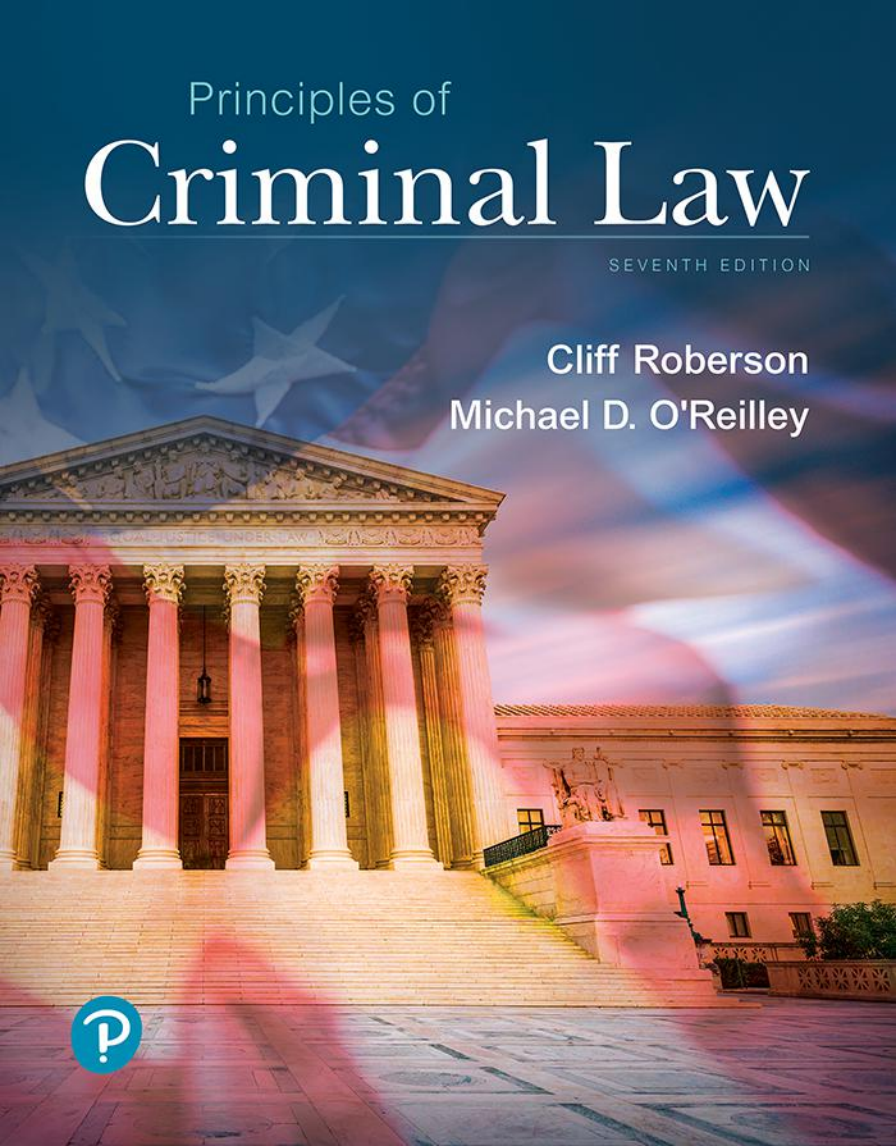
Principles of Criminal Law

SEVENTH EDITION

Cliff Roberson
Michael D. O'Reilley



Seventh Edition

Principles of Criminal Law

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Preface

The study of substantive criminal law is 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 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 the Seventh Edition

The seventh edition contains several significant changes. Those changes include the following:

- New material on organized and white-collar crimes
- 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
- Expanded section on theft crimes
- 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.

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Instructor's Manual with Test Bank. Includes content outlines for classroom discusion, 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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Comments, suggestions, and recommendations on this text may be sent to the authors by emailing cliff.roberson@washburn.edu.

1

Introduction to Criminal Law

CHAPTER OUTLINE

Introduction
Origins of Criminal Law
Principles of Criminal Responsibility
Morals Versus Law
Classification of Crimes
Case Law
Reform of Criminal Law
Police Powers of Government
Punishment
Summary
Additional Assignments
Review Practicum
Questions in Review
Notes

LEARNING OBJECTIVES

After reading this chapter, you should know:

1. The origins of criminal law.
2. The development of common law.
3. The principles of criminal responsibility.
4. The importance of case law.
5. The classification of crimes.
6. Police powers of the government.

Key Terms

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

▶ Introduction

This chapter explores 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.

For those individuals who are unfamiliar with the U.S. courts systems, included is Appendix A, which provide a brief overview of the federal courts system. The appendix might assist those individuals understand some of the issues in prosecuting criminal behavior.

Criminal law is used to fully define and establish the limits of prohibited criminal behavior. Roscoe Pound describes two needs that can be considered the controlling force behind most philosophical thinking in 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 by a criminal punishment. It often is but a civil injury or wrong.[2]

> 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

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 flash 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.[4]

In 2016, however, a federal district court in New Mexico upheld a similar state statute and held that the statute making it a crime to flash your lights to warn drivers was valid and did not violate the First Amendment of the U.S. Constitution.[5]

> 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,* free speech does not mean you have the right to yell "fire in a crowded theater."[6]

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 criminal punishment.[3]

▶ 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."[7] 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 and congress should use words that are well known and understandable to a person of reasonable intelligence.

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.

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.

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)).

We know that 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.

▶ 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 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

The defenses that excuse criminal conduct that would otherwise be criminal are discussed more in depth in a textbook on criminal procedure. Three of the most often discussed defenses are insanity, self-defense, and necessity. Insanity is a legal term and not a medical term. It is based on the concept that an actor who committed the act should not be punished for a crime if he or she did not know the nature and quality of the act or if he or she did not know that he or she was doing was wrong. The exact requirements to establish the defense of insanity varies under federal and state laws.

The prevailing insanity rule in the jurisdictions in the United States is known as the M'Naghten rule, which is also referred to as the right–wrong test. If no issue is raised at trial as to the sanity of the defendant, it is presumed that the defendant is sane. If the issue is raised, the rules of the jurisdiction as to how much evidence the defendant must present to raise the issue vary widely. Kansas, for example, has eliminated insanity as a defense. In Kansas, the sanity of the accused is considered in determining the proper sentence.

The defense of self-defense is based on the concept that an individual generally has the right to defend him- or herself. Generally, it is not acceptable to use deadly self-defense against a nondeadly attack. The rules of self-defense also vary by jurisdictions.

Necessity refers to a situation where an individual confronts an emergency and must make a choice between two evils and chooses the lesser evil. For example, if a person is caught in a sudden snow storm and is freezing, the defense of necessity may be used when the individual breaks into someone's locked cabin to prevent from freezing to death. Necessity may not be used to justify a homicide.

To constitute a crime there must be both an actus reus (an act or failure to act) and the required mens rea (state of mind). The exception to this rule involves strict liability crimes that do not require mens rea. A strict liability crime would be serving adulterated food in a restaurant. Even if I believed that the food was good, the mere fact that I served the adulterated food is a crime. (*Note*: in this example, we are referring to the operator or owner of the restaurant and not the actual waiter.)

Both the state of mind and the act must be joined in time, even if only for an instance. For example, I intend to kill my business partner John. The next week, however, I change my mind and decide that this is not the right thing to do. Then I accidentally cause a fire that destroys the business and in the process John dies in the fire. Since there is no jointer in time between the state of mind (the desire to kill John) and the act (causing the fire), I am not guilty of the murder of John.

▶ Morals Versus Law

As a 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 boy (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 rule, the standards that we set for moral and ethical reasons are higher than the standards required by our criminal laws. This is because 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.

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,

PRACTICUM 1.1

ISSUE: WHAT CONSTITUTES VOYEURISM?

In 2014, the Massachusetts Supreme Court in the case of *Commonwealth v. Michael Robertson* ruled that snapping unauthorized photos under a woman's dress or skirt was legal in Massachusetts, according to the ruling of the court, under the then-current state law that prohibits voyeurism of a subject who is completely or partially nude was not violated because those being photographed were wearing clothing.[9] 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 the video camera of a cell phone 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:

1. While this conduct was legal at the time it was committed in Massachusetts, is it a morally correct conduct?

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?

the colonies' religious beliefs became a part of our **criminal codes**, 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.[10]

Societal rules—norms—are used by society to regulate behavior in each 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.

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.

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.

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

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

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

▶ Classification of Crimes

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

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.

jail A local place of confinement for those awaiting trial and those who have been convicted of misdemeanors. *Note*: In a few states, like California, persons convicted of a felony crime and given short periods of confinement may be confined in local jails rather than serving their confinement in a prison.

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

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

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 are also classified as crimes against the person, crimes against property, sex 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.[11] White-collar crimes are also called business crimes, commercial crimes, or occupational crimes.

At one time, victimless crimes were considered as a separate classification of crimes. They are now included in the category of crimes against the public order. Victimless crimes were used to designate those crimes 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. While many of these offenses were called "victimless crimes," most authorities believe that society is the victim. Additionally, some of the crimes formerly considered as victimless, such as drug use, lead certain people to commit other crimes, such as prostitution, to pay for their addictions.

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 way the case is tried and appealed. Procedural criminal law does not establish crimes or prescribe punishments.

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. Most of our crimes are classified as either felonies or misdemeanors. The key to distinguishing between a felony and a misdemeanor is not the punishment given in court but the punishment that could have been imposed. For example, X commits the crime of burglary and could receive a ten-year sentence 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.

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.

Most states distinguish between **misdemeanors** and felonies based on 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 more than one year is also considered a felony under the code. All other crimes are misdemeanors.

Several states, such as California, have crimes that are referred to as "wobblers" since 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 first, second, and third degrees. 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.

In some states, municipal 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.[12]

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 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

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.

▶ Case Law

A substantial majority of "law" is case law.

Case law is the term used to indicate appellate court interpretations of the law.[13] 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.[14] 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

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 common law practice of following precedents (other court decisions) is termed **stare decisis**, which means to abide by or adhere to decided cases.[15] 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.[16]

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.[17] Stare decisis is founded on the theory that security and certainty require following established legal principles, under which rights may accrue.[18]

Statutory Law

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

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, 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 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 13 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.[19] 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. 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 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 because of crime or defining it in an inchoate mode.[20] 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 many 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[21]:

- 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 able to either direct the movement of the vehicle or keep the vehicle moving. It is not necessary for the engine to be running for a person to be in physical control of a motor vehicle.

QUESTION:

1. 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 factfinder'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.

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 if those laws do not violate limitations contained in the state and federal

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

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).

constitutions. State legislatures, in turn, may delegate some of this power to local governments, which enact ordinances defining crimes within their jurisdiction.

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."[22]

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 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 based on these factors that the court imposed the maximum statutory punishment.

Question:

1. 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)

▶ Punishment

One of the core functions of criminal law is to punish wrongdoers. This section presents a brief introduction to the concepts of punishment. Chapter 16 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 because of the defendant's criminal conviction.[23]

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 reform and embark on a law abiding, useful life through therapy and education. The assumption of rehabilitation is that people are not permanently criminal and that it is possible to restore criminals to useful lives, to lives in which they contribute to themselves and to society. Rehabilitation seeks to bring criminals into a more peaceful state of mind or into attitudes which are helpful to society, rather than harmful to society.

Incapacitation as the rationale for punishment is based on denying the criminal the opportunity to commit other crimes by his or her restraint (confinement). It incapacitates the prisoner by physically removing him or her from the society against which he or she is 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. . . ."[24]

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].

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 many people do not consider as 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?

Review 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. Provide the citation for this case.
5. 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?
7. Explain the importance of precedent in criminal law.
8. What are considered as the police powers of a government?
9. What are the differences between public and private laws?
10. How do felonies differ from misdemeanors?

Notes

1. Roscoe Pound, "Justice According to the Law," 14 Colum. L. Rev. 1–26 (1914).
2. *United States v. New Bedford Bridge*, 27 F. Cas. 91 (C.C.D. Mass. 1847).
3. Arnold H. Loewy, *Criminal Law* (St. Paul, MN: West, 1987).
4. *Elli v. City of Ellisville, et al*. 997 F. Supp. 2nd. 980 (C.D. Mo. 2014)
5. *Martinez v. City of Rio Rancho*, 197 F. Supp. 3rd 1294 (D. NM, 2016).
6. 249 U.S. 47 (1919).
7. Theodore Plucknett, *A Concise History of the Common Law*, 5th ed. (Boston: Little Brown, 2001), 61.
8. *Black's Law Dictionary*, 4th ed. (St. Paul, MN, 1951).
9. *Commonwealth v. Robertson*, 5 N.E. 3rd 522 (2014).
10. Norval Morris and Gordon Hawkins, *The Honest Politician's Guide to Crime Control* (Chicago: University of Chicago Press, 1969).
11. Edwin H. Sutherland, "White-Collar Criminality," 5 Am. Sociological Rev. 40–46 (1940).
12. *United States v. Grimaud*, 220 U.S. 506 (1911).
13. Id.
14. Lower courts are "under supervision" of a higher court when the lower court's decisions may be appealed to the higher court.
15. 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.
16. William Blackstone, *Commentaries on the Laws of England*, 7th ed. 168 (1775).
17. *Moore v. City of Albany*, 98 N.Y. 396 (1967).
18. *Otter Tail Power Co. v. Von Bank*, 72 N.D. 497 (1974).
19. Andrew Ashworth, "Towards a Theory of Criminal Legislation," 1 Crim. L. J. 41 (1989).
20. Inchoate crimes are crimes that involve incomplete or unfinished acts, for example, attempts. See Chapter 4 for a more detailed explanation.
21. William J. Chambliss and Thomas F. Courtless, *Criminal Law, Criminology, and Criminal Justice* (Pacific Grove, CA: Brooks-Cole, 1991), 7.
22. U.S. Constitution, Article I, section 8, Clause 10.
23. Joshua Dressler, *Understanding Criminal Law* (New York: Matthew Bender, 1989), 5.
24. James Stephens, *A History of the Criminal Law in England*, vol. 2 (London: Macmillan, 1883), 82.

2

Criminal Liability

CHAPTER OUTLINE

Introduction
Bill of Rights
Due Process
Eighth Amendment
Jurisdiction
Social Harm
Right to Privacy
Legality
Equal Protection
Double Jeopardy
Doctrine of Merger
Summary
Additional Assignments
Review Practicum
Questions in Review
Notes

LEARNING OBJECTIVES

After reading this chapter, you should know and understand:

1. The individual protections in the Bill of Rights.
2. The meaning of the Due Process Clause in the Fourteenth Amendment to the U.S. Constitution.
3. The issues involved with the implied right to privacy.
4. The protections against "cruel and unusual" punishments and "double jeopardy."
5. The relationship between social harm and criminal liability.
6. The jurisdictional requirements in criminal law.

Key Terms

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

▶ Introduction

To understand criminal law concepts, it is necessary to have a basic understanding of the constitutional and legislative issues that limit criminal liability. This chapter provides a brief overview of those critical issues. Although the statute of limitations is a limitation on criminal liability, it is also an affirmative defense, and is discussed in Chapter 5.

Many of the limitations on criminal liability are derived from the Bill of Rights contained in the U.S. Constitution. In addition, most states have both constitutional and legislative provisions that place restrictions on criminal liability. For example, many states like Florida have adopted "Stand Your Ground Laws" that limit criminal responsibility in situations where there is a home invasion. The stand your ground laws are also discussed in Chapter 5.

There are, however, limits to constitutional protections from criminal liability. Consider the military case of *United States v. Rapert*[1] in which the defendant in a court-martial was charged with threatening to kill the president. The defense raised the issue that defendant's statement was protected under the First Amendment. The appellate court noted that, in determining whether the First Amendment's freedom of speech clause protected defendant from being prosecuted for his statement, the court must decide whether the gravity of the evil, discounted by its improbability, justifies such invasion of free speech as is necessary to avoid the danger. The appellate court held that the defense's argument was without merit.

▶ Bill of Rights

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

> *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 are referred to as our federal "Bill of Rights." The first nine amendments contain protections for individuals. The Bill of Rights contains 23 separate individual rights. Twelve of those rights are procedural rights for persons accused of criminal conduct.

The Bill of Rights and the Fourteenth Amendment to the Constitution limit the actions of the government by placing restrictions on the procedures that the government may use against a person accused of a crime. Only a few of the restrictions 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 restrictions are discussed later in this chapter.

The Bill of Rights originally was adopted as a protection against the powers of a federal government. However, the Supreme Court has invoked the Due Process Clause of the Fourteenth Amendment to apply most of the Bill of Rights limitations on governmental action to the states. Accordingly, today, the Bill of Rights acts as a protection against the power of both our federal and our state governments.

CRIMINAL LAW IN ACTION

THE BILLS OF RIGHTS

AMENDMENT 1

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof, or abridging the freedom of speech, or of the press, or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.

AMENDMENT 2

A well-regulated militia, being necessary to the security of a free state, the right of the people to keep and bear arms, shall not be infringed.

Amendment 3

No soldier shall, in time of peace, be quartered in any house, without the consent of the owner, nor in time of war, but in a manner to be prescribed by law.

Amendment 4

The right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures shall not be violated, and no warrants shall issue but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched and the persons or things to be seized.

Amendment 5

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy or life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Amendment 6

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor; and to have the assistance of counsel for the defense.

Amendment 7

In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise reexamined in any court of the United States than according to the rules of the common law.

Amendment 8

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

Amendment 9

The enumeration in the Constitution of certain rights shall not be construed to deny or disparage others retained by the people.

Amendment 10

The powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people.

CRIMINAL LAW IN ACTION

The District of Columbia (hereafter D.C.) bans handgun possession by making it a crime to carry an unregistered firearm and prohibiting the registration of handguns; provides separately that no person may carry an unlicensed handgun, but authorizes the police chief to issue one-year licenses; and requires residents to keep lawfully owned firearms unloaded and disassembled or bound by a trigger lock or similar device. Respondent Heller, a D.C. special policeman, applied to register a handgun he wished to keep at home, but D.C. refused. He filed this suit seeking, on Second Amendment grounds, to enjoin D.C. from enforcing the bar on handgun registration, the licensing requirement insofar as it prohibits carrying an unlicensed firearm in the home, and the trigger-lock requirement insofar as it prohibits the use of functional firearms in the home. The U.S. District Court dismissed the suit, but the D.C. Circuit Court reversed, holding that the Second Amendment protects an individual's right to possess firearms and the D.C.'s total ban on handguns, as well as its requirement that firearms in the home be kept nonfunctional even when necessary for self-defense, violated that right.

Question:

Does the Second Amendment only protect a citizen's right to carry a firearm in connection with service in the militia?

In *the District of Columbia v. Heller*, 554 U.S. 570 (2008), the U.S. Supreme Court held in a 5–4 decision that the Second Amendment protects an individual's right to possess a firearm unconnected with service in a militia for traditionally lawful purposes, such as self-defense within the home.

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 Fourteenth Amendment of the U.S. Constitution. Due process means that a defendant is entitled to fundamental fairness, which includes, for example, the right to notice and an opportunity to be heard. However, due process is a flexible concept, and the procedural protections available under the due process clause are based on each situation at issue. When determining the procedural protections required to protect due process rights, a court 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.[2]

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. The one in the Fourteenth Amendment protects an individual from actions by state and local governments. Not all rights listed in the Bill of Rights have been imposed on state prosecutions by the U.S. Supreme Court. The Court has imposed only those rights that the Court has considered as essential to the concept of due process. In addition, the Court has added protections that are not enumerated in the Bill of Rights such as the right to privacy.

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 provide reasonable persons with "fair" notice as to what conduct is illegal. The U.S. Supreme Court has stated that "the root of the vagueness doctrine is a rough idea of fairness."[4]

Most penal statutes must necessarily be somewhat 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 to put them at an unreasonable risk of prosecution.

The void for vagueness limitation also applies to sentencing legislation. In *Beckles v. U.S.*, the U.S. Supreme Court noted that statutes fixing sentences must specify the range of available sentences with sufficient clarity. The Court noted that the Due Process Clause prohibits the Government from taking away someone's life, liberty, or property under a criminal law so vague that it fails to give ordinary people fair notice of the conduct it punishes, or so standardless that it invites arbitrary enforcement.[5]

The U.S. Supreme Court in *Williams v. Pennsylvania* held that the due process guarantees "an absence of actual bias" on the part of a judge.[7] The Court observed that bias is easy to attribute to others and difficult to discern in oneself. To establish an enforceable and workable framework, the Court's precedents apply an objective standard that, in the usual case, avoids having to determine whether actual bias is present. The Court asks not whether a judge harbors an actual, subjective bias, but instead whether, as an objective matter, "the average judge in his position is 'likely' to be neutral, or whether there is an unconstitutional potential for bias." Of relevance to Williams case, the Court has determined that an unconstitutional potential for bias exists when the same person serves as

CASE ON POINT

IS IT A CRIME TO WRITE PROFANE COMMENTS ON A TRAFFIC CITATION?[6]

When William Barboza was driving through the town of Liberty, N.Y., a state trooper pulled Barboza over for speeding. Three months later, Barboza mailed in his summons along with a payment, punctuating the ticket with a few 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 arrested and charged with aggravated harassment.

Did Barboza's Conduct Constitute a Crime?

New York Penal Law § 240.30(1)(b) provides, in part, that a person is guilty of aggravated harassment 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 Motion to Dismiss

Barboza was charged with aggravated harassment, a serious offense. The prosecution argued that Barboza acted with the intent to make the victims uncomfortable, alarmed, and annoyed, and that the code section appropriately criminalized Barboza'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 Profanity 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 ruled that the word "annoying" was too vague to support a criminal charge because what annoys one person may not annoy another.

The charges against Barboza were dismissed. After the dismissal, Barboza filed a federal civil lawsuit claiming that his constitutional rights had been violated. The United States District Court for the Southern District of New York ruled in Barboza's favor (*Barboza v. D'Agata* (2015), Case No. 7:13 – cv – 04067).

both accuser and adjudicator in a case. This objective risk of bias is reflected in the due process maxim that no man can be a judge in his own case and no man is permitted to try cases where he has an interest in the outcome.

▶ Eighth Amendment

Prohibition against cruel and unusual punishment prohibits legislatures from enacting laws making some conduct criminal or criminalizing an individual's status.

cruel and unusual punishment Physical or mental punishment that involves torture or a lingering death, or the infliction of unnecessary and wanton pain serving no legitimate penological purpose.

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.[8] 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 or to have an illness is a person's status and not an act.

CRIMINAL LAW IN ACTION

WHAT DO YOU THINK?

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

Jessica Lunsford, a 9-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, motivated by his daughter's tragic death, encouraged 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, the prosecutor must prove that the victim or victims were under 14 years of age and that the defendant was over 17 years of age.

Sentencing under this code section can range from 25 years to life in prison. The code section is unique because it prohibits parole. In other words, whoever is convicted of this crime must serve every day of the sentence imposed.

If an indictment charges a defendant under this code section and alleges five separate acts of sexual abuse, jurors in the defendant's criminal trial need not agree as to which of the five individual acts were committed if they all agree that the defendant committed at least two of the acts. For example, if ten of the twelve jurors determine that defendant committed all the acts charged and the other two jurors found that the state had only proven two of the acts charged, a valid finding of guilty was appropriate.

Do you believe it is constitutionally appropriate to convict a defendant in a situation where not all jurors are required to agree that defendant committed the specific acts charged?

The Texas Court of Appeals concluded that Section 21.02 did not violate a defendant's constitutional and statutory right to a unanimous jury verdict.[10]

While Robinson could not be punished for being a drug addict, 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 most other drug addicts become addicted because of their illegal activities in using prohibited drugs.[9]

Note: Cruel and unusual punishments are also discussed in Chapter 16.

▶ Jurisdiction

Jurisdiction refers to the power of a court.

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

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

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.[11] 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 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 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 Arizona judge convinces his city council to pass an ordinance to punish persons who travel from the local area to Nevada for gambling. While part of the statutory violation occurs within the jurisdiction of the local city, an appellate court most likely would 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 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

Generally, for a court to have jurisdiction over the person it must have the defendant before the court, but 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 and Federal Jurisdiction

Most 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 criminal 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.

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

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

CASE ON POINT

***KOON V. UNITED STATES*[12]**

Facts: On the evening of March 2, 1991, Rodney King and two friends sat in a car in Altadena, California, and drank malt liquor for many hours. Then, with King driving and intoxicated they left Altadena. California Highway Patrol officers observed King's car traveling at a speed they estimated to be over 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 officers called for help on the radio. Units of the Los Angeles Police Department joined the pursuit, one manned by Officer 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 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 friends complied. King got out of the car but he did not lie down. Los Angeles Police Officer Stacey Koon arrived while King was refusing to comply with Powel's order. Koon fired Taser (stun) darts into King. The officers were later videotaped assaulting King. Koon, Powell, and Wind were tried in state court for assault with a deadly weapon and excessive use of force by a police officer. They were acquitted of all charges, except for 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 law. They may be tried in federal court for violations of federal law, that is, violation of King's civil rights under 18 U.S.C. 242. In fact, that is what happened.

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 or county 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)

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

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.

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 U.S. Supreme Court held in *Robinson v. California*, an individual cannot be punished for being addicted to drugs.[13] 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.

Although the "right to privacy" is not explicitly guaranteed by the U.S. Constitution, the Supreme Court has held that the **right to privacy** is a substantive right protected by the Constitution under the due process and freedom of association clauses (*NAACP v. Alabama* (1958), 357 U.S. 449). The Court reasoned that the framers of the Constitution intended that an independent right of privacy exist and that it protects citizens from undue government encroachment.[14]

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.

In the *City of Chicago v. Wilson*,[15] 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 explained that there exist unspecified constitutionally protected freedoms, including the right to choose one's appearance.

In *Sterling v. Cupp*,[16] 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.[17] In *Stanley v. Georgia*, the U.S. Supreme Court discussed the right of Americans "to be free, except in very limited circumstances, from unwanted governmental intrusions into one's privacy,"[18] and held that we have the right to possess obscene material in our homes without fear of government intrusion. If it is not illegal to possess obscene material, should it be permissible to possess illegal drugs in the privacy of our homes?

The right to privacy, discussed in the Roberson case, protects a person from having his or her private matters made public. This 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*,[20] 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. It stated, "Considering the nature and immediacy of the government's

CASE ON POINT

STANLEY V. GEORGIA[19]

Question:

1. 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 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.

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.[21]

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.[22]

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

CASE ON POINT

PAPACHRISTOU V. CITY OF JACKSONVILLE[23]

Question:

1. When is a statute void for vagueness?

JUSTICE WILLIAM O. DOUGLAS DELIVERED THE COURT'S OPINION:

[*Note*: case has been edited and citations omitted.]

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.

Note: Compare the Papachristou case with the following case.

CASE ON POINT

HUTCHINS V. DISTRICT OF COLUMBIA

In the *Hutchins* case, minors, parents, and a private business brought an action against the District of Columbia challenging the constitutionality of the District's Juvenile Curfew Act. The U.S. Court of Appeals (on rehearing) held that the Act was constitutional.

One provision of the Act is persons under 17 years of age commit an offense if they remain in any public place or on the premises of any establishment within the District of Columbia after 11:00 p.m. on Sunday through Thursday nights (12:01 a.m. during the months of July and August), or after 12:01 a.m. on Saturday and Sunday. Another provision of the Act provided that the curfew stays in effect until 6:00 a.m. every morning.

The court noted that in *Papachristou v. City of Jacksonville*, the Supreme Court held that "wandering or strolling" from place to place was historically part of the "amenities of life," the Court actually held only that the vagrancy law at issue was void for vagueness. While vagrancy statutes certainly prohibit individuals from moving about, the constitutional infirmity in these statutes is not that they infringe on a fundamental right to free movement, but that they fail to give fair notice of conduct that is forbidden and pose a danger of arbitrary enforcement. In other words, they do not afford procedural due process.

The appellate court stated that statutory provision was sufficiently definite to satisfy due process requirements so long as a person of ordinary intelligence would have a reasonable opportunity to know what is prohibited; that the fertile legal imagination can conjure up hypothetical cases in which the meaning of disputed terms could be questioned does not render the provision unconstitutionally vague.

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 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 similar 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 18 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.[24] If the classification is based on a suspect classification 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.

One aspect of the equal protection requirement is the concept of "equality of punishment." This is discussed in Chapter 16.[25]

▶ 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

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.

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

CASE ON POINT

IN RE MICHAEL M.[26]

Facts: The defendant, a 17-year-old male, was charged with having unlawful sexual intercourse with a female under the age of 18, 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 based on gender. The appellate courts denied his petition.

Question: May a state make it a crime for a 17-year-old male to have sex with a 17-year-old female while not making it a crime for the female involved?

Answer:

JUSTICE WILLIAM H. REHNQUIST DELIVERED THE COURT'S DECISION:

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.]

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

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 and multiple punishments for the same criminal act.

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 doctrine does not apply because the crimes are different. 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.

doctrine of merger At common law, if an act of misconduct constituted both a felony and a misdemeanor, the lesser offense was considered as merging into the more serious crime.

▶ Doctrine of Merger

At common law, if an act of misconduct constituted both a felony and a misdemeanor, the lesser offense was considered as merging into the more serious crime. In most American jurisdictions, however, the common law doctrine of merger is no longer applied. For example, at common law, if an individual committed a battery on a victim and the victim later dies, the lesser crime of battery would merge with the crime of murder. Therefore, the criminal could be convicted of murder but not battery. Under present-day criminal statutes, the defendant may be convicted of both murder and assault but may not be sentenced on both crimes.

Consider the facts involving James Scott "Jim" Brady who was an assistant to the U.S. President and White House Press Secretary under President Ronald Reagan. In 1981,

Brady became permanently disabled from a gunshot wound during the attempted assassination of Ronald Reagan. Brady died on August 4, 2014, 33 years after the shooting. His death was ruled a homicide, caused by the gunshot wound he received in 1981. John Hinckley was tried in Washington, D.C., having been charged with 13 offenses including battery and attempted murder, Hinckley was found not guilty by reason of insanity.[27] Had Hinckley been found guilty, he could clearly have been tried 33 years later for the murder of Brady since the crimes did not merge. Hinckley was determined to be insane at the time of the shooting; however, there was a legal issue as to whether or not he could be tried later for the murder. At common law, with the doctrine of merger, there would have been the additional question of whether or not the two crimes had been merged. Hinckley case is also discussed in Chapter 5 regarding the defense of insanity. The prosecutor decided not to try Hinckley after Brady's death.

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?[28]

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 a 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, the attorney general of the United States at the time.

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?[29]

Summary

The first 10 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 certain actions by the federal government, and the one in the Fourteenth protects an individual from certain 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. A criminal code section that is so vague that an individual would not be reasonably aware of the conduct prohibited will be found unconstitutional by the courts on the ground that it is void for vagueness.

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 conduct, such as an act of prostitution.

The right to privacy is not explicitly included in the U.S. Constitution. However, the U.S. Supreme Court has found authority for privacy as a substantive right under the freedom of speech and the 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 the same, but it may distinguish between persons only based on 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 a conviction and it cannot impose multiple punishments for the same criminal conduct. The purpose of the doctrine is to protect a person from the harassment of multiple trials and multiple punishment for the same offense.

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?

Review 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?
6. How do the first nine amendments to the U.S. Constitution protect individual rights?
7. Why are there two due process clauses in the U.S. Constitution?
8. Why did the Supreme Court hold that California could not punish Robinson for being addicted to drugs?
9. How does a trial court usually obtain personal jurisdiction over a person?
10. Differentiate between jurisdiction and venue.

Notes

1. 75 M.J 164 (2016).
2. *People v. Noboa*, 2008 Mich. App. LEXIS 783, 7-8 (Mich. Ct. App. Apr. 17, 2008)
3. *Winters v. New York*, 333 U.S. 507 (1948).
4. *Colten v. Kentucky*, 407 U.S. 104 (1972).
5. *Beckles v. United States*, 137 S. Ct. 886, 197 L. Ed. 2d 145 (2017).
6. 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).
7. 136 S. Ct. 1899, 1905–06, 195 L. Ed. 2d 132 (2016)
8. *Robinson v. California*, 370 U.S. 660 (1962).
9. *Powell v. Texas*, 392 U.S. 533 (1966).
10. *Kennedy v. State*, 385 S.W.3d 729 (Amarillo C of A, 2012).
11. *Gardner v. State*, 569 S.W. 2d 74 (1978).
12. 518 U.S. 81 (1996).
13. *Robinson v. California*, 370 U.S. 660 (1962).
14. *Griswold v. Connecticut*, 381 U.S. 479 (1965).
15. 75 Ill. 2d 525 (1978); 389 N.E. 2d 522 (1978).
16. 290 Ore. 611 (Or. 1981).
17. Joshua Dressler, *Understanding Criminal Law*, 2nd ed. (New York: Matthew Bender, 1995), 91.
18. *Stanley v. Georgia*, 394 U.S. 557 (1969).
19. 394 U.S. 557, 564 (1969).
20. 536 U.S. 822 [2001].
21. *Calder v. Bull*, 3 U.S. 386 (1798) at 390.
22. 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).
23. 405 U.S. 156 (1972)
24. *People v. Liberta*, 474 N.E. 2d 567 (N.Y. 1984).
25. Cal. Penal Code 161.5.
26. 450 U.S. 464 (1981).
27. *United States v. Hinckley*, 525 F. Supp. 1342 (D.D.C. 1981)
28. *See: United States v. L. Cohen Grocery Co.*, 255 U.S. 81 (U.S. 1921)
29. See: *Mayfield v. United States*, 2009 U.S. App. LEXIS 26889 (9th Cir. Or. Dec. 10, 2009)

3

Requirement of an Act

CHAPTER OUTLINE

Introduction
Act—Actus Reus
Legal Duty
Intent—Mens Rea
Joinder of Intent and Act
Causation
Presumptions
Summary
Additional Assignments
Questions in Review
Notes

LEARNING OBJECTIVES

After reading this chapter, you should know and be able to discuss the following issues and principles:

1. The two requisites of each crime.
2. The meaning of actus reus and mens rea.
3. The concept of a legal duty to act.
4. The requirements for a voluntary act.
5. The different types of intent involved in criminal behavior.

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

▶ Introduction

There are two requisites to each crime: the required act or failure to act (actus reus) and the required mental state (mens rea). To state this in 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.

> *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.

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. Since there is no single accepted meaning of actus reus, many courts and commentators use the term narrowly to 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 a voluntary muscular contraction (voluntary movement). Actus reus includes three ingredients of a crime:

actus reus An illegal act; the act or failure to act that constitutes the 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, if 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. 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?

A secretary in the administrative offices of the Texas Board of Criminal Justice once had a sign on her desk that read: "Some people are alive today only because it would be a

crime to kill them." The secretary probably had at one time or another fantasized about killing someone who had exasperated her. Thoughts alone, however, are not criminal activity.

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. In this context once the person enters the building with the necessary intent, the crime has been completed.

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] If, however, the individual had unlawfully aimed the firearm at B, which is a crime, and because of an involuntary muscle spasm the firearm discharged resulting in B's death, the crime of criminal homicide has been committed.

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

Criminal liability can be based on a failure to act (act of omission) when the individual has 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. The duty to render aid would be a moral duty only. If, however, the bystander doctor causes the accident by his negligence, then in most states, he would have a legal duty 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 legal duty to make a reasonable effort to rescue the child who is in danger.

If a person has no duty to act, but chooses to act, there is a legal duty for that person to act in a reasonable manner.

CASE ON POINT

WILLIAMS V. STATE[3]

A Hinds County jury convicted Johnny Williams of capital murder in the killing of his 17-month-old daughter, Jada Williams. Williams was sentenced to life in the custody of the Mississippi Department of Corrections without the possibility of parole. Williams now appeals. He argues jury instruction S–3 was improperly granted, which permitted the jury to find Williams guilty of the underlying felony of child abuse without finding he abused the child.

Officer Griffin of the Jackson Police Department responded to a call about an unconscious infant, later identified as Jada Williams, who was brought to the

emergency room of the Central Mississippi Medical Center in Jackson, Mississippi. Officer Griffin was informed by a nurse that the child was stiff when her mother brought her in. Officer Griffin testified that Jada had bruises on her hips, buttocks, and legs.

At trial, Williams testified in his own defense. He admitted to spanking Jada on her buttocks with a belt because she had an accident. He left the room, and upon returning, she was limp and unresponsive. Williams admitted that he told his sister not to call an ambulance because he feared the police would be called. He told his brother that Jada was "gone." Williams did not believe his "whooping" caused Jada to die. He denied punching Jada or hitting her in the head. He mentioned that his children had spent a couple of days with a friend immediately prior to Jada's death.

The trial court instructed the jury:

> If you find beyond a reasonable doubt that Johnny Williams was the father, guardian or custodian of Jada Williams, or that he was responsible for her care or support, whether legally obligated to do so or not, and you find that he intentionally caused or allowed to be caused upon Jada Williams, nonaccidental physical injury to Jada Williams, through whipping or striking Jada Williams, then you shall find that Johnny Williams did abuse Jada Williams; and/or, If you find beyond a reasonable doubt that Johnny Williams was the father, guardian or custodian of Jada Williams, or that he was responsible for her care or support, whether legally obligated to do so or not, and you find that he did intentionally otherwise abuse Jada Williams by failing to provide necessary medical treatment to Jada Williams, then you shall find that Johnny Williams did abuse Jada Williams.

The appellate court noted that the Mississippi Supreme Court has interpreted the term "otherwise abuse" in section 97–5–39(2) to indicate an exhaustive list of felonious-child-abuse actions, which would include acts of omission. The court noted that the language of 97–5–39(1) signals the Legislature's inclusion of acts of omission as abusive behavior, which would also constitute felony child abuse.

The court found no error in the trial court's instructions on this issue.

Requirements of a Voluntary Act

Generally, 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 ruled that under the plain terms of the statute, a voluntary act is presupposed. It stated that "the rule has been declared and an approved by the court, 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."[4]

Few would argue that Martin's presence in a public place was a voluntary act, given that police forcibly removed him from his home and then placed him in the street. The police conduct was unethical at best and was more of a kidnap than an arrest.

However, the line between voluntary and involuntary acts is not always so clear. For example, driver A has a seizure, loses control of his vehicle which then careens into oncoming traffic killing driver B. Driver A's loss of control of his vehicle obviously was involuntary. But his decision *not* to take his seizure medication before driving was not only voluntary, but also reckless. The legal question then is, in view of the totality of the circumstances, did driver A act with sufficient free will to be culpable for his conduct?

Let's examine the more complicated subject of hypnosis, which poses a mysterious entanglement of voluntary and involuntary acts, including the interaction of the conscious and subconscious. Sigmund Freud compared the human mind to an iceberg, the conscious mind being above water, and the subconscious mind being the two-thirds of the iceberg under water. The conscious mind is the waking mind, the here and now mind that allows

an individual to be aware of things and to focus on whatever he or she chooses. The subconscious mind is a vast storehouse holding one's memories, ideas, dreams, experiences—even bad ones, notions, feelings, and urges. This is how the subconscious can influence everything you do, without necessarily being aware of it.

Hypnotism has its roots in various forms of meditation that have been an element of cultures and religions for thousands of years. But the scientific apperception of hypnosis did not start developing seriously until the mid-1700s. Medical doctors now understand general characteristics of hypnosis but no one is sure how it happens and why a person under hypnosis does what he or she does. Hypnosis is sometimes referred to as a "sleep state," because the Greek word for "sleep" is "hypnos." But "sleep state" is an inaccurate term here, given that the subject of the hypnotism is alert.

Hypnosis is best defined as a procedure in which a hypnotist using suggestions and guidance can enable a subject to gradually transition into an altered state of consciousness, sometimes referred to as a "trance" or "daydream" state in which he is uninhibited, relaxed, highly susceptible to the suggestions and commands of the hypnotist, and has tuned out all other stimuli around him.

Proponents of hypnosis for use in law enforcement investigations and in the court system contend that it is a powerful tool for recovering repressed or forgotten memory from victims and witnesses of crime. They argue that impressions relating to sensory perceptions are recorded and stored in the memory, like a photo being stored on film, but one that remains accessible through hypnosis. These hypnosis proponents also claim that hypnotic subjects always tell the truth. However, the late Dr. Bernard L. Diamond, formerly a law professor and psychiatrist at the University of California, Berkeley, who was a strong supporter of hypnosis in medical treatment, disputed the proponents' contentions. Diamond maintained that attempting to use hypnosis to enhance memory for courtroom testimony was, in fact, a manipulation of memory. Diamond condemned the use of memory retrieval hypnosis in the legal context as "unscientific."[5]

Suppose H hypnotizes K to shoot and kill V. If K does fatally shoot V, has K acted voluntarily? Did K have sufficient free will to be held legally culpable? H certainly planted the idea of killing V in K's mind, but did K willingly confront V and willingly shoot him? Was K acting on his own volition or was K simply H's marionette? Did K have some desire or motive deep in his subconscious to kill V? Did K voluntarily pull the trigger? Or did K believe late country singer Johnny Cash's song, *The Devil's Right Hand*, in which, when charged with murder, Cash sang, "You've got the wrong man. Nothing touched the trigger but the devil's right hand." Did K honestly believe that, not he, but the devil, pulled the trigger? We likely will never know.

Most medical doctors who use hypnotism in their practice assert no one under hypnosis can be forced to commit murder unless the capacity to do so was already in his essential nature. However, research has established that hypnosis actually causes physiological changes in a subject. Hypnosis alters perception and affects brain function. It changes the brain's electrical activity and blood flow. It also can unexpectedly redeploy a subject's attention. Some hypnotized subjects have suffered temporary amnesia, hysterical blindness, and uncontrolled emotions. Another factor that must be considered is that not all hypnosis subjects are like. Some people are extremely susceptible to hypnotism and can be inducted into the state quickly and easily. Others are just not hypnotizable.[6]

Medical doctors also affirm that influences more powerful than hypnosis exist, whether combined with hypnotism or not. These "persuaders" will induce a subject to engage in conduct that he ordinarily would have considered morally repugnant. Among these influences are brainwashing, long-term confinement, brutality, deprivation, and the abuse of controlled substances. All cause deterioration of the personality and ultimately produce a subject particularly malleable and acquiescent.

K's most formidable challenge in arguing the involuntariness of his conduct here likely will be the skepticism with which most trial courts view the probity and reliability of hypnosis evidence. Hypnosis has been acknowledged as a scientific and legitimate form of treatment in the medical community. It often is used by psychiatrists to evaluate the mental competence of defendants in the trial courts to determine whether sanity or other mental state may be an issue. Nevertheless, this has not led to universal acceptance of hypnosis in the legal community. The conundrum arises because due process requires that, before a court admits expert testimony or the results of a new scientific technique, the trial court must determine that the proffered evidence has been accepted as reliable in the particular field to which it belongs, and that the evidence to be offered is relevant and probative in the case.[7]

There is little uniformity among state and federal court rules and procedures when it comes to hypnosis evidence. Some courts have issued noteworthy decisions completely excluding any hypnotically influenced testimony.[8] The U.S. Supreme Court reversed an Arkansas State Supreme Court decision that affirmed a defendant's manslaughter conviction in a trial court because that court ruled that hypnotically refreshed testimony is per se unreliable and therefore inadmissible. The U.S. Supreme Court found the decision unconstitutional because per se exclusion of the evidence prevented the defendant, who had been hypnotized prior to trial in order to recover repressed memory, from exercising her Due Process and Sixth Amendment rights to testify on her own behalf.

While, on first impression, *Rock* may appear reasonable and logical, it creates more problems than it solves. Although the right does not appear explicitly in the Constitution, few would argue that a defendant in a criminal case has no right to testify on his or her own behalf. That right is protected by the Due Process Clause. Nevertheless, a court could lawfully prohibit a defendant from testifying who had a multiple personality disorder or was simply incapable of expressing himself or herself coherently to the jury and the judge. Therefore, in a case in which a defendant was hypnotized before trial to assist in recovering lost memory should the court bar that defendant from presenting unreliable evidence? Does allowing that defendant to testify unfairly deny the prosecution due process by forcing the prosecutor to cross-examine a defendant whose testimony is deemed unreliable?

Many courts have taken the course of issuing decisions generally *admitting* posthypnotic testimony for the purpose of enhancing memory.[9] While the approach risks the admission of unreliable evidence, courts reason the issue of hypnosis is a credibility issue, not an admissibility issue. There is danger the hypnotist was inadequately trained, insufficiently independent, or was overly assertive in making suggestions to a subject who is anxious to please. There also are risks that defendant's memory is dubious, the prosecution will be disadvantaged by having to cross-examine an unreliable witness, and that neither the judge nor the jury will receive adequate information upon which to evaluate the credibility and probative value of the evidence presented.

Some courts admit hypnosis evidence only with the following procedural safeguards, such as limiting the subject's testimony to matters recalled prior to the hypnosis; the substance of the pre-hypnotic memory was preserved by video and audio recording; the subject consented to the hypnosis; the hypnosis session itself also was video and audio recorded from the beginning to the end; the hypnosis was performed by a licensed psychiatrist, psychologist, or therapist; the hypnotist was independent of, and not responsible to, the prosecution, to law enforcement, or to the defense.

These guidelines have been criticized by several courts as being time consuming, difficult to monitor, and confusing for the jury. But most courts prefer admitting hypnosis influence evidence with procedural safeguards in place as opposed to employing rules of per se admission or per se exclusion of such evidence and they reject the procedural safeguard complaints as unwarranted.[10]

Hypnosis still is not ready for prime time in the court system. To paraphrase Winston Churchill, hypnosis remains a mystery wrapped in an enigma. Rules of court procedure

mandating video and audio recordings of subjects interviewed in pre-hypnosis and during the hypnosis session itself are a substantial step forward. Nevertheless, the reliability criteria set forth in *Frye* and *Daubert* (*supra*) has not been met. At this stage, the best course may be to improve procedural safeguards and trust in the jury system.

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:

1. 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 ruled 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.[11] Her voluntary act was an act of omission, namely, her willful failure to intervene.

▶ Legal Duty

A legal duty is an obligation imposed by the law. Failure to fulfill such a duty can result in criminal and/or civil sanctions. Legal duties are distinct from moral or ethical duties, although 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 legislation and by common law in those countries like the United States that are considered common law countries.

There are also general classifications of legal duties: those in which a breach is criminal and subject to criminal sanctions and those in which 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. Confusions over what it means to "owe a duty" stems from the variety of ways the term is used. For instance, sometimes duty refers to a general standard or obligation. At other times, duty refers to a conclusion about whether the defendant's act or omission should be actionable, irrespective of any general standard. When an attorney states that her client owed no duty, she is arguing that no breach of duty occurred.

If a plaintiff alleges a defendant negligently inflicted upon him or her, it is a claim that the defendant breached an existing legal duty. When the plaintiff relies upon common law principles as the basis for the duty element of the negligence claim, determining whether that duty does exist 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.[12]

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