not only crimes but that most people consider to be morally wrong—for example, rape, murder, and theft. Generally, all common law crimes are *mala in se* crimes. *Mala prohibita* crimes are those that are not usually considered morally wrong even though they are criminal—for example, insider trading or speeding. The most popular classification of crimes is by the categories of treason, felonies, misdemeanors, and infractions.

Additional Assignments

1. Read the selected cases and associated material for Chapter 1 posted at www.mycrimekit.com
2. Complete the online study guide material for Chapter 1 posted at www.mycrimekit.com
3. Discussion and thought questions:
   a. Explain the functions of criminal law in our society.
   b. Why is the classification of crimes important?
   c. What factors may be considered by our lawmakers when they take up the reform of substantive criminal laws?
   d. Contrast "moral values" and "criminal law."
   e. Explain the development of common law.
   f. Why is the concept of stare decisis important?

Practicum

1. Log on to the Internet and go to www.findlaw.com
2. Click on the tab for "Search cases and codes."
3. Search for the U.S. Supreme Court decision *Hoke v. United States*, decided in 1913.
4. Briefly explain why this case is important to the study of criminal law.

Questions in Review

1. What constitutes criminal behavior?
2. What types of conduct constitute the crime of treason?
3. Explain the purposes of "police powers."
4. Explain the importance of the Model Penal Code.
5. What constitutes stare decisis?
6. How does case law differ from statutory law?

Notes

1. Roscoe Pound, "Justice According to the Law," 14 Colum. L. Rev. 1–26 (1914).
2. Arnold H. Loewy, *Criminal Law* (St. Paul, MN: West, 1987).
3. Joshua Dressler, *Understanding Criminal Law* (New York: Matthew Bender, 1989), 5.
4. James Stephens, *A History of the Criminal Law in England*, vol. 2 (London: Macmillan, 1883), 82.
5. Norval Morris and Gordon Hawkins, *The Honest Politician's Guide to Crime Control* (Chicago: University of Chicago Press, 1969).
6. Edwin H. Sutherland, "White-Collar Criminality," 5 Am. Sociological Rev. 40–46 (1940).
7. *United States v. Grimaud*, 220 U.S. 506 (1911).
8. *Black's Law Dictionary*, 4th ed. (St. Paul, MN, 1951).
9. Id.
10. Lower courts are "under supervision" of a higher court when the lower court's decisions may be appealed to the higher court.
11. There are instances in which courts do not follow the doctrine of stare decisis—for example, when a court overrules one of its prior decisions.
12. William Blackstone, *Commentaries on the Laws of England* 168 (7th ed., 1775).
13. *Moore v. City of Albany*, 98 N.Y. 396 (1967).
14. *Otter Tail Power Co. v. Von Bank*, 72 N.D. 497 (1974).
15. Andrew Ashworth, "Towards a Theory of Criminal Legislation," 1 Crim. L. J. 41 (1989).
16. Inchoate crimes are crimes that involve incomplete or unfinished acts, for example, attempts. See Chapter 4 for a more detailed explanation.
17. William J. Chambliss and Thomas F. Courtless, *Criminal Law, Criminology, and Criminal Justice* (Pacific Grove, CA: Brooks-Cole, 1991), 7.

2 Criminal Liability

CHAPTER OUTLINE

Bill of Rights
Eighth Amendment
Due Process
Jurisdiction
Social Harm
Right to Privacy
Legality
Equal Protection
Double Jeopardy

LEARNING OBJECTIVES

What you should know about criminal liability. After reading this chapter, you should know

1. *State or federal jurisdiction.*
2. *The meaning of the due process limitations in the Constitution.*
3. *When a statute is void for vagueness.*
4. *Issues involved in determining if there is federal or state jurisdiction.*
5. *The relationship between social harm and criminal liability.*
6. *The issues involved with the right to privacy.*
7. *The constitutional limitations on criminal liability.*
8. *The protections against "cruel and unusual" punishments and "double jeopardy."*
9. *The jurisdictional requirements in criminal law.*

KEY TERMS

bill of rights
conviction
cruel and unusual punishment
double jeopardy
due process
equal protection
ex post facto laws
jurisdiction
legality
right to privacy
social harm
venue

To understand criminal law concepts, it is necessary to have a basic understanding of the issues involving criminal liability. Accordingly, the goal of this chapter is to provide you a brief overview of those issues that are critical to an understanding of criminal law concepts. (Although the statute of limitations is a limitation of criminal liability, it is also an affirmative defense, as discussed in Chapter 5.)

▶ Bill of Rights

> *Bad men, like good men, are entitled to be tried and sentenced in accordance with the law . . .*
>
> JUSTICE HUGO BLACK, *GREEN V. UNITED STATES*, 1961

The first ten amendments to the U.S. Constitution comprise what is generally considered as our federal "**Bill of Rights**." Only the first nine amendments however contain protections for individuals. The Bill of Rights contains 23 separate individual rights—12 of them concern procedural rights for persons accused of criminal conduct.

Bill of Rights The first ten amendments to the U.S. Constitution that set forth certain rights guaranteed to individuals.

The Bill of Rights and the Fourteenth Amendment to the Constitution limit the actions of the government. In general, the amendments place restrictions on the procedures that the government may use against a person accused of a crime. Most of the restrictions apply to criminal procedural matters. Few directly affect substantive criminal law. The two major restrictions against substantive criminal law

are the Due Process Clause, which is also important in the criminal procedural context, and the Eighth Amendment prohibition against cruel and unusual punishment. Both of these restrictions are discussed later in this chapter.

The Bill of Rights was adopted as a protection against the powers of a federal government. The Supreme Court has used the Due Process Clause of the Fourteenth Amendment to apply to the states most of the Bill of Rights limitations on governmental actions.

Eighth Amendment

Prohibition against cruel and unusual punishment limits the legislative authority to make some conduct criminal.

cruel and unusual punishment Physical or mental punishment in excess of that given to the people under similar circumstances; banned by the Eighth Amendment to the U.S. Constitution.

In *Robinson v. California*, the Supreme Court held that the prohibition in the Eighth Amendment against **cruel and unusual punishment** not only limits the amount and types of punishment that may be inflicted, it also limits the legislative authority to make some conduct criminal.[1] For example, while the state may make it a crime to possess or use drugs, the state may not make it a crime to be addicted to drugs or to be afflicted with a disease because being addicted to drugs or alcohol is a person's status and not an act.

While Robinson could not be punished for being a drug addict, it is clear that he could be punished for possessing or using illegal drugs. This is based on the concept that in possessing or using drugs he was engaged in behavior that society has an interest in preventing. In contrast, punishment for being an addict is based merely on the person's status. The Court, in comparing drug addiction with leprosy, failed to consider that a leper may have that condition without displaying any criminal behavior, whereas Robinson and the majority of other drug addicts become addicted because of their illegal activities in using prohibited drugs.[2]

CRIMINAL LAW IN ACTION

WHAT DO YOU THINK?

JESSICA'S LAW—CONTINUOUS SEXUAL ABUSE OF YOUNG CHILD OR CHILDREN

Jessica Lunsford, a nine-year-old Florida girl, was kidnapped, raped, and killed by John Couey, a registered sex offender and chronic burglar. He was convicted of capital murder and sentenced to death. Mark Lunsford, Jessica's father, was motivated by the case to encourage passage of tougher sex offender laws throughout the United States. At least 30 states enacted such laws. Texas joined the movement by enacting Texas Penal Code 21.02 in 2007.

Texas Penal Code 21.02 entitled "Continuous Sexual Abuse of Young Child or Children" provides in part, that a person commits an offense under this section if during a period that is 30 or more days in duration, the person commits two or more acts of sexual abuse, regardless of whether the acts of sexual abuse are committed against one or more minor victims. To be convicted of this crime, it must be proven that the victim or victims are under 14 years of age and that the defendant is over 17 years of age.

Note: Sentencing can range from 25 years to life in prison. The code section is unique because there is no parole. Whoever is convicted of this crime has to serve the sentence day for day.

If an indictment charges a defendant under this code provision and alleges five separate acts of sexual abuse, jurors at his criminal trial need not agree as to which of the five individual acts were committed as long as they all agree that the defendant committed at least two of the acts.

Is it constitutionally appropriate to convict a defendant in a situation where not all jurors are required to agree that defendant committed the specific acts?

The Texas Court of Appeals concluded that Section 21.02 did not violate Appellant's constitutional and statutory right to a unanimous jury verdict. [*Kennedy v. State*, Amarillo Court of Appeals, No. 07-11-0042-CR, 11-13-2012.]

Due Process

> *Whatever disagreement there may be as to the scope of the phrase "due process of law," there can be no doubt that it embraces the fundamental conception of a fair trial, with opportunity to be heard.*
>
> OLIVER WENDELL HOLMES, *FRANK V. MANGUM*, 1915

The federal and state constitutions protect against the deprivation of life, liberty, or property without due process of law under the U.S. Constitution, Fourteenth Amendment. Due process means that a defendant is entitled to fundamental fairness that includes the right to notice and an opportunity to be heard. However, due process is also a flexible concept, and the procedural protections available are based on the particular situation at issue. When determining the procedural protections required to protect due process rights, one must examine the private interest at stake, the risk of deprivation of interests through the procedure used, the value of other procedures, and the state or government interest, including the administrative burden imposed by substitute procedures. [*People v. Noboa*, 2008 Mich. App. LEXIS 783, 7-8 (Mich. Ct. App. Apr. 17, 2008)]

There are two **due process** clauses in the U.S. Constitution. The one in the Fifth Amendment protects an individual from actions by the federal government, and the one in the Fourteenth Amendment protects an individual from actions by state governments.

due process A basic constitutional principle based on the concepts of privacy of the individual, limitations on governmental power, and a safeguard against arbitrary and unfair governmental actions. Due process includes the basic rights of a defendant in a criminal proceeding.

One aspect of due process requires that crimes be described such that an individual is reasonably aware of what conduct is prohibited by the statute. Accordingly, if the statute establishing certain conduct as criminal is vague or overbroad, the statute violates due process. What makes a statute indefinite and thus vague is hard to define. As Justice Felix Frankfurter once stated: "Indefiniteness is not a quantitative concept. It is itself an indefinite concept."[3] In general, the statute must be sufficient to provide reasonable persons with "fair" notice as to what conduct is illegal. The U.S. Supreme Court stated that "the root of the vagueness doctrine is a rough idea of fairness."[4]

One of the problems in this area is the fact that most penal statutes must necessarily be vague. Accordingly, the void for vagueness limitation is triggered only when laws become so vague that reasonable people must necessarily guess as to their meaning and application. Criminal laws are designed to protect reasonable, law-abiding persons, not put them at risk of prosecution.

CASE ON POINT

ROBINSON V. CALIFORNIA

Facts: California enacted a statute making it a crime for a person to be addicted to the use of narcotics. The offense was punishable by ninety days to one year in jail.

Question: Was the statute constitutional, since no act was required by the defendant and the defendant's condition of drug addiction was sufficient for conviction?

Holding: The statute in question was cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments to the U.S. Constitution. Robinson's "crime" consisted only of his status as a person suffering from the "disease" of drug addiction. The Court noted that it was unlikely that a state would attempt to punish a person for being afflicted with mental illness, leprosy, or venereal disease. If a state attempted to punish, a person for one of those problems, it would "doubtless be universally tried to," such punishment would be an infliction of a cruel and unusual punishment. The same regard should be shown to those persons suffering from drug addiction. Limited punishments were provided for in this statute, but even one day in custody because of a person's "status" would be cruel and unusual punishment.

In explaining the Robinson case, Justice Thurgood Marshall later stated:

> The entire thrust of Robinson's interpretation of the cruel and unusual punishment clause is that criminal penalties may be inflicted only if the accused has committed some act, has engaged in some behavior, which society has an interest in preventing, or perhaps in historical common law terms, has committed some actus reus.

Source: 370 U.S. 660 (1962).

▶ Jurisdiction

Jurisdiction refers to the power of a court.

jurisdiction The power and authority of a court to hear and determine judicial proceedings; and the power to render a particular decision in question.

Jurisdiction is the power of a court to exercise its authority over the subject matter or person. If the court has no jurisdiction over either the defendant or the subject matter of the proceeding, the court is without power to act in the matter. Jurisdiction over the subject matter refers to the power of the court to decide matters pertaining to that subject matter. For example, a family law court with no jurisdiction over criminal matters cannot issue a ruling or make a decision in a criminal case. Likewise, a justice court in most states cannot try an accused for a felony offense. In addition, a Florida court cannot try a defendant for violation of a North Carolina statute, since the Florida court lacks jurisdiction over North Carolina statutes.

PRACTICUM 2.1

ISSUE: IS A STATE "STOP AND IDENTIFY" STATUTE, WHICH REQUIRES A PERSON TO "STOP AND IDENTIFY" HIMSELF OR HERSELF WITH "CREDIBLE AND RELIABLE" IDENTIFICATION, A VIOLATION OF THE U.S. CONSTITUTION?

A police officer responded to a call reporting that a man had assaulted a woman. The officer found the defendant standing outside a parked truck with a woman inside the truck. The officer asked for defendant's identification eleven times and was refused each time. The officer arrested the defendant. The defendant was convicted for obstructing the officer in carrying out his duties under Nev. Rev. Stat. 171.12, a "stop and identify" statute that required the defendant only to disclose his name. The U.S. Supreme Court determined that the Terry stop, the request for identification and the

state's requirement of a response did not contravene the guarantees of the Fourth Amendment because the request for identity had an immediate relation to the purpose, rationale, and practical demands of the Terry stop. Also, the request for identification was reasonably related in scope to the circumstances that justified the Terry stop. The Court also determined that defendant's conviction did not violate the Fifth Amendment's prohibition on compelled self-incrimination because disclosure of his name presented no reasonable danger of incrimination.[5]

QUESTION: After Mr. Hiibel was arrested, was he advised of his Miranda rights, which included "the right to remain silent"?

An essential element of any criminal charge is that the court has subject matter jurisdiction over the offense. For example, in *Gardner v. State*, the defendant was charged in an Arkansas court with rape under an Arkansas statute.[6] It appears that the defendant raped a young girl on the backseat of a moving car that was being driven from Arkansas to Texas and then to Oklahoma. The defendant's counsel argued that the Arkansas court did not have jurisdiction because the rape actually occurred in either Texas or Oklahoma. The Arkansas Supreme Court upheld the rape conviction, saying it was not essential that all elements of a state crime take place within the state as long as at least one of them did. Thus, under this concept the defendant also may have violated the rape statutes of Texas and Oklahoma.

Limits on Jurisdiction

There are limits, however, on the ability of a state court to control the actions of citizens in other states. For example, suppose a judge in Arizona does not like Nevada's gambling laws. Accordingly, the judge convinces the city council to pass an ordinance to punish persons who travel from the local area to Nevada for the purpose of gambling. While part of the statutory violation occurs within the jurisdiction of the local city, an appellate court would probably hold that the city does not have jurisdiction to control the conduct of its citizens while they are in another state and performing actions legal

CASE ON POINT

PAPACHRISTOU V. CITY OF JACKSONVILLE

Question: When is a statute void for vagueness?

Justice William O. Douglas:
This case involves eight defendants who were convicted in a Florida municipal court for violating a . . . vagrancy ordinance. . . . At the time of the arrest, four of the defendants were riding in a car on the main thoroughfare. The four were charged with "prowling by auto". . . . The other defendants were arrested for "loitering." . . .

The ordinance is void for vagueness, both in the sense that it "fails to give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden by statute" . . . and because it encourages arbitrary and erratic arrests and convictions. . . .

Living under a rule of law entails various suppositions, one of which is that all persons are entitled to be informed as to what the State commands or forbids. . . . While not mentioned in the Constitution or Bill of Rights, the unwritten amenities have been in part responsible for giving our people the feeling of independence and self-confidence, the feeling of creativity. These amenities have dignified the right of dissent and have honored the right of nonconformists and the right to defy submissiveness. . . . The due process implications are equally applicable to the States and to this vagrancy ordinance. . . . Where the list of crimes is so all-inclusive and generalized as that one in this ordinance, those convicted may be punished for no more than vindicating affronts to police authority.

Source: 405 U.S. 156 (1972).

CASE ON POINT

IS IT A CRIME TO WRITE CUSS WORDS ON A TRAFFIC CITATION?

When William was driving through the town of Liberty, N.Y., a state trooper pulled him over for speeding. Three months later, William mailed in his summons along with a payment, punctuating the ticket with a few choice curse words and crossing out the town's name and relabeling it "TYRANNY." The court rejected his payment and he was summoned to appear in court. When he was before the judge, he was chastised for having a foul mouth. In addition, he was also arrested and charged with aggravated harassment.

Did William conduct constitute a crime?

New York Penal Law § 240.30(1)(b) provides, in part, that a person is guilty of aggravated harassment in the second degree when, with intent to harass, annoy, threaten, or alarm another person, he causes a communication to be initiated by mechanical or electronic means or otherwise with a person, anonymously or otherwise, by telephone, by telegraph, or by mail, or by transmitting or delivering any other form of written communication in a manner likely to cause annoyance or alarm.

State's Motion in Opposition to Defense's Motion to Dismiss:

The prosecution noted that William Barboza was charged with aggravated harassment, a serious offense. The defendant acted with the intent to make the victim uncomfortable, alarmed, and annoyed. That Penal Law criminalizes defendant's conduct because employees have the right to feel safe and free from annoyance and alarm in fulfilling their employment duties. While there was only one communication directed at the Court, defendant's invective, denigrating communication was intended to harass and annoy both the clerk and judge of the court to whom defendant's communication was directed.

Is the writing of cuss words on a citation when submitting payment for a traffic ticket aggravated harassment under the statute?

At one time, the City of Cincinnati made it a crime to submit a written communication that was likely to cause annoyance or alarm. The U.S. Supreme Court noted that the word "annoying" was too vague to support a criminal charge because what annoys one person may not annoy another.

The charges against William Barboza were dismissed. After the dismissal, Barboza filed a federal civil lawsuit claiming that his constitutional rights had been violated. At publication time, that lawsuit was still pending.

Source: Information taken from a motion filed by Assistant District Attorney in the Fallsburg Justice Court in opposition to defendant's motion to dismiss, filed on January 13, 2013; and *Coates v. Cincinnati*, 402 U.S. 611 (1971).

in that state. In addition, there is a constitutional right for citizens to travel between the states. It would appear under the same rationale that a state could not make it illegal for its citizens to travel to a second state to obtain an otherwise legal abortion.

Jurisdiction over the Person

As a general rule, to have jurisdiction over the person the court must have the defendant before the court. There are exceptions. For example, if the defendant is present at the start of a trial, his voluntary absence later in the trial does not cause the court to lose its jurisdiction over him. In criminal cases involving minor offenses, often the accused will waive her presence and will have an attorney appear on her behalf. In these situations, the fact that an attorney appears on the defendant's behalf constitutes a waiver and gives the court personal jurisdiction over the defendant.

State versus Federal Jurisdiction

The majority of criminal laws in the United States are state-made laws, that is, penal laws that were enacted by state legislatures. Federal laws must be based on

powers granted or implied by the U.S. Constitution. Most federal statutes are based on the Interstate Commerce Clause. State criminal law statutes are generally based on the right of a state to secure and promote the welfare of its residents. Most criminal trials take place in state courts. There are at least five counties in the United States—for example, Los Angeles, Harris (Houston), Cook (Chicago), Dallas, and New York—that try more criminal cases in each county than are tried in the entire federal court system. As discussed later in this chapter and in Chapter 5 on defenses, the same act may be both a federal and a state crime because the act violates both federal and state statutes.

CASE ON POINT

KOON V. UNITED STATES

Facts: On the evening of March 2, 1991, Rodney King and two of his friends sat in King's wife's car in Altadena, California, and drank malt liquor for a number of hours. Then, with King driving, they left Altadena. King was intoxicated. California Highway Patrol officers observed King's car traveling at a speed they estimated to be in excess of 100 mph. The officers followed King with red lights and sirens activated and ordered him by loudspeaker to pull over, but he continued to drive. The highway patrol officers called for help on the radio. Units of the Los Angeles Police Department joined in the pursuit, one unit manned by officers Laurence Powell and trainee Timothy Wind. King left the freeway, and after a chase of about eight miles, stopped at an entrance to a recreation area. Powell ordered King and his two passengers to exit the car and assume a felony prone position—that is, to lie on their stomachs with legs spread and arms behind their back. King's two friends complied. King got out of the car but did not lie down. Los Angeles Police Officer Stacey Koon arrived while King was resisting. Koon fired Taser (stun) darts into King. The officers were later videotaped assaulting King. Koon, Powell, Wind, and Briseno were tried in state court for assault with a deadly weapon and excessive use of force by a police officer. The officers were acquitted of all charges, with the exception of one assault charge against Powell that resulted in a hung jury.

Question: Can the officers be tried in federal court based on the same acts for which they were acquitted in state court?

Holding: Yes. The officers were tried in the state courts for violations of state laws. They may be tried in federal court for violations of federal laws, that is, violation of King's civil rights under 18 U.S.C. 242. In fact, that is exactly what happened.

Source: 518 U.S. 81 (1996).

Venue

Venue refers to the geographic location where a trial should be held.

venue The geographic location where a trial should be held. The Sixth Amendment to the U.S. Constitution provides that a defendant has a right to be tried in the judicial district in which the alleged criminal act occurred.

Venue, often associated with jurisdiction, refers to the geographic location where the trial should be held. Venue is derived from the Sixth Amendment of the U.S. Constitution, which provides that "the accused shall enjoy the right to a . . . public trial . . . by an impartial jury of the State and district wherein the crime shall have been committed. . . ." Since jurisdiction refers to the power of a court to take certain actions, jurisdiction cannot be waived by a defendant. Venue can, however, be waived. In highly publicized cases, the court, on motion by the defendant, may change venue and transfer the case to a different district for trial.

Social Harm

The aim of the law is not to punish sins, but is to prevent certain external results . . .

OLIVER WENDELL HOLMES, *COMMONWEALTH V. KENNEDY* (170 MASS. 1897)

social harm The proposition that, before an act may be declared a crime, there must be some harm to society resulting from the commission of the act.

Does the Constitution require that, before conduct may be declared illegal, there must be **social harm**?

Many have contended that, for behavior or conduct to be a crime, there must be some "social harm" attached to it. Social harm involves the proposition that, before an act may be declared a crime, there must be some harm to society resulting from the commission of the act. No state requires social harm as a necessary element of a criminal act. The U.S. Supreme Court has been silent on this question in cases in which the conduct involves voluntary action. This failure to rule may be because the concept of social harm is vague, and the Court hesitates to take over the state's customary role of determining what conduct constitutes social harm.

As the Court held in *Robinson v. California*, an individual cannot be punished for being addicted to drugs.[7] Accordingly, if no voluntary act is involved, the Constitution prohibits punishing a person because of the person's status (in this case, as a drug addict). In Robinson, however, the court seemed to imply that deciding what conduct constitutes social harm is for the states to decide.

Right to Privacy

A man has the right to pass through this world, if he wills, without having his pictures published, his business enterprises published, his successful experiments written up for the benefits of others, or his eccentricities commented upon, whether in handbills, circulars, catalogues, newspapers or periodicals.

JUSTICE ALTON B. PARKER, N.Y. COURT OF APPEALS, *ROBERSON V. ROCHATER FOLDING BOX CO.*, 1901

right to privacy The right to be left alone, the right to be free from unwarranted publicity, and the right to live without unwarranted interferences by the public in matters with which the public is not necessarily concerned. The right is a generic term encompassing various rights recognized to be inherent in the concept of ordered liberty, preventing governmental interference in intimate personal relationships or activities, and the freedom of an individual to make fundamental choices regarding himself or herself and family.

The "right to privacy" is not explicitly guaranteed by the U.S. Constitution. The Supreme Court, however, has held that the **right to privacy** is a substantive right protected by the Constitution under the due process and freedom of association clauses. The Court has held that the framers of the Constitution intended that an independent right of privacy exist and that it protect citizens from undue government encroachment.[8]

In the *City of Chicago v. Wilson*, 75 Ill. 2d 522, defendant Wilson was arrested for violating a section of the city's municipal code which prohibited a person from wearing clothing of the opposite sex with the intent to conceal his or her gender. Wilson was a transsexual preparing for a sex-reassignment operation. The state supreme court reversed his conviction and held that the code was unconstitutional as it applied to him. The court stated that there exist unspecified constitutionally protected freedoms, which include the right to choose one's appearance.

In *Sterling v. Cupp* [290 Ore. 611 (Or. 1981)], the Supreme Court of Oregon held that it was an invasion of privacy for male officers to conduct a body search of a female absent exigent circumstances.

The precise contours of the right to privacy have not been fully outlined by the courts. At one time, the right was perceived as a limitation on the authority of a legislature to prohibit socially harmful conduct. Recent court decisions, however, have indicated that this right has limited viability.[9] In *Stanley v. Georgia*, the Court

CASE ON POINT

STANLEY V. GEORGIA

Question: Do adults have the right to possess obscene pictures in their home under the "right to privacy"?

Holding: The mere possession of obscene pictures cannot constitutionally be made a crime. When this obscene matter is located in the privacy of one's own home, the "right of privacy" takes on an added dimension. Even though the states are free to regulate or even ban obscene matter, "that power simply does not extend to mere possession by an individual in the privacy of his own home."

The Court observed:

> The makers of our Constitution undertook to secure conditions favorable to the pursuit of happiness. They recognized the significance of man's spiritual nature, of his feelings and of his intellect. . . . They sought to protect Americans in their beliefs, their thoughts, their emotions. . . . They conferred . . . the right to be let alone.

Source: 394 U.S. 557, 564.

discussed the right of Americans "to be free, except in very limited circumstances, from unwanted governmental intrusions into one's privacy."[10] The Stanley case indicated that we have a right to possess obscene material in our homes without fear of governmental intrusion. If it is not illegal to possess obscene material, is it permissible to possess illegal drugs in the privacy of our homes? As of this date, no court has held that we have such a right. The Stanley case may be limited only to obscene material.

The right to privacy, discussed in the Roberson case, protects a person from having his or her private matters made public. This particular aspect of the right to privacy, however, does not generally apply to a "public figure" such as a congressperson or a senator.

In *Board of Education v. Earls* (536 U.S. 822 [2001]), students sued the board of education, alleging that the board's policy requiring all students participating in extracurricular activities to submit to drug testing violated the students' constitutional right to be free from unreasonable searches. The U.S. Supreme Court, in holding the requirement constitutional, discussed the issue of privacy. The court stated that: "Considering the nature and immediacy of the government's concerns and the efficacy of the Policy in meeting them, the Court concludes that the Policy effectively serves the School District's interest in protecting its students' safety and health." The Court noted that preventing drug use by schoolchildren is an important governmental concern.

Legality

We can afford no liberties with liberty itself.

JUSTICE ROBERT JACKSON, *UNITED STATES V. SPECTOR*, 1952

The principle of **legality** is a common law principle that sets limitations on the formation, creation, and interpretation of criminal law. It is not so much a rule of law as it is a guide for judges, who in earlier times were the creators and overseers of the criminal law. The principle reached its zenith in the seventeenth and eighteenth centuries in both America and Europe. The principle was developed to move the operation of law farther away from historical barbarism toward the rule of law. It promotes the concept of *nullum crimin sine lege* (no crime without law).

legality A guide for judges based on the common law principle that sets limitations on the formation, creation, and interpretation of criminal laws.

The fact that certain conduct is considered immoral or harmful does not necessarily mean that the conduct constitutes criminal behavior. According to the principle of legality, there is no crime unless the legislature makes the conduct a crime. One purpose of the principle is to prevent the government from punishing a person for conduct that was lawful when performed. The second aspect of this principle is that government must give prior notice of what conduct it considers a crime. The Constitution prohibits ***ex post facto laws***, meaning those that would retroactively criminalize actions that were innocent when they were done. The ex post facto limitation also prohibits any law that aggravates a crime (i.e., makes it more serious than it was when committed) or inflicts a greater punishment than the law allowed when the crime was committed.[11]

ex post facto laws Law that make acts criminal after they were committed, retroactively lessens the evidence required for a conviction, or increases the punishment for previously committed criminal acts.

The third aspect of the legality principle is the prohibition against bills of attainder. A bill of attainder is a special law that declares a specific person to be guilty of a crime and thus subject to punishment without a trial or conviction.[12]

The ex post facto and bill of attainder restrictions apply only to legislative action, that is, statutes and laws. The courts, using common law concepts, may expand the definition of a crime, possibly resulting in conviction and punishment that is retroactive in its effect. The judicial expansion is, however, rare, and most states have abolished common law crimes.

Equal Protection

> *The law, in its majestic equality, forbids all men to sleep under bridges, to beg in the streets, and to steal bread—the rich as well as the poor.*
>
> ANATOLE FRANCE, CRAINQUEBILLE, 1902

The Fourteenth Amendment to the U.S. Constitution prohibits states from denying individuals the **equal protection** of their laws. This constitutional right implies that all persons will be treated with substantial equality. This does not mean that a state must treat all persons exactly the same. A state may distinguish in its treatment of persons according to acceptable criteria or classifications. For example, the state may require large businesses to provide certain benefits to their employees while exempting smaller businesses from this requirement.

equal protection A clause in the Fourteenth Amendment to the U.S. Constitution that requires that persons under like circumstances be given equal protection in the enjoyment of personal rights and the prevention and redress of wrongs. The constitutional guarantee of "equal protection of the laws" means that no person or class of persons shall be denied the same protection of the laws that is enjoyed by other persons or other classes in like circumstances.

Common classifications in criminal law are based on the state of mind of the offender, type of person involved, and occupation. For example, the state may prohibit sex between an adult and a person under the age of eighteen years while not prohibiting sex between two consenting adults. A state may not, however, use an unacceptable criterion to justify the difference in treatment of individuals. For example, a state may not make it a crime for a person from a certain racial group to be in specified parts of a city.

Suspect classifications (those that appear to be illegal) are usually based on race or religion. A gender differential, while not a suspect classification, must also be based on a rational difference. For example, a statute that treats males and females differently violates the Equal Protection Clause unless the classification is substantially related to achieving an important government objective.[13] If the classification is based on one of the suspect classifications or on gender, the state has the burden to show both the existence of an important objective and the substantial relationship between the discrimination in the statute and that objective. If the classification is not based on sex, national origin, or race, generally there is a presumption that the statute is valid, and the person attacking the statute has the burden of proving that the criteria are impermissible.

PRACTICUM 2.2

SHAW V. DIRECTOR OF PUBLIC PROSECUTIONS

The defendant decided to water his garden while wearing only his underwear. He is charged and convicted of the crime defined only as "committing a public mischief."

ISSUE: *Does his conviction violate the principle of legality?*

Holding: Yes. There appears to be no fair warning or notice that watering your garden in your underwear constitutes a public mischief. The court in this case appeared to have acted retroactively, deciding what constitutes a public mischief.[14]

One aspect of the equal protection requirement is the concept of "equality of punishment." This is discussed in Chapter 15.[15]

Double Jeopardy

> *. . . [N]or shall any person be subject for the same offense to be twice put in jeopardy of life or limb . . .*
>
> U.S. CONSTITUTION, FIFTH AMENDMENT

The above-quoted constitutional guarantee against **double jeopardy** involves three separate restrictions on governmental conduct. First, the accused is protected from prosecution for the same offense after an acquittal. Second, the accused is protected from prosecution for the same offense after a **conviction**. Third, the accused is protected from multiple punishments for the same criminal conduct. The purpose of the doctrine is to protect a person from the harassment of multiple trials.

For double jeopardy to apply, the prosecution must be for the same offense as that involved in the earlier proceeding. Accordingly, if an individual is tried in state court for robbing a bank and is acquitted (a state crime), the individual may later be tried in a federal court for robbing a federally insured bank (a federal crime). In this example, although only one bank was involved, the crimes are different, and therefore the doctrine does not apply. Note the Koon case discussed earlier in this chapter on this point. Double jeopardy also does not apply when a case is reversed on appeal or a mistrial is declared for valid reasons. Double jeopardy is an affirmative defense, so the burden of raising the issue rests with the defendant.

double jeopardy A protection in the Fifth Amendment to the U.S. Constitution, enforceable against states through the Fourteenth Amendment, which protects an individual against second prosecution for the same offense after acquittal or conviction and against multiple punishments for the same offense.

conviction A judgment of guilt; verdict by a jury or by a judge in a nonjury or bench trial. Note: A plea of guilty is not a conviction until it is accepted by a judge and judgment is entered by the judge.

CASE ON POINT

IN RE MICHAEL M.

Facts: The defendant, a seventeen-year-old male, was charged with having unlawful sexual intercourse with a female under the age of eighteen, in violation of California's statutory rape law. The statute described statutory rape as "an act of sexual intercourse with a female not the wife of the perpetrator, where the female is under the age of 18 years. . . ." The defendant, prior to trial, petitioned for relief in the California Court of Appeal and the California Supreme Court, asserting that the statute unlawfully discriminated on the basis of gender. The appellate courts denied his petition.

Question: May a state make it a crime for a seventeen-year-old male to have sex with a seventeen-year-old female while not making it a crime for the female involved?

JUSTICE WILLIAM H. REHNQUIST:
A Legislature may not make overbroad generalizations based on sex which are unrelated to any differences between men and women or which demean the ability of the social status of either gender. . . . The Equal Protection Clause does not demand that a statute necessarily apply equally to all persons or require things which are different in fact to be treated in law as though they were the same. . . . This court has consistently upheld statutes where the gender classification is not invidious, but rather realistically reflects the fact that the sexes are not similarly situated in similar circumstances. . . .

Applying these principles to this case, the fact that the California Legislature criminalized the act of illicit sexual intercourse with a minor female is an indication of its intent or purpose to discourage the conduct. . . .

We are satisfied not only that the prevention of illegitimate pregnancy is at least one of the purposes of the statute, but also that the State has a strong interest in preventing such pregnancies. . . .

Accordingly, the judgment of the California Supreme Court is affirmed. [Justice John Paul Stevens dissented.]

Source: 450 U.S. 464 (1981).

HOW WOULD YOU RULE?

FIRST CASE:

In 1917, while the United States was involved in World War I and sugar was a scarce commodity, the defendant was indicted pursuant to § 4 of the Lever Act, codified at 41 Stat. 297, which imposed a fine or imprisonment upon any person who willfully exacted excessive prices for any necessaries. The defendant allegedly violated this statute by charging an unreasonable price for sugar.

The defendant appealed, contending that the statute was vague and did not provide fair notice of what conduct was prohibited. As a justice of the U.S. Supreme Court, how would you rule?

SEE: UNITED STATES V. L. COHEN GROCERY CO., 255 U.S. 81 (U.S. 1921)

SECOND CASE:

On March 11, 2004, terrorists' bombs exploded on commuter trains in Madrid, Spain, killing 191 people and injuring another 1,600, including three U.S. citizens. Shortly after the bombings, the Spanish National Police (SNP) recovered fingerprints from a plastic bag containing explosive detonators. The bag was found in a Renault van located near the bombing site. On March 13, 2004, the SNP submitted digital photographs of the fingerprints to Interpol Madrid, which then transmitted them to the Federal Bureau of Investigation (FBI) in Quantico, Virginia.

The FBI searched fingerprints in its own computer system, attempting to match the prints received from Spain. On March 15, 2004, an FBI computer produced twenty candidates whose known prints had features in common with what was identified as Latent Finger Print # 17 (LFP # 17). The FBI performed background checks on each of the candidates, one of whom was Brandon Mayfield.

On March 17, 2004, FBI Agent Green, a fingerprint specialist, concluded that Mayfield's left index fingerprint matched LFP # 17. Green then submitted the fingerprints for verification to Massey, a former FBI employee who continued to contract with the FBI to perform forensic analysis of fingerprints. Massey verified that Mayfield's left index fingerprint matched LFP # 17. The prints were then submitted to a senior FBI manager, Wieners, for additional verification. Wieners also verified the match.

On March 20, 2004, the FBI issued a formal report matching Mayfield's print to LFP # 17. The next day, FBI surveillance agents began to watch Mayfield and follow him and members of his family when they traveled to and from the mosque, Mayfield's law

office, the children's schools, and other family activities. The FBI also applied to the Foreign Intelligence Security Court (FISC) for authorization to place electronic listening devices in the "shared and intimate" rooms of the Mayfield family home; searched the home while nobody was there; obtained private and protected information about the Mayfields from third parties; searched Mayfield's law offices; and placed wiretaps on his office and home phones. The application for the FISC order was personally approved by John Ashcroft, then the attorney general of the United States.

In April 2004, the FBI sent Mayfield's fingerprints to the Spanish government. The SNP examined the prints and the FBI's report, and concluded that there were too many unexplained dissimilarities between Mayfield's prints and LFP # 17 to verify the match. FBI agents then met with their Spanish counterparts in Madrid, who refuted the FBI's conclusion that there was a match.

On October 4, 2004, Mayfield, his wife, and his children filed suit against the government in the United States District Court for the District of Oregon. The complaint alleged claims for unlawful arrest and imprisonment and unlawful searches, seizures, and surveillance in violation of the Fourth Amendment; a claim under the Privacy Act, 5 U.S.C. § 552a, for leaking information from the FBI to media sources regarding Brandon Mayfield's arrest.

Mayfield claims that his constitutional right to privacy was violated by the FBI's erroneous conclusions regarding the fingerprint match. As federal judge in the case, how would you rule?

See: Mayfield v. United States, 2009 U.S. App. LEXIS 26889 (9th Cir. Or. Dec. 10, 2009)

Summary

The first ten amendments to the U.S. Constitution constitute our federal Bill of Rights. The Bill of Rights and the Fourteenth Amendment to the U.S. Constitution restrict the procedures that the government may use against a person accused of a crime. While most of the restrictions apply to criminal procedural matters, the two major restrictions against substantive criminal law are the Due Process Clause and the Eighth Amendment prohibition against cruel and unusual punishment.

The Supreme Court has held that the Eighth Amendment limits not only the amount and types of punishment that may be inflicted, but also legislative authority to make some conduct criminal.

The Due Process Clause in the Fifth Amendment protects an individual from actions by the federal government, and the one in the Fourteenth protects an individual from actions by state governments. Among other things, due process requires that crimes be described so that an individual is reasonably aware of what conduct is prohibited by the statute.

Jurisdiction is the court's power over the subject matter or person before it. If the court has no jurisdiction over either the defendant or the subject matter of the proceeding, it is without power to act in the matter. An essential element of any criminal charge is that the court has jurisdiction over the offense. To have jurisdiction over the person, the court usually must have the defendant before the court.

While many have contended that a crime must have some "social harm" attached to it, the U.S. Supreme Court has not ruled on this question in cases in which the conduct involves voluntary action.

The right to privacy is not included as such in the U.S. Constitution. The Supreme Court, however, has found authority for privacy as a substantive right under the due process and freedom of association clauses.

Conduct is not necessarily criminal just because it is considered immoral or harmful. The principle of legality states that there is no crime unless the legislature makes the conduct a crime. The government may not enact ex post facto laws, which make an action criminal after it is performed or raise the penalty for a crime after it is committed.

The Fourteenth Amendment to the U.S. Constitution prohibits states from denying individuals

equal protection of the law. A state need not treat everyone exactly the same, but it may distinguish between persons only on the basis of permissible criteria.

The constitutional guarantee against double jeopardy involves three separate restrictions on governmental conduct. The state may not prosecute an accused for the same offense after an acquittal or for the same offense after a conviction or apply multiple punishments for the same criminal conduct. The purpose of the doctrine is to protect a person from the harassment of multiple trials.

Additional Assignments

1. Read the selected cases and associated material for Chapter 2 posted at www.mycrimekit.com
2. Complete the online study guide material for Chapter 2 posted at www.mycrimekit.com
3. Discussion and thought questions:
   a. Explain the relationship between "social harm" and "criminal conduct."
   b. Define the various types of jurisdiction.
   c. Why is the concept of jurisdiction important in criminal cases?
   d. What basic restrictions does the Bill of Rights place on state governments?
   e. Why should it be unconstitutional to punish someone for having a disease?

Practicum

1. Log on to the Internet and go to www.findlaw.com
2. Click on the tab for "Search cases and codes."
3. Search for the U.S. Supreme Court decision *Stanley v. Georgia*, decided in 1969.
4. Why is this case important?

Questions in Review

1. Explain why certain conduct in your home is protected under the Constitution?
2. Why is it not a crime to be addicted to alcohol?
3. Why may an individual be tried in both state and federal court for the same criminal act?
4. How do the legal issues in *Powell v. Texas* case differ from the *Robinson v. California* case?
5. Why is there a prohibition on statutes that are vague?

Notes

1. *Robinson v. California*, 370 U.S. 660 (1962).
2. *Powell v. Texas*, 392 U.S. 533 (1966).
3. *Winters v. New York*, 333 U.S. 507 (1948).
4. *Colten v. Kentucky*, 407 U.S. 104 (1972).
5. *Hiibel v. Sixth Judicial Dist. Court*, 124 S. Ct. 2451 (decided June 2004).
6. *Gardner v. State*, 569 S.W. 2d 74 (1978).
7. *Robinson v. California*, 370 U.S. 660 (1962).
8. *Griswold v. Connecticut*, 381 U.S. 479 (1965).
9. Joshua Dressler, *Understanding Criminal Law*, 2nd ed. (New York: Matthew Bender, 1995), 91.
10. *Stanley v. Georgia*, 394 U.S. 557 (1969).
11. *Calder v. Bull*, 3 U.S. 386 (1798) at 390.
12. U.S. Constitution, Article I, section 9, clause 3, provides, in part, "No state shall . . . pass any Bill of Attainder." See also *Cummings v. Missouri*, 71 U.S. 277 (1867).
13. *People v. Liberta*, 474 N.E. 2d 567 (N.Y. 1984).
14. *Shaw v. Director of Public Prosecutions*, 2 All E.R. 46 (1961) [Decided by the British High Court of Justice].
15. Cal. Penal Code 161.5.

3 Requirement of an Act

KEY TERMS

actus reus
constructive intent
criminal negligence
criminal sanctions
culpability
general intent
legal causation
mala in se
mala prohibita
mens rea
model penal code (MPC)
negligence
specific intent
strict liability crimes
transferred intent

CHAPTER OUTLINE

LEARNING OBJECTIVES

What you should know about the requirement of an act. After reading this chapter, you should know

1. *The two requisites of each crime.*
2. *The meaning of* actus reus *and* mens rea.
3. *What constitutes an act for purposes of meeting the* actus reus *requirement.*
4. *The concept of a legal duty to act.*
5. *The requirements of a voluntary act.*
6. *The distinction between intention and intent.*
7. *How motive differs from intent.*
8. *The different types of intent involved in criminal behavior.*
9. *The differences between "willful" and "knowingly."*
10. *What constitutes recklessness and criminal negligence.*
11. *The rationale for strict liability crimes.*
12. *Understand the importance of the joinder of intent and the act.*
13. *Causation as an implied element of a crime's actus reus.*
14. *The presumption involved in establishing the commission of a crime.*
15. *The vertical growths of criminal codes.*

There are two requisites of each crime: the required act or failure to act (actus reus) and the required mental state (mens rea). To state a different way, a defendant is not guilty of an offense unless he or she committed the wrongful act with the required mental state or culpability. Accordingly, before a defendant may be found guilty in a criminal trial, the prosecution must establish beyond a reasonable doubt the required actus reus and the required mens rea. In this chapter, we will examine those two requisites along with the associated rules of criminal responsibility.

Crime = required act or failure to act + mental state of culpability joined in time

> *A man may have as bad a heart as he chooses, if his conduct is within rules.*
>
> OLIVER WENDELL HOLMES, "NATURAL LAWS," IN COLLECTED LEGAL PAPERS, 1921

Act—Actus Reus

If the law was so restricted (to punish bad thoughts), it would be utterly intolerable: All mankind would be criminals, and most of their lives would be passed in trying and punishing each other . . .

JAMES FITZJAMES STEPHEN, HISTORY OF CRIMINAL LAW IN ENGLAND, 1883

Actus reus is necessary to prevent a person from being punished for his or her mere thoughts.

actus reus An illegal act; the act or failure to act that constitutes the crime.

The Latin term **actus reus** was not actively used by scholars prior to the twentieth century.[1] It is currently used in most works on criminal law in the United States. Unfortunately, it has no single accepted meaning. Since it has no universally accepted meaning, many courts and commentators use the term more narrowly to simply describe the defendant's conduct or the results of that conduct rather than the combination of both. The term actus reus literally means "guilty act." It is more than voluntary muscular contractions (voluntary movement). The actus reus includes three ingredients of a crime:

1. a voluntary act or a failure to perform a voluntary act that one has a legal duty to perform
2. that causes
3. social harm

Actus reus can be conceptualized as including both muscular contractions and the circumstances and consequences associated with the contractions.

The actus reus requirement does not need to be a completed crime, as long as it is a substantial step toward the completion of a crime or an attempt. It must be more than a bare desire or wish to complete a crime.

The justification for requiring actus reus is to prevent punishing a person merely for his or her thoughts. An old legal maxim says that you cannot be punished for your evil thoughts, but you may be punished for any actions associated with your evil thoughts. An additional justification is based on the concept that criminal law should not be so broad as to reach those people who entertain criminal schemes in the mind only but never allow the thoughts to govern their conduct. The practical reason for the actus reus requirement is that, until a person does something, we have no objective proof of the seriousness of his or her thoughts. Haven't we all at one time or another thought about "choking someone"?

Voluntary Acts

An act necessary to constitute a crime varies with each crime and is generally specified in the statute that establishes the crime.

The act necessary to constitute a crime varies with each crime and is generally specified in the statute that establishes it. For example, as this text will discuss, burglary is the entering of a building with the intent to commit certain offenses. In this crime, the actus reus is the entering of the building with the required criminal intent.

Involuntary movement normally is not sufficient to cause criminal liability. For example, C shoves A into B. A has not committed the act necessary to establish an assault on B, since A's act was involuntary. A classic example of an involuntary movement is a muscle spasm that causes a pistol to discharge, thereby killing someone; this is not an act sufficient to establish murder. Most authorities acknowledge that mere reflex is not a voluntary act.[2]

In some crimes, the act of speaking can be the act underlying the crime. In others, possession of something that is illegal may be an act sufficient to constitute a crime.

Acts of Omission

The failure to act may itself be an act for purposes of criminal law.

Criminal liability can be based on a failure to act (act of omission) when the individual has a legal duty to do so. Note that there must first be a legal duty to act. A moral duty is insufficient to establish criminal liability. For example, if a medical doctor is a bystander who witnesses an automobile accident, he has no legal duty to render medical assistance to the injured persons. If, however, the doctor causes the accident by his negligence, then he has a duty to render aid. In the first situation, the duty to render aid is a moral duty only. In the second situation, since the doctor caused the accident, he is under a statutory duty in most states to render aid.

Legal duty to act arises in most cases from statutory sources. For example, most state vehicle codes require persons involved in an automobile accident to render aid or assistance to persons injured in the accident. Under the Internal Revenue Code, most of us are required to file tax returns. The failure to file when required is a crime.

In some cases, the duty may result from the relationship of the parties. For example, parents have a duty to protect and safeguard their children. Thus, a parent generally has a duty to rescue his or her endangered child. The legal duty may also result from a contractual relationship between the parties. If a childcare worker accepts the care of a child, the worker has a reasonable duty to rescue if the child is in danger.

If one has no duty to act, but does act, then there is a legal duty to act in a reasonable manner.

Requirements of a Voluntary Act

As a general rule to be guilty of a crime, you must commit a voluntary act. There are a few exceptions to this requirement especially involving health and safety code violations.

Consider an actual case where the police go to Martin's home and find him intoxicated. They remove him from his home and place him in the street. Is he guilty of being intoxicated on a public highway in violation of an Alabama state statute? The Alabama appellate court stated that under the plain terms of this statute, a voluntary act is presupposed. The rule has been declared, and we think it sound, that an accusation of drunkenness in a designated public place cannot be established by proof that the accused, while in an intoxicated condition, was involuntarily and forcibly carried to that place by the arresting officer. Conviction of appellant was contrary to this announced principle and, in our view, erroneous. [See *Martin v. State*, 31 Ala. App. 334 (1944)].

PRACTICUM 3.1

A husband was convicted of first-degree rape upon his daughter based on a sexual relationship that had been going on for some time.

ISSUE: *Can a wife who knows of the illegal sexual relationship be convicted as an accomplice for her failure to take any action to stop the relationship? If so, what is her voluntary act?*

The court held that the wife had a duty to protect her daughter and that her failure to intervene on behalf of the child made her an accomplice.[3] Her voluntary act was her willful failure to intervene.

Legal Duty

A legal duty is an obligation imposed by the law.

A legal duty is an obligation imposed by the law. Failure to fulfill such a duty can result in criminal or civil sanctions. Legal duties are distinct from moral or ethical duties, while a duty may be both legal and ethical. Often legal duties are assumed. For example, it is assumed that you have a legal duty to refrain from assaulting your neighbor.

Legal duties are created in different ways and by different types of law. The two most common creations are by common law in those countries like the United States that are considered as common law countries and by legislation.

There are also two general classifications of legal duties: those duties where a breach is criminal and subject to criminal sanctions and those duties where the breach is punishable under civil law. While there is some overlap and certain actions may be both a crime and a tort, in this text we are concerned only with those involving criminal law (i.e., criminal penalties).

As with other legal concepts, the concept of duty "is very involved, complex, and nebulous." The confusions over what it means to "owe a duty" stems from the variety of different ways that term is used. For instance, sometimes duty is used to refer to a general standard or obligation. At other times, duty is used as "a conclusion about whether the defendant's particular act or omission should be actionable, irrespective of any general standard." When an attorney states that her client owed no duty, she is in fact arguing that no breach of duty occurred.

Duty is used in different senses:

- Duty as obligation,
- Duty as nexus between breach and duty,
- Duty as breach as a matter of law, and
- Duty as exemption from the operation of negligence law.

When determining whether a duty exists for purposes of stating a claim for negligence, it is the obligation to another sense or duty in its most basic sense. When a party relies upon common law principles as the basis for the duty element of her negligence claim, determining whether a duty should be imposed involves considerations of public policy.

The courts have used four factors to make the determination of whether duty is involved:

- The reasonable foreseeability of the injury;
- The likelihood of injury;
- The magnitude of the burden of guarding against the injury; and
- The consequences of placing that burden on the defendant. [*Lance v. Senior*, 36 Ill.2d 516, 518 (1967)].

The important question to ask is whether a plaintiff and a defendant stood in such a relationship to one another that the law imposed upon the defendant an obligation of reasonable conduct for the benefit of the plaintiff. Consider the following situation:

A fifty-eight-year-old man was pushed onto the subway tracks in New York's Times Square Station in December, 2012, no one helped him. He was killed by an oncoming train.

Question: Did the inactions of those on the platform constitute criminal conduct? The failure to act can only constitute a crime if the law imposes an affirmative duty to act. As a general matter, a person is under no legal obligation to rescue another, unless a "special relationship" exists between the potential rescuer and the person in danger. A "special relationship" exists, for example, in situations where one person is dependent on the other (e.g., parent to minor child) or where a statute or contract imposes a legal duty to act. There is a common law no-duty rule that applies in almost every state. It does not matter whether the rescue is easy or the person in need of help is in grave danger.

CASE ON POINT

THE MURDER OF KITTY GENOVESE

Kitty Genovese was murdered in New York City. She was killed on the sidewalk in front of her apartment in Queens. Kitty Genovese was a twenty-eight-year-old bar manager when she was murdered by Winston Moseley, a twenty-nine-year-old computer punch-card operator. Her murder was only one of six hundred and thirty-six murders committed in New York City in 1964. Yet, over fifty years later researchers and the news are still discussing the case. The case has been condemned by presidents, mayors, academics, and theologians. It has been studied in college criminal justice and psychology courses. It was even used some forty years later to justify the Iraq war. In recent years, there has been controversy over the actual facts in the case. Many individuals claim that the original reports of the case were embellished.

The attack started at 3:20 a.m. and continued until she died some thirty-five minutes later. During this period, at least thirty-seven law-abiding citizens watched the killer stalk and stab her three times. Twice during the series of assaults on Genovese, lights turned on in nearby bedrooms interrupted the killer and frightened him off. Each time he returned to continue the assaults. Despite her cries for help, not one of the thirty-seven citizens attempted to help—not one even called the police during the attacks, although one called after her death. When asked why he did not call the police, one man stated, "I was tired."[4] Since none of the thirty-seven citizens had a legal duty to help, their inaction, while morally wrong, was not criminal behavior.

CASE ON POINT

JONES V. UNITED STATES

Circuit Judge Wright:

…. There are at least four situations in which the failure to act may constitute breach of a legal duty. One can be held criminally liable: first, where a statute imposes a duty to care for another; second, where one stands in certain status relationship to another; third, where one has assumed a contractual duty to care for another; and fourth, where one has voluntarily assumed the care of another and so secluded the helpless person as to prevent others from rendering aid.

Note: the Jones case holds that the failure to act may be a breach of duty if

- statute imposes a duty to care for another,
- one stands in certain status relationship to another,
- one has assumed a contractual duty to care for another, or
- one has voluntarily assumed the care of another and so secluded the helpless person as to prevent others from rendering aid.
- one has wrongly created the peril.

Source: 308 F.2d 307 (D.C. Cir. 1962).

4. Possession is an act, within the meaning of this section, if the possessor knowingly procured or received the thing possessed or was aware of his control thereof for a sufficient period to have been able to terminate his possession.

Summary of Actus Reus

Requirement		
Voluntary Act	Some kind of action-mere bad thoughts are insufficient	
Or		**Legal duty crated by**
Omission to act when under a legal duty to act		statute contract status relationship wrongful creation of peril

Intent—Mens Rea

Actus non facit reum nisi mens sit rea.

"An Act Does not Make (an Individual) Guilty, Unless the Mind be Guilty."[5]

mens rea The required mental state necessary to constitute a crime.

criminal sanctions Punishments that are associated with being convicted of crimes.

culpability Blameworthiness for criminal conduct based on mens rea.

The general concept of ***mens rea*** is that **criminal sanctions** should not be imposed on those who innocently cause harm. As Justice Oliver Wendell Holmes, Jr., stated in *The Common Law*: "even a dog distinguishes between being stumbled over and being kicked."[6] Accordingly, for an act to be criminal, it must be accompanied by the required mens rea, also referred to as "**culpability**." Although this concept appears clear and is generally accepted, there are many problems in applying it to particular cases. One legal scholar says that the term mens rea is fraught with greater ambiguity than any other legal term.[7]

As we will show, different crimes require different degrees of intent. Sometimes it is confusing because some crimes require a high degree of intent while others require substantially less. For example, larceny requires that the defendant actually intended to steal the property whereas the crime of negligent homicide require only that the defendant negligently caused the death of a living person.

In addition, substantial problems are caused by the traditional use of imprecise terminology. Frequently, the textbooks use terms like "specific intent" or "general intent." Specific intent generally refers to a particular state of mind required as an element of the crime. General intent is an esoteric concept. It is usually used to explain the attachment of criminal liability even when a defendant does not intend to bring about a particular result. Both specific and general intent are discussed in more detail later in this chapter.

The Model Penal Code, Section 2.02, rejects the concepts of specific intent and general intent. Instead, the code uses four separate states of mind; purposeful, knowing, reckless, and negligent.

If a person has sufficient mens rea to commit a crime, but commits a lesser one, he or she will be held accountable only for the actual crime committed. A classic example in this area is the following:

> If one from a housetop recklessly throws down a billet of wood upon the sidewalk where persons are constantly passing, and it falls on a person passing by and kills him, this would be murder. If instead of killing him, it inflicts only a slight injury, the party would not be convicted of murder since murder was not committed.[8]

The term mens rea has been difficult for the courts and the legislatures to define: The U.S. Code takes seventy-nine words to define it. A restatement of the

U.S. Code's definition serves only to confuse readers. Many scholars consider intent and mens rea to be the same. Others argue that intent is only a part of mens rea, since it does not cover those situations where recklessness or negligence is sufficient to establish the mental requirement.

The easiest way to understand mens rea is to understand the four mental states that qualify as mens rea: general intent, specific intent, transferred intent, and constructive intent. As we will note later in this chapter, constructive intent includes those situations in which recklessness or negligence is sufficient to establish mens rea.

In criminal law, there is a significant distinction between the words *intention* and *intent*. Intention is often equated with the mental state of specific intent, which is discussed below. Intent is also different from motive.

Motive is the desire that compels or drives a person to intend to do something. Unlike intent, motive is not an element of the crime and therefore does not need to be proven in order to find a defendant guilty. Evidence of a motive, however, is often used to establish the existence or absence of intent.

General Intent

Arnold Loewy, in attempting to describe **general intent**, states: "General intent is an extraordinarily esoteric concept. It is usually employed by courts to explain criminal liability when a defendant did not intend to bring about a particular result."[9]

general intent A concept employed by the courts to explain the required criminal intent for a defendant to be convicted of a certain crime, by which the government is not required to prove that the defendant intended to bring about a particular result.

General intent, for the most part, refers to the intent to commit the act (actus reus) required for the crime. General intent is sufficient mens rea for most criminal offenses. To establish general intent, it must be shown that the defendant acted with a malevolent purpose; that is, the accused committed the required act while knowing that it was wrong. Once it is proven that the accused committed the required act, it is presumed that he or she had the necessary general intent.

It is often stated that a person is presumed to intend the natural and probable consequences of his or her knowing and deliberate acts. There is no presumption, however, that a person intended results that are not natural, reasonable, or probable consequences of voluntary acts.

Specific Intent

Specific intent refers to doing the actus reus with the intent to cause a particular result. The term specific intent is often used by the courts for crimes that require proof of a particular mental state of intent or knowledge. Unlike general intent, specific intent is not presumed but must be proven. Associated with specific intent is the requirement of *scienter*. Scienter is a legal term meaning the degree of knowledge that makes a person criminally liable for his or her physical acts.[10] When a certain state of knowledge (scienter) is required, the prosecution must allege the existence of the scienter in the indictment (charges) against the accused. For example, in most states, the offense of battery or assault upon a police officer requires showing that the defendant knew that the victim was a police officer. This is the scienter, and it must be alleged in the pleadings. Other examples of scienter include

specific intent The intent to accomplish a specific purpose as an element of a crime.

- Aiding a felon (must allege and prove that the defendant knew that the person he or she was aiding was a felon).
- Refusing to assist a law enforcement officer (must allege and prove that the defendant knew that the person requesting assistance was a law enforcement officer).

PRACTICUM 3.2

Defendants were prosecuted in the County of Maui, Hawaii, for indecent exposure. They admitted that they were sunbathing in the nude on a beach but contended that there was no intent to expose themselves indecently. In addition, defendants contended that there was no evidence to show an intent to expose themselves indecently. The statute in question required a general intent for the essential **elements** of the offense. Evidence was presented in court to establish that the beach was isolated and away from the view of the adjoining road and beaches. It was accessible by a well-worn path and known to be a favorite fishing location.

ISSUE: *Are the facts sufficient to justify an inference of intent on the part of the defendants to be seen by others?*

The court held that the defendants' actions in exposing themselves on a public beach under circumstances where they might be seen by others was sufficient to infer a general intent to offend the community's common sense of decency.[11]

constructive intent A principle of law that refers to those situations where the actor does not intend any harm but should have known that his or her behavior created a high risk of harm to others.

Model Penal Code (MPC) A model code of criminal laws developed by the American Law Institute for the purpose of standardizing general provisions of criminal liability, sentencing, defenses, and the definitions of specific crimes between and among the states.

negligence The unconscious creation of risk, or the mental state in which the actor unknowingly creates a substantial and unjustifiable risk of harm to others.

criminal negligence Behavior in which a person fails to reasonably perceive substantial and unjustifiable risks of dangerous consequences; negligence of such a nature and to such a degree that it is punishable as a crime; or flagrant and reckless disregard for the safety of others or willful indifference to the safety and welfare of others.

Also associated with specific intent is the term willful. This is another one of those terms that is very perplexing. At times, it means nothing more than "intentional." At other times, it means more, namely that the defendant intentionally caused the social harm with a bad motive. This latter meaning was applied by the U.S. Supreme Court in *United States v. Murdock*.[12] In this case, the defendant refused to answer questions by a governmental agency, based on his belief that he had a constitutional privilege not to answer the questions. The Court held that, while he did not have a constitutional privilege to avoid the questions, his refusal to answer was based on an honest but erroneous belief, and therefore his refusal was not willful.

Constructive Intent

Constructive intent refers to those situations in which the actor does not intend any harm but should have known that his or her behavior created a high risk of harm. The **Model Penal Code (MPC)** substitutes "recklessness" for constructive intent. Under the MPC, a reckless state of mind implies that one acts without intending harm but with complete disregard for the rights and safety of others, causing harm to result.

Criminal Negligence

Usually, a person is not criminally liable for negligent acts. To establish criminal liability, the **negligence** must amount to **criminal negligence**. Criminal negligence, however, has no single meaning at common law. In most cases, it constitutes a gross deviation from the standard of care required of an individual. Frequently, courts describe criminal negligence as gross negligence or culpable negligence.

In some jurisdictions the statutes tend to lump criminal reckless and criminal negligence as one concept, others consider them as separate categories of culpability. In the latter jurisdictions, criminal negligence is defined as conduct that is careless, inattentive, or neglectful. And criminal reckless generally involves a person pursuing a course of action while consciously disregarding the fact that the action gives rise to a substantial and unjustifiable risk.

One court described a criminally negligent person as one who creates a substantial unjustified risk of harm to others.[13]

Is it criminal negligence to drive with extremely worn tires on your automobile? In *Ison v. Commonwealth*, 271 S.W.3d 533 (Ky. Ct. App. 2008), a jury convicted defendant of three counts of reckless homicide (Ky. Rev. Stat. Ann. § 507.050) among other charges. The facts of the case were that on the rainy afternoon of October 21, 2005, Ison was driving his Ford Mustang on Highway 15 in Letcher County. An eyewitness in the vehicle behind Ison testified that Ison drove within the speed limit and safely negotiated a curve before losing traction and crossing lanes into oncoming traffic, where his vehicle collided with a vehicle driven by Tracy Craft. Ison's three passengers died as a result of the collision. On appeal, Ison argued that because there was insufficient proof of the necessary mental states for the offenses of reckless homicide charges. The appellate court agreed and noted that wanton behavior generally requires a person to be aware of, but consciously disregard, "a substantial and unjustifiable risk" which is "of such nature and degree that disregard thereof constitutes a gross deviation from the standard of conduct that a reasonable person would observe in the situation." The court noted that while Ison's vehicle was described as having rear tires that were extremely worn, the eyewitness to the collision testified that Ison was not speeding or driving erratically before the tires lost traction immediately prior to the collision. And the toxicology report showed no alcohol or drugs in Ison's blood.

To be liable in civil cases for negligence, one should be but is not necessarily aware that his or her conduct constitutes an unjustified foreseeable risk. Generally, the criminal defendant is aware of the unjustified risk but proceeds anyway.

In many states, "recklessly" is a synonym for "criminally negligent." In other states, *recklessly* differs from *criminally negligent* in that it involves greater risk taking. In those states where there is a difference between criminal negligence and recklessness, recklessness additionally requires that the defendant's fault be subjective, in that he or she is aware that there is unjustifiable risk of danger in his or her conduct.

In *West v. Commonwealth*, 935 S.W. 2d 315 (Ky. Ct. App. 1996), a Kentucky court of appeals stated that one acts "recklessly" with respect to a result or to a circumstance when he fails to perceive a substantial and unjustifiable risk that the result will occur or that the circumstance exists. The risk must be of such nature and degree that failure to perceive it constitutes a gross deviation from the standard of care that a reasonable person would observe in the situation.

Transferred Intent

Transferred intent refers to the situation in which one intends to harm one person and instead harms another. In these cases, the law transfers the intent to harm to the person actually harmed. Transferred intent cases are often called "bad aim" cases because a large number involve an offender firing at one person and accidentally hitting someone else.

transferred intent A principle of law that transfers the intent to harm to the person actually harmed. Involves a situation where a person intends to injure one person and mistakenly injures a third person.

The doctrine of transferred intent has long been recognized in common law. For example, Sir William Blackstone stated in his commentaries on the law of England:

> Thus if one shoots at A; and misses him, but kills B; this is murder; because of the previous felonious intent, which the law transfers from one to the other. The same is the case where one lays poison for A; and B, against whom the prisoner had no malicious intent, takes it, and it kills him; this is likewise murder.[14]

In *Henry v. State*, 184 Md. App. 146 (Md. Ct. Spec. App. 2009), defendant argued that the trial court committed error by instructing the jury on the doctrine of transferred intent where both the intended victim and the unintended victim were killed. The defendant shot his intended victim with a shotgun, killing

PRACTICUM 3.3

In a dispute over the quality of heroin, the defendant fired at the drug dealer. He missed the dealer but hit and killed a twelve-year-old bystander.

ISSUE: *Is the defendant guilty of murder with intent to kill?*

Despite the argument by his counsel that the defendant had no malice toward the victim and did not intend to kill him, the defendant was convicted of murder with intent to kill. The Maryland appellate court stated that the doctrine of transferred intent has been a part of American common law since before the Revolution and continues today as part of our law.[15]

him and also killing another person. The appellate court disagreed, holding that transferred intent doctrine applied even when defendant killed the intended target. In *State v. Anderson*, 2009 Minn. App. Unpub. LEXIS 305 (Minn. Ct. App. Mar. 31, 2009), defendant's conviction for murder and assault with a dangerous weapon was affirmed where the defendant shot the intended victim killing him and at the same time injuring two bystanders. The conviction for assault with a dangerous weapon on the bystanders was affirmed based on the doctrine of transferred intent.

Summary of Mens Rea Requirements

Intent by type	Description	Crime examples
Specific Intent	Doing an act with the intent to cause the harm	Attempt, solicitation, conspiracy, larceny
General Intent	All crimes except absolute liability crimes require at least a general intent	Rape, battery, involuntary manslaughter
Transferred Intent	Intending to cause harm to one person causes it to another	Shooting and injuring A while attempting to kill B
Absolute Liability or Strict Liability	No intent required	Generally regulatory offense like serving spoiled food or keeping a dangerous wild animal that escapes and causes injury

mala in se Crimes that are inherently bad: for example, murder, rape, and theft.

mala prohibita Acts that are crimes only because the government has declared them criminal. Acts that are not inherently bad: for example, hunting without a license.

strict liability crimes Those crimes that require no proof of culpability or state of mind and are justified on the basis of the need to encourage extremely high standards of care for the protection of the public.

Strict Liability Crimes

Serving adulterated food in a dinner is a crime in most jurisdictions regardless of the intent of the dinner employees or owner.

As Chapter 1 discussed, common law crimes are considered moral wrongs in themselves (***mala in se***). Traditionally, these crimes require proof of either general or specific intent. Some of the ***mala prohibita*** crimes, however, require no proof of culpability. These offenses are called "strict liability" offenses because mere proof that the act was committed is sufficient to convict an individual. No culpability or state of mind need be proven. Some criminal law writers contend that these crimes are not really crimes but only regulatory offenses.

Strict liability crimes often involve one of the following types of conduct: selling impure or adulterated food, selling prohibited beverages to minors, selling articles that are misbranded, and driving without a license.

Similar to the strict liability offenses are the vicarious liability crimes. In these crimes, the defendant is held accountable for the conduct of another, usually an

employee. For example, if a waiter serves adulterated food in a restaurant, the owner of the restaurant may be vicariously liable for the actions of the waiter even though the owner did not know of the conduct. In some cases, vicarious liability is extended to the employer even in situations in which the employee deliberately disobeys the orders or instructions of the employer—for example, when a bartender disobeys the owner and sells beer to minors.

In *Pelayo-Garcia v. Holder*, 2009 U.S. App. LEXIS 27096 (9th Cir. Dec. 14, 2009), an appellate court noted that Cal. Penal Code § 261.5(d) contains the following elements: (1) sexual intercourse with another person; (2) the defendant was at least twenty-one years of age at the time of intercourse; and (3) the other person was under the age of sixteen years at the time of intercourse. The statute does not expressly include a scienter requirement, and courts have concluded that Cal. Penal Code § 261.5(d) is a strict liability crime that does not require any showing of scienter. Regarding Cal. Penal Code 261.5, a reasonable and actual belief by defendant that the victim was over eighteen is a defense.

The justifications for strict and vicarious liability crimes are the need to encourage extremely high standards of care required for the protection of society and the difficulty of proving culpability in those cases.

General Requirements of Culpability

Before a person may be found guilty of a crime, it must be established that he or she had the required culpability as to each and every element of the crime. There are four kinds of culpability that may be used in a statute establishing a crime.

- **Intent:** The person acted with intent or intentionally when he or she committed the act which constituted the crime.
- **Knowledge:** A person knows or acts knowingly with knowledge when (1) he or she is aware of a fact, facts, or circumstances or result described by a statute defining the crime or (2) he or she has information which would lead a reasonable person in the same situation to believe that the facts, circumstances, or results exist.
- **Recklessness:** A person is reckless or acts recklessly when he or she knows of and disregards a substantial risk that a wrongful act may occur and his or her disregard of such substantial risk is a gross deviation from conduct that a reasonable person would exercise in the same situation.
- **Criminal Negligence:** A person is criminally negligent or acts with criminal negligence when he or she fails to be aware of a substantial risk that a wrongful act may occur and his or her failure to be aware of such substantial risk constitutes a gross deviation from the standard of care that a reasonable person would exercise in the same situation.

Frequently, criminal statutes involving criminal negligence provide substitutes for criminal negligence. For example, see the State of Washington RCW 9A.08.010*, General requirement of culpability*, which provides, in part, that when a statute provides that criminal negligence suffices to establish an element of an offense, such element also is established if a person acts intentionally, knowingly, or recklessly. When recklessness suffices to establish an element, such element also is established if a person acts intentionally or knowingly. When acting knowingly suffices to establish an element, such element also is established if a person acts intentionally.

Culpability as Determinant of Grade of Offense. When the grade or degree of an offense depends on whether the offense is committed intentionally, knowingly, recklessly, or with criminal negligence, its grade or degree shall be the lowest for which the determinative kind of culpability is established with respect to any material element of the offense.

Requirement of Willfulness Satisfied by Acting Knowingly. A requirement that an offense be committed willfully is satisfied if a person acts knowingly with respect to the material elements of the offense, unless a purpose to impose further requirements plainly appears.

CASE ON POINT

ESTABLISHING DEFENDANT'S MENTAL STATE: *STATE V. WILLIAMS*

Excerpt from the trial judge's instructions to the jury:

> Often a defendant's mental state is not conducive to demonstration through direct evidence. In criminal prosecutions, proof of a defendant's mental state often must be inferred from the circumstances, and the jury must make its determination by both the act and by the surrounding circumstances. The key to circumstantial evidence generally, and as applied to state-of-mind questions specifically, is whether it bears a logical connection to the disputed fact. When an individual's state of mind is at issue, a greater breadth of evidence is allowed. A court will admit circumstantial evidence that has a tendency to shed light on a defendant's mental state or which tends fairly to explain the defendant's actions, notwithstanding that the evidence relates to conduct that occurred before the offense. Similarly, conduct that occurs after the charged offense circumstantially may support inferences about a defendant's state of mind.
>
> The relevance of post-crime conduct to a defendant's mental state is recognized when the conduct demonstrates consciousness of guilt. Flight is recognized as being a type of post-crime conduct that can demonstrate consciousness of guilt. Evidence of flight occurring after the commission of an offense has been held probative of guilt and admissible. A defendant's post-crime conduct evidencing a guilty conscience provided a sound basis from which a jury logically could infer that a defendant was acting consistent with an admission of guilt or that the conduct was illuminating on a defendant's earlier state of mind.
>
> When the State alleges criminal recklessness, it must demonstrate through legally competent proofs that defendant had knowledge or awareness of, and then consciously disregarded, a substantial and unjustifiable risk.
>
> The element of criminal recklessness differs from knowing culpability in that the latter requires a greater degree of certainty that a particular result will occur. Recklessness can generally be distinguished from purposely and knowingly based on the degree of certainty involved. Purposely and knowingly states of mind involve near certainty, while recklessness involves an awareness of a risk that is of a probability rather than certainty. Even when recklessness is the mens rea element of the crime charged, a defendant's knowledge or awareness is material to the determination of culpability. Recklessness resembles knowledge in that both involve a state of awareness. [N.J. LEXIS 346 (N.J. Apr. 11, 2007).]

▶ Joinder of Intent and Act

The actus reus and the mens rea must be joined in time to constitute a crime.

The *actus reus* and the *mens rea* must be joined in time. For example, if X decided to murder someone one week, then changed her mind but accidentally killed the person the next week, this would not be murder, since the intent to kill and the act did not exist together at any one time. There is no specific length of time, however,

that the *mens rea* must exist before the act as long as they exist concurrently at some time. In fact, the necessary mental element may be formed at the exact time that the requisite act is committed.

In the 1951 movie, *A Place in the Sun*, George (Montgomery Cliff) planned to kill his wife. He rented a boat under a false name and takes his wife out in the boat. While out in the lake, George begins to feel sorry for his wife and decided not to take her life. Alice, the wife, tries to stand up in the boat, causing it to capsize, and she drowns. Since the actus reus and the mens rea were not joined in time, he was not guilty of murder. But in the movie he was convicted of murder based on the circumstantial evidence that he rented the boat under a false name, knew she could not swim, had a mistress, and the fact that he failed to immediately report her death.

Causation

Causation is an implicit element of the actus reus.

Causation is an implicit element of a crime's *actus reus*. This is based on the fact that the *actus reus* is considered a voluntary act resulting in the harm to society prohibited by the offense. For example, before X can be convicted of murder, his act must have been the cause of the victim's death. Most causation issues arise in criminal homicide cases. The presence of causation is usually an issue only when the harm caused was an unwanted result—for example, the unintended death of a victim.

Actual cause exists if the result would not have occurred when it did in the absence of that factor. This can be stated another way: But for the defendant's act, would the social harm have occurred when it did?

The determination that the defendant's conduct was an actual cause of the result, however, does not necessarily mean that the defendant is criminally liable for the harm. For the defendant to be guilty, not only must she have acted with the required *mens rea,* but she must also be the proximate cause of the harm. Proximate cause is also defined as the **legal causation** of the harm. That cause is legally considered the act that was directly responsible for the harm.

legal causation A cause recognized by law as necessary to impose criminal liability.

In most crimes, it is easy to assign the direct cause of the social harm. There may, however, be intervening causes that are also linked to the event. Intervening causes are classified as either dependent or independent. A dependent intervening cause is a force that occurs in response to an earlier causal force. Dependent causes do not relieve the defendant of causal responsibility for the resulting harm. An independent intervening cause is a force that does not occur in response to the wrongdoer's initial conduct. An independent cause may relieve the defendant of the causal responsibility for the resulting harm.

Consider the following examples:

1. X shoots V. V is being transported to the hospital when the ambulance is involved in a wreck that kills V. Is X guilty of murder?
2. X shoots V. V is taken to the hospital, where he receives negligent treatment. V dies. Had V received adequate treatment, he would have survived the shooting. Is X guilty of murder?

In the first situation, X probably would not be guilty of murder, since the wreck was an independent intervening cause. The wreck was not in response to the defendant's conduct. In the second situation, X probably would be guilty of murder, since poor medical treatment is considered a dependent intervening cause. In the latter example, medical treatment is in response to the defendant's conduct.

CASE ON POINT

PEOPLE V. RIDEOUT

Excerpts from the trial judge's instructions to the jury on causation:

> In criminal jurisprudence, the causation element of an offense is generally comprised of two components: factual cause and proximate cause. The concept of factual causation is relatively straightforward. In determining whether a defendant's conduct is a factual cause of the result, one must ask, "but for" the defendant's conduct, would the result have occurred? If the result would not have occurred absent the defendant's conduct, then factual causation exists. The existence of factual causation alone, however, will not support the imposition of criminal liability. Proximate causation must also be established. Proximate causation is a "legal colloquialism." It is a legal construct designed to prevent criminal liability from attaching when the result of the defendant's conduct is viewed as too remote or unnatural. Thus, a proximate cause is simply a factual cause of which the law will take cognizance.
>
> For a criminal defendant's conduct to be regarded as a proximate cause, the victim's injury must be a "direct and natural result" of the defendant's actions. In making this determination, it is necessary to examine whether there was an intervening cause that superseded the defendant's conduct such that the causal link between the defendant's conduct and the victim's injury was broken. If an intervening cause did indeed supersede the defendant's act as a legally significant causal factor, then the defendant's conduct will not be deemed a proximate cause of the victim's injury. The standard by which to gauge whether an intervening cause supersedes, and thus severs the causal link, is generally one of reasonable foreseeability. The linchpin in the superseding cause analysis is whether the intervening cause was foreseeable based on an objective standard of reasonableness. If it was reasonably foreseeable, then the defendant's conduct will be considered a proximate cause. If, however, the intervening act by the victim or a third party was not reasonably foreseeable—e.g., gross negligence or intentional misconduct—then generally the causal link is severed and the defendant's conduct is not regarded as a proximate cause of the victim's injury or death.
>
> In criminal law, a superseding intervening cause does not need to be the only cause. Indeed, while a defendant's conduct might have been a factual cause of an accident, the victim's conduct might also have been a cause and, more to the point, potentially a superseding cause.

Source: 272 Mich. App. 602 (2006).

Presumptions

The two types of presumptions are permissible and conclusive presumptions.

Often, it is difficult to prove the requisite intent required to convict the defendant of a certain crime. For example, in one state, first-degree murder may be defined as the unlawful and intentional killing of a human being with malice. How do you establish that the defendant actually intended to kill the victim, especially when the defendant claims that the killing was accidental? To overcome this difficulty, legislatures and courts establish rules of presumption. A presumption operates in the following manner: Upon proof of fact A, the court may or must presume fact B. One of the most commonly accepted presumptions is that a person is presumed to have intended the natural and probable consequences of his or her act. Many states have enacted "bad check" statutes that create the presumption that, if an individual has not made "good" the bad check within a certain number of days after notification, that the individual is presumed to have intentionally defrauded the individual who accepted the bad check. In this situation, to prove the intent to defraud (fact B), you would need to establish notification of the check's dishonor (fact A). There are two types of presumptions: permissible or rebuttable ones and