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2 CONCEPTS OF LAW AND JUSTICE

LEARNING OBJECTIVES

- Compare between criminal and civil law.
- Identify the origins for the four different sources of law.
- Discuss the similarities and differences between the various types of criminal law.
- Explain the different types of criminal defenses.

THE RISE AND FALL OF PURDUE PHARMA

The television mini-series *Dopesick* tells the story that begins in a small conservative mining town, where a young woman who injured her back visits her local doctor. He prescribes her a new drug called OxyContin to help her with her pain, a drug that was marketed as a safe option for pain management. The series is a fictionalized account of a story that played out across local communities across the nation, while highlighting the real details of addiction and the role of one pharmaceutical family in fueling the opioid crisis.

Michael Nigro/Pacific Press/LightRocket via Getty Images

Purdue Pharma is a privately held company owned by the Sackler family since 1991. Their focus was on pain-management pharmaceuticals. Their most well-known drug, was OxyContin. The main ingredient of this medication is oxycodone, which a chemical cousin to heroin and is highly addictive. Upon its development by Purdue Pharma, OxyContin was aggressively marketed to doctors, who were wooed via all-expense paid trips to pain-management seminars and other financial incentives. Many of these doctors were already known by Purdue Pharma to be high prescribers of opioids. Doctors were hired by the company to lead these seminars and endorse the drug, and sales staff were provided large bonuses to increase sales of the drug. The drug was marketed not just for acute pain management, such as postsurgery, but also for chronic pain management from conditions such as back pain, arthritis, and other injuries.[1] Company representatives, led by Arthur Sackler, pushed the narrative that the drug was perfectly safe and was less addictive than other forms of opiates as a result of its time-release properties. Yet, there was no legitimate scientific evidence that supported this claim.

The popularity of the drug soared, leading to record profits for the company. Between 1995 and 2001, Purdue Pharma received $2.8 billion dollars of revenue as a result of the sale of OxyContin. By 2017, these proceeds exceeded $35 billion. The Sackler family quickly became one of the country's richest families, with a net value of $13 billion dollars.

Despite its claims by its sales staff and company leadership, OxyContin proved to be highly addictive. Purdue Pharma's response to these claims was that it was not the drug that was the issue, but the individual who abused the drug. In 2003, the U.S. Drug Enforcement Administration cited that the company's marketing tactics and false promises were connected to the rise in opioid abuse across the nation. In the two decades since its inception, OxyContin has helped fuel an opioid crisis that has led to over 500,000 overdose deaths.[2]

Lawsuits against Purdue Pharma were filed across the country. In 2006, the company paid $600 million dollars in a Federal lawsuit for its false and misleading marketing campaign.[3] Additional class-action and government lawsuits followed alleging violations of both criminal and civil law—over 3,000 in total, including filings from 47 states. Twenty-nine of the cases named members of the Sackler family as personal defendants.[4] In 2019, the company filed for bankruptcy. As part of the settlement, the company would pay $10 million dollars to resolve the civil and criminal proceedings that had been filed against them. However, it also absolved the company of any wrongdoing, and the Sackler family also was not held liable.[5] As a result, several states appealed the decision. Purdue Pharma pled guilty to federal criminal charges of fraud in 2020.[6] In March 2022, the company and members of the Sackler family reached an agreement related to their bankruptcy filing worth $6 billion dollars, which also included money to help fund addiction programs. Individuals and their family members will be able to draw from a victim compensation fund worth $750 million dollars. However, the deal remains controversial, as it allows the company and the Sackler family to be protected from any future civil lawsuits related to OxyContin or any other Purdue-related pain management substances.[7] However, the agreement does not provide immunity to any future criminal charges.[8] The Sackler family remains one of the richest families in the United States.

CRIMINAL VERSUS CIVIL LAW

Civil Cases

In the United States, we have two separate court systems to respond to our two primary areas of law: civil law and criminal law. **Civil law** governs disputes between individuals or private parties (which can include corporations) and generally involves violations of private acts, such as contracts, property disputes, and family law. In these cases, the person who initiates the case is referred to as the **plaintiff**, and the person who is responding to the case is the defendant. The burden to prove the case is placed on the plaintiff. Under civil law, the plaintiff must provide evidence to prove their case by the **preponderance of the evidence**. This means that if the evidence presented is more likely to prove that the law was violated, then the plaintiff wins the case. Under civil law, the form of punishment is financial.

One of the most famous civil court cases was *Liebeck v. McDonald's Restaurants* (1994), otherwise referred to as the McDonald's hot coffee case. Ms. Liebeck ordered a cup of coffee from the drive-thru at a local McDonald's. While sitting in the passenger's seat, she placed the cup between her knees to steady the coffee while she removed the lid to add cream to the beverage. She subsequently spilled the contents of the cup over her groin and legs and suffered third-degree burns as a result of the high temperature of the beverage. Her burns were so extensive that she required several skin grafts and was partially disabled for two years as a result of her injuries. Ms. Liebeck sought assistance from McDonald's to cover her medical expenses. Despite several requests for a settlement, McDonald's refused. She filed a suit with the civil court of New Mexico (where she resided), and her lawyers alleged that by serving the coffee at such a high temperature, McDonald's was guilty of gross negligence. The jury in the case agreed with Ms. Liebeck and awarded her $160,000 in damages for her pain and suffering. The jury also awarded punitive damages in the case of $2.7 million.[9]

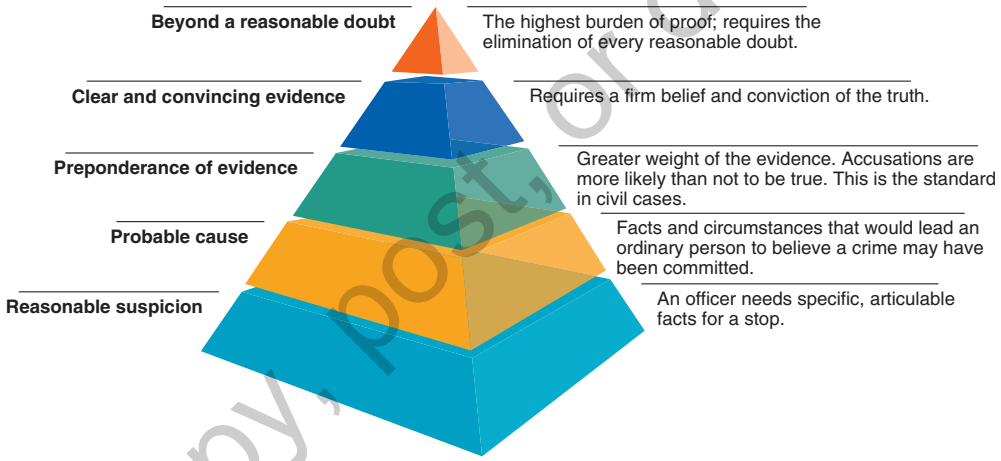
Criminal Cases

In contrast to civil law, criminal law cases are brought by the government against a defendant for violating a specific law. In a criminal law case, the burden of proof is **beyond a reasonable doubt**. Figure 2.1 demonstrates how this burden of proof is different from other forms of proof that are used throughout our justice system. This means that in order to convict a defendant of a crime, the court must find that there is little doubt according to the reasonable or typical individual that the defendant committed the crime. Depending on the type of crime that the defendant is convicted of, they may receive probation, spend time in jail or prison, or be executed as punishment for the crime. You'll learn more about the different types of punishment in Chapter 10.

Federal Criminal Laws

Federal criminal laws are enacted by the legislative branch of the federal government. Federal law related to criminal justice includes the regulation of firearms, drugs, money laundering, fraud, and a variety of other criminal activities. Federal law also governs activities within federal government buildings, in national parks, and on tribal land. In addition, federal law violations can be triggered when crimes occur across state lines.

FIGURE 2.1 ■ Burden of Proof



State Criminal Laws

States also have the power to make laws prohibiting behaviors under the Tenth Amendment. Unlike federal criminal law, which applies to all 50 states as well as the District of Columbia and U.S. territories, state law is limited to the specific geographic jurisdiction of that state. While criminal laws may have similar characteristics across the nation, there are also differences in the types of behaviors that are defined as criminal from state to state, as well as in the types of punishments that violators are subjected to. For example, by March of 2023, 21 states have legalized recreational **marijuana** use and another 37 have approved medical use of marijuana, with states such as Minnesota, North Carolina and Ohio considering decriminalization in 2023.[10] Alabama's criminal law defines the personal possession of marijuana as a misdemeanor, but subsequent possessions can be charged as felonies. Meanwhile, several other states have decriminalized simple possession or limited its enforcement to a civil violation. Even in states that have decriminalized marijuana possession, most have created specific laws about the amount that one is permitted to possess for individual use. While opponents of legalization of marijuana argue it poses a health risk or may be immoral, advocates point to its boon as a moneymaker for states as well as the social justice aspects of decriminalization and legalization where people have been incarcerated for its use.[11] Toward this end, some have advocated for expungement of criminal offenses for low-level marijuana offenses. In a December 2022 article in the *Journal of the American Medical Association (JAMA) Substance Use and Addiction* found that even decriminalization of marijuana possession has a positive effect on reducing arrests and incarceration within those jurisdictions that opt

out of legalization.[12] In addition, health proponents also cite the medicinal and therapeutic benefits of marijuana use for stress and pain relief. In compliment to the changes in state laws, in February of 2023, President Joe Biden issued an executive order regarding racial inequities within the criminal justice system and a critical review of federal marijuana laws.[13]

The Twelve Tables represented the codified customs of early Roman law. What influences of Roman law and English common law can we see in the American legal system today?

Universal History Archive/Universal Images Group via Getty Images

Municipal Criminal Laws

A municipality can have its own body of law. In terms of jurisdiction, these laws are generally the most limited as they are only applied to a specific city or county. Municipal criminal law is limited to cases involving infractions and misdemeanors. An infraction is a violation that is punishable by a fine but does not carry a potential jail sentence. Unlike misdemeanors and felonies, cases involving infractions do not involve jury trials, nor is the accused provided an attorney if they cannot afford one (though defendants are permitted to hire an attorney if they wish). The most common type of infraction is a traffic violation, but infractions can also include jaywalking and disturbing the peace. Infractions are also unique in that they follow the burden of proof similar to a civil case—preponderance of the evidence. Cases that involve misdemeanor crimes at the municipal level are handled just like misdemeanors under state and federal law, and these cases are managed by the same due process protections.

ORIGINS OF THE LAW

If we look throughout history, we see several references to law and legal systems. One of the earliest examples of law can be found in the code of Hammurabi, which dates back to 1754 BCE and contained references to 282 different laws. It is here that we find the first reference of **lex talionis**, which argued that the punishment should fit the nature of the crime. For example, the law against slander stated that "if anyone 'point the finger' at a sister of a god or the wife of any one, and cannot prove it, this man shall be taken before the judges and his brow shall be marked."[14] In contrast, ancient Roman law developed through centuries of customs that were passed down from one generation to another. These customs later became codified in 449 BCE as the Twelve Tables and stood as the foundation of the Roman law. As the Roman Empire expanded, so did its legal system. During the third century BCE, we see the emergence of the first legal scholars. These trained jurists were tasked with interpreting the law, much like the U.S. Supreme Court does today. Indeed, Roman law significantly influenced much of Western

law, including the English common-law system.[15] English common law emerged during the Middle Ages. Henry II (1154–1189 CE) established a system whereby judges were sent out to resolve disputes throughout the country. One of the key features that emerged under the common-law system was the doctrine of **stare decisis** (which means "to stand by things settled" in Latin). This refers to a system of **precedent** whereby future legal decisions are required to take into consideration previous rulings. This means that a court should issue a ruling that aligns with not only its own previous decisions but also the rulings of higher-level courts. This system is still in use today.

Both Roman law and English common law heavily influenced the American legal system. Today, we can find laws among four primary sources: constitutional law, statutory law, administrative law, and case law.

Constitutional Law

A constitution serves to establish and govern a government.[16] The U.S. Constitution stands as the highest law of our country and embodies the principles from which all other legal rules and processes are derived. It was written in 1787 in Philadelphia and was ratified by nine states on June 21, 1788. The first 10 amendments compose the Bill of Rights, and several of these amendments relate directly to criminal law. Table 2.1 highlights the **constitutional law** protections that the Bill of Rights provides. The framers of the Constitution were particularly concerned about preserving due process for individuals who are accused of a crime.

TABLE 2.1 ■ Constitutional Rights That Relate to Criminal Law

Amendment	Protection
First Amendment	Protects freedom of religion, freedom of speech, and freedom of the press as well as the right to assembly.
Second Amendment	Protects the right to bear arms.
Fourth Amendment	Protects against unreasonable searches and seizures.
Fifth Amendment	Protects against double jeopardy and self-incrimination. Provides due process protection in criminal cases.
Sixth Amendment	Provides for the right to a speedy trial by an impartial jury of one's peers in the jurisdiction where the crime occurred. Provides the right to be informed of the nature of the charges, to confront witnesses against oneself, and present witnesses in one's defense. Provides the right to an attorney.
Eighth Amendment	Protects against excessive bail and cruel and unusual punishments.
Fourteenth Amendment	Extends due process protections to the states.

Most of the rights that we refer to as part of our criminal justice process come from the Fourth, Fifth, Sixth, and Eighth Amendments. The Fourth Amendment protects individuals against unreasonable searches and seizures. Perhaps the best understanding of this is that police officers are generally required to obtain a warrant before conducting a search of your home. You'll learn about this rule of law as well as its exceptions in Chapter 8. The Fifth Amendment protects against double jeopardy and self-incrimination. **Double jeopardy** means that a person cannot be tried for a crime more than once. So if an individual is found not guilty by the court, they cannot be retried for the same case in the future. **Self-incrimination** means that a person has the right to remain silent and does not have to respond to questions that might implicate themself in a criminal offense.

The Sixth Amendment provides for the right to a speedy trial by an impartial jury of one's peers in the jurisdiction where the crime occurred. It also provides for the right to be informed of the nature of the charges, to confront any witnesses that will testify against you, and to present witnesses in your own defense. It also provides for the right to an attorney. In many ways, it is the provisions of the Sixth

Amendment that have structured our criminal courts system. You'll learn more about this structure and its processes in Chapter 9. Finally, the Eighth Amendment protects against cruel and unusual punishment. Perhaps the most commonly known argument involving the Eighth Amendment is the use of the death penalty, but this amendment has also been invoked to defend against other practices, such as the use of solitary confinement and mandatory sentencing schemes. It also protects against excessive bail.

Several of the amendments have been used to challenge various practices within the criminal justice system, such as the application of the Eighth Amendment to reduce prison overcrowding. You'll learn more about the rights of convicted individuals and the incarcerated in Chapters 11 and 12.

In addition to the U.S. Constitution, each state has its own constitution that serves as a binding document for all laws at the state level. However, these laws bind only that specific state. This means that state laws must abide by the rules set forth in not only that state's constitution but the U.S. Constitution as well. If a law is challenged, it is up to either the state supreme court or the U.S. Supreme Court to determine whether the law violates the relevant constitution. As you will see throughout this book, many of our policies and practices of criminal law have been established through the constitutional review process.

Statutory Law

Federal Statutory Law

Statutory law refers to laws that are established by governments. Federal law is created by members of Congress, who first introduce a bill in either the House or the Senate (wherever their seat is held). These bills are then debated by a committee (and in some cases a subcommittee, which comprises a small number of congressional members). Once the bill is approved by committee, it is returned to the House or the Senate for general debate. At this stage, members can reject the bill, propose amendments to the bill, or pass the bill. The bill is then sent to the president, who either signs the bill and allows it to become a law or vetoes the bill. However, Congress can override the presidential veto with a two-thirds vote by each of its chambers.[17]

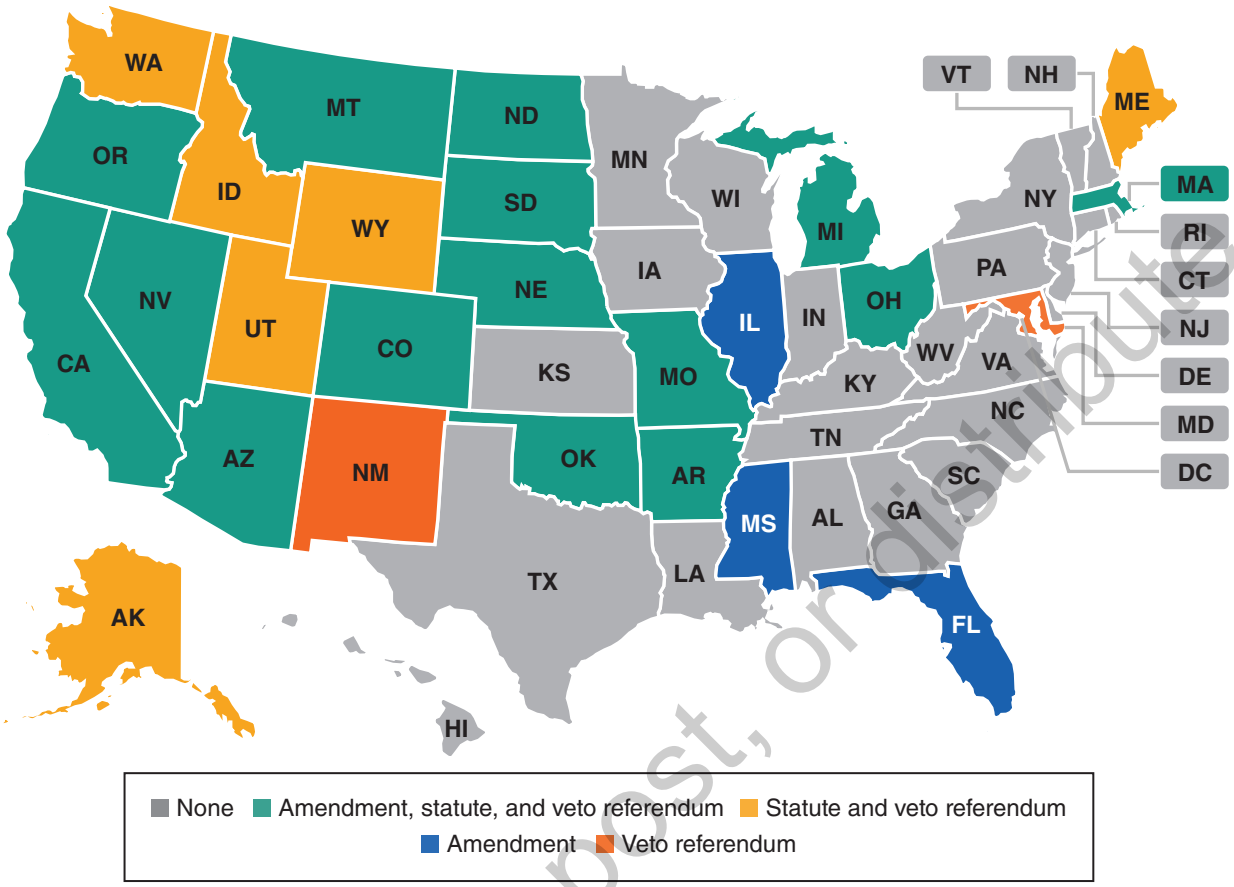
State Statutory Law

At the state level, statutory law is proposed by a member of the state legislature and is debated in a fashion similar to the federal process. Once a majority of the members of the state legislature approve the measure, it is sent to the state's governor for approval. State law exists in partnership with federal law. In cases where there is a conflict between state and federal law, it is up to the federal court system to resolve these disputes. Since each state has its own set of laws for its jurisdiction, you may often find differing and contradictory approaches to issues.

In addition to legislators, citizens of several states can create laws as a result of direct democracy (see Figure 2.2). Twenty-six states allow for laws to be adopted via a ballot initiative process.[18] Under a direct initiative, signatures are gathered by registered voters to place an initiative on the election ballot. If the measure passes by a majority vote, then the initiative is enacted into law. This method of direct democracy is particularly popular in California, which has used this practice to enact a number of state laws, including several related to criminal justice. For example, Proposition 83 (otherwise known as Jessica's Law) was passed by a vote of 70.5% of Californian voters in 2006 and was designed to increase the punishment for individuals who are convicted of sex crimes against adults and children. The law also increased the postincarceration restrictions on persons convicted of sex crimes through residency requirements and requiring those persons to wear GPS tracking devices postrelease. The law was challenged on the grounds that the residency requirements, which prohibited people convicted of sex offenses from living within 2,000 feet of a school or park, were too strict. Since many of those persons previously incarcerated for such crimes were forced to live on the streets (which could be viewed as a violation of their parole), the court held that these provisions were a violation of the liberty and privacy interests of the individuals. The court also held that restricting the residency of formerly incarcerated persons did little to protect the community. In its

FIGURE 2.2 ■ States That Provide for Initiative, Referendum, or Both.

There are 26 states that provide for at least one form of statewide, citizen-initiated ballot measure.



Source: States with initiative or referendum. (2023, April 11). Ballotpedia. https://ballotpedia.org/States_with_initiative_or_referendum.

decision, the California supreme court determined that while such restrictions could be upheld in certain types of cases (like those involving victims under the age of 14), a blanket restriction was unconstitutional.[19]

Administrative Law

Administrative law refers to the body of law that governs the creation and function of state and federal government agencies. Administrative law focuses on the powers that are granted to these agencies, the types of rules that they make, and how these agencies are linked to other areas of the government as well as the general public. Administrative law spans across virtually every topic, including intelligence, security, banking, finance, food, education, and communications—if there is a governmental agency involved in its regulation, then administrative law is at the center of this discussion. The primary source for administrative law is the Federal Administrative Procedure Act (APA). The APA has four primary purposes: (1) to mandate that government agencies inform the public of the nature, procedures, and rules of their organization; (2) to provide a process whereby the public can participate in making such rules; (3) to establish and implement a uniform process by which rules are made and violations are adjudicated; and (4) to define the scope of judicial review.[20] Current administrative law is published daily in the *Federal Register* and is reorganized on an annual basis into the *Code of Federal Regulations*.

SPOTLIGHT

CONCEALED WEAPONS ON COLLEGE CAMPUSES

The issue of allowing concealed weapons on college campuses has seen significant debate in recent years. While some states have passed laws permitting the practice, a recent poll of 1,160 colleges in the United States showed that the majority ban guns on campus, with 91% reporting heavy restrictions on their carry in public spaces on campus.[a] While all 50 states have laws that allow citizens to carry concealed weapons in certain circumstances, as of April 2023, only 11 states permit individuals to carry a concealed weapon on a college campus and nine allow for guns to be locked in vehicles on campus, including Alabama, Florida, Missouri, Nebraska, North Carolina, North Dakota, Ohio, Oklahoma, and South Carolina. An additional 22 states allow individual campuses to determine their own policies on the practice and 17 have legally banned guns from all college campuses.[b] In June 2015, Texas governor Greg Abbott signed Senate Bill 11, which permits individuals with a concealed handgun license to legally carry on college campuses. The sponsor of the bill, Allen Fletcher, argued that since Texas law already permits individuals with a concealed weapons permit to carry in public, it was likely that many students already carried in class unbeknownst to university faculty and staff.[c] As in other states, Texas state colleges and universities must create policies for their individual campuses that determine where concealed weapons can be carried. While the law does provide the creation of gun-free zones, it is unclear as to how these zones can be defined.[d] Texas already allows teachers in public elementary and secondary schools to carry a concealed weapon in the classroom if they have permission from their school district superintendent.[e] Although the law received renewed criticism after the 2022 mass shooting in Uvalde, Texas, a 2017 review of incidents at Texas research universities by the *Texas Tribune* showed no marked increases of violence or intimidation.[f] However, two weeks after the Uvalde tragedy, a poll of over 4600 Texans who work at schools showed that 77% of those surveyed did not want to carry firearms at work and did not want the responsibility of neutralizing an active shooter on the job, 59% opposed Texas legislation allowing permitless carry, and 97% desired significant gun reform legislation.[g] Meanwhile, other universities are purchasing bulletproof whiteboards for professors to help protect them and their students in the case of an active shooter.[h] This issue continues to be a hot topic of polarized debate, with 377 school shootings since the infamous Columbine High School event in 1999 and more than 349,000 students having been touched by gun violence since that event through April of 2023.[i]

The suspect in the University of Virginia shooting was under investigation at the time that he fatally shot and killed UVA football players and students Devin Chandler, Lavel Davis, Jr., and D'Sean Perry on November 13, 2022. UVA has hired an independent investigator to analyze the events that led to this mass shooting. What, if anything, should be done to ensure that college campuses are safer from active shooters?

ZUMA Press, Inc. / Alamy Stock Photo

Critical Thinking Questions

1. Does it make students safer to have staff carry guns on school campuses? What should the requirements be for one to carry a firearm, if any, on campus grounds?
2. What are the laws for concealed weapons carry for your state? What do these laws mean for the schools in your community?

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[a] Claybourn, C. (2022, December 16). What to know about gun policies on college campuses. *US News & World Report.* https://www.usnews.com/education/best-colleges/articles/what-parents-students-need-to-know-about-campus-carry-policies

[b] Rock, A. (2023, April 7). An updated list of states that allow campus carry. *Campus Safety Magazine*. https://www.campussafetymagazine.com/university/list-of-states-that-allow-concealed-carry-guns-on-campus/

[c] Kingkade, T. (2015, October 7). *Texas lawmaker says students already bring guns to class illegally.* Huffington Post. http://www.huffingtonpost.com/entry/fletcher-guns-in-class-texas_us_56154c55e4b021e856d31e35

[d] Watkins, M. (2015, June 16). Did you think campus carry was settled law? *The Texas Tribune*. http://www.texastribune.org/2015/06/16/new-law-campus-carrydebate-begins-anew

[e] Price, B. (2014, April 20). *Greg Abbott affirms teacher authority to carry concealed weapons in Texas*. Breitbart. http://www.breitbart.com/texas/2014/04/20/greg-abbott-affirms-teacher-authority-to-carryconcealed-weapons

[f] Mooney, T., Luciano, L., & Sherman, J. (2022, November 17). *Texas laws allow teachers to carry guns on school grounds with little regulation.* CBS News. https://www.cbsnews.com/news/texas-teachers-guns-at-school/; Platoff, E. (2017, August 1). After a quiet year of campus carry, community colleges get guns next. *The Texas Tribune*. https://www.texastribune.org/2017/08/01/campus-carry-one-quiet-year

[g] Texas American Federation of Teachers. *Survey Stats 5,100 responses submitted in six days • K–12 teachers and school employees • Higher ed employees • Parents • Community members • All Texans.* (n.d.). Texasaft.org. https://www.texasaft.org/wp-content/uploads/2022/06/22.06.08_TexasAFT_GunsSurvey.pdf

[h] *University of Maryland Eastern Shore Buys Bulletproof Whiteboards for Professors*. (2013, August 16). Huffington Post. http://www.huffingtonpost.com/2013/08/16/bulletproof-whiteboardsuniversity_n_3768194.html.bott-affirms-teacher-authority-to-carryconcealed-weapons

[i] Cox, J. W., Rich, S., Chong, L., Trevor, L., Muyskens, J., & Ulmanu, M. (2023, June 11). More than 356,000 students have experienced gun violence at school since Columbine. (2023, June 11). *Washington Post.* https://www.washingtonpost.com/education/interactive/school-shootings-database/

Administrative law is often involved in criminal justice matters. For example, the Department of Agriculture was one of the first agencies involved in the investigation of Atlanta Falcons quarterback Michael Vick. While Vick was ultimately convicted of federal crimes in 2007 after he pled guilty to his involvement in animal cruelty and dog-fighting events, it was administrative law that granted the Department of Agriculture the necessary jurisdiction to initiate the investigation in conjunction with the Department of Justice. Vick was ultimately sentenced to 23 months in prison. While his conviction did not prohibit him from being reinstated by the NFL postconviction or controversially being named as an honorary captain for the 2019 Pro Bowl, the case did result in new federal laws, such as the Animal Fighting Prohibition Enforcement Act of 2007.[21] This new law amended the Animal Welfare Act and increased the penalties in cases of animal fighting ventures.[22] In addition, dog fighting is now a felony in all 50 states.[23]

Case Law

Unlike statutory law, which is typically created by legislatures (and, in some cases, the initiative process), **case law** is created as a result of legal decisions by courts. These new interpretations of the law are called *precedent*. You learned earlier in this chapter that the origins of precedent lie in English common law, which served as a significant influence on the American judicial system. Case law involves a judge or panel of judges who provide a written explanation of their decision in a court case. These explanations are called **opinions**. Opinions are generally written in appellate cases, so they focus on issues of law rather than the facts of the case. These opinions lay out the reasoning used by the justices to make their decision. These written opinions often

build upon—or in some cases even overturn—previous decisions. Case law is directly linked to statutory law. Most legal challenges that create case law arise out of a conflict of statutory law. Generally speaking, in order to challenge statutory law, there needs to be an allegation that the law or its application is in violation of the governing constitution (such as a state constitution or the U.S. Constitution).

An example of case law is the 2015 U.S. Supreme Court decision in *Rodriguez v. United States*, which ruled on the lawful duration of traffic stops. Dennys Rodriguez was stopped by the Nebraska Highway Patrol for driving on the shoulder of the highway. The stop was legal as such conduct is prohibited by state law. The officer requested and received the license of Mr. Rodriguez and his passenger and subsequently issued a traffic citation for the conduct. The officer then asked if Mr. Rodriguez would consent to a perimeter search of his vehicle by a K-9 dog that was in the patrol car. When Mr. Rodriquez denied the request, the officer detained him until a second officer arrived. Upon the arrival of the backup officer, the K-9 dog performed a perimeter search of the vehicle and detected an illegal substance. A subsequent content search of the vehicle found methamphetamine. The length of time between the issuing of the traffic citation and the alert by the dog was seven to eight minutes. While Mr. Rodriguez's attorney argued that the evidence from the traffic stop should not be admissible, the objection was overruled by the trial court. Mr. Rodriguez was subsequently convicted on federal drug charges. Mr. Rodriguez appealed his conviction. The case ultimately appeared before the justices of the U.S. Supreme Court (*Rodriguez v. United States*, 2015), who agreed with Mr. Rodriguez. In its opinion, the Court stated that the extension of a traffic stop in order to conduct a dog sniff is a violation of the Fourth Amendment's protection against illegal search and seizure.[24]

TYPES OF CRIMINAL LAW

Each crime is defined under various different bodies of law—municipal law, state law, federal law, and even international law. In order to define an act as a crime, there must be a law that identifies this behavior as wrong. Laws are designed to represent the interests of the citizens. Laws about crime generally fall into one of two categories: mala in se and mala prohibita. Crimes that are **mala in se** are acts that are considered to be inherently illegal. Murder is an example of a crime that is mala in se. In comparison, acts that are **mala prohibita** are only crimes because they have been defined under the law as illegal. Examples of crimes that are mala prohibita are drug use, prostitution, and gambling.[25]

Components of a Criminal Act

Under criminal law, there are four components of a criminal act (Figure 2.3). The first is **actus reus**. Actus reus is Latin and means "evil act." In order for a crime to exist, there must be an act that is defined by society as bad or wrong. The second component is **mens rea**. While the actus reus is the act, mens rea is the "evil thought" that accompanies the crime. Thoughts alone are not considered to be criminal, but they contribute to the act of the crime by providing **intent**. In order for something to be considered a crime, there must be an evil act (or actus reus) and the bad intention to cause harm (or mens rea). When mens rea joins with actus reus, this is called **concurrence**. In a criminal case, both mens rea and actus reus must be proven beyond a reasonable doubt in order to convict someone of the crime. However, some crimes are defined as **strict liability** crimes. This means that mens rea does not need to be proven in order for an individual to be guilty of the criminal act. For example, if a man is found to be going over the speed limit, he can be charged with the violation even if he didn't realize he was speeding. Another example is that someone who drives drunk and subsequently kills another person in an accident most likely did not intend to harm anyone when they got into the car. Yet we define this as a crime. In this case, the decision to consume alcohol and then get into a car to drive home is considered a **voluntary act**, while the decision to get into an accident that causes harm to another person is an **involuntary act**.

AROUND THE WORLD

INTERNATIONAL LAW

Each government has its own body of law to govern its citizens. International law focuses on regulations between nations. International law covers a number of different topics, including human rights, international crime, refugee and migration issues, and conditions of war. International law also provides guidance on global issues such as the environment, international waters, trade, and communications.

The United Nations Security Council us tasked with maintaining international peace and security. How does international law differ from other forms of law?

Spencer Platt/Getty Images

The United Nations (UN) is the primary body tasked with supporting issues of international law. Founded in 1945 with 51 originating members it is made up of 193 member states. According to the governing charter, the UN promotes discussion among the member nations to help address the needs of various countries and help solve problems that exist between countries. In addition, the UN provides support for issues that impact the global community as a whole.[a] To date, more than 500 treaties have been deposited with the UN. One example of such a treaty is the seminal Universal Declaration of Human Rights (UDHR), first drafted back in 1948 and a milestone document regarding fundamental issues related to freedom, human dignity, peace, and justice. The document has been translated into over 500 languages and is credited as the impetus of over 70 human rights treaties. Another influential sample is the UN International Convention for the Suppression of the Financing of Terrorism. Passed in 1999, the treaty aims to criminalize the financial support of terrorist entities and acts. It has been ratified by 187 states, making it one of the most successful antiterrorism treaties.[b] The International Court of Justice (ICJ) is the judicial entity within the United Nations that is used to resolve disputes between states and violations of international law.[c] The court can also provide advisory opinions on issues of law and policy. In addition to the ICJ, several UN tribunals have been established by the UN Security Council and used to resolve specific disputes.[d] For example, the Special Court for Sierra Leone was established in 2002 to address significant war crimes that occurred during the country's civil war between 1991 and 2002.[e] However, the legal authority of these courts and tribunals is often limited as they are often established to address specific issues. In 1998, the international community adopted the Rome Statute, which provided the legal basis to establish a permanent international court system. The International Criminal Court[f] is involved in prosecuting cases of war crimes, genocide, and crimes against humanity. Since its creation, it has been involved in 31 cases stemming from nine international events.

While the other forms of law discussed in this chapter reflect the various sources of law that can be found in many different jurisdictions, international law is unique in that it represents the needs and interests of the international community as a whole.

Critical Thinking Questions

1. What are the challenges of maintaining a system of international law?
2. How does international law influence the legal decision making of the United States?

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[a] United Nations. (n.d.b). *Current members*. https://www.un.org/securitycouncil/content/current-members

[b] United Nations. (n.d.a). *About the UN*. n.d. http://www.un.org/en/about-un/index.html

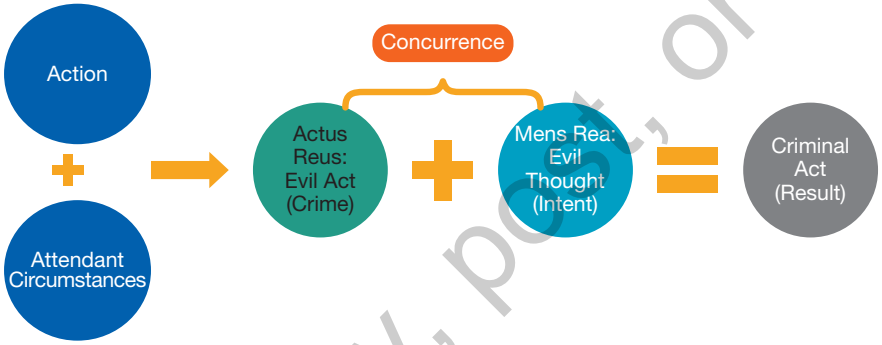
[c] United Nations. (1999, December 9). *International Convention for the Suppression of the Financing of Terrorism*. http://www.un.org/law/cod/finterr.htm

[d] United Nations. (n.d.c). *Uphold international law*. http://www.un.org/en/sections/what-we-do/upholdinternational-law/index.html

[e] Special Court for Sierra Leone. (n.d.) http://www.rscsl.org

[f] International Criminal Court. (n.d.). *About the court*. https://www.icc-cpi.int/about/the-court

FIGURE 2.3 ■ Components of a Criminal Act



In many cases, there will also be attendant circumstances to a crime. **Attendant circumstances** refer to what happens within the context of the act that makes it a crime. It is the relationship between mens rea and actus reus. For example, in the crime of rape, the act of sexual intercourse is not, in and of itself, a crime. However, in order for sex to be a lawful behavior, you must have consent from the parties involved in the act. Failure to obtain consent is an example of an attendant circumstance and is what defines the act as a crime. Finally, there is the **result**, or the harm, that is experienced as a result of the act and the intent joining together.

Substantive Criminal Law

Defining what makes something a crime is a part of **substantive criminal law**. Substantive criminal law is another way to describe statutory law because it refers to what acts we define as criminal. For example, substantive criminal law in many states defines the possession of marijuana as an illegal act. You'll learn more about the criminalization of this act in the debate at the end of this chapter. Substantive criminal law also defines the potential punishment for someone who is convicted of a crime. For example, Title 21 of the United States Code, otherwise known as the Controlled Substance Act, states that it is against the law to intentionally purchase over a 30-day period more than nine grams of certain controlled substances that are typically used in the creation of methamphetamine. The law further states that violators are subject to a minimum fine of $1,000 as well as an imprisonment sentence of no more than one year. If, however, the individual has a prior conviction for a drug-related charge, the sentence increases to a $2,500 fine and the potential for up to two years in prison. The potential sentence increases even further for those convicted persons with two or more prior convictions.[26]

Procedural Criminal Law

While substantive criminal law tells us what a crime is and how such crimes should be punished, **procedural criminal law** provides the structure by which such cases should move through the system. In Chapter 1, you were introduced to the criminal process and learned about how a case moves through the criminal justice system. It is procedural criminal law that provides the rules and regulations for how a case will proceed. It dictates the roles and responsibilities for each of the courtroom participants. It also provides guidance on how to ensure that a defendant's constitutional rights are protected. For example, procedural criminal law provides the timeline by which the accused must receive a probable cause hearing or provides details as to how a defendant can waive their right to a speedy trial. Procedural criminal law also requires that police officers inform someone of their constitutional right to remain silent if placed under arrest for a crime. The Miranda warning also informs the accused of their right to an attorney and that one will be provided if they are indigent. Informing suspects of their rights and ensuring that those rights are upheld is an important feature of procedural criminal law.

The Federal Rules of Criminal Procedure guide the federal criminal court system. They also provide the procedures that investigators must follow when building their case. This includes the rules for questioning a suspect as well as how searches are conducted. Each state also has its own code of procedural law. For example, Colorado procedural criminal law can be found within several different volumes, including the Colorado Rules of Criminal Procedure and the Colorado Rules of Evidence.

CRIMINAL DEFENSES

When someone is accused of a crime, it is up to the prosecutor to prove that the defendant is guilty. In order to prevent a guilty verdict, accused persons or their legal counsel will present their own evidence to refute or challenge the facts of the prosecution's case. This is called a **defense**. In this section, you will learn about several common types of criminal defenses. We will also explore issues related to insanity defenses, which are far less common in real life compared with their representation on television series.

Necessity, Duress, and Entrapment

In some cases, defendants will admit that they broke the law but claim that their actions were justifiable. Cases of **necessity** suggest that the individual had to break the law in order to prevent a more significant harm from occurring. In these cases, the original violation is considered moot. Consider a case in which an individual walking by an abandoned building hears someone scream. The building is locked, and "Do Not Trespass" signs are displayed prominently. However, the individual ignores these signs and breaks a window to gain illegal entry into the building where they find a young woman being assaulted. The second individual runs away, and the young woman is spared additional harm. In this case, the courts would view the case of trespass and destruction of property as necessary and justified in order to prevent the assault of the woman. In comparison, someone who engages in a criminal act under **duress** is forced to violate the law out of fear for their own safety. In order for duress to be seen as a viable justification, the threat must be serious (generally involving serious bodily injury to oneself or loved ones). In addition, the threat must be immediate, meaning that there is no option to escape.

Entrapment is different from duress and necessity in that it involves the actions of government officials. Entrapment occurs when an individual is deceived by an official (such as a police officer) into engaging in an illegal act. While the police are allowed to use techniques to gain information on a suspect, it is against the law to encourage or persuade someone to break the law in order to make an arrest. The involvement of the defendant must be of their own free will and not the result of any pressure or promises made by law enforcement.

Self-Defense

In some cases, individuals may engage in criminal acts in **self-defense**, meaning they feared for their own safety. Cases of self-defense require that the use of force is justified based on the nature of the intrusion. For example, many states have provisions for castle laws (otherwise known as "make my day"

or "stand your ground" laws), which allows citizens to protect their homes (and in some cases, their vehicles, property and workplace). These allow individuals to defend themselves with force, including, in some cases, deadly force, if they feel that their home or the individuals inside the home are under attack. One of the most comprehensive castle doctrine law is found in Texas, which allows for the use of lethal force in cases where a person is defending themselves or another person against deadly force by another, to prevent a violent felony, and when an intruder has either unlawfully entered or attempted to enter another individual's home for any purpose. Other states restrict the use of force to cases in which a person believes that they are in physical danger.

CAREERS IN CRIMINAL JUSTICE

SO YOU WANT TO BE A PUBLIC DEFENDER?

On any given day and time when you turn on your television, there will be a myriad of law and crime shows available for your entertainment pleasure. Central to many of these series are a cast of attorneys, each representing differing parties. The Sixth Amendment to the U.S. Constitution guarantees the right to legal representation. Although many people think of criminal lawyers as being divided in two groups—either a prosecutor or a private defense attorney—there is a third type of appointed defense attorneys which are known as public defenders. A public defender is a licensed attorney who is paid by city, county, state, or federal government offices to represent indigent clients, or those persons who cannot afford their own attorney. Private defense attorneys are extremely expensive, with cases easily billing into the tens of thousands of dollars. Very complex cases such as aggravated felonies or capital cases can bill into the hundreds of thousands of dollars or more for private attorneys. Have you ever considered how you would defend yourself against criminal charges if you or someone you care about were falsely accused of a crime? Guess what? A public defender would be your best hope of a sound defense if you are someone without many thousands of dollars in your savings account. Indeed, studies have shown that they are often just as effective at representing their clients as private attorneys for serious offenses.[27]

While television and film depict prosecutors and defense attorneys of all types are archenemies, the reality is that it is common for attorneys to jump across the lines and work as a prosecutor at the state or federal level and then switch into a public defender or private defense attorney role, and vice versa. When a person works as a prosecutor or a public defender, however, their salary is not contingent upon the number of hours they bill or the complexity of the case they are assigned, as opposed to a private attorney.[28] Public defenders may specialize in certain types of cases such as misdemeanors, major case felonies, mental health court, or capital cases to name a few. To practice law within the United States, students must first attain their four-year bachelor's degree and then seek admission into a law school. Most law schools require the Law School Admissions Test (LSAT) to be submitted with an essay of intent and letters of recommendation from professors or professionals who can speak to the student's likelihood of academic abilities and personal characteristics that make them likely to succeed in law school. After three years of rigorous studies and law classes, law school graduates must then pass their state bar exam, which serves to license them to practice law within that jurisdiction. Public defenders must also take classes on continuing legal education just as any other practicing attorney.[29]

So, it is a long and difficult academic road to become an attorney, including a job as a public defender. In effect, public defenders are public servants who are passionate about the integrity of the criminal justice process and the body of law. Their job is to provide a rigorous defense for every defendant, even for the guilty, as afforded by the United States Constitution and Bill of Rights. So, while some may love to hate defense attorneys because they see them as defending guilty people who have committed heinous acts, the rule of law provides that all criminal defendants are entitled to be treated as innocent until proven guilty in a court of law. That fact means that they are entitled to a competent, knowledgeable attorney to represent them and guide them through that criminal process. In the cases of wrongful arrest and convictions, having a court appointed public defender who is willing to vigorously fight for justice is a main component of the balance of power in our criminal justice system. This career has become increasingly appealing to students of criminal justice and criminology who seek a purpose-driven career in the law that seeks to remedy perceptions of systemic discrimination, social justice, and racial inequities across the criminal justice system in particular. At its core, the role of a public defender is not to get people off for bad behaviors, but to seek justice and equity in accountability within the criminal justice system, even of the guilty.

A public defender's responsibilities can be both rewarding and challenging. They may be asked to represent their clients across a number of steps during criminal cases, including police interrogations, witness interviews, seeking expert testimony, pretrial proceedings, negotiating plea deals, and examination and cross-examination of witnesses at trial. Public defenders also handle post-conviction hearings such as due process appeals and habeas corpus petitions. On the one hand, with their efforts, a public defender can often help their clients avoid jail time or introduce mitigating circumstances which call for a lesser length of sentence or criminal justice involvement of the person convicted. They may also seek acquittals for the wrongfully accused, exonerations for those falsely convicted, and they serve an important role in ensuring representation for the poor. On the other hand, public defenders often deal with large caseloads, long hours, high burnout rates, demanding clients with complex criminal and personal backgrounds, and aggressive prosecutors. Since they are publicly funded with taxpayer money, they are often underfunded on budgets and personnel as well. Depending on the state and jurisdiction, estimates range from 60% to 90% of all criminal defendants require a public defender. As of 2022, there were roughly 9500 public defenders in the United States, with 55% of these attorneys being female.[30]

Salaries for public defender's range depending on the skill level, years of experience of the attorney, region of the country and source of the data, but averages range widely. Many sources report public defenders are paid between $45,000 and $65,000 per year.[31] ZipRecruiter reported salaries as high as $276,300 and as low as $59,207, with the majority of public defender salaries ranging from $76,000 to $117,920. Other highest salaries of top public defense attorneys in the United States are for lawyers in Santa Rosa, California, at $105,000 per year to $221,000 in Dallas.[32]

Intoxication

While being under the influence of drugs or alcohol is often used as a justification for offending, it is rarely a successful defense strategy. Under this strategy, defendants argue that they were unable to appreciate the wrongfulness of their actions due to their intoxicated state. The **intoxication defense** hinges on the argument that a person who is under the influence lacks the mens rea to commit a criminal act. Alas, most state laws do not require the prosecution to prove *specific intent*—meaning that the individual intentionally caused the act and intended for that act to lead to a specific result. Rather, most crimes require only *general intent*, which states that the defendant intended to engage in the criminal act, regardless of the outcome of the crime. While involuntary intoxication (meaning that the person did not consent to intoxication) is more likely to be presented as a reasonable defense strategy, success in even these cases is rare.

Insanity

While the depiction of insanity as a criminal defense is present in a number of films and television episodes, the use of it as a defense strategy is rare in the real world. Less than 1% (0.85%) of all criminal cases involve an insanity plea, and only one out of every four of these cases is successful.[33] The concept of **insanity** means that an individual is not held responsible for their criminal actions as the result of a mental condition. One of the most famous insanity trials in the twentieth century was that of John Hinckley. Hinckley became infatuated with Jodi Foster when she first appeared as a child prostitute in the film *Taxi Driver*. Hinckley's obsession with Foster continued while she was a student at Yale, but he failed to gain her attention after numerous letters and phone calls. In 1981, Hinckley attempted to assassinate President Ronald Reagan in an effort to impress Foster. He was found not guilty by reason of insanity (NGI) for his crimes and was committed to St. Elizabeth's Hospital in Washington, D.C., for treatment. In 2016, Hinkley was allowed to leave the facility and live full-time with his mother. In 2018, the court granted him the right to live on his own, though he is still subjected to several residential and lifestyle restrictions.[34]

The concept of not guilty by reason of insanity has been a feature of law throughout history. The argument has been that someone who is insane lacks the mens rea to understand their actions and to punish that person would not deter the rest of society.[35] Throughout the twentieth century, the American criminal justice system developed several different standards to determine whether a defendant is insane. There are four states that do not allow for an insanity defense—Kansas, Montana, Idaho, and Utah. The remaining states use one of four different legal standards: The M'Naghten rule, the irresistible impulse test, the model penal code test, or the Durham rule. Table 2.2 highlights the status of the insanity defense for each state.

TABLE 2.2 ■ Legal Standards of the Insanity Defense

M'Naghten rule	Modified M'Naghten rule	M'Naghten rule with Irresistible Impulse test	Model penal code test	modified Model penal code test	Durham rule	No insanity defense
Alabama	Alaska	Colorado	District of Columbia	Arkansas	New Hampshire	Idaho
California	Arizona	New Mexico	Hawaii	Connecticut		Kansas
Florida	Colorado	Texas	Kentucky	Delaware		Montana
Iowa	Georgia	Virginia	Maryland	Illinois		Utah
Louisiana	Missouri		Massachusetts	Indiana		
Minnesota			Michigan	Maine		
Mississippi			New York			
Nebraska			North Dakota			
Nevada			Oregon			
New Jersey			Rhode Island			
North Carolina			Tennessee			
Ohio			Vermont			
Oklahoma			West Virginia			
Pennsylvania			Wisconsin			
South Carolina			Wyoming			
South Dakota						
Washington						

Source: FindLaw, "The Insanity Defense Among the States," 2018, https://criminal.findlaw.com/criminal-procedure/the-insanity-defense-among-the-states.html.

The M'Naghten Rule

The first standard is the M'Naghten rule, which is the foundation for most state definitions of insanity. The **M'Naghten rule** comes from the 1843 acquittal by the British courts of Daniel M'Naghten for the murder of Edward Drummond. M'Naghten suffered from delusions. The court held that this condition made it such that the defendant was unable to understand the difference between right and wrong. Following the trial, M'Naghten was sent to a local asylum for two decades until his death. Today, a court that finds a defendant insane under the M'Naghten rule must answer two questions: (1) Did the defendant know what they were doing at the time of the crime? And (2) did the defendant understand that these actions were wrong? If the answer to both of these questions is no, the defendant is found not guilty by reason of insanity. Based on this criterion, the M'Naghten Rule is often referred to as the "right–wrong" test.

The Irresistible Impulse Test

While the M'Naghten rule is still used by many jurisdictions, several states have adopted alternative measures. The **irresistible impulse test** expands the M'Naughten rule to include the issue of control—even though persons convicted for crimes may know that their actions are wrong, are they unable to

stop themselves from engaging in the act? The irresistible impulse test was first adopted in 1887 in Alabama. One of the challenges of this test is how a court can determine whether an individual is able to control their behavior. The court needs to hear from medical experts to determine whether the defendant was unable to control their behavior as the result of a mental disease or defect.

The Model Penal Code

The **American Law Institute (ALI) standard** (also referred to as the **model penal code test**) combines the features of the M'Naghten rule and the irresistible impulse test to establish that defendants can be found criminally insane if due to a mental disease or defect they are unable to understand the difference between right and wrong or to control their behavior.[36] Texas is one state that uses the model penal code as its definition of insanity. Andrea Yates, for example, was initially found guilty for drowning her five children in 2001 in Texas. Her conviction was overturned on appeal due to false and misleading evidence that was used against her. She was retried in 2006 and was found not guilty by reason of insanity. In another case that is reminiscent of the Yates case, an Italy, Texas, mother stabbed her five children in March of 2023, killing three of them.[37] While the state announced capital charges and a bail of $2 million was set for Shamaiya Dyeonshana Hall, relatives came forward asking for mercy. Reports then emerged that Hall's twin sister, Troyshaye, was found incompetent in the capital crime stabbing deaths of her 7-year-old daughter and a teen boy two years prior. Hall's twin remains in the custody of the North Texas State Hospital as she receives psychiatric services. Shamaiya Hall's fate is yet to be determined as she awaits trial.[38]

Andrea Yates appears before a Texas court after admitting to drowning her five children in a bathtub at the family home. Her life sentence was overturned on appeal, and she was sent to a mental hospital instead of prison. Compare this case to that of mother Shamaiya Dyeonshana Hall. In March of 2023, she was also accused of stabbing her five children to death in Texas. She was being held on capital murder charges and $2 million bond awaiting trial. Similarly, relatives stated that she suffered serious mental illness. How do you think the Hall case should be handled within the criminal justice system given the way that previous cases like Andrea Yates were handled in the same state?

The Durham Rule and Guilty but Mentally Ill

Finally, the **Durham Rule** states that an accused person is not criminally liable for their actions if the offense was a product of mental health disease or mental defect.[39] Technically, this rule was abandoned in 1972 with the establishment of the model penal code test, but New Hampshire alone continues to utilize this legal standard with the burden of proof on the defendant.[40] Today, there is the distinction

of a finding of **guilty but mentally ill** (GBMI). This standard was developed to provide an alternative to the NGI verdicts. However, some scholars have questioned whether the GBMI distinction does more harm than good. In particular, does the GBMI classification result in a longer punishment than a traditional guilty plea would give?[41] Unlike NGI cases, GBMI defendants are still sentenced to prison. To date, there have been several high-profile cases involving a ruling of GBMI. In 1997, John E. du Pont, an heir to the du Pont fortune, was found guilty but mentally ill for the death of Dave Schultz, who trained and supported several Olympic athletes on du Pont's estate in Pennsylvania.[42] The film *Foxcatcher* (2014), starring Steve Carell, Channing Tatum, and Mark Ruffalo, is based on the story of du Pont and Mark and Dave Schultz.[43]

CONCLUSION

The sources of criminal law guide our systems not only on what acts constitute crimes but also on how the criminal justice system should respond to these violations. From the roots of lex talionis to stare decisis, modern criminal law has been influenced by historical legal traditions. It is important to remember that not only is the law derived from a variety of different sources—which can influence how a crime is defined and processed—but the role of jurisdiction determines which court is charged with responding to the violation. While many of the features of our criminal law have remained constant throughout history, it is also important to remember that it is always growing and changing in response to society's issues and challenges.

CURRENT CONTROVERSY 2.1

SHOULD MILITARY JUSTICE BE SEPARATE FROM THE CRIMINAL JUSTICE SYSTEM?

—Tasha Youstin—

Introduction

The criminal justice system in the United States of America is complex, and while most individuals are aware that there is a difference between state courts and federal courts to handle civilian crimes, one system that may not be familiar to many is that of the military court system. A military justice system in the United States can be traced back to the Revolutionary War. In 1775, the Second Continental Congress created the Continental Army and, in the same day, created a committee to establish the "Articles of War," which laid the foundation for the military justice system based off of British and colonial military law. Weeks later, one of George Washington's first acts as general was to ask Congress to appoint a lawyer to the position of Judge Advocate of the Continental Army, which was the army's top legal officer.[44] The immediacy with which the military justice system was created illustrates the importance that has been placed on it. Yet, while arguments can be made for why a military system of justice needs to exist, there have been issues raised over the years questioning whether miliary justice should be separate from the civilian criminal justice system, as it is today.

The military justice system in America has changed since 1775, most notably following World War II. In an effort to address perceptions of unfairness among the general public and recognizing the need for a unified code for all branches of the armed forces, Congress created the Uniform Code of Military Justice (UCMJ) in 1950, creating a standardized system across the various branches of the military. Additionally, 1951 saw the creation of the Court of Military Appeals, playing a key role in interpreting and enforcing the UCMJ. The UCMJ is implemented through executive orders from the president, which form the volume of law known as the Manual for Courts-Martial (MCM). The military justice system has been updated and revised several times since 1951. Notably, in 1968, Congress required military judges in courts-martial proceedings, and in 1984, the Military Rules of Evidence were introduced, modeled after the Federal Rules of Evidence used in civilian courts. The adjustments to the military justice system that have occurred overtime have resulted in current military trials that are quite similar in their legal content to civilian cases conducted in federal courts.[45] with penalties that can range from a doc in pay, to death.

In asking if a separate military justice system is necessary, is important to recognize that the goals and purposes for each system differ. While both the military and civilian systems seek to punish crime, the focus of the military system is to maintain order and discipline within the military, whereas the civilian criminal justice system places great importance on preserving the constitutional rights of individuals accused of crime in order to maximize individual autonomy within society.[46] Indeed, according to the MCM, the purpose of military law "is to promote justice, to assist in maintaining good order and discipline in the armed forces, to promote efficiency and effectiveness in the military establishment, and thereby to strengthen the national security of the United States."[47] The difference in motives between these two systems has resulted in other differences between them. Obviously, one key difference between the military justice system and civilian justice system is jurisdiction. Specifically, the military justice system prosecutes military personnel who violate the UCMJ, while the civilian criminal justice system focuses on those who violate state or federal laws. Other differences will be discussed in the following paragraphs illustrating the pros and cons of the military justice system in the United States.

PRO: The Military Justice System Should be Separate From the Civilian Criminal Justice System

There is no civilian equivalent to the expectations placed on military members, and as such, the military has been regarded as its own separate society. This view, upheld by the U.S. Supreme Court, can even be seen in the Bill of Rights, where in the Seventh Amendment individuals are granted the right to a grand jury indictment, "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." The differences in expectations for civilians versus members of the military has been foundational in justifying a separate military justice system.

Viewing the military as a separate society, one of the most common arguments for the necessity of a separate system is the maintenance of order. Specifically, the system is used to enforce discipline in order to manage the demands of military service. The belief that order and discipline are essential to the success of any military has permeated American society, as well as other countries throughout history. In considering the unique challenges and requirements for the military to be effective and efficient, there are certain behaviors which violate the UCMJ but have no counterpart in state or federal criminal code. Examples include acts such as absence from duty, disrespect, and sleeping on guard duty. Not only does the military justice system handle behaviors, or violations, that are essential to the function of the military, but it is equipped to do so in a timely fashion. While civilian cases may take months or years to be resolved, cases in the military justice system are handled much faster, helping to maintain order and discipline. Additionally, all military members accused of violating the UCMJ are given access to free legal representation, regardless of income level.

Another positive aspect of the military justice system is that it allows for consistency and order to be maintained across different jurisdictions, including when in other countries. While laws may vary from state to state or country to country, the UCMJ provides consistency in expectations of behaviors, and allows for issues to be addressed as soon as they arise, regardless of the location.

CON: The Military Justice System Should Not Be Separate

While amendments to the military justice system have occurred over the years to address criticisms and make improvements, there are still several issues that remain unresolved. The first issue is that military members are not afforded the same rights as those in civilian trials. As mentioned above, members of the military are not given a right to grand jury indictment. Additionally, juries in military trials are smaller and selected from active-duty officers, as opposed to a random "jury of peers." While military members still have to be found guilty beyond a reasonable doubt, juries do not have to be unanimous, as is required in trials at the state or federal level.

Perhaps the biggest issue within the military justice system is the discretionary power afforded to senior commanders. In the civilian system, a prosecutor has the discretionary power to decide which charges to bring against a defendant. In the military system, that power rests with a senior commander with no legal training. Additionally, as the military justice system has goals beyond justice, the goal to maintain order may lead to unfairness with which decisions are made regarding who to prosecute and when. This issue of discretion in the choice to bring charges has been in the headlines with regards to issues of rape and sexual assault in the military, with many critics arguing that too many reports of rape and sexual assault are not being charged. This issue has been so extensive that President Biden made changes at the end of 2021 to how the military

will prosecute sexual assault and several other "victim-centric" offenses. These changes take the charging authority away from the commander and place it with the newly created "Special Trial Counsel (STCs)." STCs will be specially trained military lawyers serving as prosecutors for these crimes, and these changes must be implemented by the end of 2023.[48] While many believe these changes will lead to increased fairness in charging decisions, commanders will still retain very broad discretionary power within the military justice system for most other offenses.

Also addressed in the current changes is the issue of sentencing. Until now, if found guilty, there were no set sentencing guidelines for the various offenses. Some violations may carry a minimum or maximum sentence, but the absence of set guidelines has led to sentences that can vary dramatically from case to case, even when found guilty of the same offense. In some instances, military members have received harsher punishments than their civilian counterparts, leading to perceptions of unfairness. The new changes will require military judges to use sentencing parameters, though deviations are still allowed as long as the judge articulates their reasons for departure.

Conclusion

Overall, when addressing whether or not the military justice system should be separate from the civilian criminal justice system, there are arguments on both sides of the issue. A military system of justice addresses the "society" of the military and the necessity of maintaining order and discipline through a separate code of conduct (the UCMJ) with commanders given the discretion pursue or not pursue charges. The system allows for swift proceedings and punishment anywhere in the world. Unfortunately, the system also results in the loss of some rights in military court that would be guaranteed in the civilian criminal justice system. Additionally, the goals of the military justice system may at times be at odds with the goals of justice, leading to issue of unfairness and failure to issue charges despite a victim complaint. As the military system is once again undergoing significant changes, only time will tell if these changes adequately address the concerns with the military system of justice.

Discussion Questions

1. Do you think the civilian criminal justice system could adequately handle issues of military justice? Why or why not?
2. Some critics have suggested that military members who are accused of felonies should be tried through the civilian criminal justice system, leaving the military justice system to focus more on violations unique to military service. What would be the positive consequences of that type of change? What would be the negative consequences?

CURRENT CONTROVERSY 2.2

ARE HATE CRIMES ON THE RISE?

—Angela R. Gover—

Introduction

The FBI defines *hate crime* as a "criminal offense against a person or property motivated in whole or in part by a convicted person's bias against a race, religion, disability, sexual orientation, ethnicity, gender, or gender identity." Therefore, in addition to the *action* that constitutes the standard definition of crime, hate crime emphasizes the *motivation* behind crimes targeting populations based on hatred, prejudice, and animosity. Additionally, acts of bias or hate against minority groups that are meant to intimidate, yet do not rise to the legal definition of crime (e.g., name-calling, derogatory imitations, creation or display of racist images or symbols), are referred to as "hate incidents."

The Hate Crime Statistics Act of 1990 requires the U.S. federal government to collect data about crimes motivated by race, religion, sexual orientation, or ethnicity. As of 2021, hate crime data are derived from the National Incident-Based Reporting System (NIBRS) and Summary Reporting System (SRS) reports voluntarily submitted to the FBI by local law enforcement agencies. According to the U.S. Department of Justice Hate Crime Statistics report for 2021, most U.S. hate crimes

targeted victims according to race/ethnicity/ancestry (64.8%), with those related to sexual orientation and gender identity (19.7%) and religion (14.2%) comprising the next two largest bias motivation categories.[49] Basing their research on hate crime data from a variety of sources, from year-to-year criminological researchers endeavor to investigate the causes and evolution of hate crimes and the impacts of changing laws, societal norms, social justice movements, and the evolving political climate on its perceived rise or decline.

PRO: Hate Crimes Are on the Rise

Various factors have contributed to a rise in U.S. hate crimes in recent years, including increased anti-Asian bias during the COVID-19 pandemic and anti-Black animosity in response to racial justice protests that erupted across the nation in 2020 following the deaths of African Americans like George Floyd and Brionna Taylor at the hands of police, among others.[50] Indeed, the preponderance of hate crimes in America have targeted and continue to target the African American community. According to a report by the Center for the Study of Hate and Extremism at the California State University, San Bernadino, Anti-Asian hate crimes spiked by 330% in 2021.[51] Likewise, the report shows that hate crimes against the Asian population increased by 145% in the 16 largest cities in the United States. Indeed, more than 30% of respondents to a COVID-19 questionnaire said they had seen someone blame the Asian community for the virus's spread (Ipsos, 2020). Due in large part to the increased numbers of attacks on the Asian American community, President Biden signed the COVID-19 Hate Crimes Act on March 20, 2021, indicating that the matter was a priority among the highest levels of the U.S. government.[52]

In November 2020, the FBI reported a significant spike in hate-related homicides for 2019, partly due to the August 2019 mass shooting in El Paso, Texas, in which a perpetrator motivated by hatred toward Latinos murdered 23 random victims and injured 23 others.[53] Unfortunately, hate-related mass shootings are becoming all too common in the United States.[54] A gunman opened fire in a Buffalo, New York, supermarket in May of 2022, killing 10 in a rampage that investigators allege was motivated by racial hatred against African Americans. October 2018 saw the murder of 11 congregants at the Tree of Life synagogue in Pittsburgh, Pennsylvania, by a gunman motivated by anti-Semitism. The Pittsburgh attack was not the only such attack on a place of worship in recent years, with others in San Diego, California, in 2019 (Jewish congregants); Charleston, South Carolina, in 2015 (Black Christian congregants); and Oak Creek, Wisconsin, in 2012 (Sikh congregants). Additionally, devastating fatal mass shootings targeting members of the LGBTQ community took place in Colorado Springs, Colorado, (2022) and Orlando, Florida, (2016). As well, the Human Rights Campaign reported record numbers of violent, fatal attacks on individual members of the transgender and nonconforming community in 2021 and 2022.[55]

It is important to note that many law enforcement agencies failed to submit hate crime reports from their jurisdictions over the past few years, and most significantly for 2021 due to a procedural switch in data gathering. Regardless, hate crimes most certainly occurred in the vast majority of these jurisdictions. Therefore, due to the nature of hate crime reporting from local agencies to the federal government, the FBI's yearly report continues to tremendously understate the true numbers committed nationwide.

The FBI has been compiling annual reports on hate crime statistics based on voluntary reporting from law enforcement agencies since 1990. The FBI acts as the country's central repository for the country's hate crime data. It strives to produce accurate statistics to be used for management, operation, and administration by law enforcement.[56] During the 2021 transition to the FBI's new National Incident-Based Reporting System (NIBRS) database, voluntary reporting from local jurisdictions significantly decreased. Local law enforcement agencies received funding totaling $120 million from the Justice Department to aid in their transition to the new system that began in 2016; however, they fell short in that effort.[57]

The FBI used the National Incident-Based Reporting System for the first time in 2021 to compile the yearly statistics on hate crimes. Unfortunately, many jurisdictions did not make the switch to NIBRS in time to submit data before the reporting deadline, mostly due to the cost involved. Notably, although Los Angeles, Chicago, and New York have some of the biggest law enforcement entities in the nation, the 2021 data do not include thousands of agencies from these cities. Overall, 63% of law enforcement agencies submitted reports. Thus, as noted by the FBI itself, a vast amount of critical data, including all hate crimes committed in every nonreporting jurisdiction, was not included in their annual report for 2021.[58] Ultimately, the preponderance of hate crimes across the United States is certainly even higher than we know.

CON: Hate Crimes Are Not on the Rise

In late 2022, the FBI crimes report showed a slight dip in reported hate crimes across the United States compared the previous year, with 1001 fewer reported hate crimes in 2021 compared to 2020. Notably, although the FBI recorded a 9% increase in anti-Asian crimes and a 35% increase in anti-LGBTQ crimes, the total number of hate crimes reported to the FBI decreased from 8,263 to 7,262.[59] Similarly, the FBI crimes report from November 2019 showed a slight decrease in reported hate crimes for 2018 in comparison to 2017, dropping from 7,175 to 7,120.[60]

Han, Riddell, and Piquero (2023) analyzed data from police departments in New York, San Francisco, Seattle, and Washington D.C. examining the effects of COVID-19 on hate crime through an ARIMA (autoregressive integrated moving average) forecasting model and trend analysis.[61] Their analysis confirmed that despite the dramatic increase in hate crimes against Asian Americans in 2020 compared to 2019 in three of the four cities, there was a decline in the overall number of hate crimes. Further empirical analysis revealed that the increase in crimes targeting Asian Americans coincided with pandemic-related stay-at-home orders and blaming labels, such as "Kung-flu" or "Chinese Virus," used by some media outlets and certain political officials.

Conclusion

Are hate crimes increasing? Official law enforcement data *should* provide the clearest answer as to whether hate crime is on the rise or decline. However, data from the FBI likely reflect a significant undercount, not only from victims who do not report to law enforcement agencies, but also due to underreporting from local law enforcement agencies to the federal database.

While official FBI data indicated a decrease in hate crimes in 2021, these figures omit thousands of law enforcement organizations from the largest cities in the nation. In fact, 37% of all agencies failed to report any hate crime data for 2021, with 11,883 of 18,812 agencies reporting *any* data.[62]

If you look at independent research to see if hate crime increased last year you can turn to studies such as the four-city interrupted time series design which suggests an increase in hate crime against Asian Americans.[63] If you look at national data during this same time period, you see a completely different, inaccurate picture resulting from NIBRS data. As such, the FBI may want to consider forbidding the use of the 2021 data or comparisons to it, even if 2022 reporting improves. The statistics have been widely and vociferously criticized as unreliable, distorted, and woefully out of proportion to the escalating hate plaguing communities around the country. Hate crime statistics will present a better and more comprehensive picture of hate crimes nationally in the coming years as additional departments and agencies switch to the NIBRS data collection, with ongoing support from the Justice Department.

Ultimately, hate crime is a complex and nuanced issue impacted by factors including efficient data gathering, mass killings, and changes in the social climate from year to year. A single lethal (or string of) mass shooting(s) motivated by racial, religious, or sexual orientation hate, which itself may have been exacerbated by a climate of divisive rhetoric, has the potential to impact hate crime statistics in a given year. Additionally, racialized scapegoating due to catastrophic events, like a pandemic, have the potential to cause a sharp rise in hate crimes against a particular demographic in a given time period. Meanwhile, crimes against other demographics may increase at lower rates, remain static, or even decline from year to year, only to reverse course once again depending on a variety of factors. Therefore, blanket statements like "hate crimes are increasing" or "hate crimes are decreasing" often fail to present a comprehensive understanding of the facts. We do know for certain that hate crimes are occurring, they are widespread, and they are devastating to the individuals, families, and communities they affect.

Discussion Questions

1. Federal law requires the FBI to publish data on hate crime each year. Should the U.S. Congress enact legislation requiring the FBI to obtain valid statistics on hate crime from every local government in the nation, as well as fund this requirement?
2. Should hate crime reporting become a requirement provision for federal funding to law enforcement agencies nationwide?

KEY TERMS

actus reus
administrative law
American Law Institute standard
attendant circumstances
beyond a reasonable doubt
case law
civil law
concurrence
constitutional law
defense
double jeopardy
duress
Durham rule
entrapment
guilty but mentally ill
insanity
intent
intoxication defense
involuntary act
irresistible impulse test
lex talionis
M'Naghten rule
mala in se
mala prohibita
marijuana
mens rea
model penal code test
necessity
opinions
plaintiff
precedent
preponderance of the evidence
procedural criminal law
result
self-defense
self-incrimination
stare decisis
statutory law
strict liability
substantive criminal law
voluntary act

DISCUSSION QUESTIONS

1. What are the key differences between civil and criminal cases?
2. How do statutory law, case law, and constitutional law all work together in a criminal case?
3. What are the components of a criminal act?
4. How is substantive law related to procedural law?
5. What is the difference between being declared innocent and being declared not guilty?
6. Why is it so difficult to find someone not guilty by reason of insanity?

LEARNING ACTIVITIES

1. Review the criminal code in your state. Identify a particular crime and determine the four components of the criminal act under that law.
2. Identify a U.S. Supreme Court decision related to a criminal justice issue from the most recent term. What was the majority opinion and were there any dissenting opinions in that case? What implications does this decision have for the criminal justice, legal, and any other related systems?
3. Select a recent article from your local or regional newspaper about a major crime. What are the actus reus, mens rea, attendant circumstances, and result of this crime? Is this crime mala in se or mala prohibita?