

# 1

## THE NATURE, PURPOSE, AND FUNCTION OF CRIMINAL LAW

### TEST YOUR KNOWLEDGE: TRUE/FALSE

1. The only difference in the enforcement of criminal and civil law is that violation of a criminal law may result in imprisonment.
2. Criminal law defines what is punished, and criminal procedure sets forth the rules on how crimes are investigated and prosecuted.
3. The only difference between felonies and misdemeanors is that felonies result in incarceration.
4. The best source to consult to find a comprehensive and relatively easy statement of the criminal law in a state is the criminal code rather than the decisions of the state supreme court.

*Check your answers at the end of the chapter on page 20.*

### Can Police Officers Be Subjected to Prosecution in Both State and Federal Court?

As the videotape begins, it shows that King rose from the ground and charged toward Officer Powell. Powell took a step and used his baton to strike King on the side of his head. King fell to the ground. From the 18th to the 30th second on the videotape, King attempted to rise, but Powell and Wind each struck him with their batons to prevent him from doing so. From the 35th to the 51st second, Powell administered repeated blows to King's lower extremities; one of the blows fractured King's leg. At the 55th second, Powell struck King on the chest, and King rolled over and lay prone. At that point, the officers stepped back and observed King for about 10 seconds. . . . At one-minute-five-seconds (1:05) on the videotape, Briseno, in the District Court's words, "stomped" on King's upper

back or neck. King's body writhed in response. At 1:07, Powell and Wind again began to strike King with a series of baton blows, and Wind kicked him in the upper thoracic or cervical area six times until 1:26. At about 1:29, King put his hands behind his back and was handcuffed.

## INTRODUCTION

Criminal law is the foundation of the criminal justice system. The law defines the conduct that may lead to an arrest by the police, trial before the courts, and incarceration in prison. When we think about criminal law, we typically focus on offenses such as rape, robbery, and murder. States, however, condemn a range of acts in their criminal codes, some of which may surprise you. In Alabama, it is a criminal offense to promote or engage in a wrestling match with a bear or to train a bear to fight in such a match.<sup>1</sup> A Florida law states that it is unlawful to possess “any ignited tobacco product” in an elevator.<sup>2</sup> Rhode Island declares that an individual shall be imprisoned for seven years who voluntarily engages in a duel with a dangerous weapon or who challenges an individual to a duel.<sup>3</sup> In Wyoming, you can be arrested for skiing while being impaired by alcohol<sup>4</sup> or for opening and failing to close a gate in a fence that “crosses a private road or river.”<sup>5</sup> You can find criminal laws on the books in various states punishing activities such as playing dominos on Sunday, feeding an alcoholic beverage to a moose, cursing on a miniature golf course, making love in a car, or performing a wedding ceremony when either the bride or groom is drunk.<sup>6</sup> In Louisiana, you risk being sentenced to 10 years in prison for stealing an alligator, whether dead or alive, valued at \$1,000.<sup>7</sup>

## THE NATURE OF CRIMINAL LAW

Are there common characteristics of acts that are labeled as crimes? How do we define a **crime**? The easy answer is that a crime is whatever the law declares to be a criminal offense and punishes with a penalty. The difficulty with this approach is that not all criminal convictions result in a fine or imprisonment. Rather than punishing a **defendant**, the judge may merely warn them not to repeat the criminal act. Most commentators stress that the important feature of a crime is that it is an act that is officially condemned by the community and carries a sense of shame and humiliation. Professor Henry M. Hart Jr. defines crime as “conduct which, if . . . shown to have taken place,” will result in the “formal and solemn pronouncement of the moral condemnation of the community.”<sup>8</sup>

The central point of Professor Hart's definition is that a crime is subject to formal condemnation by a judge and jury representing the people in a court of law. This distinguishes a crime from acts most people would find objectionable that typically are not subject to state prosecution and official punishment. We might, for instance, criticize someone who cheats on their spouse, but we generally leave the solution to the *individuals involved*. Other matters are left to *institutions* to settle; schools generally discipline students who cheat or disrupt classes, but this

rarely results in a criminal charge. Professional baseball, basketball, and football leagues have their own private procedures for disciplining players. Most states leave the decision whether to recycle trash to the *individual* and look to *peer pressure* to enforce this obligation.

## CRIMINAL AND CIVIL LAW

How does criminal law differ from **civil law**? Civil law is that branch of the law that protects the individual rather than the public interest. A legal action for a civil wrong is brought by an individual rather than by a state prosecutor. You may sue a mechanic who breaches a contract to repair your car or bring an action against a landlord who fails to adequately heat your apartment. The injury is primarily to you as an individual, and there is relatively little harm to society. A mechanic who intentionally misleads and harms a number of innocent consumers, however, may be charged with criminal fraud.

Civil and criminal actions are characterized by different legal procedures. For instance, conviction of a crime requires the high standard of proof beyond a reasonable doubt, although responsibility for a civil wrong is established by the much lower standard of proof by a preponderance of the evidence or roughly 51% certainty. The high standard of proof in criminal cases reflects the fact that a criminal conviction may result in a loss of liberty and significant damage to an individual's reputation and standing in the community.<sup>9</sup>

The famous 18th-century English jurist William Blackstone summarizes the distinction between civil and criminal law by observing that civil injuries are “an infringement . . . of the civil rights which belong to individuals. . . . [P]ublic wrongs, or crimes . . . are a breach and violation of the public rights and duties, due to the whole community . . . in its social aggregate capacity.” Blackstone illustrates this difference by pointing out that society has little interest in whether someone sues a neighbor or emerges victorious in a land dispute. On the other hand, society has a substantial investment in the arrest, prosecution, and conviction of individuals responsible for espionage, murder, and robbery.<sup>10</sup>

The difference between a civil and criminal action is not always clear, particularly with regard to an action for a **tort**, which is an injury to a person or to their property. Consider the drunken driver who runs a red light and hits your car. The driver may be sued in tort for negligently damaging you and your property as well as criminally prosecuted for reckless driving. The purpose of the civil action is to compensate you with money for the damage to your car and for the physical and emotional injuries you have suffered. In contrast, the criminal action punishes the driver for endangering society. Civil liability is based on a preponderance of the evidence standard, while a criminal conviction carries a possible loss of liberty and is based on the higher standard of guilt beyond a reasonable doubt. You may recall that former football star O. J. Simpson was acquitted of murdering Nicole Brown Simpson and Ron Goldman but was later found guilty of wrongful death in a civil court and ordered to compensate the victims' families in the amount of \$33.5 million.

The distinction between criminal and civil law proved immensely significant for Kansas inmate Leroy Hendricks. Hendricks was about to be released after serving 10 years in prison for molesting two 13-year-old boys. This was only the latest episode in Hendricks's almost 30-year

history of indecent exposure and molestation of young children. Hendricks freely conceded that when not confined, the only way to control his sexual urge was to “die.”

Upon learning that Hendricks was about to be released, Kansas authorities invoked the Sexually Violent Predator Act of 1994, which authorized the institutional confinement of individuals who, due to a “mental abnormality” or a “personality disorder,” are likely to engage in “predatory acts of sexual violence.” Following a hearing, a jury found Hendricks to be a “sexual predator.” The U.S. Supreme Court ruled that Hendricks’s continued commitment was a civil rather than criminal penalty, and that Hendricks was not being unconstitutionally punished twice for the same criminal act of molestation. The Court explained that the purpose of the commitment procedure was to detain and to treat Hendricks in order to prevent him from harming others in the future rather than to punish him.<sup>11</sup> Do you think that the decision of the U.S. Supreme Court makes sense?

## THE PURPOSE OF CRIMINAL LAW

---

We have seen that criminal law primarily protects the interests of society, and civil law protects the interests of the individual. The primary purpose or function of criminal law is to help maintain social order and stability. The Texas Criminal Code proclaims that the purpose of criminal law is to “establish a system of prohibitions, penalties, and correctional measures to deal with conduct that unjustifiably and inexcusably causes or threatens harm to those individual or public interests for which state protection is appropriate.”<sup>12</sup> The New York Criminal Code sets out the basic purposes of criminal law as follows<sup>13</sup>:

- *Harm.* To prohibit conduct that unjustifiably or inexcusably causes or threatens substantial harm to individuals as well as to society
- *Warning.* To warn people both of conduct that is subject to criminal punishment and of the severity of the punishment
- *Definition.* To define the act and intent that is required for each offense
- *Seriousness.* To distinguish between serious and minor offenses and to assign the appropriate punishments
- *Punishment.* To impose punishments that satisfy the demands for revenge, rehabilitation, and deterrence of future crimes
- *Victims.* To ensure that the victim, the victim’s family, and the community interests are represented at trial and in imposing punishments

The next step is to understand the characteristics of a criminal act.

## THE PRINCIPLES OF CRIMINAL LAW

The study of **substantive criminal law** involves an analysis of the definition of specific crimes (specific part) and of the general principles that apply to all crimes (general part), such as the defense of insanity. In our study, we will first review the general part of criminal law and then look at specific offenses. Substantive criminal law is distinguished from **criminal procedure**. Criminal procedure involves a study of the legal standards governing the detection, investigation, and prosecution of crime and includes areas such as interrogations, search and seizure, wiretapping, and the trial process. Criminal procedure is concerned with “how the law is enforced”; criminal law involves “what law is enforced.”

Professors Jerome Hall<sup>14</sup> and Wayne R. LaFare<sup>15</sup> identify the basic principles that compose the general part of the criminal law. Think of the general part of the criminal law as the building blocks that are used to construct specific offenses such as rape, murder, and robbery.

- *Criminal Act.* A crime involves an act or failure to act. You cannot be punished for bad thoughts. A criminal act is called *actus reus*.
- *Criminal Intent.* A crime requires a criminal intent or *mens rea*. Criminal punishment is ordinarily directed at individuals who intentionally, knowingly, recklessly, or negligently harm other individuals or property.
- *Concurrence.* The criminal act and criminal intent must coexist or accompany one another.
- *Causation.* The defendant’s act must cause the harm required for criminal guilt, death in the case of homicide, and the burning of a home or other structure in the case of arson.
- *Responsibility.* Individuals must receive reasonable notice of the acts that are criminal so as to make a decision to obey or to violate the law. In other words, the required criminal act and criminal intent must be clearly stated in a statute. This concept is captured by the Latin phrase *nullum crimen sine lege, nulla poena sine lege* (no crime without law, no punishment without law).
- *Defenses.* Criminal guilt is not imposed on an individual who is able to demonstrate that their criminal act is justified (benefits society) or excused (the individual suffered from a disability that prevented them from forming a criminal intent).

We now turn to a specific part of the criminal law to understand the various types of acts that are punished as crimes.

## CATEGORIES OF CRIME

---

### Felonies and Misdemeanors

There are a number of approaches to categorizing crimes. The most significant distinction is between a **felony** and a **misdemeanor**. A crime punishable by death or by imprisonment for more than one year is a felony. Misdemeanors are crimes punishable by less than a year in prison. Note that whether a conviction is for a felony or for a misdemeanor is determined by the punishment provided in the statute under which an individual is convicted rather than by the actual punishment imposed. Many states subdivide felonies and misdemeanors into several classes or degrees to distinguish between the seriousness of criminal acts. A **capital felony** is a crime subject either to the death penalty or to life in prison in states that do not have the death penalty. The term **gross misdemeanor** is used in some states to refer to crimes subject to between 6 and 12 months in prison, whereas other misdemeanors are termed **petty misdemeanors**. Several states designate a third category of crimes that are termed **violations** or **infractions**. These tend to be acts that cause only modest social harm and carry fines. These offenses are considered so minor that imprisonment is prohibited. This includes the violation of traffic regulations.

Florida classifies offenses as felonies, misdemeanors, or noncriminal violations. Noncriminal violations are primarily punishable by a fine or forfeiture of property. The following list shows the categories of felonies and misdemeanors and the maximum punishment generally allowable under Florida law:

- *Capital Felony*. Death or life imprisonment without parole
- *Life Felony*. Life in prison and a \$15,000 fine
- *Felony in the First Degree*. Thirty years in prison and a \$10,000 fine
- *Felony in the Second Degree*. Fifteen years in prison and a \$10,000 fine
- *Felony in the Third Degree*. Five years in prison and a \$5,000 fine
- *Misdemeanor in the First Degree*. One year in prison and a \$1,000 fine
- *Misdemeanor in the Second Degree*. Sixty days in prison and a \$500 fine

The severity of the punishment imposed is based on the seriousness of the particular offense. Florida, for example, punishes as a second-degree felony the recruitment of an individual for prostitution knowing that force, fraud, or coercion will be used to cause the person to engage in prostitution. This same act is punished as a first-degree felony in the event that the person recruited is under 14 years old or if death results.<sup>16</sup>

### *Mala in Se* and *Mala Prohibita*

Another approach is to classify crime by “moral turpitude” (evil). *Mala in se* crimes are considered “inherently evil” and would be evil even if not prohibited by law. This includes murder, rape, robbery, burglary, larceny, and arson. *Mala prohibita* offenses are not “inherently evil”

and are considered wrong only because they are prohibited by a statute. This includes offenses ranging from tax evasion to carrying a concealed weapon, leaving the scene of an accident, and being drunk and disorderly in public.

Why should we be concerned with classification schemes? A felony conviction can prevent you from being licensed to practice various professions, bar you from being admitted to the armed forces or joining the police, and prevent you from adopting a child or receiving various forms of federal assistance. In some states, a convicted felon is still prohibited from voting, even following release. The distinction between *mala in se* and *mala prohibita* is also important. For instance, the law provides that individuals convicted of a “crime of moral turpitude” may be deported from the United States.

There are a number of other classification schemes. The law originally categorized as **infamous crimes** those crimes that were considered to be deserving of shame or disgrace. Individuals convicted of infamous offenses such as treason (betrayal of the nation) or offenses involving dishonesty were historically prohibited from appearing as witnesses at a trial.

## Subject Matter

This textbook is organized in accordance with the subject matter of crimes, the scheme that is followed in most state criminal codes. There is disagreement, however, concerning the classification of some crimes. Robbery, for instance, involves the theft of property as well as the threat or infliction of harm to the victim, and there is a debate about whether it should be considered a crime against property or against the person. Similar issues arise in regard to burglary. Subject matter offenses in descending order of seriousness are as follows:

- *Crimes Against the State.* Treason, sedition, espionage, terrorism (Chapter 16)
- *Crimes Against the Person: Homicide.* Homicide, murder, manslaughter (Chapter 10)
- *Crimes Against the Person: Sexual Offenses and Other Crimes.* Sexual offenses, assault and battery, false imprisonment, kidnapping (Chapter 11)
- *Crimes Against Habitation.* Burglary, arson, trespassing (Chapter 12)
- *Crimes Against Property.* Larceny, embezzlement, false pretenses, receiving stolen property, robbery, fraud (Chapters 13 and 14)
- *Crimes Against Public Order.* Disorderly conduct, riot (Chapter 15)
- *Crimes Against the Administration of Justice.* Obstruction of justice, perjury, bribery (Chapters 14 and 15)
- *Crimes Against Public Morals.* Prostitution, obscenity (Chapter 15)

The book also covers the general part of criminal law, including the constitutional limits on criminal law (Chapter 2), sentencing (Chapter 3), criminal acts (Chapter 4), criminal intent (Chapter 5), the scope of criminal liability (Chapters 6 and 7), and defenses to criminal liability (Chapters 8 and 9).

Consider the following factual scenario that is from the U.S. Supreme Court's description of the events surrounding the beating of Rodney King. Should the defendants once acquitted in state court have been prosecuted in federal court?<sup>17</sup>

### YOU DECIDE 1.1

On the evening of March 2, 1991, Rodney King and two of his friends sat in King's wife's car in Altadena, California, a city in Los Angeles County, and drank malt liquor for a number of hours. Then, with King driving, they left Altadena via a major freeway. King was intoxicated. California Highway Patrol [CHP] officers observed King's car traveling at a speed they estimated to be in excess of 100 miles per hour. The officers followed King with red lights and sirens activated and ordered him by loudspeaker to pull over, but he continued to drive. The CHP officers called on the radio for help. Units of the Los Angeles Police Department joined in the pursuit, one of them manned by petitioner Laurence Powell and his trainee, Timothy Wind. [The officers are all Caucasian; King is African American. King later explained that he fled because he feared that he would be returned to prison after having been released four months earlier following a year spent behind bars for robbery.]

King left the freeway and, after a chase of about eight miles, stopped at an entrance to a recreation area. The officers ordered King and his two passengers to exit the car and to assume a felony prone position—that is, to lie on their stomachs with legs spread and arms behind their backs. King's two friends complied. King, too, got out of the car but did not lie down. Petitioner Stacey Koon arrived, at once followed by Ted Briseno and Roland Solano. All were officers of the Los Angeles Police Department, and, as sergeant, Koon took charge. The officers again ordered King to assume the felony prone position. King got on his hands and knees but did not lie down. Officers Powell, Wind, Briseno, and Solano tried to force King down, but King resisted and became combative, so the officers retreated. Koon then fired Taser darts (designed to stun a combative suspect) into King.

The events that occurred next were captured on videotape by a bystander. As the videotape begins, it shows that King rose from the ground and charged toward Officer Powell. Powell took a step and used his baton to strike King on the side of his head. King fell to the ground. From the 18th to the 30th second on the videotape, King attempted to rise, but Powell and Wind each struck him with their batons to prevent him from doing so. From the 35th to the 51st second, Powell administered repeated blows to King's lower extremities; one of the blows fractured King's leg. At the 55th second, Powell struck King on the chest, and King rolled over and lay prone. At that point, the officers stepped back and observed King for about 10 seconds. Powell began to reach for his handcuffs. [At the sentencing phase, the district court found that Powell no longer perceived King to be a threat at this point.] At one-minute-five-seconds (1:05) on the videotape, Briseno, in the district court's words, "stomped" on King's upper back or neck. King's body writhed in response. At 1:07, Powell and Wind again began to strike King with a series of baton blows, and Wind kicked him in the upper thoracic or cervical area six times until 1:26. At about 1:29, King put his hands behind his back and was handcuffed. . . .

Powell radioed for an ambulance. He sent two messages over a communications network to the other officers that said "oops" and "I haven't [*sic*] beaten anyone this bad in a long time." Koon sent a message to the police station that said, "Unit just had a big time use of force. . . . Tased and beat the suspect of CHP pursuit big time." King was taken to a hospital where he was treated for a fractured leg, multiple facial fractures, and numerous bruises



and contusions. Learning that King worked at Dodger Stadium, Powell said to King, “We played a little ball tonight, didn’t we, Rodney? . . . You know, we played a little ball, we played a little hardball tonight, we hit quite a few home runs. . . . Yes, we played a little ball and you lost and we won.”

Koon, Powell, Briseno, and Wind were tried in California state court on charges of assault with a deadly weapon and excessive use of force by a police officer. The officers were acquitted of all charges, with the exception of one assault charge against Powell that resulted in a hung jury. [The jury was composed of 10 white, 1 Hispanic, and 1 Asian American.] The verdicts touched off widespread rioting in Los Angeles. More than 40 people were killed in the riots, more than 2,000 were injured, and nearly \$1 billion in property was destroyed. [Los Angeles mayor Tom Bradley acknowledged the dangerous trend, at least in certain sections of the LAPD, toward racially motivated events; and President George H. W. Bush announced in May that the verdict had left him with a deep sense of personal frustration and anger and that he was ordering the Justice Department to initiate a prosecution against the officers.]

On August 4, 1992, a federal grand jury indicted the four officers, charging them with violating King’s constitutional rights under color of law. Powell, Briseno, and Wind were charged with willful use of unreasonable force in arresting King. Koon was charged with willfully permitting the other officers to use unreasonable force during the arrest. After a trial in U.S. District Court for the Central District of California, the jury convicted Koon and Powell but acquitted Wind and Briseno. [Koon and Powell were sentenced to 30 months in prison. This jury was composed of nine whites, two African Americans, and one Hispanic American. King later won a \$3.8 million verdict from the City of Los Angeles. He used some of the money to establish a rap record business.] See *Koon v. United States*, 518 U.S. 81 (1996).

The issue to consider is whether individuals may be prosecuted and acquitted in California state court and then prosecuted in federal court. This seems to violate the prohibition on double jeopardy in the Fifth Amendment to the U.S. Constitution, which states that individuals shall not be “twice put in jeopardy of life or limb.” Double jeopardy means that an individual should not be prosecuted more than once for the same offense. Without this protection, the government could subject people to a series of trials in an effort to obtain a conviction.

It may surprise you to learn that judges have held that the dual sovereignty doctrine permits the U.S. government to prosecute an individual under federal law who has been acquitted on the state level. The theory is that the state and federal governments are completely different entities and that state government is primarily concerned with punishing police officers and with protecting residents against physical attack, while the federal government is concerned with safeguarding the civil liberties of all Americans. Each of these entities provides a check on the other to ensure fairness for citizens. The evidence introduced in the two prosecutions to establish the police officers’ guilt in the King case was virtually identical, and the federal prosecution likely was brought in response to political pressure. On the other hand, the federal government historically has acted to prevent unfair verdicts, such as the acquittal of members of the Ku Klux Klan charged with killing civil rights workers during the 1960s.

Do you believe that it was fair to subject the Los Angeles police officers to the expense and emotional stress of two trials? As the attorney general of the United States, would you have

advised President George H. W. Bush to bring federal charges against the officers following their acquittal by a California jury?

## SOURCES OF CRIMINAL LAW

---

We now have covered the various categories of criminal law. The next questions to consider are these: What are the sources of criminal law? How do we find the requirements of criminal law? There are a number of sources of criminal law in the United States:

- *English and American Common Law.* These are English and American judge-made laws and English acts of Parliament.
- *State Criminal Codes.* Every state has a comprehensive written set of laws on crime and punishment.
- *Municipal Ordinances.* Cities, towns, and counties are typically authorized to enact local criminal laws, generally of a minor nature. These laws regulate the city streets, sidewalks, and buildings and concern areas such as traffic, littering, disorderly conduct, and domestic animals.
- *Federal Criminal Code.* The U.S. government has jurisdiction to enact criminal laws that are based on the federal government's constitutional powers, such as the regulation of interstate commerce.
- *State and Federal Constitutions.* The U.S. Constitution defines treason and together with state constitutions establishes limits on the power of government to enact criminal laws. A criminal statute, for instance, may not interfere with freedom of expression or religion.
- *International Treaties.* International treaties signed by the United States establish crimes such as genocide, torture, and war crimes. These treaties, in turn, form the basis of federal criminal laws punishing acts such as genocide and war crimes when Americans are involved. These cases are prosecuted in U.S. courts.
- *Judicial Decisions.* Judges write decisions explaining the meaning of criminal laws and determining whether criminal laws meet the requirements of state and federal constitutions. Judges typically rely on **precedent** or the decision of other courts in similar cases.

At this point, we turn our attention to the common law origins of American criminal law and to state criminal codes.

## The Common Law

The English **common law** is the foundation of American criminal law. The origins of the common law can be traced to the Norman conquest of England in 1066. The Norman king, William the Conqueror, was determined to provide a uniform law for England and sent royal judges throughout the country to settle disputes in accordance with the common customs and practices of the country. The principles that composed this common law began to be written down in 1300 in an effort to record the judge-made rules that should be used to decide future cases.

By 1600, a number of **common law crimes** had been developed, including arson, burglary, larceny, manslaughter, mayhem, rape, robbery, sodomy, and suicide. These were followed by criminal attempt, conspiracy, blasphemy, forgery, sedition, and solicitation. On occasion, the king and Parliament issued decrees that filled the gaps in the common law, resulting in the development of the crimes of false pretenses and embezzlement. The distinctive characteristic of the common law is that it is for the most part the product of the decisions of judges in actual cases.

The English civil and criminal common law was transported to the new American colonies and formed the foundation of the colonial legal system that in turn was adopted by the 13 original states following the American Revolution. The English common law was also recognized by each state subsequently admitted to the Union; the only exception was Louisiana, which followed the French Napoleonic Code until 1805 when it embraced the common law.<sup>18</sup>

## State Criminal Codes

States in the 19th century began to adopt comprehensive written criminal codes. This movement was based on the belief that in a democracy, the people should have the opportunity to know the law. Judges in the common law occasionally punished an individual for an act that had never before been subjected to prosecution. A defendant in a Pennsylvania case was convicted of making obscene phone calls despite the absence of a previous prosecution for this offense. The court explained that the “common law is sufficiently broad to punish . . . although there may be no exact precedent, any act which directly injures or tends to injure the public.”<sup>19</sup> There was the additional argument that the power to make laws should reside in the elected legislative representatives of the people rather than in unelected judges. As Americans began to express a sense of independence, there was also a strong reaction against being so clearly connected to the English common law tradition, which was thought to have limited relevance to the challenges facing America. As early as 1812, the U.S. Supreme Court proclaimed that federal courts were required to follow the law established by Congress and were not authorized to apply the common law.

States were somewhat slower than the federal government to abandon the common law. In a Maine case in 1821, the accused was found guilty of dropping the dead body of a child into a river. The defendant was convicted even though there was no statute making this a crime. The court explained that “good morals” and “decency” all forbid this act. State legislatures reacted against these types of decisions and began to abandon the common law in the mid-19th century.

The Indiana Revised Statutes of 1852, for example, proclaim that “[c]rimes and misdemeanors shall be defined, and punishment fixed by statutes of this State, and not otherwise.”<sup>20</sup>

Some states remain **common law states**, meaning that the common law may be applied where the state legislature has not adopted a law in a particular area. The Florida Criminal Code states that the “common law of England in relation to crimes, except so far as the same relates to the mode and degrees of punishment, shall be of full force in this state where there is no existing provision by statute on the subject.” Florida law further provides that where there is no statute, an offense shall be punished by fine or imprisonment but that the “fine shall not exceed \$500, nor the term of imprisonment 12 months.”<sup>21</sup> Missouri and Arizona are also examples of common law states. These states’ criminal codes, like that of Florida, contain a **reception statute** that provides that the states “receive” the common law as an unwritten part of their criminal law. California, on the other hand, is an example of a **code jurisdiction**. The California Criminal Code provides that “no act or omission . . . is criminal or punishable, except as prescribed or authorized by this code.”<sup>22</sup> Ohio and Utah are also code jurisdiction states. The Utah Criminal Code states that common law crimes “are abolished and no conduct is a crime unless made so by this code . . . or ordinance.”<sup>23</sup>

Professor LaFave observes that courts in common law states have recognized a number of crimes that are not part of their criminal codes, including conspiracy, attempt, solicitation, uttering gross obscenities in public, keeping a house of prostitution, cruelly killing a horse, public inebriation, and false imprisonment.<sup>24</sup>

You also should keep in mind that the common law continues to play a role in the law of code jurisdiction states. Most state statutes are based on the common law, and courts frequently consult the common law to determine the meaning of terms in statutes. In the well-known California case of *Keeler v. Superior Court*, the California Supreme Court looked to the common law and determined that an 1850 state law prohibiting the killing of a “human being” did not cover the “murder of a fetus.” The California state legislature then amended the murder statute to punish “the unlawful killing of a human being, or a fetus.”<sup>25</sup> Most important, our entire approach to criminal trials reflects the common law’s commitment to protecting the rights of the individual in the criminal justice process.

## State Police Power

Are there limits on a state’s authority to pass criminal laws? Could a state declare that it is a crime to possess fireworks on July Fourth? State governments possess the broad power to promote the public health, safety, and welfare of the residents of the state. This wide-ranging **police power** includes the “duty . . . to protect the well-being and tranquility of a community” and to “prohibit acts or things reasonably thought to bring evil or harm to its people.”<sup>26</sup> An example of the far-reaching nature of the state police power is the U.S. Supreme Court’s upholding of the right of a village to prohibit more than two unrelated people from occupying a single home. The Supreme Court proclaimed that the police power includes the right to “lay out zones where family values, youth values, the blessings of quiet seclusion, and clean air make the area a sanctuary for people.”<sup>27</sup>

State legislatures in formulating the content of criminal codes have been profoundly influenced by the Model Penal Code.

## The Model Penal Code

People from other countries often ask how students can study the criminal law of the United States, a country with 50 states and a federal government. The fact that there is a significant degree of agreement in the definition of crimes in state codes is due to a large extent to the **Model Penal Code**.

In 1962, the American Law Institute (ALI), a private group of lawyers, judges, and scholars, concluded after several years of study that despite our common law heritage, state criminal statutes radically varied in their definition of crimes and were difficult to understand and poorly organized. The ALI argued that the quality of justice should not depend on the state in which an individual was facing trial and issued a multivolume set of model criminal laws, *The Proposed Official Draft of the Model Penal Code*. The Model Penal Code is purely advisory and is intended to encourage all 50 states to adopt a single uniform approach to the criminal law. The statutes are accompanied by a commentary that explains how the Model Penal Code differs from existing state statutes. Roughly 37 states have adopted some of the provisions of the Model Penal Code, although no state has adopted every single model law. The states that most closely follow the code are New Jersey, New York, Pennsylvania, and Oregon. As you read this book, you may find it interesting to compare the Model Penal Code to the common law and to state statutes.<sup>28</sup>

This book primarily discusses state criminal law. It is important to remember that we also have a federal system of criminal law in the United States.

## Federal Statutes

The United States has a federal system of government. The states granted various powers to the federal government that are set forth in the U.S. Constitution. This includes the power to regulate interstate commerce, to declare war, to provide for the national defense, to coin money, to collect taxes, to operate the post office, and to regulate immigration. The Congress is entitled to make “all Laws which shall be necessary and proper” for fulfilling these responsibilities. The states retain those powers that are not specifically granted to the federal government. The Tenth Amendment to the Constitution states that 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.”

The Constitution specifically authorizes Congress to punish the counterfeiting of U.S. currency, piracy and felonies committed on the high seas, and crimes against the “Law of Nations” as well as to make rules concerning the conduct of warfare. These criminal provisions are to be enforced by a single Supreme Court and by additional courts established by Congress.

The **federal criminal code** compiles the criminal laws adopted by the U.S. Congress. This includes laws punishing acts such as tax evasion, mail and immigration fraud, bribery in obtaining a government contract, and the knowing manufacture of defective military equipment. The **Supremacy Clause** of the U.S. Constitution provides that federal law is superior to a state law within those areas that are the preserve of the national government. This is termed the **preemption doctrine**. In 2012, the Supreme Court held that federal immigration law preempted several sections of an Arizona statute directed at undocumented individuals.

Several recent court decisions have held that federal criminal laws have unconstitutionally encroached on areas reserved for state governments. This reflects a trend toward limiting the federal power to enact criminal laws. For instance, the U.S. government, with the **Interstate Commerce Clause**, has interpreted its power to regulate interstate commerce as providing the authority to criminally punish harmful acts that involve the movement of goods or individuals across state lines. An obvious example is the interstate transportation of stolen automobiles.

In the past few years, the U.S. Supreme Court has ruled several of these federal laws unconstitutional based on the fact that the activities did not clearly affect interstate commerce or involve the use of interstate commerce. In 1995, the Supreme Court ruled in *United States v. Lopez* that Congress violated the Constitution by adopting the Gun-Free School Zones Act of 1990, which made it a crime to have a gun in a local school zone. The fact that the gun may have been transported across state lines was too indirect a connection with interstate commerce on which to base federal jurisdiction.<sup>29</sup>

In 2000, the Supreme Court also ruled unconstitutional the U.S. government's prosecution of an individual in Indiana who was alleged to have set fire to a private residence. The federal law made it a crime to maliciously damage or destroy, by means of fire or an explosive, any building used in interstate or foreign commerce or in any activity affecting interstate or foreign commerce. The Supreme Court ruled that there must be a direct connection between a building and interstate commerce and rejected the government's contention that it is sufficient that a building is constructed of supplies or serviced by electricity that moved across state lines or that the owner's insurance payments are mailed to a company located in another state. Justice Ruth Bader Ginsburg explained that this would mean that "every building in the land" would fall within the reach of federal laws on arson, trespass, and burglary.<sup>30</sup>

In 2006, in *Gonzales v. Oregon*, the Supreme Court held that U.S. Attorney General John Ashcroft lacked the authority to prevent Oregon physicians acting under the state's Death With Dignity law from prescribing lethal drugs to terminally ill patients who are within six months of dying.<sup>31</sup>

The sharing of power between the federal and state governments is termed **dual sovereignty**. An interesting aspect of dual sovereignty is that it is constitutionally permissible to prosecute a defendant for the same act at both the state and federal levels. In 2019, in *Gamble v. United States*, the Supreme Court affirmed that this type of double prosecution does not constitute **double jeopardy**.<sup>32</sup> You will remember from You Decide 1.1 that in 1991 Rodney King, an African American, was stopped by the Los Angeles police. King resisted and eventually was subdued, wrestled to the ground, beaten, and handcuffed by four officers. The officers were acquitted by an all-Caucasian jury in a state court in Simi Valley, California, leading to widespread protest and disorder in Los Angeles. The federal government responded by bringing the four officers to trial for violating King's civil right to be arrested in a reasonable fashion. Two officers were convicted and sentenced to 30 months in federal prison, and two were acquitted.

We have seen that the state and federal governments possess the power to enact criminal laws. The federal power is restricted by the provisions of the U.S. Constitution that define the limits on governmental power.

## Constitutional Limitations

The U.S. Constitution and individual state constitutions establish limits and standards for the criminal law. The U.S. Constitution, as we shall see in Chapter 2, requires the following:

- A state or local law may not regulate an area that is reserved to the federal government. A federal law may not encroach upon state power.
- A law may infringe upon the fundamental civil and political rights of individuals only in compelling circumstances.
- A law must be clearly written and provide notice to citizens and to the police of the conduct that is prohibited.
- A law must be nondiscriminatory and may not impose cruel and unusual punishment. A law also may not be retroactive and punish acts that were not crimes at the time that they were committed.

The ability of legislators to enact criminal laws is also limited by public opinion. The American constitutional system is a democracy. Politicians are fully aware that they must face elections and that they may be removed from office in the event that they support an unpopular law. As we learned during the unsuccessful effort to ban the sale of alcohol during the Prohibition era in the early 20th century, the government will experience difficulties in imposing an unpopular law on the public.

Of course, the democratic will of the majority is subject to constitutional limitations. A classic example is the Supreme Court's rulings that popular federal statutes prohibiting and punishing flag burning and desecration compose an unconstitutional violation of freedom of speech.<sup>33</sup>

### CRIME IN THE NEWS

In 1996, California became 1 of 23 states at the time to authorize the use of marijuana for medical purposes. (The other states are Alaska, Arizona, Colorado, Connecticut, Delaware, Hawaii, Illinois, Maine, Maryland, Massachusetts, Michigan, Minnesota, Montana, Nevada, New Hampshire, New Jersey, New Mexico, New York, Oregon, Rhode Island, Vermont, and Washington, and the same applies in the District of Columbia. Maryland exempts medical marijuana users from jail sentences.)

California voters passed Proposition 215, the Compassionate Use Act of 1996, which is intended to ensure that "seriously ill" residents of California are able to obtain marijuana. The act provides an exemption from criminal prosecution for doctors who, in turn, may authorize patients and primary caregivers to possess or cultivate marijuana for medical purposes. The California legislation is directly at odds with the federal Controlled Substances Act, which declares it a crime to manufacture, distribute, or possess marijuana. There are more than 100,000 medical marijuana users in California, and roughly one tenth of 1% of the population uses medical marijuana in the states that collect information on medical marijuana users.

Angel Raich and Diane Monson are two California residents who suffer from severe medical disabilities. Their doctors have found that marijuana is the only drug that is able to



alleviate their pain and suffering. Raich's doctor goes so far as to claim that Angel's pain is so intense that she might die if deprived of marijuana. Monson cultivates her own marijuana, and Raich relies on two caregivers who provide her with California-grown marijuana at no cost.

On August 15, 2000, agents from the federal Drug Enforcement Administration (DEA) raided Monson's home and destroyed all six of her marijuana plants. The DEA agents disregarded objections from the Butte County Sheriff's Department and the local California District Attorney's Office that Monson's possession of marijuana was perfectly legal.

Monson and Raich, along with several doctors and patients, refused to accept the destruction of the marijuana plants and asked the U.S. Supreme Court to rule on the constitutionality of the federal government's refusal to exempt medical marijuana users from criminal prosecution and punishment. The case was supported by the California Medical Association and the Leukemia and Lymphoma Society. Raich suffers from severe chronic pain stemming from fibromyalgia, endometriosis, scoliosis, uterine fibroid tumors, rotator cuff syndrome, an inoperable brain tumor, seizures, life-threatening wasting syndrome, and constant nausea. She also experiences extreme chemical sensitivities that result in violent allergic reactions to virtually every pharmaceutical drug. Raich was confined to a wheelchair before reluctantly deciding to smoke marijuana, a decision that led to her enjoying a fairly normal life.

A doctor recommended that Monson use marijuana to treat severe chronic back pain and spasms. She alleges that marijuana alleviates the pain that she describes as comparable to an uncontrollable cramp. Monson claims that other drugs have proven ineffective or resulted in nausea and create the risk of severe injuries to her kidneys and liver. The marijuana reportedly reduces the frequency of Monson's spasms and enables her to continue to work.

The U.S. Supreme Court, in *Gonzales v. Raich* in 2005,<sup>34</sup> held that the federal prohibition on the possession of marijuana would be undermined by exempting marijuana possession in California and other states from federal criminal enforcement. The Supreme Court explained that the cultivation of marijuana under California's medical marijuana law, although clearly a local activity, frustrated the federal government's effort to control the shipment of marijuana across state lines, because medical marijuana inevitably would find its way into interstate commerce, increase the nationwide supply, and drive down the price of the illegal drug. There was also a risk that completely healthy individuals in California would manage to be fraudulently certified by a doctor to be in need of medical marijuana. Three of the nine Supreme Court judges dissented from the majority opinion. Justice Sandra Day O'Connor observed that the majority judgment "stifles an express choice by some States, concerned for the lives and liberties of their people, to regulate medical marijuana differently."<sup>35</sup>

Following the decision, Angel Raich urged the federal government to have some "compassion and have some heart" and not to "use taxpayer dollars to come in and lock us up. . . . [W]e are using this medicine because it is saving our lives." She asked why the federal government was trying to kill her. Opponents of medical marijuana defend the Supreme Court's decision and explain that individuals should look to traditional medical treatment rather than being misled into thinking that marijuana is an effective therapy. They also argue that marijuana is a highly addictive drug that could lead individuals to experiment with even more harmful narcotics.

The Obama administration initially did not enforce federal marijuana laws against individuals in medical marijuana states. In 2011, the Department of Justice (DOJ) announced that although individuals could grow and use small amounts of medical marijuana, the DOJ would criminally prosecute growers of more than 100 plants and individuals involved in the commercial marketing and sale of marijuana. In 2013, the Obama administration reversed



course and announced that it would not prosecute individuals in medical marijuana states unless the individuals threatened certain federal law enforcement interests. This included the distribution of marijuana to minors, providing revenue to criminal enterprises, diversion of marijuana to states where marijuana remains illegal, and the possession and use of marijuana on federal property.

In 2014, Congress adopted a law prohibiting the DOJ from using resources to prevent states from “implementing their own State laws that authorize the use, distribution, possession, or cultivation of medical marijuana.”

President Trump, during the presidential election campaign, indicated that marijuana was a state rather than federal issue. In 2017, Attorney General Jeff Sessions, however, wrote a letter to Congress opposing the continued congressional prohibition on the use of federal funds to prosecute medical marijuana. He argued that the law was “unwise,” given America’s drug epidemic, and that the law interfered with federal efforts to combat international drug organizations and crimes of violence associated with drug trafficking. Attorney General Sessions also noted that marijuana use had negative psychological and physical effects. President Trump, on signing an earlier extension of the law in 2016, issued a “signing statement” indicating that he would enforce the law in accordance with his “constitutional responsibility to take care that the laws be faithfully executed.”

Attorney General Sessions, in January 2018, sent a memo to U.S. attorneys rescinding the policy of the Obama administration on marijuana prosecutions. Attorney General Sessions wrote that U.S. attorneys should use their own discretion in determining whether to bring charges for marijuana possession or sale in states where marijuana use for recreational or medical purposes is lawful.

President Biden on assuming office favored decriminalization of possession of marijuana and expungement of criminal convictions, supported medical marijuana and reduction in federal penalties relating to marijuana, and supported allowing states and localities to follow their own policies.

In December 2020, the U.S. House of Representatives passed the Marijuana Opportunity, Reinvestment, and Expungement (MORE) Act. The act would repeal the federal prohibition on the possession, distribution, or production of marijuana; expunge the narcotics conviction of people with prior federal marijuana convictions; and impose a tax on marijuana products, which would fund new programs intended to support “individuals and businesses in communities impacted by the war on drugs.” The legislation has yet to be approved by the Senate.

Where do you stand on the medical marijuana controversy?

Thirty-six states, the District of Columbia, Guam, Puerto Rico, and the U.S. Virgin Islands at present have approved comprehensive, publicly available medical marijuana/cannabis programs. Eleven states allow use of “low THC, high cannabidiol (CBD)” products for medical reasons in limited situations. Nineteen states, two territories, and the District of Columbia allow recreational use of marijuana.

## CHAPTER SUMMARY

Criminal law is the foundation of the criminal justice system. The law defines the acts that may lead to arrest, trial, and incarceration. We typically think about crime as involving violent conduct, but in fact a broad variety of acts are defined as crimes.

Criminal law is best defined as conduct that, if shown to have taken place, will result in the “formal and solemn pronouncement of the moral condemnation of the community.” Civil law is distinguished from criminal law by the fact that it primarily protects the interests of the individual rather than the interests of society.

The purpose of criminal law is to prohibit conduct that causes harm or threatens harm to the individual and to the public interests, to warn people of the acts that are subject to criminal punishment, to define criminal acts and intent, to distinguish between serious and minor offenses, to punish offenders, and to ensure that the interests of victims and the public are represented at trial and in the punishment of offenders.

In analyzing individual crimes, we will concentrate on several basic issues that comprise the general part of the criminal law. A crime occurs when there is a concurrence between a criminal act (*actus reus*) and criminal intent (*mens rea*) and the causation of a social harm. Individuals must be provided with notice of the acts that are criminally condemned in order to have the opportunity to obey or to violate the law. Individuals must also be given the opportunity at trial to present defenses (justifications and excuses) to a criminal charge.

The criminal law distinguishes between felonies and misdemeanors. A crime punishable by death or by imprisonment for more than one year is a felony. Other offenses are misdemeanors. Offenses are further divided into capital and other grades of felonies and into gross and petty misdemeanors. A third level of offenses includes violations or infractions, acts that are punishable by fines.

Another approach is to classify crime in terms of “moral turpitude.” *Mala in se* crimes are considered “inherently evil,” and *mala prohibita* crimes are not inherently evil and are considered wrong only because they are prohibited by statute.

Our textbook categorizes crimes in accordance with the subject matter of the offense, the scheme that is followed in most state criminal codes. This includes crimes against the person, crimes against habitation, crimes against property, crimes against public order, and crimes against the state.

There are a number of sources of American criminal law. These include the common law, state and federal criminal codes, the U.S. and state constitutions, international treaties, and judicial decisions. The English common law was transported to the United States and formed the foundation for the American criminal statutes adopted in the 19th and 20th centuries. Some states continue to apply the common law in those instances in which the state legislature has not adopted a criminal statute. In code jurisdiction states, however, crimes are punishable only if incorporated into law.

States possess broad police powers to legislate for the public health, safety, and welfare of the residents of the state. The drafting of state criminal statutes has been heavily influenced by the American Law Institute’s Model Penal Code, which has helped ensure a significant uniformity in the content of criminal codes.

The United States has a system of dual sovereignty in which the state governments have provided the federal government with the authority to legislate various areas of criminal law. The Supremacy Clause provides that federal law takes precedence over state law in the areas that the U.S. Constitution explicitly reserves to the national government. There is a trend toward strictly limiting the criminal law power of the federal government. The U.S. Supreme Court, for example, has ruled that the federal government has unconstitutionally employed the Interstate Commerce Clause to extend the reach of federal criminal legislation to the possession of a firearm adjacent to schools.

The authority of the state and federal governments to adopt criminal statutes is limited by the provisions of federal and state constitutions. For instance, laws must be drafted in a clear and nondiscriminatory fashion and must not impose retroactive or cruel or unusual punishment. The federal and state governments possess the authority to enact criminal legislation only within their separate spheres of constitutional power.

### CHAPTER REVIEW QUESTIONS

1. Define a crime.
2. Distinguish between criminal and civil law. Distinguish between a criminal act and a tort.
3. What is the purpose of criminal law?
4. Is there a difference between criminal law and criminal procedure? Distinguish between the specific and general part of the criminal law.
5. List the basic principles that compose the general part of criminal law.
6. Distinguish between felonies, misdemeanors, capital felonies, gross and petty misdemeanors, and violations.
7. What is the difference between *mala in se* and *mala prohibita* crimes?
8. Discuss the development of the common law. What do we mean by common law states and code jurisdiction states?
9. Discuss the nature and importance of the state police power.
10. Why is the Model Penal Code significant?
11. What is the legal basis for federal criminal law? Define the preemption doctrine and dual sovereignty. What is the significance of the Interstate Commerce Clause?
12. What are the primary sources of criminal law? How does the U.S. Constitution limit criminal law?
13. Why is understanding criminal law important in the study of the criminal justice system?

## LEGAL TERMINOLOGY

capital felony  
civil law  
code jurisdiction  
common law  
common law crimes  
common law states  
crime  
criminal procedure  
defendant  
double jeopardy  
dual sovereignty  
federal criminal code  
felony  
gross misdemeanor  
infamous crimes

infractions  
Interstate Commerce Clause  
*mala in se*  
*mala prohibita*  
misdemeanor  
Model Penal Code  
petty misdemeanors  
police power  
precedent  
preemption doctrine  
reception statutes  
substantive criminal law  
Supremacy Clause  
tort  
violations

## TEST YOUR KNOWLEDGE ANSWERS

1. False.
2. True.
3. False.
4. True.