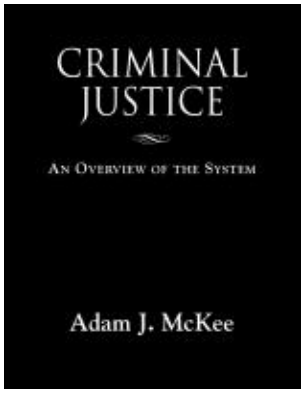
CRIMINAL JUSTICE

An Overview of the System

Adam J. McKee



This book provides an overview of the criminal justice system of the United States. It is intended to provide the introductory student a concise yet balanced introduction to the workings of the legal system as well as policing, courts, corrections, and juvenile justice. Six chapters, each divided into five sections, provide the reader a consistent, comfortable format as well as providing the instructor with a consistent framework for ease of instructional design.

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Chapter 1: The Criminal Justice System

One of the most important advantages to living in a civil society is the security that it provides. In contemporary society, the role of ensuring security is relegated to government. That is, citizens have a reasonable expectation that society, as a collective, will protect us from rogue members. In giving power to government to perform this critical security function, we create the potential for the abuse of that power. In the American system of criminal justice, we see two competing and equally important ideas: We demand both security and freedom from governmental abuse of power. These freedoms are collectively known as **individual rights** or **civil liberties**. These civil rights are woven into the very fabric of our government at both the state and federal level.

In this context, we can view the **criminal justice system** is a collection of rules and people (usually in the form of public agencies) working together to protect the public from harm. These elements are commonly divided into three broad categories: police, courts, and corrections. These three elements have the same basic function: To respond to crime. A **crime** is a violation of some criminal law with no legal justification or excuse. Local, state, and federal governments can make criminal laws. The vast majority of criminal laws are a matter of state **statutes**.

Saying that the criminal justice system has the purpose of "responding to crime" results in a dramatically oversimplified view of how the system works. Every agency within the criminal justice system will agree that it responds to crime, but we find profoundly different mission statements, goals, objectives, and methods among these myriad agencies. A major reason for these differences is that the public has several conflicting definitions of the concept of **justice**.

Section 1.1: Major Components of the Criminal Justice System

Learning Objectives

After completing this section, you should be able to:

1.1(a) Describe the differences between the individual rights and public order perspective.
1.1(b) Describe the need for a system of order maintenance within society and explain the role of law within that system.
1.1(c) Explain the structure of the criminal justice system in terms of the three major components using the vocabulary of criminal justice.
1.1(d) Understand the goals of the criminal justice system.
1.1(e) Describe how justice can be defined from various perspectives.

Introduction

In reality, there is no one criminal justice system in the United States. There are many similar systems. Each state has its criminal justice system, and the Federal government has another still. This section considers how these various systems are composed by looking at the major components common to them all. Traditionally, the criminal justice system can be divided into three major components: Police, Courts, and Corrections.

It may seem that there is no real common thread to this system. In the United States, the thing that binds all of the components together and regulates them is the **rule of law**. Philosophically, the rule of law is the idea that every person is subject to the law, even those that make the law, interpret the law, and enforce the law. The most potent law in the United States is the Constitution of the United States. This body of laws provides all Americans with civil liberties that the government cannot violate. If a state law or federal law violates any of these protections, then the courts will declare the law void. It is up to the appellate courts, most notably the Supreme Court, to interpret these laws and determine the exact nature and scope of specific civil liberties in the United States. Further, if an agent of the state or federal government violates a person's rights, that person has remedies available. For example, citizens can sue government employees that violate their rights under Section 1983 of the **United States Code**. An important remedy in criminal justice is the **exclusionary rule**. The exclusionary rule was established by the Supreme Court to prevent police misconduct. The rule states that illegally obtained evidence (evidence obtained in violation of someone's constitutional rights) cannot be admitted as evidence in court.

Police

People tend to use the word **police** generically to indicate those individuals with law enforcement responsibility. The majority of these are municipal police officers, but there are many **sheriffs' deputies** as well as state and federal agents that do not technically fit under the umbrella term "police." It is important to realize that enforcing the law is only a small fraction of what the police do every day. They maintain order and provide many services to the communities they serve. The police also have the responsibility of investigating crimes, collecting evidence, and work with prosecutors to obtain convictions in court.

The police are often called the "gatekeepers of the criminal justice system." This description is accurate because entry into the system requires formal action on the part of law enforcement. Police officers have incredible decision-making authority when dealing with citizens and suspects. An officer can choose to ignore an offense, issue a verbal warning, issue a written warning, issue a citation, or formally

arrest the person. Of course, the seriousness of the crime plays a major role in how the police exercise **discretion**. An officer would not ignore or issue a citation to a person engaged in a serious felony crime.

The duties of police officers can be very general in the case of a patrol officer, or they can be very specialized, for example, in the case of a homicide detective. The level of specialization depends largely on the size of the agency where the officer works. Large, urban police departments tend to have more resources, more officers, and a higher degree of specialization. Despite this fact, the backbone of policing is the patrol division, and patrol is always a generalist function. The successful patrol officer is a jack-of-all-trades.

Courts

When law enforcement and prosecutors accuse a person of violating a criminal law, it is up to the courts to determine if the person did indeed violate the law. If so, it is up to the court prescribe the appropriate punishment (within the scope of the sentencing laws in that court's jurisdiction). Because the American legal system is **adversarial** in nature, there must always be two teams in any court case. In a criminal matter, a lawyer known as the **prosecutor** presents the government's case. A major goal of the prosecutor is to see the **defendant** found guilty of the alleged crime. To use a sports analogy, the prosecutor is the offense. The **defense attorney** has the job of trying to show that the defendant is not guilty, or at least that defendants should not be accountable for their actions for some legal reason. To continue the sports analogy, the **judge** serves as a referee, making sure that both sides diligently follow the rules of the "game." The **jury** is tasked with watching the game and deciding (at the end) who the winner is. In the adult criminal justice system, all cases are adversarial in nature. This point will prove to be important repeatedly as the workings of the criminal justice system are examined.

In a jury trial, the jury serves as the **finder of fact**. The term *finder of fact* in this case means that the jury decides whether the defendant is innocent or guilty. In serious cases, the defendant has a right to **trial by jury**. It is allowable, however, that the defendant consent to a bench trial. A bench trial is a trial where the judge takes on the role of the jury as finder of fact.

The term **courts**, used as a general heading, covers a wide array of professionals. It includes defense attorneys (both public servants and private contractors), prosecuting attorneys, judges, and court staff.

Corrections

Corrections is another umbrella term that is difficult to define because it encompasses so many diverse criminal justice activities. Corrections can include **probation**, **parole**, jail, prison, and myriad community-based sanctions that are becoming more and more popular. Another problem with accurately defining corrections is a general disagreement about the philosophy of **incarceration**. Does society send people to prison *as* punishment, or *for* punishment? Do we expect prisons to punish or rehabilitate? Most people can agree on one thing: The public expects correctional institutions to ensure the public safety.

A discussion of corrections usually begins with **jails**. Jails are usually operated at the local level, most often under the leadership of a **county sheriff**. Jails hold several different classifications of prisoners. Jails are most commonly thought of as holding individuals that have been arrested and are awaiting a first appearance in court. Legally, these individuals are presumed innocent because they have not been proven guilty. Other jail inmates have been convicted of relatively minor offenses (misdemeanors) and (in most states) are serving sentences of less than one year. Other prisoners may have been convicted of serious offenses, and are housed in the local jail awaiting transfer to a state prison.

Persons convicted of serious crimes can be sentenced to a **prison** term. A prison is generally larger, more secure, and provides more services than a jail. The reason for these extra services is that prisons are

designed for long sentences (relative to jail sentences). Prisons are most often run at the state level of government, but there are also many federal prisons.

Defining Justice

One of the overarching goals that brings the components of the criminal justice system together is that each is designed (in some way) to promote justice. Everyone has an idea of what **justice** is, but pinning down a definition that will be widely agreed upon proves to be a challenge. There are several different ways of looking at the idea. One way to view justice is in terms of ***equality***. In economic language, equality means that everyone gets the same amount, regardless of what they "put in." Another perspective is to view justice in terms of ***equity***. When viewed this way, it means that people get what they deserve. In terms of economic reward, those "just deserts" are based on how hard the person works. When it comes to harms done to society, many feel that "just deserts" means that criminal punishments should be in proportion to the harm done. This concept of **just deserts** in criminal justice has been referred to as **retributive justice**. The idea of wrongdoers being deserving of repayment in kind is known by the Latin phrase ***Lex Talionis***, or the law of retribution. In its purest form, *lex talionis* is the Biblical doctrine of "an eye for an eye, a tooth for a tooth." In today's criminal justice system, the idea of retribution takes on the meaning of variable lengths of prison sentences.

Both of the above definitions focus on the outcome of an act to determine if it was just. Another way to look at the idea of justice is to examine the process. In other words, an act is just if it was done using a fair process. Justice viewed in terms of fair process is often referred to as **procedural justice**. This idea leaves room for debate as to what sort of processes are to be considered fair. Accessibility and predictability are common criteria. In the United States, the idea of procedural justice is closely tied to the idea of **due process**. In a philosophical sense, due process means that agents of the criminal justice system conduct criminal proceedings in a "fundamentally fair" way. In a practical sense, due process means that the state must respect all legal rights of accused persons. What criminal justice procedures are required under due process is a dynamic body of rules. These rules are most often judicial determinations of what exactly the Constitution means in practice. The idea of due process is represented throughout the **Bill of Rights**, as well as being specifically guaranteed by both the **Fifth Amendment** (applies to the federal government) and the **Fourteenth Amendment** (applies to state government). Throughout this text, these fundamental civil liberties will be discussed in the context of the different elements of the criminal justice system. Police, courts, and corrections must all observe the legal requirements of due process.

Amendment V

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

Note that the Fifth Amendment is constructed in the form of a very, very long sentence. Many different subjects are addressed in that sentence. This type of sentence construction is common in the Constitution. When lawyers and legal scholars want to point out a particular phrase within that long sentence, they refer

to it as a clause. The text specifying that no person shall "**be deprived of life, liberty, or property, without due process of law"** is known as the **due process clause.** Some fundamental liberties are expressed in the constitution in this manner. Other rights, however, are not explicitly stated in the constitution. The due process clause is of critical importance to civil liberties because it stands in as a proxy for many other rights. The right to privacy, for example, is never specifically mentioned in the Constitution. Such a right exists, according to the Supreme Court, because it is a necessary element of fundamental fairness in the criminal justice system.

Key Terms

Adversarial (legal system), Bench Trial, Bill of Rights, Civil Liberties, Corrections, Courts, Crime, Criminal Justice System, Defendant, Defense Attorney, Discretion, Due Process, Due Process Clause, Equality (in Justice), Equity (in Justice), Exclusionary Rule, Fifth Amendment, Finder of Fact, Fourteenth Amendment, Incarceration, Individual Rights, Jail, Judge, Jury, Just Deserts, Justice, Lex Talionis, Parole, Police, Prison, Probation, Procedural Justice, Prosecutor, Retributive Justice, Rule of Law, Sheriff, Sheriff's Deputies, Statute, Trial by Jury, United States Code

Section 1.2: Roles, Objectives, and Limits in Criminal Justice

Learning Objectives

After Completing this section, you should be able to:

1.2(a) Describe the role of each of the three branches of government in shaping the criminal justice system.
1.2(b) Discuss the critical role of the Constitution of the United States in limiting criminal justice policy.
1.2(c) Compare and contrast the common objectives of the criminal justice system.
1.2(d) Describe the basic positions of both sides of the "Nonsystem Argument."
1.2(e) Explain the importance of rules and discretion in the operation of the criminal justice system.

Introduction

Because the criminal justice system represents a function of the "state," each of the **Three Branches of Government** has a role to play. Each branch has different responsibilities; thus, each branch depends on the other to function properly. Keep in mind that each of these three branches of government exists on the federal, state, and local level. Each of these levels of government dominates some aspect of the criminal justice system. Law enforcement is primary a local government function, as are jail operations. Making criminal laws and operating corrections agencies is primarily a state function. The federal government duplicates all criminal justice functions on a national scale. Ultimately, prisons, jails, and corrections programs can be operated at all levels of government. In practice, one level of government tends to dominate each particular function within the criminal justice system.

The Role of the Legislature

The term **legislature** refers to lawmaking assemblies such as the **Congress of the United States** or the law making bodies of all the states. Legislatures have many important functions in the criminal justice system. Perhaps the most direct function is that the legislature determines what acts are crimes and what the punishment is for particular crimes. They do this by enacting statutes. Official versions of the law that are organized by subject are called **codes**. Thus, when we refer to the **criminal code** (also called the **penal code**) we are referring to a collection of statutes that define crimes. In the **dual federalist** criminal justice system of the United States, state legislatures are the source of the bulk of criminal laws. Another crucial role of the legislature is to provide funding for criminal justice agencies and programs. Without funding, criminal justice activities would halt.

The Role of the Judiciary

The role of the **judiciary** in criminal justice is complicated by the **hierarchical** nature of the court systems. This hierarchy can be simplified by dividing courts into two major categories: **trial courts** and **appellate courts**. Trial courts adjudicate the guilt of people charged with crimes and impose sentence on those determined to be guilty. Hollywood leads to the conclusion that most criminal cases result in a trial by jury. This is substantially incorrect. The fact is that most criminal defendants who do not have their charges dropped prior to being formally charged will plead guilty. Most of those guilty pleas are a result of **plea bargaining**, an unglamorous but necessary process that takes place largely out of the public view.

Appellate courts are different in that they do not conduct criminal trials. Rather, they hear complaints raised by people who were not satisfied with their treatment by the trial court or some other aspect of the criminal justice system. The appellate courts can hear these complaints because they have the power of **judicial review**. Judicial review means that the appellate courts can review a law made by the legislature and determine if it meets constitutional standards. At the federal level, this means the standards set forth in the **Constitution** of the United States. At the state level, state appellate courts can determine if state legislatures have acted within the limits of that state's particular constitution. If the high court determines that a law is **unconstitutional**, then the law becomes void.

Appeals courts also have the power to review the actions of government employees, such as law enforcement officers and correctional officers. The most important appellate court in the United States is the **United States Supreme Court**. The day-to-day activities of police officers, for example, are heavily influenced by Supreme Court **decisions** dictating how the police must treat suspects and evidence. Keep in mind that the United States has **dual court systems** due to the structure of the American government. In a later section, the differences between the state and federal court system will be examined.

The Role of the Executive

The **executive branch** of government includes the offices of the president of the United States, governors of the fifty states, and the mayors of America's many towns and cities. Often these individuals are directly responsible for many appointments within the criminal justice system. Mayors appoint chiefs of police in many towns and cities. Governors appoint law enforcement heads as well as correctional leadership. The president appoints federal judges, including those who sit on the Supreme Court.

The executive has a key role to play in setting criminal justice agendas and galvanizing public opinion. A theme that permeates any discussion of the criminal justice system is the use and misuse of discretion. The term *discretion* is used to indicate the power that agents of the criminal justice system have to make decisions based on personal judgments. At this point in the text, the discussion centers on discretion at the highest levels of government, and how that discretion influences the criminal justice system. In later sections, the discussion will turn to how the use of discretion by officers in the field influence the operation of the system and impact the lives of citizens.

Common Objectives

The **Bureau of Justice Statistics** (1993) has identified three common goals of every element of the criminal justice system. These are efficiency, effectiveness, and fairness. **Efficiency** means economically applying available resources to accomplish statutory goals as well as to improve public safety. **Effectiveness** refers to carrying out justice system activities with proper regard for equity, proportionality, constitutional protections afforded defendants and convicted offenders, and public safety. **Fairness** refers to justice issues such as assuring equal treatment and handling of like offenders and giving equal weight to legally relevant factors in sentencing. Fairness is of such great importance because it is enshrined in the Constitution of the United States under the catchall phrase *due process*. Note that the Supreme Court has focused on **procedural due process** as the ultimate measure of justice in the United States. That is, the system of concerned with everyone being treated the same as they are processed through the system. More often than not, the fairness of individual outcomes is of little concern.

The Constitutional Framework

No matter where you live in the United States, you are protected by two independent criminal justice systems. There is always the federal system as well as the system of the state. This means that at both the state and federal level we find those who enforce the law, those who adjudicate the law, and those who punish and rehabilitate offenders. While these broad goals are the same, the particulars are quite different.

The system is further complicated by the fact that most law enforcement in the United States is done on a local level. Thus, local officers are enforcing state laws. Offenders sentenced to a period of incarceration can serve their time in local jails or state run penitentiaries. The federal system is less convoluted in that federal agents investigate federal crimes, and federal prosecutors take those cases to federal courts.

By far, state and local government takes on the largest share of the criminal justice burden. As citizens, the local police departments and sheriff's departments that serve us are whom we depend on to protect us from criminal harms.

The Nonsystem Argument

One of the most enduring debates about the criminal justice system of the United States is whether it is a **system** at all. The term *system* suggests components that work together to achieve some overarching goal. Critics argue that no such thing happens in American criminal justice. They argue that the police, courts, and corrections agencies act independently of each other with different financial resources and different goals and objectives. Many critics see a failure to organize around a central purpose, and thus we find that the criminal justice system is no system at all. This position is known as the **Nonsystem Argument**.

Rules

One common aspect of all criminal justice systems within the United States is the abundance of rules that govern criminal justice activities. These rules are hierarchical. The most important and enduring rules that must be followed by agents of the criminal justice system are those enshrined in the Constitution of the United States. Most of the safeguards of American civil liberties against intrusion by the government are contained in the Bill of Rights. The *Bill of Rights* is the first ten Amendments to the Constitution.

After the federal constitution and the constitution of the states comes federal and state statutes. The collection of federal statutes organized by topic is called the *United States Code*. States have a criminal codes as well. There are also court rules established by the high courts that bind the lower courts as well as agents of the criminal justice system. At the federal level, these are known as the ***Federal Rules of Criminal Procedure***. In addition to these various laws, there are agency rules and regulations that agents of the criminal justice system must follow.

Discretion

Discretion refers to the authority the public gives agents of the criminal justice system to make decisions based on their own professional judgment. Discretion is necessary because formal rules cannot take into account every contingency criminal justice professionals encounter in practice. To function effectively, criminal justice professionals must make judgment calls. Discretion is called for when a police officer makes a decision as to whether to stop a motorist, question a suspicious person, issue a citation, make an arrest, or use deadly force. Prosecutors use discretionary powers daily in their work. Decisions

must be made as to what to charge a person with, whether or not to offer a plea bargain agreement, and so forth.

Juvenile Justice

For much of history in the United States, children were treated the same as adult criminals. According to **common law**, the defense of infancy was available to children below the age of seven. The idea was that very young children were not culpable because they lacked the capacity to understand the wrongfulness of their actions. After age seven, the **infancy defense** disappeared, and children could face prison and even death. During the 19th century, society's view of children began to change. People began to realize that children were not merely miniature adults. They were still developing cognitively and morally. This new view of adolescence spawned a revolution in **juvenile justice** and led to a completely separate way of dealing with youths that committed crimes. The **Juvenile Court movement** began in the United States at the end of the Nineteenth Century. From the juvenile court statute adopted in Illinois in 1899, the system has spread to every State in the Union, the District of Columbia, and Puerto Rico.

Early reformers found the prospect of children receiving long prison sentences and sharing prison space with adult criminals appalling. There was also a conviction that the duty to children went beyond mere justice. The reformers believed that it was the duty of the state to step into the role of the parent when the parents either would not or could not correct the wayward child. Unlike adults, children were considered fundamentally good. The rigid and cold adult system was not appropriate for children; both the substantive and the procedural criminal law had to be discarded in favor of a system that fostered the best interest of the child. Thus, from inception the focus of the juvenile system was "treatment" or "rehabilitation."

Key Terms

Appellate Court, Bureau of Justice Statistics, Code, Common Law, Congress of the United States, Constitution, Criminal Code, Decisions (courts), Dual Court System, Dual Federalism, Effectiveness, Efficiency, Executive Branch, Fairness, Federal Rules of Criminal Procedure, Hierarchical, Infancy Defense, Judicial Review, Judiciary, Juvenile Court Movement, Juvenile Justice, Legislature, Nonsystem Argument, Penal Code, Plea Bargain, Procedural Due Process, System, Three Branches of Government, Trial Court, Unconstitutional, United States Supreme Court

Section 1.3: Defining and Measuring Crime

Learning Objectives

After completing this section, you should be able to:

1.3(a) Name and describe the three major national crime data-gathering programs in the United States today.
1.3(b) Discuss what crime statistics tell us about crime in the United States.
1.3(c) Describe the limitations of the three major national crime data-gathering programs in the United States today.
1.3(d) Describe the FBI's Crime Index, and list the Index Crimes.
1.3(e) Define crime rate and explain why crime statistics are generally expressed as rates rather than counts or percentages
1.3(f) Define the hierarchy rule and explain how it impacts crime reporting.
1.3(g) Discuss the meaning of the term clearance rate and describe how it is different than the crime rate.
1.3(h) Describe the development of the NIBRS, and identify why it is superior to the UCR.
1.3(i) Compare and contrast the purpose and data collection methods of the NIBRS with the NCVS.
1.3(j) List and define each of the Part I offenses as used in the UCR.

Introduction

A crime is an act or **omission** that is prohibited by law. For a law to be valid, a particular punishment or range of punishments must be specified. In the United States, the most common punishments are fines and imprisonment. As a matter of legal theory, a crime is a failed duty to the community for which the community will exact some punishment. This is the reason that prosecutions are always brought forward by the government, as a representation of the community that government serves. Historically, legal scholars differentiated between things that were "wrongs in themselves," which were referred to as **mala in se** offenses. These were distinct from **mala prohibita** offenses, which represented acts that were criminal merely because the government wished to prohibit them. Many criminal justice scholars use these terms to differentiate between heinous crimes like rape and murder and **victimless crimes** such as gambling and vagrancy.

Felonies, Misdemeanors, and Violations

Today, the most common and most basic division of crimes is based on the seriousness of the offense, and thus the possible punishment. **Misdemeanors** are less serious crimes that are punishable by fine and confinement in a local jail for a period not to exceed a year. **Felonies** are more serious crimes that the government punishes by fines, imprisonment (most commonly under the auspices of the state's Department of Corrections) for a period exceeding a year, or death. The distinction between misdemeanors and felonies is of ancient origin, coming to us through the **Common Law of England**. **Common law felonies** included murder, rape, mayhem, robbery, sodomy, larceny, arson, manslaughter, and burglary.

What is classified as a misdemeanor largely depends on the jurisdiction. Common examples are petty theft, prostitution, public intoxication, simple assault, disorderly conduct, and vandalism. Some crimes can be both misdemeanors and felonies, depending on the circumstances. A battery that results in a handprint on the victim's face may be classified as a misdemeanor, while a kick that breaks the victim's ribs may be a felony. Similarly, an arson that does relatively little damage (in terms of financial costs) may be a

misdemeanor, while an arson that destroys a home will be a felony. These distinctions have made it into our popular culture, where criminals who commit felonies are often known as **felons**. Less commonly used is the term **misdemeanant**, who is a person convicted of misdemeanor.

Most jurisdictions recognize a class of offenses that do not result in any period of incarceration, and are punished with only a fine. These minor breaches of the law are usually called **violations**. We will delve much deeper into the particulars of what constitutes various crimes in a later section.

Measuring Crime

To understand crime and the criminal justice system, we need to understand the prevalence of crime. Good crime statistics are critically important to understanding crime trends. The more federal and state agencies know about crime trends, the more intelligently they can allocate precious resources and maximize efforts at crime suppression and prevention. Crime statistics are also frequently used as an evaluation tool for justice programs. If the **rate** of a particular crime is falling, then what the system is doing will seem to be working. If the rate of a particular crime is rising, then it will seem to indicate that the criminal justice system is failing.

In the United States, the most frequently cited crime statistics come from the FBI's **Uniform Crime Reports (UCR)**. The UCR are crime data collected by over 16,000 local and state law enforcement agencies on crimes that have been brought to the attention of police. These law enforcement agencies voluntarily send information to the FBI, which compiles them into an annual published report along with several special reports on particular issues.

Learn More Online

To learn more about the Uniform Crime Reports (UCR) and the National Incident Based Reporting System (NIBRS), visit the FBI's UCR page at:
http://www.fbi.gov/ucr/ucr.htm

Since its inception in the 1930s, many people have been critical of the UCR system for a variety of reasons. Among these reasons are the facts that the UCR includes only crimes reported to the police, only counts the most serious crime committed in a series of crimes, does not differentiate between completed crimes and attempts, and does not include many types of crimes, such as white-collar crimes and federal crimes. Another critical complaint (especially among scholars) was that the UCR did not obtain potentially important information about the victim, the offender, the location of the crime and so forth. Without this information, social scientists could not use the UCR data in attempts to explain and predict crime. These complaints eventually led to the development of a much more informative system of crime reporting known as the **National Incident Based Reporting System (NIBRS)**.

The NIBRS is an incident-based reporting system in which agencies collect data on each single crime occurrence. NIBRS data come from local, state, and federal automated records' systems. The NIBRS collects data on each single incident and arrest within 22 offense categories made up of 46 specific crimes called Group A offenses. For each of the offenses coming to the attention of law enforcement, specified types of facts about each crime are reported. In addition to the Group A offenses, there are 11 Group B offense categories for which only arrest data are reported.

According to the FBI, participating in NIBRS can benefit agencies in several ways. The benefits of participating in the NIBRS are:

- The NIBRS can furnish information on nearly every major criminal justice issue facing law enforcement today, including terrorism, white collar crime, weapons offenses, missing children where criminality is involved, drug/narcotics offenses, drug involvement in all offenses, hate crimes, spousal abuse, abuse of the elderly, child abuse, domestic violence, juvenile crime/gangs, parental abduction, organized crime, pornography/child pornography, driving under the influence, and alcohol-related offenses.
- Using the NIBRS, legislators, municipal planners/administrators, academicians, sociologists, and the public will have access to more comprehensive crime information than the summary reporting can provide.
- The NIBRS produces more detailed, accurate, and meaningful data than the traditional summary reporting. Armed with such information, law enforcement can better make a case to acquire the resources needed to fight crime.
- The NIBRS enables agencies to find similarities in crime-fighting problems so that agencies can work together to develop solutions or discover strategies for addressing the issues.
- Full participation in the NIBRS provides statistics to enable a law enforcement agency to provide a full accounting of the status of public safety within the jurisdiction to the police commissioner, police chief, sheriff, or director.

The major problem with NIBRS today is that it has not been universally implemented. Agencies and state Programs are still in the process of developing, testing, or implementing the NIBRS. In 2004, 5,271 law enforcement agencies contributed NIBRS data to the UCR Program. The data from those agencies represent 20 percent of the U.S. population and 16 percent of the crime statistics collected by the UCR Program. Implementation of NIBRS is occurring at a pace commensurate with the resources, abilities, and limitations of the contributing law enforcement agencies.

A commonly cited problem with the UCR is that there are many, many crimes that do not come to the attention of police. This problem is not limited to minor offenses. For example, it is estimated that nearly half of all rapes go unreported. These undocumented offenses are often referred to as the **dark figure of crime**. This is the reason that the United States is the Bureau of Justice Statistics' (BJS) developed the **National Crime Victimization Survey (NCVS)**. The NCVS, which began in 1973, provides a detailed picture of crime incidents, victims, and trends. Today, the survey collects detailed information on the frequency and nature of the crimes of rape, sexual assault, personal robbery, aggravated and simple assault, household burglary, theft, and motor vehicle theft. It does not measure homicide or commercial crimes (such as burglaries of stores).

Two times a year, **U.S. Census Bureau** personnel interview household members in a nationally representative sample of approximately 42,000 households (about 75,000 people). Approximately 150,000 interviews of persons age 12 or older are conducted annually. Households stay in the sample for three years. New households are rotated into the sample on an ongoing basis.

The NCVS collects information on crimes suffered by individuals and households, whether or not those crimes were reported to law enforcement. It estimates the proportion of each crime type reported to law enforcement, and it summarizes the reasons that victims give for reporting or not reporting.

The survey provides information about victims (age, sex, race, ethnicity, marital status, income, and educational level), offenders (sex, race, approximate age, and victim-offender relationship), and the crimes (time and place of occurrence, use of weapons, nature of injury, and economic consequences). Questions also cover the experiences of victims with the criminal justice system, self-protective measures used by victims, and possible substance abuse by offenders. Supplements are added periodically to the survey to obtain detailed information on topics like school crime. BJS publication of NCVS data includes Criminal

Victimization in the United States, an annual report that covers the broad range of detailed information collected by the NCVS.

Learn More Online

To learn more about the National Crime Victimization Survey (NCVS), visit the BJS Criminal Victimization page at:
http://www.ojp.usdoj.gov/bjs/cvictgen.htm

Index Crimes

The Federal Bureau of Investigation (FBI) designates certain crimes as Part I or **index offenses** because it considers them both serious and frequently reported to the police. The Part I offenses are defined as follows:

Criminal homicide: Murder and nonnegligent manslaughter: the willful (nonnegligent) killing of one human being by another. Deaths caused by negligence, attempts to kill, assaults to kill, suicides, and accidental deaths are excluded.

Forcible rape: The carnal knowledge of a female forcibly and against her will. Rapes by force and attempts or assaults to rape, regardless of the age of the victim, are included. Statutory offenses (no force used—victim under age of consent) are excluded.

Robbery: The taking or attempting to take anything of value from the care, custody, or control of a person or persons by force or threat of force or violence and/or by putting the victim in fear.

Aggravated assault: An unlawful attack by one person upon another for the purpose of inflicting severe or aggravated bodily injury. This type of assault usually is accompanied by the use of a weapon or by means likely to produce death or great bodily harm. Simple assaults are excluded.

Burglary (breaking or entering): The unlawful entry of a structure to commit a felony or a theft. Attempted forcible entry is included.

Larceny-theft (except motor vehicle theft): The unlawful taking, carrying, leading, or riding away of property from the possession or constructive possession of another. Examples are thefts of bicycles, motor vehicle parts and accessories, shoplifting, pocketpicking, or the stealing of any property or article that is not taken by force and violence or by fraud. Attempted larcenies are included. Embezzlement, confidence games, forgery, check fraud, etc., are excluded.

Motor vehicle theft: The theft or attempted theft of a motor vehicle. A motor vehicle is self-propelled and runs on land surface and not on rails. Motorboats, construction equipment, airplanes, and farming equipment are specifically excluded from this category.

Arson: Any willful or malicious burning or attempt to burn, with or without intent to defraud, a dwelling house, public building, motor vehicle or aircraft, personal property of another, etc.

Key Terms

Aggravated Assault, Arson, Burglary, Common Law Felonies, Criminal Homicide, Dark Figure of Crime, Felon, Forcible Rape, Index Offenses, Larceny-theft, Mala In Se, Mala Prohibita, Misdemeanant, Motor Vehicle Theft, National Crime Victimization Survey (NCVS), National Incident Based Reporting System (NIBRS), Omission, Rate, Robbery, U.S. Census Bureau, Uniform Crime Reports (UCR), Victimless Crime, Violation

Section 1.4: The Criminal Justice Process

Learning Objectives

After completing this section, you should be able to:

1.4(a) Define the vocabulary related to criminal case processing.
1.4(b) Explain the basic legal requirements for a lawful arrest.
1.4(c) Describe the tasks involved in the booking process.
1.4(d) Describe the two major types of charging documents.
1.4(e) Describe the purpose of an initial appearance.
1.4(f) Describe the role of the preliminary hearing and the grand jury.
1.4(g) Describe the tasks involved in an arraignment.

Introduction

As we pointed out in the previous section, crimes often do not come to the attention of law enforcement. This is what is called the *dark figure of crime*. The criminal justice process does not begin until crimes come to the attention of police. Since many crimes go unreported, a majority of crimes never begin the process. Those that do generally enter the system from the private sector. That is, most criminal prosecutions begin with a private citizen making a report to police. Very few offenses are detected by officers performing random patrols, contrary to the conventional wisdom that preventive patrol serves to prevent crime. Information from private citizens is the key to success in the criminal justice system.

Investigation

Once a crime is reported to the police, an investigation will begin. Depending on the nature and seriousness of the crime, this investigation may be as simple as a patrol officer asking a few questions at the scene, or as complex as involving detectives and forensic scientists. The first responder will conduct a preliminary investigation. The **preliminary investigation** involves securing the crime scene and identifying victims, perpetrators, and witnesses. Other tasks that do not involve specialized training and large amounts of time are also part of the preliminary investigation. Cases that are more complex will require a **follow-up investigation**, which is usually conducted by a detective.

Arrest

An **arrest** involves taking a person into actual physical custody by law enforcement. For an arrest to be legal, it must be based on **probable cause**. Probable cause means that enough evidence is present to convince a reasonable person that it is more likely than not that the suspect committed the crime. Perhaps one of the most controversial aspects of the arrest process is the use of force by police in making an arrest. Constitutional and statutory law authorizes the use of *reasonable* force when the force is necessary to take a suspect into custody. Often, what constitutes **reasonable force** is a hotly disputed matter. In the landmark case of ***Graham v. Connor*** (1989), the Supreme Court of the United States established the legal requirement that the use of force by police be **objectively reasonable**. This standard suggests that police may use an amount of force that a reasonable person would conclude was necessary to effect the arrest and no more. Note that the force used to effect an arrest is a different legal issue than self-defense. Officers are always allowed to answer deadly force with deadly force when lives are at stake.

Booking

After an arrest, suspects are taken to a police station holding facility or jail for **booking**. The difference depends largely on the size of the jurisdiction. Large municipal agencies often have their own holding cells, while small and rural agencies usually use the county jail for booking and holding purposes. Booking is the process of officially recording that a person has been arrested. This usually involves identifying, photographing, and fingerprinting the suspect. The identification process usually involves recording the suspect's personal information, such as their legal name, date of birth, address, physical characteristics, and so forth. Most jails will have a standardized booking form for this purpose. An official record is also made at this time about the alleged crime committed by the suspect. The suspect's identifying information will usually be retrieved from a criminal history database. The suspect will also be photographed and fingerprinted. These identification tasks have been made swift and accurate by modern digital technologies. The suspect will be thoroughly searched for contraband, and all personal property will be confiscated and inventoried. The property is returned to the suspect upon release unless it is deemed illegal contraband or evidence of a crime. Note that in most jurisdictions, persons suspected of minor offenses can be issued a written citation in lieu of being booked into jail. By signing the citation, the person is promising to appear in court at the date and time listed on the citation.

Charging

This crucial step is where law enforcement and prosecutors make the decision as to what particular crime to charge a suspect with, if at all. The usual process is for police to turn over a case file to the prosecutor's office. The case file will contain the police **arrest report**, along with supporting documentation such as witness statements, victims statements, forensic laboratory reports, and so on. The prosecutor will determine if there is enough evidence to go forward with the case. If there appears to be enough evidence to go forward in the prosecutor's professional legal judgment, then a **charging document** is filed with the court. The name of the charging document changes from jurisdiction to jurisdiction. Some jurisdictions (including the federal courts) require an **indictment** by a grand jury, and others use a prosecutorial **information**. Note that an arrest does not always precede the issuance of a charging document. There are times when the charging document is filed first, and then a warrant is issued for the arrest of the accused. This situation is most common in jurisdictions where grand jury indictments are a common charging document.

Initial Appearance

Under the constitution, people cannot be seized and jailed without reasonable cause. To make sure that no one is arrested and held illegally, every arrestee has the right to be brought before a judge within hours of arrest. During this first or **initial appearance**, a **magistrate** will inform the suspect of the charges against him, advise him of his rights, and determine if there is enough evidence to hold the suspect for further processing. These hearings tend to be less formal than later formal hearings, and can be conducted by lower court magistrates who may or may not have the authority to preside over the actual criminal trial. In most jurisdictions, bail is set at this stage in the process.

At the federal level, the process is somewhat formalized, and several important tasks are taken care of in this single step. At an initial appearance in federal court, a judge advises the defendant of the charges filed, considers whether the defendant should be held in jail until trial, and determines whether there is probable cause to believe that an offense has been committed, and the defendant has committed it. Defendants who are unable to afford **counsel** are advised of their right to a court-appointed attorney. The

court may appoint either a federal public defender or a private attorney who has agreed to accept such appointments from the court. Regardless of the type of appointment, the attorney will be paid by the court from funds appropriated by Congress. Defendants released into the community before trial may be required to obey certain restrictions, such as home confinement or drug testing, and to make periodic reports to a **pretrial services officer** to ensure appearance at trial.

Preliminary Hearing and the Grand Jury

As a matter of American legal tradition, a **grand jury** was convened to hear evidence presented by the prosecutor and determine if that evidence was sufficient to warrant a full-blown criminal trial. In other words, it was the duty of the grand jury to determine if probable cause existed in a particular criminal case. Defendants had no right to be present at grand jury proceedings, and these deliberations were held in secret.

States that were more populous found that the grand jury system was unwieldy. It was too labor intensive and took up too much time. These states developed a system whereby the prosecutor files a charging document called an **information** with the court. A hearing is then held to determine if probable cause is indeed present as the prosecution alleges. Defendants have the right to be present at these **preliminary hearings**. Regardless of whether a grand jury system us used or prosecutorial information is used, the gold standard for moving forward to a criminal trial is probable cause.

The federal courts still use the old grand jury system. At the beginning of a federal criminal case, the principal actors are the **U.S. Attorney** (the prosecutor) and the grand jury. The U.S. attorney represents the United States in most court proceedings, including all criminal prosecutions. The grand jury reviews evidence presented by the U.S. attorney and decides whether there is sufficient evidence to require a defendant to stand trial.

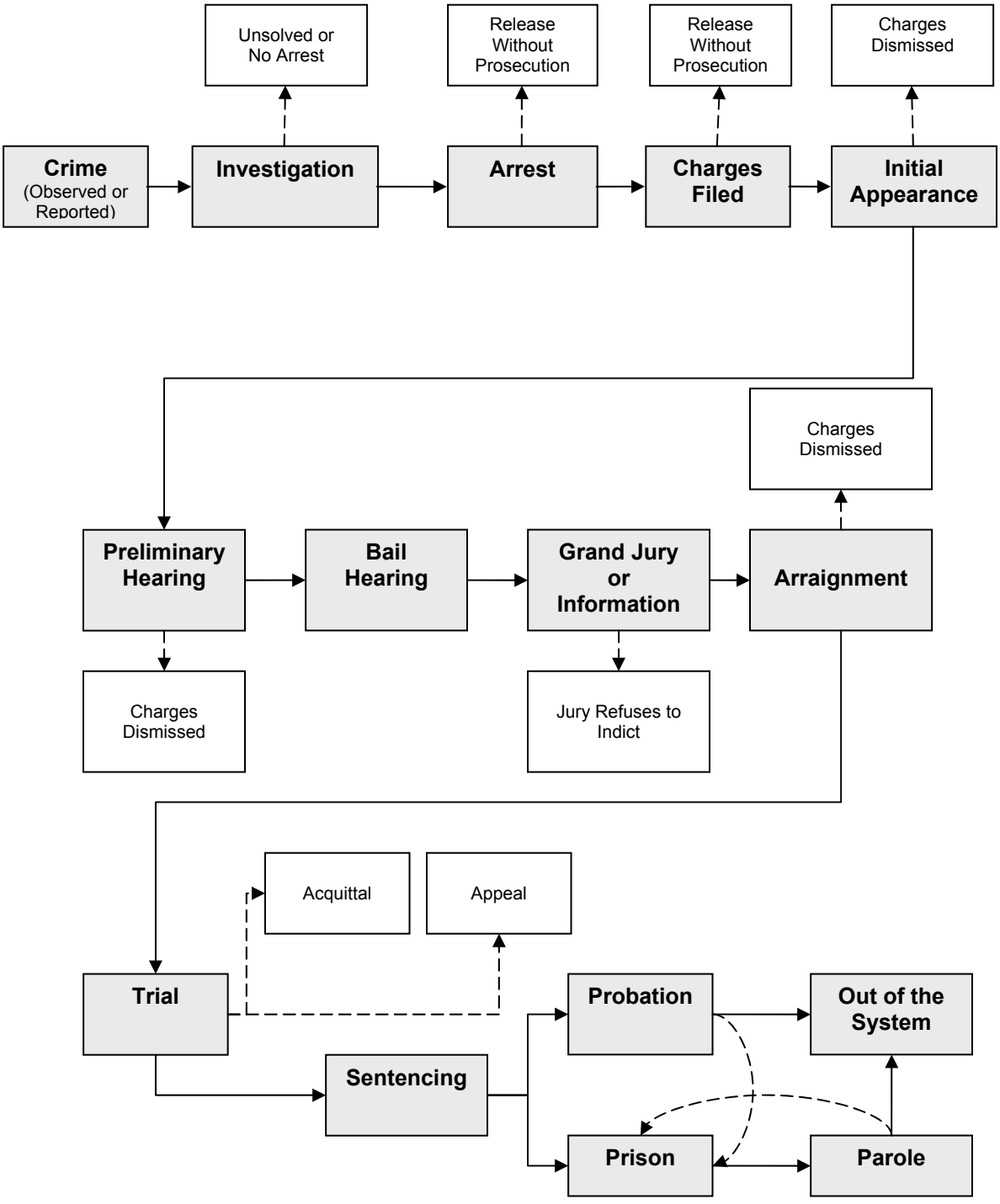
Arraignment

At this stage, the criminal defendant appears in court to have the formal charging document read. This is where the defendant enters a **plea**. The most common pleas are guilty and not guilty. In most jurisdictions, **standing mute** (saying nothing when asked for a plea) will result in the court entering a not guilty plea on behalf of the defendant. If a defendant pleads guilty in return for the government agreeing to drop certain charges or to recommend a lenient sentence, the agreement often is called a **plea bargain**.

In federal criminal courts, the defendant enters a plea to the charges brought by the U.S. attorney. More than 90% of federal criminal defendants plead guilty rather than go to trial. If the defendant pleads guilty, the judge may impose a sentence at that time, but more commonly will schedule a hearing to determine the sentence at a later date. In most felony cases, the judge waits for the results of a **presentence report**, prepared by the court's probation office, before imposing sentence. If the defendant pleads not guilty, the judge will proceed to schedule a trial.

Because of the seriousness of a guilty plea, the judge must determine that a guilty plea was made both **knowingly and voluntarily**. If it is determined that a guilty plea is entered knowingly and voluntarily, there is no need to go on with a trial. In many cases, the judge will impose a sentence at this point.

The Sequence of Events in the Criminal Justice System



Key Terms

Arrest, Arrest Report, Booking, Charging Document, Counsel, Follow Up Investigation, Graham v. Connor (1989), Grand Jury, Indictment, Information, Initial Appearance, Knowingly and Voluntarily, Magistrate, Objectively Reasonable, Plea, Preliminary Hearing, Preliminary Investigation, Presentence Report, Pretrial Services Officer, Probable Cause, Reasonable Force, Standing Mute, U.S. Attorney

Section 1.5: The Criminal Justice Process (Continued)

Learning Objectives

After completing this section, you should be able to:

1.5(a) List and describe the various steps on the criminal justice process.
1.5(b) Describe how discretionary decisions impact case flow through the criminal justice system.
1.5(c) Define bail and describe when bail may be denied to an accused person.
1.5(d) Differentiate between a jury trial and a bench trial.
1.5(e) Explain why criminal trials are said to be an adversarial process.
1.5(f) List and define the various criminal sentences commonly used in the United States today.
1.5(g) Outline the appeals process, describing the duties of each actor in the process.
1.5(h) Explain how the criminal justice process can be compared to a "funnel."

Pretrial Detention or Bail

Pretrial detention refers to keeping the suspect in jail until trial. Most criminal suspects are released on **bail** prior to trial. Bail is a specified amount of money paid by the defendant to ensure that they will show up in court on the appointed day. If they do not show up, the bail is forfeited and a **bench warrant** is issued for the person's arrest. The right to bail is not a constitutional guarantee as many think. The actual constitutional rule is that excessive bail may not be required. If an accused person is determined by the courts to be a flight risk, then the judge may deny bail and hold the person in jail until trial. Such a period of incarceration prior to trial is known as **pretrial detention**.

Plea Bargaining

A **plea bargain** is a negotiated agreement between the prosecution and the defendant. In most cases, the defendant agrees to plead guilty to a lesser crime than that originally charged, or to a lesser sentence than can normally be expected if the case goes to trial. There are many critics of the plea bargaining process, but it is unavoidable in our criminal justice system.

Trial

The purpose of a **trial** is to answer the basic question of the defendant's guilt. A finding of guilt must be based on facts (evidence), and accordingly the persons reaching this decision are referred to in legal documents and texts as the "finders of fact." This can be a jury in a jury trial, or a judge acting alone in what is referred to as a **bench trial**. Recall that the American legal system is adversarial, which means that two sides must contest the issue of guilt in court. The prosecution attempts to prove the guilt of the defendant, and the defense attempts to demonstrate the accused person's innocence. As a technical matter, the burden of proof is on the state (prosecution). This legal jargon means that the defendant does not have to do anything at all; it is up to the prosecutor to prove guilt. As a practical matter, doing nothing is rarely employed as a defense strategy. In a criminal trial, guilt must be proven **beyond a reasonable doubt (BRD)**. This is a very high **evidentiary standards**—the highest known to our legal system.

Sentencing

If the defendant pleads guilty or is found guilty, a judge (or jury in some states) will hand down a **sentence**. Possible sentences include **monetary fines**, probation, periods of incarceration in jail or prison, or some combination of supervision and incarceration.

At the federal level, the judge determines the defendant's sentence according to special federal **sentencing guidelines** issued by the **United States Sentencing Commission**. The court's probation office prepares a report for the court that applies the sentencing guidelines to the individual defendant and the crimes for which he or she is guilty. During sentencing, the court may consider not only the evidence produced at trial, but all relevant information that may be provided by the pretrial services officer, the U.S. attorney, and the defense attorney. In unusual circumstances, the court may depart from the sentence calculated according to the sentencing guidelines. The federal sentencing guidelines have been controversial, and have resulted in a huge number of appeals court cases where the person being sentenced disagreed with the guidelines or their application.

A federal court's sentence may include time in prison, a fine to be paid to the government, and **restitution** to be paid to crime victims. The court's **probation officers** assist the court in enforcing any conditions that are imposed as part of a criminal sentence. The supervision of offenders also may involve services such as substance abuse testing and treatment programs, job counseling, and alternative detention options.

Appeal

The decisions of trial courts are not set in stone. If some legal rule is violated, the convict can **appeal** the decision to a higher court in an effort to have the wrong corrected. A successful appeal usually means that the trial court is ordered to rehear the case while fixing the problem that the appeals court found with the first trial. Of course, a rehearing of the case by the trial court is not mandatory. If the prosecutor believes that the state cannot prove guilt beyond a reasonable doubt given the appellate court's directions, then the case will be dropped.

The losing party in a decision by a trial court in the federal system normally is entitled to appeal the decision to a federal court of appeals. In criminal cases, the defendant may appeal a guilty verdict, but the government may not appeal if a defendant is found not guilty. Either side in a criminal case may appeal with respect to the sentence that is imposed after a guilty verdict.

The party to a case who files an appeal is known as an **appellant**. The appellant must show that the trial court (or sometimes an administrative agency) made a legal error that affected the decision in the case. The court of appeals makes its decision based on the record of the case established by the trial court. It does not receive additional evidence or hear witnesses. The court of appeals also may review the factual findings of the trial court or agency, but typically may only overturn a decision on factual grounds if the findings were "clearly erroneous."

In appeals heard by the **United States Circuit Courts**, panels of three judges working together decide cases. The appellant presents legal arguments to the panel, in writing, in a document called a **brief**. In the brief, the appellant tries to persuade the judges that the trial court made an error, and that its decision should be reversed. On the other hand, the party defending against the appeal, known as the **appellee**, tries in its brief to show why the trial court decision was correct, or why any error made by the trial court was not significant enough to affect the outcome of the case.

Although some cases are decided on the basis of written briefs alone, many cases are selected for an **oral argument** before the court. Oral argument in the court of appeals is a structured discussion between the appellate lawyers and the panel of judges focusing on the legal principles in dispute. Each side is given

a short time (usually about 15 minutes) to present arguments to the court. The court of appeals decision usually will be the final word in the case, unless it sends the case back to the trial court for additional proceedings, or the parties ask the U.S. Supreme Court to review the case. In some cases the decision may be reviewed ***en banc***, that is, by a larger group of judges (usually all) of the court of appeals for the circuit.

A litigant who loses in a federal court of appeals, or in the highest court of a state, may file a petition for a ***writ of certiorari***, which is a document asking the Supreme Court to review the case. The Supreme Court, however, does not have to grant review. The Court typically will agree to hear a case only when it involves an unusually important legal principle, or when two or more federal appellate courts have interpreted a law differently. There are also a small number of special circumstances in which the Supreme Court is required by law to hear an appeal. When the Supreme Court hears a case, the parties are required to file written briefs and the Court may hear oral argument.

Corrections

Corrections is designed to protect the public and serve the public interest by punishing or rehabilitating criminal offenders, depending on one's philosophy. The idea of corrections is much broader that just prisons and jails where convicts serve out entire sentences. It also encompasses mechanisms of early release, such as probation and parole. The corrections system in the United States is immense. On any given day, about 7 million Americans are under some sort of correctional supervision. Although only about a third of convicted offenders are actually incarcerated, the number of convicts in America's prisons is quite large. This translates into massive public expenditures. Because it is so expensive, corrections remains a topic of much political debate.

Release from the System

The final state of the criminal justice process is release from the system. If an offender is released from confinement on parole, then the conditions of parole must be met and severe limitations are placed on the offender. Offenders that have served a complete prison sentenced and "**flat timed**," are free of parole conditions and can return to a semblance of life before entry into the criminal justice system.

The Criminal Justice Funnel

The criminal justice system is frequently described as acting much like a funnel. Just as the funnel is wide at the top and narrow at the bottom, so too is the criminal justice system. That is to say, as we move forward in the criminal justice process, we find fewer and fewer cases. At every step along the way, people drop out of the system. Of all the crimes known to police, very few result in convictions and prison sentences. The police may decide to deal with a case informally. Prosecutors may decide not to prosecute a case. Judges may decide on treatment rather than imprisonment. These are just a few examples of people leaving the system prior to incarceration.

Decision Points in the Criminal Justice Process			
Decision Maker	**Task**	**Decision to move forward…**	**Decision to Stop…**
Complainant	Inform police.	Police are informed.	Nothing is done.
Police	Investigation.	An arrest is made.	No arrest is made.
Prosecutor	Charging.	Charges are filed with the court.	No charges are filed.
Judge	Initial Appearance.	Defendant is held over for trial.	Defendant is released.
Defendant	Plead.	Plead not guilty.	Plead guilty.
Jury	Decide guilt.	Find the defendant guilty.	Find the defendant not guilty.
Judge or Jury (Depending on jurisdiction)	Determine sentence.	Sentence offender to incarceration.	Sentence the offender to community supervision.

Key Terms

Appeal, Appellant, Bail, Bench Warrant, Beyond a Reasonable Doubt (BRD), Burden of Proof, Criminal Justice Funnel, *En Banc*, Evidentiary Standard, Flat Timed, Monetary Fine, Oral Argument, Petition for a *Writ of Certiorari*, Pretrial Detention, Probation Officer, Restitution, Sentence, Sentencing Guidelines, Trial, United States Circuit Courts, United States Sentencing Commission

Chapter 3: Criminal Law

The term *criminal law* can be confusing. This is because some sources use it in a very general way to describe the entire spectrum of laws dealing with the criminal justice system; others use it as a shorthand way of referring to what is also known as the **substantive criminal law**. This text follows the latter approach by using the heading criminal law to refer to the substantive criminal law, which is the part of the law that describes what acts are prohibited and what punishments are associated with those acts. Also included are legal defenses (such as the insanity defense) that apply in criminal cases.

A common way of organizing criminal laws is to divide them into *felonies* and *misdemeanors*, which depend largely on the seriousness of the offense and the type of punishment associated with the offense. Things like petty thefts, simple assault, disorderly conduct, and public drunkenness are relatively nonserious crimes classified as **misdemeanors**. Misdemeanors are usually only punishable by fine and imprisonment in a local jail for a period less than a year. **Felonies**, on the other hand, are serious crimes (e.g., rape, murder, burglary, kidnapping) where the punishment can be death or a long period (at least a year) of incarceration in a state-run prison. Note that this distinction depends on the sentence; some convicts go to prison for less than a year because of early release programs such as “good time” and parole.

There is also a distinction between types of criminal law based in the inherent evil of the act. If the act is "wrong in itself," it is considered a *mala in se* offense. If an act is not necessarily evil and is only considered criminal because it is prohibited by the government, it is considered a *mala prohibita* offense. Most so-called "victimless crimes" are *mala prohibita* offenses. Because people's views vary so widely as to the inherent wrongness of an act, there is no absolute standard for classification.

Criminal acts that are highly visible to the public are often referred to as **visible crime, ordinary crime,** or **street crime**. The overt nature of such crimes makes notice by police more likely, and thus prosecution more likely. Murder is a common example: Most murders come to the attention of the police, and prosecution is more likely than for most other offenses. Occupational crimes are less obvious. These are crimes that a particular job provides the criminal opportunity. The most common example is **embezzlement**. Crimes committed by groups with a discernable organization structure are classified as **organized crime**. Organized crime is considered especially heinous because groups can cause more criminal damage, and the groups make for more difficult investigations and prosecutions.

A large swath of criminal offenses involving computers and related technologies are collectively known as **cybercrime**. Cybercrime involves disparate acts such as distributing child pornography, sending out mass emails in an attempt to obtain identifying information (**phishing**), distributing viruses designed to damage computer systems, hacking into business computers to steal money, and so forth.

Crimes that are motivated by bias toward a particular race, religion, ethnicity, or sexuality are known as **hate crimes**.

Criminal versus Civil Law

At civil law, a wrong done to another person is called a **tort**. When a harmed individual (the plaintiff) wins a tort case in civil court, they may also win a money award referred to as **damages**. In other words, torts are private wrongs. A criminal prosecution operates under a different legal theory. A crime, the theory holds, may harm the individual, but it also harms all of society. Since the people are represented by the

state, all criminal prosecutions are brought forward in the name of the state. What the "state" calls itself can vary from state to state; some prosecutions are done in the name of the people, and some are done in the name of the "commonwealth." Regardless of how the case is named, a prosecutor working for the government on behalf of society brings it forward.

It is important to note that the criminal system and the civil system sometimes interact. A person can be found guilty of a crime in criminal court, and found liable for a tort for the exact same behavior. In addition, individuals that have suffered losses due to criminal actions can sometimes use the civil courts to recoup their losses.

State versus Federal Crimes

While the United States is a common law country, most criminal laws are a matter of statutes today. An essential difference between a state criminal statute and a federal criminal statute is that federal laws will usually contain a jurisdictional element. Because of the constitutional limits placed on the authority of Congress to make criminal laws, federal criminal statutes must be tailored to a particular power delegated to Congress, such as the power to regulate interstate commerce. Most criminal laws exist on the state level because of this limitation.

When a particular act is criminal on both the state and federal level, there is overlapping jurisdiction in the case. As a matter of constitutional law, the person could be prosecuted on both the state and federal level. In practice, this rarely happens. In a few high-profile cases, federal prosecutors have taken up a case when the public widely perceived that justice was not done in state courts (e.g., the Rodney King police brutality case).

Section 3.1: Sources of Criminal Law

Learning Objectives

After completing this section, you should be able to:

3.1(a) Describe the development of the common law and how it came to the United States.
3.1(b) Describe the doctrine of stare decisis and its impact on the American legal system.
3.1(c) Identify the various sources of law in America, and describe the nature of each.
3.1(d) List and describe the limits placed on criminal statutes by the Constitution of the United States.
3.1(e) Describe the origins and content of the Model Penal Code.
3.1(f) Compare and contrast the civil law with the criminal law.

Introduction

The primary function of the substantive criminal law is to define crimes, including the associated punishment. The **procedural criminal law** sets the procedures for arrests, searches and seizures, and interrogations. In addition, it establishes the rules for conducting trials. Where does criminal law come from?

The Common Law

The term *common law* can be disturbingly vague for the student. That is because different sources use it in several different ways with subtle differences in meaning. The best way to get a grasp on the term's meaning is to understand a little of the history of the American legal system. Common law, which some sources refer to as "judge-made" law, first appeared when judges decided cases based on the legal customs of medieval England at the time. It may be hard for us to imagine today, but in the early days of English common law, the law was a matter of *oral* tradition. That is, the definitions of crimes and associated punishments were not written down in a way that gave them binding authority.

By the end of the medieval period, some of these cases were recorded in written form. Over a period, imported judicial decisions became recorded on a regular basis and collected into books called **reporters**. The English-speaking world is forever indebted to Sir William Blackstone, an English legal scholar, for collecting much of the common law tradition of England and committing it to paper in an organized way. His four-volume set, ***Commentaries on the Laws of England***, was taken to the colonies by the founding fathers. The founding fathers incorporated the common law of England into the laws of the Colonies, and ultimately into the laws of the United States.

In modern America, most crimes are defined by statute. These statutory definitions use ideas and terms that come from the common law tradition. When judges take on the task of interpreting a statute, they still use common law principles for guidance. The definitions of many crimes, such as murder and arson, have not deviated much from their common law origin. Other crimes, such as rape, have seen sweeping changes.

One of the primary characteristics of the common law tradition is the importance of **precedent**. Known by the legal Latin phrase ***stare decisis***, the doctrine of precedence means that once a court makes a decision on a particular matter, they are bound to rule the same way in future cases that have the same legal issue. This is important because a consistent ruling in identical factual situations means that everyone gets the same treatment by the courts. In other words, the doctrine of *stare decisis* ensures equal treatment under the law.

Constitutions

When the founding fathers signed the Constitution, they all agreed that it would be the supreme law of the land; the Framers stated this profoundly important agreement in Article VI. After the landmark case of *Marbury v. Madison* (1803), the Supreme Court has had the power to strike down any law or any government action that violates constitutional principles. This precedent means that any law made by the Congress of the United States or the legislative assembly of any state that does not meet constitutional standards is subject to nullification by the Supreme Court of the United States.

Every state adopted this idea of constitutional supremacy when creating their constitutions. All state laws are subject to review by the high courts of those states. If a state law or government practice (e.g., police, courts, or corrections) violates the constitutional law of that state, then it will be struck down by that state's high court. Local laws are subject to similar scrutiny.

Statutory Law

Statutes are written laws passed by legislative assemblies. Modern criminal laws tend to be a matter of statutory law. In other words, most states and the federal government have moved away from the common-law definitions of crimes and established their own versions through the legislative process. Thus, most of the criminal law today is made by state legislatures, with the federal criminal law being made by Congress. Legislative assemblies tend to consider legislation as it is presented, not in subject order. This chronological ordering makes finding the law concerning a particular matter very difficult. To simplify finding the law, most all statutes are organized by subject in a set of books called a code. The body of statutes that comprises the criminal law is often referred to as the criminal code, or less commonly as the penal code.

Administrative Law

The clear distinction between the executive, legislative, and judicial branches of government becomes blurry when U.S. governmental agencies and commissions are considered. These types of bureaucratic organizations can be referred to as semi-legislative and semi-judicial in character. These organizations have the power to make rules that have the force of law, the power to investigation violations of those laws, and the power to impose sanctions on those deemed to be in violation. Examples of such agencies are the Federal Trade Commission (FTC), the Internal Revenue Service (IRS), and the Environmental Protection Agency (EPA). When these agencies make rules that have the force of law, the rules are collectively referred to as **administrative law**.

Court Cases

When the appellate courts decide a legal issue, the doctrine of precedence means that future cases must follow that decision. This means that the holding in an appellate court case has the force of law. Such laws are often referred to as **case law**. The entire criminal justice community depends on the appellate courts, especially the Supreme Court, to evaluate and clarify both statutory laws and government practices against the requirements of the Constitution. These legal rules are all set down in court cases.

Key Terms

Administrative Law, Case Law, *Commentaries on the Laws of England*, Criminal Law, Cybercrime, Damages, Embezzlement, Felony, Hate Crime, Misdemeanor, Ordinary Crime, Organized Crime, Phishing, Precedent, Procedural Criminal Law, Reporter, Sir William Blackstone, *Stare Decisis*, Street Crime, Substantive Criminal Law, Tort, Visible Crime

Section 3.2: Substantive Criminal Law

Learning Objectives

After completing this section, you should be able to:

3.2(a) Discuss the idea of the rule of law and explain its importance in the American legal system.
3.2(b) Explain the constitutional prohibitions against Bills of Attainder and Ex Post Facto laws.
3.2(c) Explain the limits that the First Amendment places on the criminal law, citing doctrinal examples.
3.2(d) Explain the limits that the Second Amendment places on the criminal law, citing doctrinal examples.
3.2(e) Describe the limits that the Eighth Amendment places on the criminal law, citing doctrinal examples.
3.2(f) Describe the development of the right to privacy in constitutional law.

Introduction

As previously discussed, the criminal law in its broadest sense encompasses both the substantive criminal law and **criminal procedure**. In a more limited sense, the term *criminal law* is used to denote the *substantive criminal law*, and *criminal procedure* is considered another category of law. (Most college criminal justice programs organize classes this way). Recall that the *substantive law* defines criminal acts that the legislature wishes to prohibit and specifies penalties for those that commit the prohibited acts. For example, murder is a substantive law because it prohibits the killing of another human being without justification.

No Crime without Law

It is fundamental to the American way of life that there can be no crime without law. This concept defines the idea of the Rule of Law. The rule of law is the principle that the law should govern a nation, not an individual. The importance of the rule of law in America stems from the colonial experience with the English monarchy. It follows that, in America, no one is above the law.

Constitutional Limits

Unlike the governments of other countries, the legislative assemblies of the United States do not have unlimited power. The power of Congress to enact criminal laws is circumscribed by the Constitution. These limits apply to state legislatures as well.

Bills of Attainder and *Ex Post Facto* Laws. A **bill of attainder** is an enactment by a legislature that declares a person (or a group of people) guilty of a crime and subject to punishment for committing that crime without the benefit of a trial. An ***ex post facto*** law is a law that makes an act done before the legislature enacted the law criminal and punishes that act. The prohibition also forbids the legislature from making the penalty for a crime more severe retroactively. Both of these types of laws are strictly prohibited by the Constitution.

Fair Notice and Vagueness. The due process clauses of the Fifth and Fourteenth Amendments mandate that the criminal law afford **fair notice**. The idea of fair notice is that people must be able to determine

exactly what is prohibited by the law, so vague and ambiguous laws are prohibited. If a law is determined to be unclear by the Supreme Court, it will be struck down and declared **void for vagueness**. Such laws would allow for arbitrary and discriminatory enforcement if allowed to stand.

First Amendment

The First Amendment to the United States Constitution guarantees all Americans the "freedom of expression." Among these "expressions" are the freedom of religion and the freedom of speech. In general, Americans can say pretty much whatever they like without fear of punishment. Any criminal law passed by the legislature that infringes on these rights would not withstand constitutional scrutiny. There are, however, some exceptions.

When the health and safety of the public are at issue, the government can curtail the freedom of speech. One of the most commonly cited limiting principles is what has been called the **clear and present danger test**. This test, established by the Supreme Court in ***Schenck v. United States*** (1919), prohibits inherently dangerous speech, such as falsely shouting "fire!" in a crowded theater.

Another prohibited type of speech has been referred to as **fighting words**. This means that the First Amendment does not protect speech calculated to incite a violent reaction. Other types of unprotected speech include hate speech, profanity, libelous utterances, and obscenity. These latter types of speech are very difficult to regulate by law because they are very hard to define and place limits on. The current trend has been to protect more speech that would have once been considered obscene or profane.

The freedom to worship as one sees fit is also enshrined in the Constitution. Appellate courts will strike down statutes that are designed to restrict this **freedom of religion**. The high court has protected door-to-door solicitations by religious groups and even ritualistic animal sacrifices. The Court, however, has not upheld all claims based on the free exercise of religion. Statutes criminalizing such things as snake handling, polygamy, and the use of hallucinogenic drugs have all been upheld.

The First Amendment protects the right of the people to assemble publicly, but as with the other freedoms previously discussed, it is not absolute. The courts have upheld restrictions on the time, place, and manner of public assemblies, so long as those restrictions were deemed reasonable. The reasonableness of such restrictions usually hinges on a **compelling state interest**. The **freedom of assembly**, then, does not protect conduct that jeopardizes the public health and safety.

Second Amendment

The constitutionally guaranteed "right to keep and bear arms" in the Second Amendment is by no means absolute has been the source of much litigation and political debate in recent years. The Supreme Court has established that the second Amendment confers a right to the carrying of a firearm for self-defense, and that right is applicable via the Fourteenth Amendment to the states. Typical restrictions include background checks and waiting periods. Some jurisdictions highly regulate the concealing, carrying, and purchase of firearms and many limit the type of firearms that can be purchased. Many criminal laws have enhanced penalties when they are committed with firearms. Most gun laws and **concealed carry laws** vary widely from jurisdiction to jurisdiction.

Eighth Amendment

The **Eighth Amendment** to the United States Constitution prohibits the imposition of **Cruel and Unusual Punishments**. Both the terms *cruel* and *unusual* do not mean what they mean in everyday usage; they are both legal terms of art. The Supreme Court has incorporated the doctrine of proportionality into the

Eighth Amendment. Recall that *proportionality* means that the punishment should fit the crime, or, at least, should not be grossly disproportionate to the offense. The idea of proportionality has appeared in cases that considered the grading of offenses, the validity of lengthy prison sentences, and whether the imposition of the death penalty is constitutional. (The legal controversies of three strikes laws and the death penalty will be discussed at greater length in a later section).

The Right to Privacy

Most American's view the **right to privacy** as a fundamental human right. It is shocking, then, to find that the Constitution *never* expressly mentions a right to privacy. The Supreme Court agrees that such a right is fundamental to due process and has established the right as being inferred from several other guaranteed rights. Among these are the right of free association, the prohibition against quartering soldiers in private homes, and the prohibition against unreasonable searches and seizures. The right to privacy has been used to protect many controversial practices that were (at least at the time) socially unacceptable to large groups of people. Early courts decided that laws prohibiting single people from purchasing contraceptives were unconstitutional based on privacy rights arguments. The right to an abortion established in ***Roe v. Wade*** (1973) hinged primarily on a privacy rights argument. More recently, in ***Lawrence v. Texas*** **(**2003), the court ruled that laws prohibiting private homosexual sexual activity were unconstitutional. In the *Lawrence* case, privacy rights were the deciding factor.

Key Terms

Bill of Attainder, Clear and Present Danger Test, Compelling State Interest, Concealed Carry Law, Criminal Procedure, Cruel and Unusual Punishment, Eighth Amendment, *Ex Post Facto* Law, Fair Notice, Fighting Words, First Amendment, Freedom of Assembly, Freedom of Expression, Freedom of Religion, *Lawrence v. Texas* (2003), Right to Privacy, *Roe v. Wade* (1973), *Schenck v. United States* (1919), Second Amendment, Void for Vagueness

Section 3.3: Elements of Crimes

Learning Objectives

After completing this section, you should be able to:

3.3(a) Describe the *actus reus* element of crimes.
3.3(b) Describe the *mens rea* element of crimes referencing the four culpable mental states recognized in the Model Penal Code.
3.3(c) Explain what is meant by strict liability, and given examples of strict liability offenses.
3.3(d) Define the element of concurrence.
3.3(e) Differentiate between crimes of general intent and crimes of specific intent.
3.3(f) Describe the element of harm, and how the element of cause relates to it.

Introduction

The legal definitions of all crimes contain certain **elements**. If the government cannot prove the existence of these elements, it cannot obtain a conviction in a court of law. Other elements are not part of all crimes, but are only found in crimes that prohibit a particular *harm*. Often, a difference in one particular element of a crime can distinguish it from another related offense, or a particular degree of the same offense. At common law, for example, manslaughter was distinguished from murder by the mental element of **malice aforethought**.

The Criminal Act

Nobody can read minds, and the First Amendment means that people can say pretty much whatever they want. What you think and say (within limits) is protected. It is what you do—your behaviors—that the criminal law seeks to regulate. Lawyers use the legal Latin phrase ***actus reus*** to describe this element of a crime. It is commonly translated into English as the *guilty act*. The term *act* can be a bit confusing. Most people tend to think of the term *act* as an action verb—it is something that people do. The criminal law often seeks to punish people for things that they did *not* do. When the law commands people to take a particular action and they do not take the commanded action, it is known as an ***omission***. The law commands that people feed and shelter their children. Those who do not are guilty of an offense based on the omission. The law commands that people pay their income taxes; if they do not pay their taxes, the omission can be criminal. Threatening to act or attempting an act can also be the *actus reus* element of an offense.

In addition to acts and omissions, **possession** of something can be a criminal offense. The possession of certain weapons, illicit drugs, burglary tools, and so forth are all guilty acts as far as the criminal law is concerned. **Actual possession** is the legal idea that most closely coincides with the everyday use of the term. Actual possession refers to a person having physical control or custody of an object. In addition to actual possession, there is the idea of **constructive possession**. Constructive possession is the legal idea that the person had knowledge of the object, as well as the ability to exercise control over it.

Criminal Intent

A fundamental principle of law is that to be convicted of a crime, there must be a guilty act (the *actus reus*) and a culpable mental state. Recall that culpability means blameworthiness. In other words, there are

literally hundreds of legal terms that describe mental states that are worthy of blame. The most common is *intent*. The **Model Penal Code** boils all of these different terms into four basic culpable mental states: purposely, knowingly, recklessly, and negligently.

Purposely. According to the Model Penal Code, a person acts **purposely** when "it is his conscious object to engage in conduct of that nature…."

Knowingly. A person acts **knowingly** if "he is aware that it is practically certain that his conduct will cause such a result." In other words, the prohibited result was not the actor's purpose, but he knew it would happen.

Recklessly. A person acts **recklessly** if "he consciously disregards a substantial and unjustifiable risk." Further, "The risk must be of such a nature and degree that, considering the nature and purpose of the actor's conduct and the circumstances known to him, its disregard involves a gross deviation from the standard of conduct that a law-abiding person would observe in the actor's situation."

Negligently. A person acts **negligently** when "he should be aware of a substantial and unjustifiable risk that the material element exists or will result from his conduct." The idea is that a reasonably carefully person would have seen the danger, but the actor did not.

At times, the legislature will purposely exclude the *mens rea* element from a criminal offense. This leaves only the guilty act to define the crime. Crimes with no culpable mental state are known as **strict liability** offenses. Most of the time, such crimes are mere violations such as speeding. An officer does not have to give evidence that you were speeding purposely, just that you were speeding. If violations such as this had a mental element, it would put an undue burden on law enforcement and the lower courts. There are a few instances where serious felony crimes are strict liability, such as the statutory rape laws of many states.

Concurrence

For an act to be a crime, the act must be brought on by the criminal intent. In most cases, concurrence is obvious and does not enter into the legal arguments. A classic example is an individual who breaks into a cabin in the woods to escape the deadly cold outside. After entering, the person decides to steal the owner's property. This would not be a burglary (at common law) since burglary requires a breaking and entering with the intent to commit a felony therein. Upon entry, the intent was to escape the cold, not to steal. Thus, there was no **concurrence** between the guilty mind and the guilty act.

Criminal Harm and Causation

In criminal law, **causation** refers to the relationship between a person's behavior and a negative outcome. Some crimes, such as murder, require a prohibited outcome. There is no murder if no one has died (although there may be an *attempt*). In crimes that require such a prohibited harm, the *actus reus* must have caused that **harm**.

Key Terms

Actual Possession, Actus Reus, Causation, Concurrence, Constructive Possession, Elements (of crimes), Harm, Knowingly, Malice Aforethought, Model Penal Code, Negligently, Omission, Possession, Purposely, Recklessly

Section 3.4: Legal Defenses

Learning Objectives

After completing this section, you should be able to:

3.4(a) Compare and contrast the two major categories of legal defenses.
3.4(b) Discuss the frequency and probability of success of the insanity defense.
3.4(c) List and explain the various legal tests for insanity.
3.4(d) Describe the circumstances under which intoxication may be a legal defense, and when it is not.
3.4(e) Describe the circumstances under which a successful entrapment defense can be raised.
3.4(f) Describe the circumstances under which a successful self-defense justification may be raised.
3.4(g) Describe the circumstances under which a successful necessity defense may be raised.
3.4(h) Describe when a mistake is and is not a valid legal defense.

Introduction

To successfully obtain a conviction, the prosecutor must show all of the elements of the crime beyond a reasonable doubt in criminal court. This is not the end of it in some cases. It must also be shown (if the issue is raised) that the *actus reus* and the *mens rea* was present, but also that the defendant committed the act without **justification** or **excuse**. Both justifications and excuses are species of **legal defenses**. If a legal defense is successful, it will either mitigate or eliminate guilt.

A *justification* consists of a permissible reason for committing an act that would otherwise be a crime. Under normal circumstances, for example, it would be a crime to shoot a man dead on the street. If, however, the man was a mugger and had the shooter at knifepoint, then the justification of self-defense could be raised. A justification means that an act would normally be wrong, but under the circumstances it was the right thing to do. An excuse is different. When a criminal defendant uses an excuse, the act was not the right thing to do, but society should nevertheless hold the actor less culpable because of some extenuating circumstance.

The Insanity Defense

The term insanity comes from the law; psychology and medicine do not use it. The everyday use of the term can be misleading. If a person acts abnormally, they tend to be considered by many as "crazy" or "insane." At law, merely having a mental disease or mental defect is not adequate to mitigate guilt. It must be remembered that Jeffery Dahmer was determined to be *legally* sane, even though everyone who knows the details of his horrible acts knows that he was seriously mentally ill. To use insanity as a legal excuse, the defendant has to show that he or she lacked the capacity to understand that the act was wrong, or the capacity to understand the nature of the act. Some jurisdictions have a **not guilty by reason of insanity** plea.

The logic of the **insanity defense** goes back to the idea of *mens rea* and culpability. We as a society usually only want to punish those people who knew what they were doing was wrong. Most people believe that it is morally wrong to punish someone for an unavoidable accident. Likewise, society does not punish very young children for acts that would be crimes if an adult did them. The logic is that they do not have the maturity and wisdom to foresee and understand the nature of the consequences of the act. Put in oversimplified terms, if a person is so crazy that they do not understand that what they are doing is wrong, it is morally wrong to punish them for it.

Over the years, different courts in different jurisdictions have devised different tests to determine systematically if a criminal defendant is legally insane. One of the oldest and most enduring tests is the **M'Naghten rule**, handed down by the English court in 1843. The basis of the M'Naghten test is the inability to distinguish right from wrong. The Alabama Supreme Court, in the case of ***Parsons v. State*** (1887), first adopted the **Irresistible Impulse Test**. The basic idea is that some people, under the duress of a mental illness, cannot control their actions despite understanding that the action is wrong.

Today, all of the federal courts and the majority of state courts use the **substantial capacity test** developed within the *Model Penal Code*. According to this test, a person is not culpable for a criminal act "if at the time of the crime as a result of mental disease or defect the defendant lacked the capacity to appreciate the wrongfulness of his or her conduct or to conform the conduct to the requirements of the law." In other words, this test contains the awareness of wrongdoing standard of M'Naghten as well as the involuntary compulsion standard of the irresistible impulse test.

It is a Hollywood myth that many violent criminals escape justice with the insanity defense. In fact, the insanity defense is seldom attempted by criminal defendants and is very seldom successful when it is used. Of those who do successfully use it, most of them spend more time in mental institutions than they would have spent in prison had they been convicted. The insanity defense is certainly no "get out of jail free card."

Entrapment

Entrapment is a defense that removes blame from a person who commits a criminal act when convinced to do so by law enforcement. In other words, people have the defense of entrapment available when police lure them into crime. A valid entrapment defense has two related elements: There must be a government inducement of the crime, and the defendant's lack of predisposition to engage in the criminal conduct. Mere **solicitation**, however, to commit a crime is not inducement. Inducement requires a showing of at least persuasion or mild coercion.

Self-defense

As a matter of political theory, the right to use force is handed over to the government via the social contract. This power to use force is entrusted to law enforcement. Thus, when force is called for to end a confrontation, people should call the police. There are times, however, when the police are not available in emergencies. In these rare instances, it is permissible for the average citizen to use force to protect themselves and others from violent victimization.

The legality of using force in **self-defense** hinges on reasonableness. Whether a use of force decision was a reasonable one will always depend on the circumstances of each individual situation. The amount of force used should be the minimum likely to repel the attack. The defense also requires that the danger be **imminent**. In other words, the use of force cannot be preemptive or retaliatory. Generally, **deadly force** can only be used to prevent loss of life. Some jurisdictions allow the use of **non-deadly force** to prevent thefts.

Intoxication

While there is some logic to the idea that being intoxicated diminishes a person's capacity to develop *mens rea*, it usually serves to enhance rather than mitigate criminal culpability. There are some jurisdictions that allow **voluntary intoxication** as a factor that mitigates culpability, such as when murder in the first degree is reduced to murder in the second degree. Involuntary intoxication is another matter. If a defendant

has been given a drug without their knowledge, then a defense of **involuntary intoxication** may be available.

Mistake

It is often said, "Everybody makes mistakes." The law recognizes this, and **mistake** can sometimes be a defense to a criminal charge. Mistakes made because the situation was not really the way the person thought it was are known as **mistakes of fact**. These can be a criminal defense. Mistakes as to matters of law (**mistakes of law**) can never be used as a criminal defense. There is a presumption in American law that everyone knows the criminal law. This may seem like a preposterous assumption, but consider the alternative. If a defendant could mount a defense by claiming that he or she did not know the act was criminal, then everyone could commit every crime at least once and get away with it by claiming that they did not know. For this reason, the law has to presume that everybody knows the law.

Necessity

The defense of **necessity** is based on the idea that it is sometimes necessary to choose one evil to prevent another, such as when property is destroyed to save lives. The necessity defense is sometimes referred to as the **lesser of two evils** defense because the evil that he actor seeks to prevent must be a greater harm that the evil that he or she does to prevent it. In most jurisdictions, the defense will not be available if the person created the danger they were avoiding.

Duress

Duress, sometimes known as **coercion**, means that the actor did the criminal act because they were forced to do so by another person by means of a threat. The idea is that while the actor commits the *actus reus* of the offense, the *mens rea* element, the criminal intent, was that of the person that coerced the actor to commit the crime. The effect of a successful duress defense is a matter of state law, so may be different in different jurisdictions. Most jurisdictions require that the actor have no part in becoming involved in the situation.

Key Terms

Coercion, Deadly Force, Duress, Entrapment, Excuse, Imminent Danger, Insanity Defense, Involuntary Intoxication, Irresistible Impulse Test, Justification, Lesser of Two Evils Defense, Mistake Defense, Mistake of Fact, Mistake of Law, M'Naghten Rule, Necessity Defense, Non-deadly Force, Not Guilty By Reason of Insanity, *Parsons v. State* (1887), Self-defense, Solicitation, Substantial Capacity Test, Voluntary Intoxication

Section 3.5: Substantive Offenses

Learning Objectives

After completing this section, you should be able to:

3.5(a) Compare and contrast to common law elements of murder with the modern statutory definition provided by the Model Penal Code.
3.5(b) Differentiate between an assault and a battery.
3.5(c) Describe the evolution of the law defining the offense of rape, including the idea of rape shield laws.
3.5(d) Compare and contrast the common law definition of arson with the modern statutory definition provided by the Model Penal Code.
3.5(e) Compare and contrast the elements of robbery with the elements of burglary.

Introduction

Unlike the social scientific definitions of crime that essentially consider only the act, legal definitions of crimes are more complex. An important aspect of understanding these legal definitions is understanding the common elements that constitute each crime. Once the essential elements of crimes are understood, it is a relatively easy matter to consider the elements that must be proven in court to obtain a conviction. Recall that each element of the crime must be proven beyond a reasonable doubt.

Murder

At common law, **murder** was defined as killing another human being with malice aforethought. Malice aforethought is a legal term of art that goes beyond the obvious meaning of the two terms. The term *malice* means the intention to do evil. It is sometimes defined as "ill will." *Aforethought* means thought about or planned beforehand. If we put the two together, it suggests that the plan to cause harm was premeditated. This "murder with intent to kill" is one legal way to look at it, but at common law, malice aforethought could be satisfied in other ways. An alternative was a murder committed when the intent was only to cause **grievous bodily harm**. In addition, a person was guilty of murder if someone else was killed in the while committing a felony. This is known as the **felony murder rule**.

Most murders require the specific intent to harm the person that dies. When someone does something that kills somebody, but there was no specific target, then there is a **depraved heart murder.** A classic example of this is firing a rifle into a passenger train car. No specific victim was intended, but it was highly likely that someone would die.

While there are some differences in these common law classifications of murder and the modern statutory classifications, their underlying prohibitions are the same. The Model Penal Code, for example, prohibits purposefully or knowingly killing another human being. This functions in a nearly identical way to the common law rule against intentional murder. The Model Penal Code punishes killings that come from "extreme recklessness" in a way that mimics the depraved heart murder of common law. The Model Penal Code creates a **rebuttable presumption** that a killing committed during the commission of certain felonies shows extreme recklessness. This provision mimics the felony murder rule in function.

Assault and Battery

In everyday language, **assault** and **battery** are used interchangeably. In many jurisdictions, however, they are two distinct offenses. An assault is an act that creates an imminent fear that the victim will be harmed, but no actual harm occurs. In other words, an assault is a threat of force. A battery is a physical act that results in some actual harm to the victim. Some jurisdictions include any offensive touching in the definition of battery. Many jurisdictions define an unwanted touching of the sexual organs of another person as a **sexual battery**. Note that in most cases, the assault is a lesser-included offense of the battery. That means that in jurisdictions that have both assault and battery statutes, both offenses cannot be charged against the same person for the same act.

Rape

Rape is a crime that has evolved dramatically over time. At common law, rape was defined as *the unlawful carnal knowledge of a female without her consent*. In this common law context, the term unlawful means that law did not authorize the act. Historically, this precluded applying the rape law to a husband who forced his wife to have sex (now known as **marital rape**). ***Carnal knowledge*** is synonymous with *sexual intercourse*. Thus, the law was very specific; many violent sexual acts (such as those perpetrated against men) did not fit the legal definition of rape.

Historically, rape has been a very difficult crime for the state to prove. The most difficult element to prove in court tends to be the fact that the woman did not consent to the act. Many jurisdictions required that the victim offer forceful resistance to the perpetrator. In addition, many required that the victim be of "previously chaste character." Defense attorneys would use this requirement to attack the victim on the witness stand, increasing the trauma of an already traumatic event. Most states have now passed what are known as **rape shield laws**. These are laws designed to protect victims of rape from further trauma. Most of these laws prohibit the introduction of evidence about the victim's past sexual history and reputation.

The changing legal climate of rape law has influenced the definition used by the FBI's Uniform Crime Reports program. The traditional UCR definition was “The carnal knowledge of a female forcibly and against her will.” Many agencies interpreted this definition as excluding a long list of sex offenses that are criminal in most jurisdictions, such as offenses involving oral or anal penetration, penetration with objects, and rapes of males. The new Summary definition of Rape is: “Penetration, no matter how slight, of the vagina or anus with any body part or object, or oral penetration by a sex organ of another person, without the consent of the victim.” This language is very similar to that of the Model Penal Code's rape statute.

Arson

Arson has always been considered a very serious crime. At various times, the penalty under the common law was death by burning. **Common law arson** was very narrowly defined as the *malicious burning of the dwelling of another*. In the common law context, a malicious burning was one where the perpetrator had criminal intent. The *burning* requirement did not mean that the dwelling had to be completely consumed by the fire. Smoke and blackening were generally considered to be insufficient; some part of the structure (albeit a very small amount) must be destroyed by the fire.

Modern statutory definitions have tended to expand on what is covered by arson. Today, most all structures will qualify. Many states include the burning of any valuable property in the definition of arson, setting the penalty based on the value of the property destroyed. The model penal code requires that the arsonist have the purpose of destroying another person's building or other structure.

Robbery

Robbery is the taking of the property of another by the use of force or threat of force. Because of the force involved, most jurisdictions classify robbery as a crime against persons rather than a property crime. For this reason, some force is required for a theft of property to amount to a robbery. Purse snatching, for example, does not constitute a robbery in most jurisdictions because the only force involved was the amount necessary to acquire possession of the property. Many states divide robbery into categories based on the seriousness of the offense. The use of a weapon, especially a firearm, often elevates the crime to aggravated robbery or first-degree robbery, depending on the jurisdiction. Most robbery statutes are state laws, but some robberies, notably those that affect interstate commerce or the currency, are matters of federal law.

Burglary

At common law, **burglary** required that the crime take place in the dwelling house of another at night. Most states have greatly broadened this requirement to include any structure at any time of day. Many jurisdictions draw a distinction between residential burglary and commercial burglary, with the penalty being more severe for residential burglary. Burglary is much more serious than a mere theft of property because it involves the home, which is sacred under the common law tradition, and the risk of violence is high.

Most modern statutes require a breaking and entering into the home or other structure of another person with the intent to commit a crime therein. Under most circumstances, the crime will be a theft. Other offenses contemplated within the structure, such as rape, can also meet the requirements for burglary.

Classification of Juvenile Behaviors

Recall that there is a separate juvenile system that is operated in parallel with the adult system. The special treatment of juveniles extends into the criminal law along with other aspects of the criminal justice system. The OJJDP estimates that about 1.3 million juveniles were arrested in 2013, continuing a downward trend in the number of persons under the age of 18 arrested each year. Only about 61,000 if these were offenses listed on the Violent Crime Index. The remaining offenses were property crimes and nonviolent offenses. Some of these were status offenses, such as **truancy**, curfew violations, and running away.

The vast majority of these arrests were for nonviolent crimes. About 5% were for minor offenses, such as **truancy**, running away, or curfew violations. Because the juvenile justice system is different that the adult criminal justice system, a different classification scheme has been developed to describe children. There are three basic categories of youths under the jurisdiction of the Juvenile Courts.

Delinquents

Delinquents are youths who commit acts that would be considered as criminal of the same act were committed by an adult. This classification includes both misdemeanors and felonies.

Status Offenders

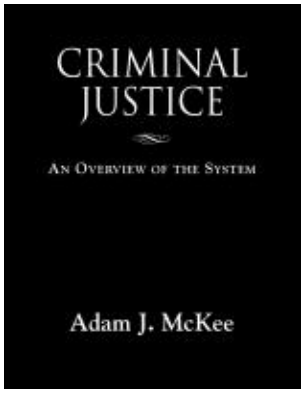
Status offenders are youths who commit acts that would not be defined as criminal if committed by an adult, but are only taken notice of *because* of the juvenile's age (e.g., truancy, running away from home, and curfew violations).

Dependent and Neglected Children

Dependent and neglected children are youths who are disadvantaged in some way and in need of support and supervision.

Key Terms

Arson, Assault, Battery, Burglary, Carnal Knowledge, Commercial Burglary, Common Law Arson, Delinquents, Dependent and Neglected Children, Depraved Heart Murder, Dwelling House, Felony Murder Rule, Grievous Bodily Harm, Lesser-included Offense, Marital Rape, Murder, Rape, Rape Shield Laws, Rebuttable Presumption, Residential Burglary, Robbery, Sexual Battery, Status Offenders, Status Offenses, Truancy



This book provides an overview of the criminal justice system of the United States. It is intended to provide the introductory student a concise yet balanced introduction to the workings of the legal system as well as policing, courts, corrections, and juvenile justice. Six chapters, each divided into five sections, provide the reader a consistent, comfortable format as well as providing the instructor with a consistent framework for ease of instructional design.

Criminal Justice:
An Overview of the System