The Criminal Justice System

An Introduction

5th Edition

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The Criminal Justice System: An Introduction, Fifth Edition

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PREFACE

This book views the criminal justice system as a whole composed of many subsystems—the police, the prosecutors, the courts, and corrections, including probation and parole. It describes the subsystems of the criminal justice system as the authors know them to be—not as they should be. This fifth edition incorporates the latest developments while retaining the basic organization of previous editions. Illustrations have been revised to reflect the latest facts and figures.

This book is designed to provide students with basic information on the criminal justice system. The first part of the text places the criminal justice system in proper perspective. Students are first introduced to the nature of law and society in general. The methods for assessing the amount of crime are presented, followed by a brief overview of criminal justice agencies and the criminal justice process. The criminal justice agencies are discussed in the order in which they are usually encountered when an individual goes through the criminal justice process. Sections on the police, the prosecution and defense, the courts, corrections, and probation and parole all follow a pattern: within each of these sections the history, present structure, current functions, and contemporary problems of each major area are thoroughly discussed.

A number of pedagogical features have been built into the fifth edition to help students master the material. Each chapter begins with an outline, so that students can quickly see what will be covered, and a statement of purpose, to help students understand exactly what they are supposed to master and why. More than 16 illustrations have been included to assist in the clarification and further development of topics in the text. At the end of each chapter, a summary and a list of key terms will aid students in reviewing material, and a series of discussion questions will help stimulate thought.

The fifth edition include a complete updating of charts and statistics to reflect the changes and enhancements the Federal Bureau of Investigation has made to the Unified Crime Reports System including the implementation of the National Incident Based Reporting System and the abandonment of the crime index for a more reliable crime trend measure. The history of law enforcement has been expanded. Additional information on homeland security and its effect on the police is now included. New approaches to policing such as Problem-Oriented Policing (The POP Approach) and Intelligence-Led Policing are discussed. Issues of cyber crime, identity theft, accreditation, and new approaches to crime analysis and the police role in these issues are presented. This edition now includes information on prosecution standards, community prosecution, and prosecution abuse. The examination of historical court systems in Europe in general and Rome in particular has been expanded and we have clarified the dual nature of our legal system, both statute- and judge-made law. We have emphasized the concept of jurisdiction, and how it governs what cases courts hear. We have spotlighted the inter-relation between the courts' functions and the other branches of the criminal justice system, the push-and-pull relationship between the theory of lawmaking, and the court practice. In the final chapter we highlighted the dilemma for courts caused by the intersection of politics, funding, media, and technology. A discussion on how radically modern information systems are changing the way courts work, and the court's ambivalence about the changes, is included. The expansion of community correctional programs has been noted. Prisoner radicalization and the terrorism threat it poses has been added

as well as discussions on accreditation.

At the back of the text are four appendixes and a glossary. Appendix A is an extremely handy reference for all students of the justice system: the United States Constitution. Appendix B is the glossary which provides definitions of justice system terms that every student of criminal justice ought to know. Appendix C provides information on websites useful in gaining knowledge of the criminal justice system. We have prepared a computerized learning course based on this book. The program is free and is available by using the order form in Appendix D in the back of the book. You will be charged for shipping and handling

We would like to thank those who assisted in the development and refinement of the text over the years. They include:

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The opinions expressed in this book are the authors' and are not necessarily those of the institutions that employ them.

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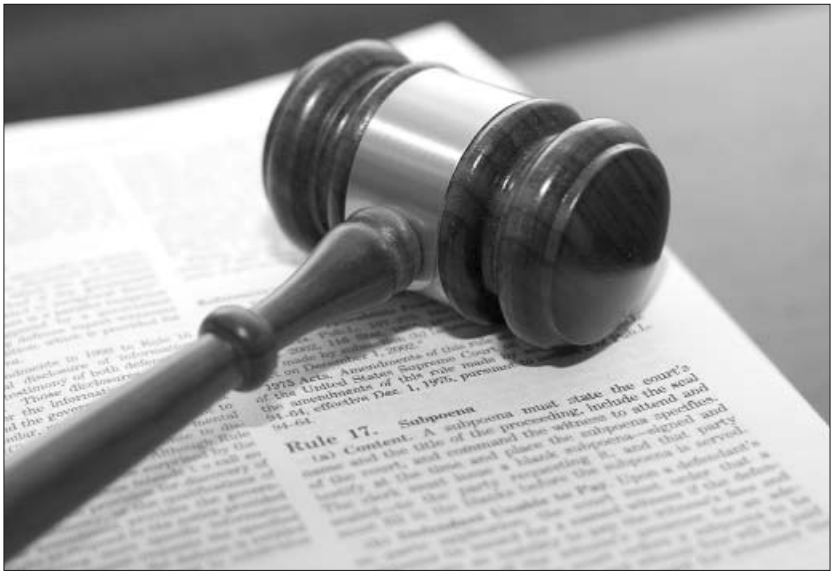
Part One:
Overview –
The Criminal Justice System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CHAPTER ONE: LAW AND SOCIETY

Purpose: To develop an understanding of law and its functions in, and relationship to, society.

Despite years of study and the continuous expenditure of large amounts of tax dollars for law enforcement, crime remains one of the nation's most troublesome problems. In 2006, U.S. residents aged 12 and older experienced an estimated 25 million violent and property crimes.[1] When this rate of victimization is coupled with the fear of crime that each incident creates in the victim, as well as among non-victims who learn of the crime, one can easily understand why the study of crime and the nation's institutions of crime control remain important in our institutions of higher education.

While the study of crime by criminologists dates back to the eighteenth century, the study of the criminal justice system, society's formal social control apparatus, is relatively new and an extremely important area of study. As the more traditional means of social control—churches, communities, schools, families, and so on—continue to lose their effectiveness as the primary forces for maintaining social order, the ever-increasing burden on the nation's criminal justice apparatus warrants closer review and analysis and a better understanding by the general American public.

Because criminal law is the principal weapon our system of criminal justice uses to combat crime, we will begin our study of the administration of criminal justice in America with a discussion of the general nature, development, and functions of law in society, particularly the criminal law. Following this discussion, a more detailed analysis of the nature of crime and our system for monitoring crime will be presented.

SOCIOLOGY OF LAW

For centuries, legal scholars have struggled with the problem of understanding law. Because law is a complex social institution, varying in nature in different societies and at different stages of historical development, it has placed barriers in the way of developing a universally accepted definition of law that would serve as a foundation for future discussion and research. Faced with the complexity of this institution, some scholars have argued against efforts to define law, expounding the belief that total immersion in a legally based profession will provide each individual with a sound feeling for law. While this observation may hold once people are employed in some aspect of our legal system, the

student contemplating a career in one of the criminal justice professions needs an adequate understanding of the essence of law and its relation to society. To this end sociologists have contributed most of the research and analysis currently available.

The Evolution of Law

Sociologists view society as a vast social system that is structured or molded by interactions among members of society, particularly those interactions or contacts that recur with some degree of regularity. The position each member of society holds within this social structure is differentiated by varying sets of obligations collectively called his or her *role* and a set of rights referred to as his or her *status*. These obligations and rights are expressed in the form of rules known as *norms,* which may or may not be clearly articulated. Take, as an example, norms that define parental roles and status, which are generally understood or implicit. In the past, family members generally expected fathers to be in charge of their households, to be providers and protectors of their clans with the right to make the final decisions on matters relating to the families' well-being. With changes in society, such as the increase in divorce rate, expectations and norms have changed. Other norms relating to family obligations and rights have been made more explicit over time by statutes or laws, such as those dealing with child abuse and neglect.

The reason for this gradual process of codifying norms, or lawmaking, can be traced to the earliest human efforts at self-preservation. Although people were engulfed by a society that necessitated such combinations as clans and tribes for protection, and for social and economic advancement, their individuality led to the development of certain expressed general rights about person and property. Over time, unwritten rules governing social and economic interaction were expanded until they recognized each individual's right to defend his or her person from injury and to enjoy property without outside interference. Although a sufficient standard for primitive societies, unwritten rules of social control were ineffective in a rapidly developing and advancing society. Consequently, an effort was made to clarify and reword rules so that all people would know their definitions, limits, and applications. Some of these rules became the laws that later received further breadth and expression through the growth of courts and legislative bodies. For example, the right of defense from personal injury was gradually qualified by the rule that if an individual attempted to injure the person of another, and was personally injured while doing so, the attacker could not claim any compensation. These laws—laws that create, discover, and define the rights and obligations of each person in society—are referred to as *substantive laws.*

The Nature of Law

The rules of law in society are legal or formalized norms that define how people or institutions "ought" to act and how state officials or sanctioning agents are supposed to act when a rule violator is brought before them. Every law expresses an opinion or preference. For example, the law that commands us to drive on the right-hand side of the street expresses the preference of order over chaos. As such, law is based on a normative system, a value system that represents our social conscience. Some rules of law, like the laws against murder, are directed to everyone. Some, like the traffic laws, are addressed only to a particular category of persons

(automobile drivers). Others are pertinent to very specific positions (such as laws that define the role of the president of the United States). Still others are addressed to collectivities (corporation law).

Collectively, the *rules of law* or *law* serve as a means of social control in society. More specifically, law is "any system of regulations to govern the conduct of the people of a community, society, or nation, in response to the need for regularity, consistency, and justice based upon collective human experience."[2] Law is that portion of the normative system sustained by state power.

Law, as a means of social control, is but one of the many social institutions that help give order to social life. On a daily basis, the norms or standards of other social institutions, such as church, community, family, and school, influence a person's patterns of social behavior. What differentiates law from these other social ordering institutions is the formal and general nature of its ordering process. Take, for example, a violation of the social norm dictating that an individual provide their children with adequate support. An individual's failure to fulfill this social obligation will normally activate informal social pressures in the form of public opinion, which may originate from local clergy members, elder family members, or neighbors. If these more personal methods of informal social control fail, then a legal solution to the problem may be sought. Law will be more formal and general in its handling of the violation. Before a court of law, the issues involved will be clearly defined by highly structured, often time-consuming, court procedures. The legal process facilitates an objective decision reflecting a community judgment as opposed to a personal judgment. Law, then, is a special kind of formal ordering process that is characterized by the carefully chosen steps it follows in an effort to create, maintain, or restore social order. It is the unique character of this decision-making process that distinguishes law from the other means of social control.

A Normative Legal System

As a dynamic process, law involves much more than merely a body of rules. Law encompasses virtually every aspect of state action—the process of law creation, the process of authoritatively defining the content of societies' norms, the settlement of disputes, the sanctioning of the breach of norms, and the redistribution of resources. Therefore, and in fact, law is a subsystem of society, an important element of the state. As individuals in society make demands on the state, the demands lead either to the creation of new norms or to a change in the application of existing rules.

If a citizen demands that a rule-making institution, such as the legislature, formulate a new legal norm of conduct for its citizenry (for example, Prohibition), then simultaneously a new norm or rule for sanctioning agents will be created, directing them, in their individual or institutional roles, to impose a sanction if the new legal norm is breached. This normative system of law or legal system is a system by which one part of the population utilizes state power to coerce another.

GENERAL FUNCTIONS OF LAW

In all but the most simplistic societies, a system of law performs social functions that are essential to the maintenance of the society itself. If a society could exist without potential disputes,

then formalized procedures to define the rights and obligations of each person would not be needed. Because this is not the case, *one of the primary functions of law is to establish order in society when disputes arise*. The conflict may simply be a quarrel between two neighboring families over the issue of disciplining one another's children without appropriate consent. The dispute may be immediately resolved through the informal pressures of neighborhood families, church, or other social institutions, but if it is not resolved, one of the injured parties may seek a legal remedy for the problem, bringing the social function of law into play. From society's point of view, a legal remedy serves as a means of settling a dispute that might otherwise further deteriorate into acts of personal violence or private revenge.

Inherent in a legal solution is a second major function of law, that *law serves as a means of reaffirming the social norms that may have been violated*. When a dispute arises because one party does not act the way the other party in the dispute expected or wanted, then when the matter comes before a third party, each side has to offer evidence justifying that their actions were supported by commonly held norms. The degree to which a court will or will not sanction the breach of a legal norm will be directly determined by whether the principal objective of the dispute settlement is compromise, so that future relations may be preserved, or absolute victory, where no further contact between the parties involved is anticipated.

While the law performs this important norm enforcement function when the norms of society have been violated, the primary method for controlling certain patterns of behavior still rests with the social institutions of family, community, church, and school. People base their behavior on calculations of probable reward or punishment for conformity or nonconformity to society's rules. Instilled in each member is knowledge of the consequences of personal actions that violate acceptable patterns of behavior. Although this kind of social control is important, its effectiveness is limited by the complex nature of society and the problems and consequences that can stem from this complexity. As society becomes more diverse, community consensus (the shared belief in basic norms) becomes more difficult to achieve and sustain. The current level of geographical mobility, coupled with urbanization and social evolution, has reduced the effectiveness of community consensus as an element of social order.

Thus, a third major function of law is to reinforce these informal methods of control by further enabling each individual to calculate the consequences of personal actions. This function allows one to predict with more assurance what others will do, adding rationality and efficiency to social interaction. For example, laws perform an important function in governing everyday vehicle traffic in this nation. A driver entering a major highway complex has a legal obligation to yield the right of way to the main flow of traffic. The yield sign provides a driver entering the highway with specific instructions as to what to do and, in turn, provides the motorists speeding down the highway with certain expectations about the conduct of the motorist approaching the entrance ramp. If an auto accident results because a motorist fails to yield, then the dispute settlement function of law is brought into play in an effort to resolve the conflict.

A fourth function of law is its role as an instrument of social change or social engineering. Law emerges not only to codify existing norms but also to modify behavior, to remold moral and legal conceptions, and to convey the emerging attitudes, standards, and beliefs of a rapidly

changing society. An example of law as a tool of social engineering occurred during mid-1990s as smoking bans increased in popularity.

In 1990, the city of San Luis Obispo, California, became the first city in the world to ban indoor smoking in all public places.[3] Other states, such as New York, soon followed this example with bans of their own. In 1994, California enacted the statewide workplace smoking ban and followed it up in 1998 with a statewide ban of smoking in bars. At present, 36 states and the District of Columbia have some form of smoking ban. California has recently begun making entire cities smoke-free, restricting smoking in all places except residential homes. A total of 2791 municipalities in the United States have local laws in effect that restrict areas where smoking is permitted.[4]

In 2003, the city of Pueblo, Colorado, enacted a smoking ban. In the first 18 months after the ban, hospital admissions for heart attacks dropped 27%. Hospital admissions for neighboring towns remained the same. The American Heart Association reported, "The decline in the number of heart attack hospitalizations within the first year and a half after the non-smoking ban that was observed in this study is most likely due to a decrease in the effect of second hand smoke as a triggering factor for heart attacks."[5]

The new anti-smoking laws provide ample evidence of the important function that law as an instrument of social change continues to play in society and illustrate a shift in the value society places on smoke-free environments.

RULE OF LAW

Other societies rely as heavily as American society on well-ordered legal systems to maintain their civilizations, but vast differences exist in the way different systems affect the lives of the people under their control. The United States operates under a legal system that recognizes the *rule of law*, or government under law. These phrases describe the willingness of a people to accept and order their behavior according to the rules and procedures that are prescribed by political and social institutions—such as legislatures and universities—and enforced, where necessary, either by those bodies or by other institutions – such as governors, police, and courts. The "rule of law" expresses the idea that people recognize the legitimacy of the law as a means of ordering and controlling the behavior of *all* people in a society.

This includes sanctioning the use of deadly force by select groups of individuals designated as law enforcement officials in the interest of the safety and welfare of the state's citizenry. Should the orderly and appropriate use of force be abused, under the rule of law, the rules governing the conduct of those in authority will be challenged and most likely changed. *In essence, this constitutes a fifth general function of the law: determining who will maintain the authority to "exercise physical coercion as a socially recognized privilege/right, along with the selection of the most effective forms of physical sanction to achieve the social ends that the law serves.*"[6] In short, law functions to make rules for the rulers as well as the ruled, whether they are the president, the Congress, or the judiciary.

The legal proscriptions of the United States Constitution, the vast numbers of statutes outlining societal norms, and so on, are not wholly accurate descriptions of the real world of the legal order in the United States, particularly the criminal justice system. The normative system of law in the United States outlines only what

"ought" to be, not what in fact is taking place. Therefore, the serious student of criminal justice must study the law in action to understand fully the nature of criminal justice in America. Our system of rule of law still finds individuals, within their designated roles in the criminal justice system, exercising their legal authority with vast amounts of discretion, when from a strictly statutory perspective they are charged with carrying out the letter of the law.

This discussion of the function of law could be expanded, but the basic point is that when a society reaches a certain level of complexity, mobility, and diversity, it can no longer rely as heavily on the traditional social institutions of family, church, school, and community to perform the functions of social control. Contemporary society in the United States has reached a level of social evolution that makes it increasingly dependent on a highly structured, formalized system of the law and government acting as agencies of social control.

DIVISIONS OF LAW

To this point in this book, the analysis of law has concentrated on a number of the functions of the law and on its nature as a formal means of social control. The various divisions of the law must also be considered.

Substantive Law and Procedural Law

Substantive law is "law which creates, defines, and regulates rights..."[7] Substantive law tells us what the laws are, what rights we have, and what duties we must accept.

Included in the general body of substantive law is the substantive law of crimes and punishments, or *criminal law*. In criminal law, the statutes that set forth and define crimes and specify the punishments for each crime are found in the *penal codes* of the various states and the federal government. When a crime, such as an act of armed robbery, is committed, *procedural law* is activated. As the action arm of the law, procedural law "sets the rules and methods employed to obtain one's rights and, in particular, how the courts are conducted."[8] When a criminal violation has taken place, it is the procedural law that sets forth the rules that govern the enforcement of the substantive criminal law, the law of crimes and punishments. These rules, found in the criminal procedure codes, govern the conduct of the police officers investigating a crime and the orderly operations of the courts. Procedural criminal law is of great importance in controlling the orderly enforcement of substantive criminal law and as a significant part of the protection of the rights of individuals within America's system of social order.

Civil Law and Criminal Law

Another general division of the law based on purpose is the division that exists between civil law and criminal law. *Civil law* adjusts conflicts and disputes involving, for example, payments, inheritances, and divorces; *criminal law* deals with crimes and the apprehension and trial of people suspected of violating the criminal laws of the community. In general, civil and criminal laws have similar functions as institutions of social control. However, there are three basic differences between these two bodies of law: the nature of the wrong committed, the consequences of the court proceedings, and the nature of the litigating party (see Table 1.1).

Characteristic	Criminal	Civil
Injured party	Society (public injury)	Individual (private injury)
Litigating party	Government (prosecution)	Individual (plaintiff)
Redress	Fines, imprisonment, death	Monetary damages, injunctions, specific performance, etc.
Beneficiary of Sanctions	Society	Individual

Table 1.1. COMPARISON OF CRIMINAL LAW AND CIVIL LAW.

The first major difference between criminal law and civil law is that criminal law deals with crimes that are public wrongs, involving a social harm, and civil law deals with private wrongs, or injuries to an individual, more commonly referred to as *torts*.

Second, in civil proceedings the redress for private injury, known as a *remedy*, may simply be money payable to the injured party, known as *damages,* or a court order prohibiting or ordering certain action. In criminal proceedings, however, redress may be a fine payable to the state, a prison sentence, probation, death or other punitive actions. These penalties and certain others can be levied only by the state, by specific order of its courts.

The third major difference is the nature of the litigating party. In criminal cases the government or state is the litigating party; that is, the prosecution attempts to enforce the criminal law. In civil cases the government is only present as judge and jury, the injured party being the litigating party, or plaintiff.

Statutory Law and Common Law

Beginning with the Middle Ages, a majority of the English-speaking world has followed a system of *common law* that originated in England. Common-law concepts were formulated through the written opinions issued in cases tried before the various royal judges as they traveled throughout the districts and circuits of England. These traveling judges ensured that the legal principles developed and applied in one area of England were applied equally in other parts of the country. The essence of the common law concept was constantly in question, however. At first it was thought to be, and pretty much was, an expression of custom and usage. The early common lawyers regarded it as preexisting: it is the law because it always was the law. In later centuries the common law was seen not as part of history but as part of nature, or divinity, or

reason. From either point of view, the common law existed outside of court, and the judge's obligation was to find it and declare it, not create it. Over a period of time a common body of law developed, generally referred to as the Common Law of England. This was the body of law the earliest English settlers carried to the American colonies. Common, by definition is, "the traditional unwritten law of England, based on custom and usage, which began to develop over a thousand years before the founding of the United States."[9] Its basic principles were developed in England from the time of the Norman Conquest to the date of the American Revolution.

Statutory law, on the other hand, is law produced by legislative bodies: Congress, state assemblies, and so forth. When these bodies legislate, something new is added to the law or something old is put away. This is done by deliberate act, at a given moment. A statute, as the etymology informs us, is a thing set up, constructed, and made to stand. The common law, in contrast, is continuous and pervasive; its parts are not discrete. It is not designed; it is only applied to situations.

One often hears common law referred to as *case law*, which is because the body of common law originated from decisions handed down by the traveling royal judges. The promulgation of the written opinions of the judges led to the doctrine of *stare decisis*, sometimes referred to as the *doctrine of precedent*. This means that judges and lawyers refer to decisions of past cases to determine the actual state of the law for the case they are handling. Such opinions or rulings of the court often lead to the development of *statutory law*—laws that are made by Congress and state legislatures. For example, when the United States Supreme Court decided that suspected or accused individuals were entitled to be informed of their constitutional rights at the point during a criminal investigation when suspicion focuses on them, the legislatures of the various states enacted criminal procedure laws to meet the new requirements. Case law is frequently used to interpret legislative intent when a particular statutory law is unclear. In turn, when legislative bodies rewrite laws in keeping with court interpretations of statutory law, this is known as legislative ratification.

SOURCES OF LAW

Before analyzing the nature, formulation, and development of criminal law, a few brief comments are necessary on the sources of law that constitute the legal foundations of this text and the legal hierarchy of authority in American jurisprudence. Although this is somewhat of an oversimplification, some have classified the sources of law as *original* and *secondary*.

Primary or original sources of law may be placed in three categories: constitutions, statutes, and cases. Generally, a constitution governs the organization of the political state and its relations with its citizenry. The United States Constitution specifies that the federal government be divided into three branches—executive, legislative, and judicial—operating under a system of checks and balances that ensures a government of and by the people. Statutes are continually enacted by Congress and the legislatures of the 50 states in response to ever-changing requirements; they may cover such areas as environmental protection, crime control, social security benefits, civil rights, and the like. Case law, the rules announced in the decisions of the various state and federal courts, answers questions not answered by legislative enactments; it determines the proper applica-

tion of ambiguous statutes; and, most important, it declares unconstitutional those statutes that do not fit the provisions of state and federal constitutions.

In the hierarchy of legal authority, the constitutions of the states are supreme in their jurisdiction, subject only to those provisions of the United States Constitution made applicable to the states through the Fourteenth Amendment. Next in the hierarchy of legal authority are the statutes, which are subject only to the constitutions. Below them are the decisions made in court cases.

Secondary sources of law include commentaries on the three primary sources of law. No formal hierarchy of authority exists here, as secondary sources of law have no legal authority. Secondary sources include articles such as those found in the *Harvard Law Review*, various legal texts on selected topics, treatises on law, and official comments such as the United States attorney general's opinions on the interpretation of statutes. The value of secondary sources of law lies in the expertise of the authors and in that understanding and clarification their writings may contribute to a fuller knowledge of the law.

THE DEVELOPMENT OF CRIMINAL LAW

The substantive law of crimes is the body of law that declares what conduct in a society is criminal and prescribes the punishment to be imposed for such conduct. It is the oldest branch of law; its origins can be traced to the earliest of ancient civilizations. Edwin Sutherland, a noted criminologist, advances four principal theories regarding the origin of the criminal law as an agency of social control. He proposes that criminal law originated

1. in torts, or wrongs to individuals;
2. in the rational process of unified behavior;
3. in a crystallization of customs; and
4. in conflicts of interests among different groups.[10]

Taken alone, any one of these theories is an inadequate explanation of the development of criminal law. In total, they account for its development at various stages in the growth of a politically organized society.

Controlling Crime in Primitive Societies

Earliest primitive societies maintained control over human behavior through folkways and customs, not law. Each individual's life centered on personal rights rather than property rights. As tribes emerged and governments developed, people took a greater interest in both personal and property rights and protected their interests through personal acts of vengeance.

The concept of criminal law emerged only when the custom of private vengeance was replaced by the principle that the community as a whole is injured when one of its members is harmed. Thus, the right to act against a wrongdoing was taken out of the hands of the immediate victim and his family and was, instead, granted to the state as the representative of the people.[11]

Initially, this new system of justice involved nothing more sophisticated than the substitution of public vengeance for private vengeance. However, with time and through the influence

of systems developing in various nations, several legal concepts and principles emerged to support the administration of the criminal law, legal concepts and principles that today distinguish criminal law from the law of torts. George M.Calhoun outlines these principles of criminal law:

- It will recognize the principle that attacks upon the person or property of individuals, or rights thereto annexed, as well as offenses that affect the state directly, may be violations of the public peace and good order.

- It will provide, as part of the ordinary machinery of government, means by which such violations may be punished by and for the state, and not merely by the individual who may be directly affected.

- The protection it offers will be readily available to the entire body politic, and not restricted to particular groups or classes of citizens.[12]

These legal concepts of criminal law emerged and developed principally from three different societies of the Western world: Greek, Roman, and English.

Criminal Law in Ancient Greece

Richard Quinney states that the turning point in the development of criminal law in the Western world took place in Athens, Greece, around the sixth century BCE. Living under economic and political oppression, the lower classes threatened revolution and were appeased by the ruling aristocrats through legal reforms, which "established popular courts, provided for appeal from the decisions of magistrates, and assured the right of all citizens to initiate prosecutions."[13] Thus, each citizen was protected from the wrongdoings of others as well as from wrongs perpetrated by the government.

Criminal Law in Ancient Rome

Unlike Greek law, Roman criminal law did not emphasize the protection of the rights of the individual against the state. This was because Roman society placed great emphasis on private legal matters and civil procedure. Early Roman society, a rural community, operated under a system of customary or unwritten law. It was not until 450 BCE that the Roman Senate ordered that these laws be collected and put into written form so that the injustices they had brought about could be rectified. Under the control of the *Decembri* (the "ten men"), this codification process produced the Twelve Tables, a system of private criminal law that was well received by the plebeians of Roman society.[14] However, as Rome grew rapidly from a rural community to a city-state, the Twelve Tables became inadequate as a means of controlling the internal threats that grew with the development of the Roman state.

Subsequently, during the third century BCE and the beginning of the second century, a criminal jurisdiction was established for the control of those engaged in such politically threatening activities as violence, treason, arson, poisoning, and the carrying of weapons, and the theft of state property. Tribunals and courts were instituted to deal with such cases.[15]

Criminal Law in Medieval England

At the time of the Norman Conquest in 1066 CE, the administration of law in England, although well coordinated and long established, lacked a unified national character. There were three main bodies of law—the Wessex law, the Mercian law, and the Dane law—all of which were similar, but greatly influenced by local custom and tradition.[16] Because this was largely a system of tribal justice, long blood feuds often raged among neighboring families and within the same family. The Roman Catholic Church and the rise of feudalism provided the only political consolidation that touched this warring kingdom of the Anglo-Saxons. As kinship groups declined in importance and the role of the landlords, kings, and bishops increased, all disputes fell under the jurisdiction of the appropriate ruling authority for disposition.

It eventually became "a breach of the King's peace to resort to the feud before compensation had been demanded from the offender of his family."[17]

This was the tribal and feudal system of law that William the Conqueror encountered in 1066. His contribution to the development of criminal law resulted from his unification of England under one head of state. Under his rule and that of William II (1087-1100) and his brother Henry I, The Lawgiver (1100-1135), national sovereignty was to emerge.[18] The Charter of Liberties, which was endorsed by Henry I in 1100 and which set the stage for the eventual signing of the famous Magna Carta in 1215, recognized the sovereign's obligations to his subjects.[19] In turn, the state centralized its authority over the affairs of its subjects. Thirty judicial districts, eventually to be traveled by the royal judges appointed under Henry II (1154-1189), were created.

By the end of the reign of Henry II, the law of England was in the hands of the Crown. A court of "common law" was established for the justice of all men. A new procedure and a new concept of offenses had been created. Now for the first time some offenses were regarded as clearly in violation of the peace of king and country. A criminal law had emerged in England.[20]

Not too many years later, criminal laws began to emerge in response to conflicts between interest groups. In 1349, the first full-fledged British vagrancy statute was passed, making it "a crime to give alms to any who were unemployed while being of sound mind and body."[21] Unlike some of the earlier vagrancy statutes, which had been enacted to provide financial relief for religious houses swamped by the poor, sick, and feeble, this statute was created to force laborers "to accept employment at a low wage in order to insure the landowner an adequate supply of labor at a price he could afford to pay."[22] Such a law also served to discourage the movement of serfs from the rural communities into cities, where the rapid growth and development of industry promised a new and better style of life for the underprivileged working class.

Criminal Law in Colonial America

The foundation of contemporary criminal law in America can be found in the famous Plymouth Colony of 1630. Here, one can find the earliest articulation of the fundamental principle underlying the American legal system, that ours is a government of laws, not of men.[23] In formulating the Code of 1636, the General Court of the colony set forth the general scheme or

frame of government of the colony: the source of legislative power, the duties and authority of the several officers of the colony, qualifications for the franchise, provision for the holding of the courts, and the source of authority to declare war. Second, it contained a rudimentary bill of rights, certainly the first in America, antedating by five years that adopted by Massachusetts Bay in the Body of Liberties of 1641.[24]

The significance of the code to the evolution of criminal law in Colonial America and contemporary America is twofold. First, the 1636 code was the first code of laws in any modern sense in North America. Second, the code represented a clean break from the more ancient codifications of the law, such as the Twelve Tables of Rome, that "simply sought to reduce traditional law to writing, often as a defense against autocratic rulers."[25] As a modern code, the Code of 1636 went beyond the mere codification and compilation of informal rules to the revision of existing laws in the light of accepted ideals for the purpose of elaborating the law and providing fresh starting points for legal development. One of the most striking features of several provisions is the typically Puritan concern about the regulation of personal conduct and behavior. In the course of the 17th century, Plymouth enacted numerous laws punishing and providing specified fines for drinking, gaming, idleness, lying, swearing, and the like. They were not general prohibitions, but for the most part detailed provisions describing the offense. The tests of drunkenness, for example, are set forth with a degree of specificity that would astound many a modern police court.

The significance of such provisions lies not only in their exemplification of Puritan ideas about right living, but also in what they reveal about the Pilgrims' view of law. To them law was conceived of in large measure as a restraint on individual action in the interest of the whole group. At Plymouth the individual was essentially a member of the community, so that there was no aspect of his life, not even his private conduct, which was free of the control of the law insofar as the law was designed to further effective organization and good order in the community.[26]

Under the early form of Puritan government, the state's authority was to be wholly supported by religion, so much so that "most provisions in the Puritans' legal code were annotated by chapter and verse from the Old Testament and many incorporated biblical phraseology."[27] Under this heavy religious influence, crime was looked upon as a sin; the criminal as a sinner, nothing more; and the criminal law as the principal tool people had at their disposal to combat evil. In response to criminal violations, such as fornication, courts imposed penalties consisting of mild corporal punishment and fines, rarely resorting to lengthy imprisonment that would isolate an individual from society. The most severe form of punishment was sale into servitude in those cases in which an individual could not pay his or her fine.

Although the notion of sin and attempts to control it influenced the shape and direction of early Colonial criminal law, in fact Colonial criminal law expressed much more than standards of morality. Colonial criminal law was also a vehicle for economic and social planning, as Friedman points out:

Many of the peculiarities of the criminal codes related directly to the organization of economic life. In Virginia, hogs were more vital than sheep; the stealing of hogs, then, was a more serious crime than the stealing of sheep. In 1715, New York made it unlawful "from & after the first day of May until the first day of September

Annually to gather, Rake, take up, or bring to the Market, any Oysters whatsoever, under the penalty of Twenty shillings for every Offense; or for any Negro, Indian, or Maletto (sic) Slave to Sell any Oysters in the City of New York at any time whatsoever." Criminal laws were a natural way of expressing economic policies in societies with a sense of strong government and with few special agencies of economic control.[28]

Criminal Law in Post-Revolutionary America

Following the American Revolution, the passage of criminal laws to combat sin and the prosecution of sinners rapidly declined. Social customs were relaxed and a new legal attitude emerged towards immorality. Our founders turned their attention to threats to private property instead of personal behavior. The post-Revolutionary years left many individuals economically disadvantaged or completely unemployed, driving many to steal to survive. As crimes against property increased, the long-dominant concept of crime as the product of sin was challenged by the notion of crime as the product of idleness. Consequently, the light penalties provided in the earlier penal codes were changed, and heavy emphasis was placed on hard labor as punishment. By 1785 the Massachusetts legislature was to go so far as to provide for the imprisonment of thieves at hard labor, under the belief that the labor of the incarcerated would pay the state's cost for this relatively new form of punishment.[29]

By 1810, "crime was prosecuted to 'insure the peace and safety of society' and to relieve the public from the 'depredations' of 'notorious offenders' and the 'tax levied on the community by . . . privateering' of thieves."[30] The transition to secularized criminal law brought with it a new attitude toward offenders: that they were not fellow sinners, but a separate, distinct lower class of people who must be severely punished and segregated from society. When crime ceased being a sin, forgiveness and reintegration into society ceased being popular functions of the criminal law.

As criminal law and the agencies of the state began playing a larger role in the protection of social order and property, there was growing concern that these very agencies, with their new array of severe penalties, posed a threat to each individual's liberty. This fear prompted post-Revolutionary legal scholars to search for safeguards that would prevent the arbitrary use of state power. Questions concerning the degree of protection afforded each individual solely through the auspices of an independent judiciary and jury trial began to be raised, and the rights of the accused became of foremost concern to the legal scholars of this era. Whereas pre-Revolutionary Colonial America was concerned with the fair and impartial exercise of state power, post-Revolutionary America showed less reverence for the social value of this exercise of state power. "Often in colonial history, part of the population opposed this or that part of the criminal code as tyrannical. What was tyrannical was not so much in the form of regulation as in the substance; or, at times, in the allocation of power—not how by who governed."[31]

Concluding that the fair and impartial exercise of state power could not always be assured, legal scholars sought the total prohibition of this power in those instances where fair and impartial exercise could not be guaranteed. For example, the pre-Revolutionary practice of issuing "general standing warrants good from the date of issue until six months after the death of the issuing sovereign, which permitted the holder to

enter any house by day . . . and their search for smuggled goods without special application to a court" was stopped.[32] By the late 1780s, a "search warrant could be granted only upon an oath stating that felony had been committed, and, in theft cases, that the party complaining thereof had probable cause to suspect that stolen property was in a particular place. The reasons for the suspicion also had to be stated, and any warrant issued had to state the specific places to be searched and the persons to be seized."[33]

Contemporary Criminal Law in America

Although these observations on the post-Revolutionary criminal law reform movement in Colonial America shed a great deal of light on many criminal law issues today, some comment must be made about the emergence of criminal law in the American West and its influence on the evolution of criminal law in America. In the early West, fast-growing settlements developed their own codes to promote local order. For example, local rules were established to regulate the disputes that arose over land and mining rights in the western mining camps. Since there were as yet no territorial or state governments to formulate and administer law, there emerged a "local law" among the miners to regulate their own social and economic interests. These laws spread throughout the western territories, and eventually, when states were formed, many of the local laws were enacted into statute or were incorporated into court decisions.

With the closing of the frontier, new problems emerged that required new laws for the preservation of domestic order. Once again, as in a former time, a host of laws was enacted for the regulation of morality, although this time more than religion was at stake. Morality, or control of the moral order, became an excuse for the control of the more material aspects of society. Laws bearing on private and public morality reflected the desire to preserve all aspects of life. If the moral base of social and economic life should be threatened, then the social and economic order itself might give way. Thus laws regulating sexual activities, drinking, drug abuse, and the like were enacted to control the total environment, even the most intimate aspects of one's life, so that the existing order would be secured and perpetuated—according to the interests of the established order.[34]

Thus, the repetition of the pattern of enforcing morality through criminal law has caused the United States today to have more criminal laws and more elaborate law enforcement machinery than at any other time in its history. The rapid growth of criminal sanctions has caused many legal scholars to question the ability of society to discriminate between appropriate and inappropriate use of these sanctions, and to express concern as to the impact of this trend on law as an effective means of social control.

"Overcriminalization—the misuse of the criminal sanction—can contribute to disrespect for law, and can damage the ends which law is supposed to serve by criminalizing conduct regarded as legitimate by substantial segments of the society, by initiating patterns of discriminatory enforcement, and by draining resources away from the effort to control more serious misconduct."[35] Nowhere has the impact of this trend been more apparent than in the nation's attempts to regulate the use of narcotics through the Harrison Act of 1914 and the use of alcohol through the Volstead Act of 1919. Common to both these pieces of legislation is that "either there is no victim in the usual sense of the word, because the participants in the offense are will-

ing; or the defendant himself is the victim; or the interest of the victim is so insubstantial that it does not justify imposition of the criminal sanction to protect it."[36]

The passage of these criminal laws and other more contemporary crimes such as traffic violations to deter conduct not significantly harmful to persons or to the property of others raises important questions as to what principles are supposed to guide the formulation of criminal law, and what principles do in fact guide its formulation in society today. To offset this problem some states are beginning to take steps to decriminalize certain behavior (see Box 1.1).

BASIC PREMISES OF CRIMINAL LAW

A closer analysis of criminal law in America reveals that basic principles "have been more or less strictly observed by courts and legislatures when formulating the substantive laws of crimes."[37] They are (legality, (2) act, (3) mental state, (4) concurrence, (5) harm, and (6) causation.

The Principle of Legality

Essentially, the principle of legality is synonymous with rule of law. Rule of law expresses a people's willingness to accept and order their behavior according to the rules prescribed by political and social institutions. As long as the people recognize the legitimacy of the law, it will remain a means of ordering and controlling the behavior of all people. To ensure this legitimacy, certain legal maxims have evolved to govern the definition of a crime in our society: (1) no crime without law, (2) no punishment without law, and (3) no crime without punishment. Together these maxims constitute the principle of legality: the premise that conduct is not criminal unless it is forbidden by a law that provides advance warning that such conduct is criminal. (An example of a violation of this principle is an ex post facto law, one that defines a new crime and applies this definition retroactively to an act that was not criminal at the time it was committed.) A crime, then, in our society, "is any social harm defined and made punishable by law."[38] It is also a public injury, an offense against the state, created by the state and punishable only by the state.

Guilty Act (*Actus Reus*)

A second basic premise of criminal law is that no crime can be committed by bad thoughts alone. Simply thinking about breaking into a neighbor's house to steal a laptop computer does not constitute a crime if one does not take action to achieve the desired results. If, however, one were in fact to break the lock on the front door of a neighbor's house and enter with the intent to steal the laptop computer, one would have committed a criminal act or *actus reus*, which can give rise to legal action. In addition to protecting each citizen from prosecution for his or her thoughts, the principle of *actus reus* minimizes the temptation to create crimes of status. Definitions of acts that are considered criminal or constitute wrongful conduct vary from one code to another. According to the following definition from the Texas state penal code, the conduct described would constitute the crime of burglary: A person commits an offense if, without the effective consent of the owner, he:

- Enters a habitation, or a building (or any portion of a building) not then open to the

IS POLYGAMY A CRIMINAL ACT?

Individuals have a recognized constitutional right to engage in any form of consensual sexual relationship with any number of partners. Thus, a person can live with multiple partners and even sire children from different partners so long as they do not marry. However, when that same person accepts a legal commitment for those partners "as a spouse," we jail the person.

Likewise, someone can have multiple husbands so long as they are consecutive, not concurrent. Thus, a person can marry and divorce men in quick succession. Yet if she marries two of the men for life, she will become the matron of a state prison.

Religion defines the issue.

The difference between a polygamist and the follower of an "alternative lifestyle" is often religion. In addition to protecting privacy, the Constitution is supposed to protect the free exercise of religion unless the religious practice injures a third party or causes some public danger.

However, in its 1878 opinion in *Reynolds v. United States*, the court refused to recognize polygamy as a legitimate religious practice, dismissing it in racist and anti-Mormon terms as "almost exclusively a feature of the life of Asiatic and African people." In later decisions, the court declared polygamy to be "a blot on our civilization" and compared it to human sacrifice and "a return to barbarism." Most tellingly, the court found that the practice is "contrary to the spirit of Christianity and of the civilization which Christianity has produced in the Western World."

Contrary to the court's statements, the practice of polygamy is actually one of the common threads among Christians, Jews, and Muslims.

Deuteronomy contains a rule for the division of property in polygamist marriages. Old Testament figures such as Abraham, David, Jacob, and Solomon were all favored by God and were all polygamists. Solomon truly put the "poly" to polygamy with 700 wives and 300 concubines. Mohammed had 10 wives, though the Koran limits multiple wives to four. Martin Luther at one time accepted polygamy as a practical necessity. Polygamy is still present among Jews in Israel, Yemen, and the Mediterranean.

Indeed, studies have found polygamy present in 78% of the world's cultures, including some Native American tribes. (While most are polygynists—with one man and multiple women—there are polyandrists in Nepal and Tibet in which one woman has multiple male spouses.) As many as 50,000 polygamists live in the United States.

Given this history and the long religious traditions, it cannot be seriously denied that polygamy is a legitimate religious belief. Since polygamy is a criminal offense, polygamists do not seek marriage licenses. However, even living as married can send you to prison. Prosecutors have asked courts to declare a person as married under common law and then convicted the person of polygamy.

While the justifications have changed over the years, the most common argument today in favor of a criminal ban is that underage girls have been coerced into polygamist marriages. There are indeed such cases. However, banning polygamy is no more a solution to child abuse than banning marriage would be a solution to spousal abuse. The country has laws to punish pedophiles, and there is no religious exception to those laws.

The First Amendment was designed to protect the least popular and least powerful among us. When the high court struck down anti-sodomy laws in *Lawrence v. Texas*, we ended decades of the use of criminal laws to persecute gays. However, this recent change was brought about in part by the greater acceptance of gay men and lesbians into society, including openly gay politicians and popular TV characters.

Source: Jonathan Turley. "Polygamy Laws Expose Our Own Hypocrisy." *USA Today.* October 03, 2004.

public, with intent to commit a felony or theft; or

- Remains concealed, with intent to commit a felony or theft, in a building or habitation; or

- Enters a building or habitation and commits or attempts to commit a felony or theft.

Another state's code might well differ in details.

While this example involves an act of *commission*, an *omission*, or failure to act when there is a legal duty to act, may also constitute a crime. Such would be the case if a motorist involved in an automobile accident failed to stop, or if a taxpayer avoided filing an income tax return each year. In both examples, the criminal statutes impose the duty to act, and breach of the duty constitutes the wrongful act.

Mental State (*Mens Rea*)

Just as there can be no crime without a guilty act, there can be no crime without a guilty or wrongful purpose in mind. This is often referred to as *criminal intent* or *mens rea*.

Since the modern concept of crime assumes the rational ability of the particular violator to undertake an act designed to harm either an individual or property, legal punishment can only be enacted against the violator if his action was "intended" and "apparent" to his mind. While intent presupposes that the individual desires to complete whatever act he originates, mens rea assumes that the intent was knowledgeable and intelligible to the person as he undertook his particular action.[39]

For some crimes—burglary, for example—the controlling penal statute defines not only the wrongful act but also the *specific intent* necessary to make the act a crime. In this case, the breaking and entering must be done with the specific intent of committing a felony or theft. Other statutes defining criminal conduct often use such phrases as "knowingly" or "willfully" to indicate the type of mental state required.

Where regulatory offenses, such as traffic laws governing speeding, are involved, often no specific *mens rea* requirement is stated. In such cases, the *mens rea* requirement is understood: the legislature is not expected to make reference to it in all cases, particularly when those offenses that are oriented toward social betterment rather than the punishment of a serious offense are involved.

Concurrence in Time

For those crimes whose definitions require both wrongful act and a guilty mind, no crime is committed unless the mental state concurs with the act. Take, for example, John Doe, who decides to visit his next-door neighbor, Mary Roe. Because they are good friends, John Doe simply opens the front door and enters Mary's home with completely innocent intentions. While inside, John decides to steal Mary's laptop computer. Has John committed the crime of burglary? No, because by most definitions of the crime of burglary, John would have had to enter Mary's house by means of force, fraud, or threats with the "intention aforehand" of committing a felony or crime of theft.

Harm (an Injury or Result)

To be constitutional, a criminal statute must have been enacted to protect the public health, the public morals, or the public safety. If no real relation between the criminal statute and the protection of the public from some harm or injury can be determined, the statute may be declared unconstitutional. Such would be the case if a statute were enacted making a physical state, such as being overweight or short or tall, a criminal offense. As an element of crime, and possibly the most important element, harm or injury resulting from a criminal act determines the statutory penalties affixed to the specific violation.

Causation

An essential element of every crime is that a causal relationship exists between the offender's conduct and the harm or injury sustained by another. In the usual sense, demonstrating this connection causes little difficulty. Take, for example, Mary Roe, who has returned home and found her laptop computer stolen. Questioning of her neighbors reveals that John Doe was seen leaving her house with the laptop. Taking her pistol, she goes to John's house with the intent to kill him and does in fact shoot and kill him. Mary not only legally caused John's death but also intended to do so, and therefore is guilty of murder. The definition of the crime of murder specifies that the defendant's act must cause a death.

These basic premises underlie American criminal law and so have been extremely important in shaping the development of the substantive law of crimes. Although the definition of each crime stipulates a different combination of act and state of mind, each major crime has two elements, a *criminal act* and *criminal intent*. Neither alone is sufficient to constitute a major crime; the two must concur to establish criminal responsibility.

The categories of crimes that are punishable without *mens rea* (guilty mind) involve for the most part violations of regulatory statutes punishable by light monetary fines rather than imprisonment. Many of these violations are such that establishing the defendant's state of mind at the time of the violation is particularly difficult, if not impossible. Regulatory offenses such as traffic violations or violations of motor vehicle laws fall into this category. Even if intent could be established, the vast number of people who commit such violations would thwart any efforts at enforcement.

LEGAL ANALYSIS

When an individual is charged with a crime, the prosecution carries the burden of proof as to each and every element of the offense charged. This means that the prosecutor handling the case must first engage in what is known as legal analysis, the application of rules of law to facts, to be sure that the crime charged fits the facts of the case. This analysis begins with a discussion of the *elements* of the crime that are being applied to the offender. An element is a portion of a crime that is identified as one of the preconditions of the applicability of the entire crime and that can be conveniently analyzed separately from the other elements of the crime such as the requirement of a certain mental state *(mens rea*).

Take, for example, the analysis of the following typical municipal ordinance that makes smok-

ing in a public place a "criminal" offense.

> *Sec. 21-237 (a). A person commits an offense if he is knowingly or intentionally in possession of a burning tobacco product or smokes tobacco in any public place.*

Step one is to break the rule into its elements. This is accomplished by asking what facts, conditions, or preconditions must exist before an individual can be considered to have committed this "class e" misdemeanor offense. The answer to this question reveals the elements unique to this specific crime. A person must

1. knowingly or intentionally
2. possess
3. burning tobacco product or smoke tobacco in
4. any public place.

Basically, sec. 21-237(a) has four elements. Facts in support of all four elements must exist before an individual can be considered to have violated this city ordinance. As each element is analyzed more closely, a number of logical questions come to mind. How does the criminal law define "knowingly" or "intentionally?" Does knowingly and intentionally mean that the defendant would have to have first seen and then ignored a posted no-smoking sign? What about "possession?" If someone handed the defendant a lit cigarette for a quick drag would that single act be sufficient to constitute possession? What is a "tobacco product?" Does a homemade cigarette qualify or must it be manufactured? What about "smoke tobacco?" Does the mere act of lighting a cigarette for another constitute smoking tobacco? More importantly, what constitutes a "public place?" Is a public place a shopping mall, a wrestling arena, or a parking lot?

Once a criminal law has been broken down into its elements, the structure of legal analysis is readily apparent. Each element becomes a separate section of the analysis for the prosecutor and defense attorney, and each element represents a separate legal issue that must be carefully researched by reading case law. At the time of trial the prosecutor must introduce evidence in support of each element of this offense. If the prosecutor fails to do so, a jury will find a defendant not guilty. Should the prosecutor and defense attorney disagree as to the definition of a "public place," the presiding trial judge will have the final word subject to any appeal to a higher court for further clarification.

PURPOSE OF CRIMINAL LAW

If the purpose of law is the regulation of an individual's conduct as it relates to society as a whole or in part, then from this general purpose originates the primary objective of criminal law: the prevention of certain specified undesirable conduct with resulting protection for various interests of society. Because these results are achieved by punishing the criminal for infractions of the criminal law whenever they occur, some authors have gone so far as to say that the purpose of criminal law is to punish.

The purpose of punishment, however, is not so clearly defined. Various theories have been advanced: prevention, restraint, rehabilitation, deterrence, education, and retribution—any one or all of which may secure the aims of criminal law. Which one of these theories or what combination thereof best achieves the goal of a minimum standard of conduct on the part of each individual in society has yet to be determined.

Deterrence

The advocates of this theory feel that if a potential criminal violator is aware of punishment, such as prison, for a crime, he or she will not wish to endure the punishment and therefore will not commit the crime. This theory of general deterrence is based on the belief that the application of criminal law to some will reduce the probability those crimes will be committed by others. In theory, the more one resembles the person who has been punished the more effective the deterrent example becomes.

Although this theory of punishment goes back to the early 18th-century work of Bentham and Beccaria, the founding fathers of the classical school of criminological thought, little statistical or experimental evidence was on hand to prove or disprove theories about deterrence until the mid-1970s.xl In part, the lack of research can be explained by the reluctance of criminologists to accept the basic psychological assumption of deterrence—that individuals calculate the pains and pleasures of crime and pursue the crime if the latter outweigh the former. To accept such a premise allows little or no possibility of further investigation into the causes of crime.

Rehabilitation

Specific deterrence, unlike general deterrence, focuses on the rehabilitative treatment of offenders, those individuals who have already committed crimes. *Rehabilitation* theory emphasizes that criminal behavior is the product of causes that can be identified and treated through the administration of criminal law. This theory of punishment assumes that the candidate for rehabilitation is capable of recovery, has a mind capable of guiding behavior, and is amenable to education.

As early as 1949, the United States Supreme Court endorsed rehabilitation stating "Retribution is no longer the dominant objective of criminal law. Reformation and rehabilitation of offenders have become important goals of criminal jurisprudence."[41]

Although it was the dominant theory of punishment in corrections for years, rehabilitation suffered a severe setback in the late 1970s after the publication of two studies summarizing evidence that efforts to rehabilitate offenders do not work.[42] At present, views regarding rehabilitation vary widely; however, a recent study illustrates the value society continues to place on rehabilitation programs.[43]

Restraint

This theory, also called incapacitation, is based on the belief that society may protect itself from persons it deems dangerous either by executing them or by imprisoning them for life. With the decline of rehabilitation as the dominant theory of punishment, support for the warehousing of criminals has gained renewed popularity. Recent evidence that a disproportionately large amount of crime is committed by a relatively small number of criminals has caused new emphasis to be placed on identifying these career criminals and removing them from the streets for as lengthy a period as possible. This is known as selective incapacitation.[44] Consistent with this theory is the "three strikes, you're out" rule. This is a sentencing enhancement that was created in 1994 under the Violent Crime Control and Law Enforcement Act and provides a life sentence to repeat offenders for their third conviction. The sentence is given to those that have met the criteria of committing three serious crimes. The law was created to curb the growing violent crime rates in the country at that time.

Some states have also enacted similar rules requiring a life sentence for the third felony offense.

Retribution

Retribution is by far the oldest theory of punishment. Society imposes punishment on criminals to obtain revenge for the harm one person has inflicted on another person or on his or her property. Retribution constitutes a moral demand that a criminal act not go unpunished and that the harm a person does be returned in equal degree. This theory of punishment requires a balance between the wrong that was committed and the penalty to be imposed on the wrongdoer. It is this balancing principle underlying retribution that distinguishes it from revenge.

Retribution is by far the leading theory of punishment in the nation today. Disenchantment with the failure of rehabilitation to slow the rate of recidivism has led the criminal justice system to shift its focus from concern with the criminal to concern with the nature of the crime the criminal has committed and the fate of the victim. By resurrecting retribution as a major reason to impose prison terms, sentencing guidelines now focus on the seriousness of the offense and emphasize promoting respect for the law and just punishment for the offense.

Education

Criminal law is both symbolic and practical. Its enforcement, from arrest to final punishment, teaches the general public what conduct is or is not socially acceptable. With the enforcement of the law, the moral requirement that a criminal act not go unpunished is reinforced.

Many programs exist within today's correctional systems that focus on preparing the offender for life outside of prison. For example, an inmate can obtain a GED or participate in vocational education programs.

Restitution

Restitution involves righting a wrong by restoring the conditions that were changed by the criminal act to their original state. Restitution as a form of punishment is generally associated with property-related offenses. The wrongdoer must replace at full value the property that has been stolen or damaged. Restitution programs are particularly popular where juveniles are involved.[45]

CLASSIFICATION OF CRIMES

Crimes can be classified in several ways: the social harm caused; the grade of the offense, whether *mala in se* (wrong in themselves) or *mala prohibita* (wrong because prohibited); crimes of infamy; crimes of moral turpitude; common-law crimes; or statutory crimes. Regardless of the classification, however, crimes are always offenses against the state and are always prosecuted by the state (at the federal, state, or local levels).

Crimes of Social Harm

The following listing of the eight major offenses of the Federal Bureau of Investigation's *Uniform Crime Reports* [46] shows that crimes are classified according to the protections against

harm the criminal law affords to the various interests of society: protection from physical harm to the person (1 through 4), and protection of property from loss, destruction, or damage (5 through 8).

1. murder and non-negligent manslaughter
2. forcible rape
3. robbery
4. aggravated assault
5. burglary
6. larceny-theft
7. motor vehicle theft
8. arson

Felonies and Misdemeanors

This is the most important classification of crimes currently in use in the United States. A *felony* is generally any crime that is punishable by death or imprisonment in a penitentiary, whether state or federal. Any other crime is a *misdemeanor*, normally punishable by fine or imprisonment in a local jail. Some penal codes distinguish between felonies and misdemeanors according to the length of sentence imposed, a felony being considered a crime punishable by imprisonment for more than one year or by death.

The importance of this distinction for the criminal offender is threefold. First, as far as the substantive criminal law is concerned, certain crimes such as burglary require as an element of the offense the intent to commit a felony. Hence the intent to commit a misdemeanor will not constitute the crime of burglary. Second, this distinction is important to the offender in terms of criminal procedure because a court's jurisdiction over a crime is determined by whether the crime committed is a felony or a misdemeanor. Third, legal consequences will be affected by this distinction, and will generally be different for a convicted felon than for an individual who has sustained a misdemeanor conviction. A felony conviction may constitute grounds for loss of professional license (medical, legal, and so forth), divorce, loss of civil rights, and numerous other penalties.

Crimes *Mala in Se* and *Mala Prohibita*

These classifications of offenses (one of the most ancient) can be traced back to the common law. A crime *mala in se* at common law was considered to be an offense that was inherently wrong or inherently evil. A crime *mala prohibita* is an offense that is wrong only because it is prohibited by legislation. Most regulatory crimes such as traffic violations fall into the second category, whereas felony offenses are usually crimes *mala in se*. One author has suggested that determining whether intent is an element of the offense can make the distinction between these classifications of offenses.[47] If no criminal intent is required, as in the case of regulatory crime (traffic offenses), then the classification is *mala prohibita*. Where intent is specified as part of the definition of the crime, as it is for burglary, the classification is *mala in se*.

Infamous and Noninfamous Crimes

Under the early common law, certain crimes were considered *infamous* because of the shameful status that resulted after conviction for the offense. Initially, infamous crimes included treason, all felonies, offenses involving obstruction

of the administration of justice, and any crime included within the scope of the Roman term *crimen fals*, that is, all crimes involving deceit or falsification. In this country, before the adoption of the Constitution, two kinds of infamy were recognized, one based on the mode of punishment to be inflicted, and the other related to the future credibility of the defendant. The accepted modern view is that a crime punishable by imprisonment for more than one year in a state penitentiary is an *infamous crime*.

Crimes of Moral Turpitude

The distinction between crimes that are of *moral turpitude* and those that are not is similar to the distinction between crimes *mala in se* and crimes *mala prohibita*. Moral turpitude can be defined as an act that goes against the contemporary standards of conduct and decency, a base, depraved act that shocks the conscience of society. Most theft crimes, such as grand larceny and embezzlement, as well as such criminal acts as bigamy and rape, are generally held to involve moral turpitude. Other crimes, such as fornication and adultery, are crimes of moral turpitude in some states but not in others. The importance of this distinction to the criminal offender rests in the extraordinary legal consequences that result from conviction for a crime of moral turpitude. These consequences are similar to those following a felony conviction—disbarment, loss of professional license, and so forth.

Common-Law Crimes and Statutory Crimes

The distinction between common-law and statutory crimes was touched on briefly during the discussion of the various divisions of law. Under the common law, many of the definitions of criminal conduct were developed from specific cases. As the power of the legislative branches developed, many of these common-law crimes were redefined by statute, and other definitions of crimes were added. Today, all crimes must be defined by statutory law in order to be considered constitutional.

Major Crimes and Petty Offenses

The final classification to be touched on here involves the distinction between major crimes and petty offenses. A felony is a major crime, while a misdemeanor may be either a major crime or a petty offense according to the punishment allowable. If the criminal violation is deemed a petty offense, then in most jurisdictions a magistrate, through summary procedure, tries the offender. In most states this procedure does not involve the processes peculiar to the trial for a major crime (preliminary hearings, indictments, trial by jury, and so on).

CHAPTER SUMMARY

This chapter has briefly explored the relationship between law and society, with particular emphasis on the development of the substantive law of crimes and its nature and function. Criminal law has been described as an important instrument of social control by which organized society defines certain human conduct as criminal and attempts to prohibit or restrain such conduct by a system of procedures and penalties. If a crime is committed, a suspect is charged, and criminal prosecution will begin, governed by

the appropriate code of criminal procedure. The operational side of criminal law, greatly influenced by the doctrine of *stare decisis*, determines the nature and extent of criminal liability for each offender.

Substantive law refers to the articulated rules of law, and procedural law refers to how the laws are enforced. Civil law is concerned with torts and disputes between individuals. Criminal law pertains to illegal acts. Statutory law is created by legislation, and case law is derived from prior decisions. Original sources of law include the Constitution, statutes, and case law. Secondary sources of law include legal texts, law reviews, commentaries, and similar material.

In early society, crime was controlled through private vengeance. Over time, responsibility gradually shifted to the community. Ancient societies such as Greece and Rome developed courts and codification of laws. The common law had its roots in medieval England and was brought to America by early colonists. The law that developed in America reflected the concerns and morality of the developing country.

The basic premises of criminal law include legality, act, mental state, concurrence, harm, and causation. The principle of legality means that there is no crime without law, no punishment without law, and no crime without punishment. No crime can be committed without a guilty act by either commission or omission. The mental state must be such that there is a wrongful or guilty purpose in mind. The guilty act and the mental state must concur in time and an injury or harm must result. Causation requires that a relationship exists between the offender's act and the harm of injury.

The purposes and objects of the law include prevention, restraint, rehabilitation, education, and retribution. All have the general purpose of preventing undesirable conduct.

Several classifications of crime exist. Felonies generally are serious crimes punishable by imprisonment for more than one year, whereas misdemeanors are less serious crimes punishable by imprisonment up to one year. *Mala in se* crimes are wrong in themselves, and *mala prohibita* crimes are wrong because they are prohibited. Infamous and noninfamous crimes, major crimes and petty crimes—both are similar to felonies and misdemeanors, respectively.

Key Terms

actus reus
case law
civil law
commission and omission
common law
concurrence in time
crimen fals
criminal intent
criminal law
damages
Decembri
decriminalization
deterrence
ex post facto
felony
harm (an injury or result)
infamous crime
mala in se
mala prohibita
mens rea
misdemeanor
moral turpitude
norms
original source of law
overcriminalization

penal codes
procedural law
rehabilitation
remedy
restitution
restraint or incapacitation
retribution
role
rule of law
secondary source of law
stare decisis
status
statutory law
substantive law
torts

Discussion Questions

1. Can society exist without law?

2. What are the major differences between common law and statutory law?

3. If police officers could maintain order without regard to legality, their short-run difficulties would be considerably diminished.

4. Discuss the merits of this argument.

5. It has been said that swift and certain punishment will deter crimes. Is this a true statement? What is swift and certain punishment?

6. Should a law be general or specific? What are the dangers inherent in each approach?

7. Do all segments of society have an equal opportunity to have their values expressed in law?

8. What steps must be taken to reverse a trend toward overcriminalization?

9. How does the substantive law of crimes differ from the procedural criminal law?

10. Have the principles that have traditionally guided the formation of criminal law been weakened or discarded in the 21st century? Give an example.

11. In your opinion, is the criminal justice system or criminal law expected to achieve too many varied objectives? What objective would you eliminate if you had a chance?

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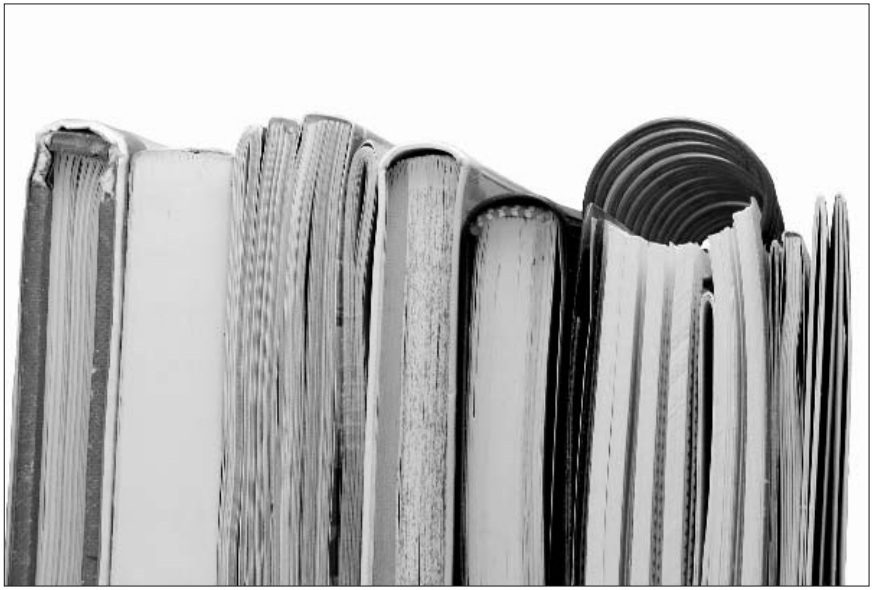

CHAPTER TWO
COUNTING CRIME

Purpose: To review the systems for assessing the magnitude and trends in crime in the United States.

In Chapter 1 we described criminal law as one of a number of instruments of social control alongside that of the family, church, school, and so on. When we speak of the success or failure of criminal law in achieving the many social control objectives we have assigned to it, we generally refer to the amount of crime in the United States and attempt comparisons with previous years to check the performance of the agencies of criminal justice in administering the criminal law and its objectives. For a report card we rely on an analysis of crime in the United States provided by the Federal Bureau of Investigation (FBI) through its annual *Uniform Crime Reports*. This reporting system, which has been the primary crime reporting system in the United States since 1930, will serve as the focal point of our discussion of crime in America.

UNIFORM CRIME REPORTS (UCR)

Once a year, generally in June, virtually every newspaper in the United States carries headlines announcing the annual crime statistics for their respective cities as reported by the FBI. It is not the most popular time of year for chiefs of police, for they are called on by members of the press and local government officials to explain why crime continues to increase in their jurisdictions. Explanations are particularly difficult if during the previous year the police department was allocated additional personnel and equipment to combat rising crime rates but no appreciable decrease in crime has materialized, or, even worse, crime actually increased. When under this type of pressure, chiefs of police, local officials, and members of the press corps each seek to explain the significance, value, and accuracy of the annual *Uniform Crime Reports* from their respective vantage points. Considering that this reporting system continues to serve as the primary vehicle for our discussions on the magnitude of crime in America and is subject to so many varied interpretations of its accuracy and value, every student of criminal justice

should gain a working knowledge of the *Uniform Crime Reports*.

STRUCTURE OF THE UCR PROGRAM

The Uniform Crime Reporting Program of the Federal Bureau of Investigation has provided more than 75 years of service to America's law enforcement community. Through reports issued by the FBI, Americans have been exposed to more data on the problem of crime in America than any other social problem in the nation's history. Although the Uniform Crime Reporting Program continues to be heavily criticized for the information that it does not report, the original goal behind creating the system, the desire of the International Association of Chiefs of Police (IACP) to have a viable system of uniform police statistics, was accomplished. In fact, the original reporting format designed by IACP's Committee on Uniform Crime Records is still in use today. This format is based on the collection of data on criminal incidents that come to the attention of law enforcement agencies through citizen reports or through direct observation by law enforcement units (more commonly referred to as "crimes known to the police").

Since offenses reported to law enforcement were the most readily available crime information, the Committee concluded that a survey of local agencies to obtain data on crimes brought to their attention was the appropriate manner to collect the data. Realizing that not all crimes are reported, the Committee evaluated various offenses on the basis of their seriousness, frequency of occurrence, pervasiveness in all geographical areas of the country, and likelihood of being reported to law enforcement. After studying state criminal codes and making an evaluation of the record keeping practices in use, the Committee in 1929 completed a plan for crime reporting which became the foundation of the UCR program.

In 1960, seven offenses were chosen to serve as an index for examining fluctuations and trends in the overall volume and rate of crime. Formerly known as the Crime Index, these offenses included the violent crimes of murder and non-negligent manslaughter, forcible rape, robbery, and aggravated assault, and the property crimes of burglary, larceny-theft, and motor vehicle theft. In 1979, arson was added as the eighth Index offense.

A Data Providers' Advisory Policy Board was established in 1988 to assist with UCR issues. In 1993, the board was combined with the National Crime Information Center Advisory Policy Board forming a single Advisory Policy Board (APB).

The APB approved the discontinued use of the Crime Index in the UCR Program in its publications in 2004. The FBI was then directed by the APB to publish a violent crime total and a property crime total until a more informative index is developed.

The Crime Index was not a true indicator of the degree of criminality because it was always driven upward by the offense with the highest number, typically larceny-theft. The sheer volume of those offenses overshadowed more serious but less frequently committed offenses, creating a bias against a jurisdiction with a high number of larceny-thefts but a low number of other serious crimes such as murder and forcible rape.[1]