Introduction and Overview of Criminal Law

Learning Objectives

After reading and studying this chapter, you should be able to

- Discuss the difference between criminal and moral wrongdoing
- Understand the distinction between *mala in se* and *mala prohibita* offenses
- List three sources of criminal law
- Explain the differences between common law and statutory law
- List two goals of the Model Penal Code
- Differentiate between a crime and a tort
- Know the distinction between federal and state legislation
- State the four types of correctional supervision
- Identify the elements of a case brief

Introduction

This chapter provides an overview of the structure and processes of the American criminal justice system. This material is divided into five sections. Part 1 reviews a broad range of foundational issues related to criminal law. It introduces and explains the important concepts, terms, and definitions of criminal law. Part 2 reviews the sources of American criminal law. Our criminal law comes from a wide range of sources, from timeworn **common law** to modern legislation. Part 3 examines who is in the criminal justice system and looks at the number of people who are in the U.S. correctional system. Part 4 reviews the three-part structure of the criminal justice system, police, courts, and corrections. This section reviews the main decision points along the criminal justice system continuum—from arrest to arraignment to trial to sentencing and punishment. It also includes an overview of the federal and state court systems that handle criminal cases. The final part examines how all the structures of the justice system come together in a court case. It concludes with a detailed discussion on the elements of a case brief.

This first chapter should be used as a reference guide for the remaining chapters. The foundational terms, concepts, procedures, and structures related to criminal law are all included here. Students are encouraged to review this material as necessary.

Criminal Law Terms and Concepts

Approximately one-half of all violent crime is not reported to the police.

Bureau of Justice Statistics, 2012[1]

Defining Crime

A criminal act may be the result of an affirmative act or a negative act. An affirmative act refers to an action that someone engages in, such as punching another person in the nose. Purchasing a penknife to puncture someone's tires or hacking into someone's computer would also constitute an affirmative act.

In contrast, a negative act refers to *in*action, or to an action that someone fails to take. In general, a person cannot be held criminally liable for failing to act. However, if a person has a legal duty to act, they can be held responsible for a failure to meet that responsibility. For example, parents have a legal duty to provide for the health, safety, and welfare of their children. If a father does not provide food for his children while they are in his care and they starve to death, he may be held criminally liable for their deaths. Likewise, a motorist who is involved in a traffic accident that causes injury to his passenger has a legal duty to call the police. If a driver hits a pedestrian walking across the street, the driver is required to stop and seek assistance. If she fails to do so, she may face punishment. In addition to an act or a failure to act, a crime requires that the action or inaction violate an existing law. Based on this discussion we can now consider a working definition of **crime**:

> An act or omission punishable by the state or federal government through the enforcement of its criminal law.

The definition of crime and the definition of wrongdoing are not the same. "Crimes" refer to actions and inactions that society deems both wrong *and* punishable. Thus, an act is only a crime if the law says it is. We might consider a particular action to be wrong: a teacher who does not grade fairly; a girlfriend who is unfaithful; or neighbors who do not mow their lawn. However wrong these actions may be, they are not crimes. An action constitutes a crime only if a legislative body—for example, a municipality, a state legislature, or Congress—has passed a law stating that it is a crime. Even after an act is defined as criminal, in order for it to be punishable, it must be brought to the attention of law enforcement.

Each year, U.S. law enforcement agencies receive millions of crime reports. As noted at the beginning of this section, more than one-half of all offenses are never reported to crime enforcement agencies. Legally speaking, these offenses do not exist. Unreported incidents are sometimes referred to as the "dark figure" of crime. There are many reasons that crime victims and witnesses may be reluctant to report crimes. One is fear of retaliation by the offender. Another is that the victim may be unaware that he has been the victim of a crime—for instance if he does not know that his checks or valuables were stolen from his home. It is also possible that a victim may be too embarrassed to go to the police to report a crime. An example of this is a person who fell prey to a Ponzi scheme and lost her retirement savings.

Crime and Morality

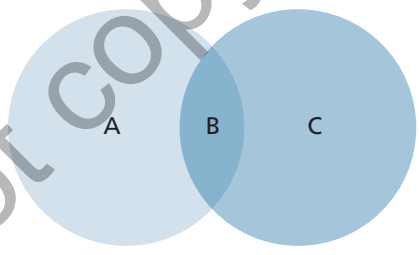
Making certain actions criminal reflects a value judgment by our society that an action or series of actions are wrong and should be punished. However, sometimes there is a

gap between what is wrong and what is punished under the law. Consider the following scenario, drawn from a classic law school hypothetical:

> Janet is an excellent swimmer. She is enjoying winter break from college at the beach, soaking up some sun. She is reading her favorite blogs, updating her Facebook page, and painting her nails.
>
> As Janet basks in the sun, she sees Ambrosia who appears to be about three years old. Janet is playing in the water, approximately twenty-five feet from Janet. Janet does not see anyone else on the beach besides Ambrosia.
>
> Janet notices that Ambrosia is gasping for air. Ambrosia screams, "Help!" Janet watches. Janet does not want to get her hair or nails wet so she makes no attempt to rescue the sinking toddler. With a little effort, Janet could have saved Ambrosia. Instead, Janet uses her smartphone to take notes! She records how many times Ambrosia's head bobs up and down, how many times she yells for help, and her final gasp for air. Ambrosia drowns.

Is Janet criminally responsible for Ambrosia's death? Applying the definition of "crime," is there an affirmative act or an omission? In this instance, Janet failed to act to save Ambrosia. Should the law *require* people to act in some circumstances? Many of us would agree that Janet's failure to at least attempt to save Ambrosia is morally wrong. However, the law does not punish every moral wrong. In order to hold Janet criminally accountable for Ambrosia's death, she must have a legal duty to act. For instance, if Janet had been Ambrosia's babysitter, she would have had an affirmative duty to assist a child left in her care. The above scenario highlights the fact that in some instances an action that is considered wrong may not be considered criminal. Figure 1.1 below illustrates the relationship between criminal wrongs and moral wrongs.

Figure 1.1 Relationship Between Criminal and Moral Wrongs



As indicated, there are three possible relationships between moral wrongs and criminal wrongs. In some instances, there is no intersection between actions that are deemed morally wrong and actions that are deemed criminally wrong. For instance, actions such as rudeness or greed can be considered moral wrongs but are not against the law. These are represented as the section "A" in Figure 1.1. In some instances, there is overlap between moral wrongs and criminal wrongs. The dark shaded section of the chart labeled "B" represents this overlap. In these instances, the criminal law is a reflection of society's moral sentiments. Some criminal wrongs are not moral wrongs. Examples of this include *mala prohibita* offenses. This is represented as section "C" on the chart.

Let's look more closely at these distinctions. The differences between these groups of wrongs may be understood by considering the distinction between **mala in se** offenses and **mala prohibita** offenses. Offenses that society considers to be inherently wrong and morally unacceptable are known as mala in se crimes. Mala in se, a Latin phrase, refers to crimes such as murder, rape, and theft. These contrast with mala prohibita offenses, which are actions that are considered wrong because they violate the law, not because they are morally wrong. Examples of mala prohibita offenses include laws that require automobile drivers to wear seat belts, laws that impose seasonal restrictions, such as months and time of day that one can hunt deer, and laws that prohibit carrying a concealed weapon. Figure 1.2 lists examples of mala in se and mala prohibita offenses.

Figure 1.2 Mala In Se Versus Mala Prohibita Offenses

Mala In Se	Mala Prohibita
• Theft	• Hunting restrictions
• Murder	• Seat belt laws
• Kidnapping	• Building without a permit
• Arson	• Littering
• Mayhem	• Prohibited alcohol purchases
• Rape	• Draft evasion

"Victimless" Crimes

There is another group of actions that does not fall neatly into either mala in se or mala prohibita categories. These are sometimes referred to as "victimless" crimes. One example is adultery, which many people view as morally objectionable. Some people believe it is wrong for a married person to have sexual relations with a person other than his spouse. However, in the majority of states, adultery is no longer unlawful. In centuries past, adultery was a **felony**—an offense that could result in not only a lifetime of community shame for the adulterer, but also jail, exile, and sometimes death. The view of adultery as a felonious act is symbolized by Hester Prynne, the protagonist in Nathanial Hawthorne's book, *The Scarlet Letter*. Following an adulterous affair, Prynne was forced to wear a red "A" on her clothing as a mark of her indiscretion. Today, a handful of states have laws against adultery. For instance, in Minnesota it is a **misdemeanor** for a married woman to have sexual intercourse with a man other than her husband.[2] (See Chapter 6 for further discussion of offenses against public decency.)

The issues of victimless crime, morality, and definitions of crime overlap. The following three scenarios explore these intersections in more detail:

- Yago is a twenty-one-year-old college junior. Before each of his midterm exams and final exams, he smokes three marijuana cigarettes to relax. He buys the drugs from another student in his dormitory on campus. Yago is a straight "A" student.

- Millicent is a college professor. She teaches large introductory courses at a top-ten community college. She has a ritual for the first day of each semester—she smokes crystal methamphetamine. The drug makes her feel upbeat, and she always gives a great first lecture.
- Anthony is a twenty-four-year-old student. Anthony attended college for one year but had to drop out because he could not afford the tuition. To make money, he works as a prostitute. His clients, whom he meets on the street or through referrals, pay to have sex with him. Anthony hates sex work but is doing it until he saves enough money to return to school.

Some legal commentators argue that each of the above instances involves a "victimless" crime. According to this view, if all the people involved are consenting adults, then there is no crime and no victim. In these instances, one's private actions should not subject to governmental scrutiny or regulation. Law professors Norval Morris and Gordon Hawkins strongly support this viewpoint:

> When the criminal law invades the spheres of private morality and social welfare, it exceeds its proper limits at the cost of neglecting its primary tasks. This unwarranted extension is expensive, ineffective, and criminogenic . . . [M]an has an inalienable right to go to hell in his own fashion . . . The criminal law is an inefficient instrument for imposing the good life on others.[3]

By this logic, Yago, Millilcent, and Anthony may be involved in morally questionable activity. However, because it is by choice, because they are adults, and because they are not forcing their behavior on anyone else, there should be no criminal sanction. In fact, each one of them has chosen to engage in the criminal activity to achieve a greater personal good. Those opposed to punishing actions like the ones described in the above scenarios, argue that when the law reaches too far into the personal lives of citizens, it loses its legitimacy and its likelihood of deterring crime. Enforcement, as Morris and Hawkins argue, is a waste of taxpayer dollars and encourages underground markets to develop. By this rationale, the violence associated with drug trafficking would end if marijuana, heroin, and cocaine were made legal. Further, social service agencies, not the criminal justice system, are best able to handle issues of drug addiction, mental illness, and structural unemployment.

There are legal commentators who reject the idea of **victimless crime**. They argue that whenever people are engaged in antisocial behavior, there is a victim, regardless of consent. Whether the activity takes place in public or private, there is a social cost when people engage in illicit activity. Dallin Oaks, the former president of Brigham Young University, argues that it is not always possible to identify the victims:

> In some so-called victimless crimes, all society is the victim . . . one person cannot rationally contend that what he does to or with himself is of no concern to anyone but himself. Each person steers his ship of life through a very narrow passage. The wreckage of one person in that passage becomes a serious navigational hazard for many others.[4]
>
> In the case of Yago, his illegal use of marijuana is the end point of a violent underground international drug market enterprise. For Millicent, using crystal methamphetamine could cause her to have an accident while driving, lead to addiction, or bring about other negative consequences that could

impact her family, friends, employers, or strangers. Anthony's prostitution involves a range of potential harms, including rape, assault, and the spread of sexually-transmitted diseases. Drug use, addiction, and sexually-transmitted diseases place enormous burdens on social service agencies. Oaks and others observe that individual choices have social and economic consequences and should be subject to public regulation and criminal sanction.

The punishments for many victimless crimes remain controversial, particularly for offenses involving low-level drug possession. Research indicates that harsh punishments for nonviolent crimes have detrimental social costs (see Jeremy Travis's essay, "Invisible Punishments," in Chapter 11). The criminal law's changing response to these questions reflects a shift in social attitudes and resource allocation within the justice system.

This section has addressed how crime is defined and how it is distinct from moral wrongdoing. The next section examines the sources of American criminal law. As discussed, criminal law is drawn from a wide range of sources, including the U.S. Constitution, common law, and federal, state, and local legislation.

Sources of Criminal Law

American criminal law is drawn from a broad range of historical and contemporary sources. These sources include English common law created by judges, the U.S. Constitution, **administrative regulations**, **executive orders**, and federal, state, and municipal legislation. This broad foundation highlights the fact that American criminal law comes from each of the three branches of government—legislative, judicial, and executive. This section provides an overview of the origins of criminal law and how each source links to today's criminal justice system.

Common Law

The common law refers to the legal rules applied by English judges in the absence of written laws. Judges imposed laws that reflected the customs and moral codes of the community. By the turn of the seventeenth century, English judges drew heavily from the common law. When North American colonizers brought common law with them from England in the 1600s, there was a solid body of common law in what became the United States. Common law is sometimes referred to as "judge-made" law because a judge, rather than a legislative body, makes the law. When judges were presented with cases involving harm that had no existing legal remedy, they had to determine what law should apply in a particular case. *Commonwealth v. Mochan* (1955)[5] offers a recent example of judge-made law.

In this 1955 Pennsylvania case, the defendant was charged and convicted of "immoral practices and conduct." During a one-month period, Mochan telephoned the victim numerous times and referred to her as lewd and immoral. He used obscene language to describe sex acts he would commit against the victim, a married woman. At trial, the defendant argued that he could not be convicted of a crime because there was no written or common law rule that outlawed his actions. The court disagreed and stated that the common law can be used to punish acts that directly harm the public. The court determined that Mochan's actions had injured public morality and could be punished as a misdemeanor offense.

Today most states have abolished common law crimes and replaced them with statutory crimes that have been enacted by state legislatures. There are several reasons for this. First is the constitutional prohibition against **ex-post facto laws**. A person cannot be charged with violating a law that did not exist at the time of his actions, an issue raised by the defendant in the *Mochan* case (see further discussion of this case, later in the chapter). A second reason for is that the common law does not promote uniform laws across the states. Judge-made laws may be responsive to local community beliefs, but they do not necessarily reflect national attitudes or broad public consensus. Further, under a common law system, legal outcomes are less predictable as different judges in different counties and states reach different legal conclusions. However, as noted, a handful of states still recognize common law crimes. For instance, the Maryland state courts have consistently held that some common law crimes (such as indecent exposure) are punishable as common law offenses.

Federal Legislation

The federal government operates with its own body of rules, separate from those of individual states. Whether an offense is a federal violation depends upon several factors, such as the location of the offense (whether it was on federal property) and the status of the victim and offender (whether the victim or offender is a federal employee). The U.S. Capitol building in Washington, DC, sits on federal property, and offenses that take place on its grounds, including its airspace, can trigger federal law. **Federal legislation** applies to federal employees, federal property, and federal lands. Approximately one-third of U.S. lands, which total more than 650 million acres, is owned by the federal government. This includes national parks, forests, wildlife refuges, military facilities, and American Indian reservations. Punishment may be greater for crimes that take place on federal property.

State Legislation

Each state and the District of Columbia has a criminal code. **State legislation** passed by state legislative bodies identifies various crimes, punishments, and procedures for handling unlawful actions that take place within a state's jurisdiction. Most criminal cases are prosecuted under state laws. Most of the criminal cases that make nightly news headlines involve a violation of state law.

Consider the following scenario:

> Jewell steals Anjuane's prized copy of Harper Lee's book *To Kill a Mockingbird*. Jewell removes the valuable book from Anjuane's library while visiting her home. It is a first edition copy, signed by the author and is valued at $20,000. Both Jewell and Anjuane live in Florida.

Under Florida law, a person can be convicted of grand theft if she intentionally and unlawfully takes another person's property to prevent her from using it or takes it for her own personal use. Under the law, it is second degree grand theft if the stolen property is worth between $20,000 and $100,000.[6] If the state is able to prove each element of the crime, Jewell can be found guilty of grand theft and will face up to fifteen years in prison. In addition to the value of the stolen property, the location

of the crime matters. For instance, if Jewell had stolen the book from the Library of Congress, which sits on federal property, she would have been charged under a federal theft statute (and faced harsher punishment).

Municipal Ordinances

All municipalities, including towns, cities, counties, and boroughs, are empowered to enact laws that punish low-level, non-felony offenses. **Municipal ordinances** cover a broad range of actions that protect the general welfare and maintain public health and safety. For instance, zoning and building regulations detail land use restrictions, while fire and safety ordinances outline the rules for commercial and residential properties. Other examples include ordinances that impose leash laws and regulate parking and snow removal.

In some cases, municipal ordinances regulate city services to reduce costs and ensure public access. For instance, in Anchorage, Alaska, residents may be fined for making excessive calls to the police. If the police are called to a home more than eight times in one year, the property owner may face a maximum fine of $500.[7] City ordinances may also regulate the actions of residents. A Los Angeles ordinance, for example, restricts the use of gas-powered leaf blowers. It is unlawful to use them within five hundred feet of a residence. This ordinance was enacted to address environmental concerns that leaf blowers increase the presence of airborne particles, which could cause problems for people with upper respiratory ailments. A one hundred dollar fine may be imposed for violation of the ordinance.[8] When a state law and a municipal ordinance punish the same offense, the state law is the final authority.

Executive Orders

The executive order is a type of federal law that can only be enacted by a sitting U.S. president. Executive orders require neither the consent of Congress nor a vote by the people. In some instances, executive orders are largely symbolic and do not alter the status quo. In other cases, executive orders reflect a president's attempt to make or change the law. Some commentators argue that executive orders violate the separation of powers doctrine because they allow the executive branch to carry out legislative functions. The U.S. Congress may overturn an executive order by a two-thirds vote. A president may reverse the executive orders of former presidents.

In 1789, President George Washington issued the first executive order. It was a proclamation to recognize the first national day of Thanksgiving. In 1863, President Abraham Lincoln signed the Emancipation Proclamation. This executive order initiated freedom for Black slaves in select territories. Another significant executive order is the one signed by President Franklin Roosevelt, following Japan's 1941 attack on Pearl Harbor, Hawaii. More than two thousand people died in the air assault. In 1942, Roosevelt's response was to issue an executive order that authorized the internment of Japanese American citizens and Japanese citizens:

> . . . I hereby authorize and direct the Secretary of War, and the Military Commanders . . . to prescribe military areas in such places and of such extent as he or the appropriate Military Commander may determine, from which any or all persons may be excluded, and with respect to which, the right of any persons to enter, remain in, or leave shall be subject to

> whatever restriction the Secretary of War or the appropriate Military Commander may impose in his discretion.[9]

This executive action mandated the removal of more than one hundred thousand Japanese American citizens and Japanese nationals to internment camps across America's West Coast, including California, Oregon, and Washington. The language of the presidential order did not explicitly reference race.

However, it was clear which racial groups were subject to removal. For instance, the above flyer provides "Instructions to All Persons of Japanese Ancestry," which includes "all Japanese persons, both alien and national." Executive Order 9066 was upheld by the U.S. Supreme Court in *Korematsu v. United States* (1944).[10] An executive order was also used to arrest and intern some Italian and German residents.

U.S. presidents continue to utilize the executive order. In 2012, President Barack Obama signed an executive order to impose sanctions against Iran. The order punishes individuals or companies that help the Iranian government develop or transport oil. More than eleven thousand executive orders have been signed into law by U.S. presidents (President Roosevelt leads the list with over 3,500). Governors also have the authority to pass executive orders at the state level.

Collection of Oakland Museum of California.

World War II U.S. Army poster detailing evacuation and interment orders for people of Japanese ancestry.

Federal and State Constitutions

The **U.S. Constitution** and each of the fifty state constitutions are also sources of criminal law. The federal Constitution outlines the foundational protections and guarantees of American criminal law. It references a few specific criminal offenses, including treason, bribery, breach of the peace, and "other high crimes and misdemeanors." Treason is the only explicit crime defined within the U.S. Constitution (see Chapter 12 for a detailed discussion of treason). The Bill of Rights place boundaries on the actions that state legislatures may criminalize (see Chapter 2). In contrast to the U.S. Constitution, state constitutions detail criminal offenses, underscore constitutional rights guaranteed by the federal constitution, and add additional protections. For instance some state constitutions include specific language to protect citizens' "right of privacy."

Treaties and Other International Conventions

In some instances, agreements between nations provide for criminal sanctions if the contract is broken. Countries sometimes enter into two-way **treaties** to reach an agreement on how they will handle potential criminal matters. Mutual legal assistance treaties (MLATs) offer an example. The United States has MLAT treaties with different countries, including Argentina, the Bahamas, Canada, Italy, the Netherlands, Panama, South Korea, Switzerland, Thailand, and Turkey. Countries may also agree to have particular kinds of disputes resolved by an international court. These disagreements may be resolved by courts such as the International Court of Justice (ICJ) and the International Criminal Court (ICC). The ICJ, the

judicial arm of the United Nations, hears cases and writes advisory opinions. The ICC is designed to identify and punish war crimes, genocide, and crimes against humanity. The United States is a party to the ICJ but is not a party to the treaty that established the ICC.

In *Bond v. United States* (2014),[11] the U.S. Supreme Court was asked to determine whether an international treaty can apply to domestic actions. The case involved Carol Anne Bond, who learned that her best friend had become pregnant by her husband. In response, Bond smeared lethal chemicals on several surfaces, including the pregnant woman's mailbox, car, and doorknob. Bond was convicted of violating the Chemical Weapons Convention and sentenced to six years behind bars. The convention prohibits the use of chemical weapons. On appeal to the Supreme Court, Bond challenged her sentence and argued that her crime was an "ordinary" poisoning case and should be handled by state law. The Court held unanimously that the federal law did not apply to Bond's crime. Chief Justice John Roberts noted that the law that she was charged with violating focused on acts of war and terrorism, not simple assaults.

Administrative Regulations

Federal agencies are authorized by Congress to regulate a wide range of activities. These agencies adopt administrative regulations, which have the same force as statutory law. Some federal agencies, such as the Environmental Protection Agency (EPA), have regulations that impose criminal sanctions for regulatory violations. For instance, under the Clean Air Act, the owner of a construction company who is found guilty of unlawful asbestos removal could receive a prison term for violating EPA regulations. Other agencies with administrative regulations and criminal sanctions include the Equal Employment Opportunity Commission (EEOC), the Occupational Safety and Health Administration (OSHA), and the Food and Drug Administration (FDA).

Model Penal Code

In 1962, the American Law Institute (ALI) published the **Model Penal Code (MPC)**. ALI members—judges, lawyers, and legal scholars—gathered to fix the widespread inconsistencies and disproportionate sanctions in state criminal laws. The Illinois state code that was in effect in 1961 provides an example of this problem. Different sections of the Illinois code listed different punishments for the same offenses. For instance, while one section stated there was a $200 fine for "contributing to delinquency," another imposed a $1,000 fine for the same offense. An example of disproportionate sentencing under the code was the punishment for stealing a horse. The minimum punishment for stealing a horse was three years in prison, while the minimum punishment for stealing a car was one year. Such widespread variations in punishment were problematic since they could result in unfair punishment and undercut public faith in the judicial system.

Criminal law in the United States is codified in fifty-two criminal codes. This includes the federal criminal code, the fifty state codes, and the criminal code of the District of Columbia. The MPC provides state legislatures with a template for drafting their criminal laws. Following the initial publication of the MPC, most states revised their criminal codes. This overhaul of state criminal laws led to greater uniformity across the states. Today the MPC continues to have a significant effect on the

drafting and interpretation of criminal law by American courts. Additionally, judges frequently cite sections of the MPC in their judicial opinions. This is particularly notable given that the MPC is not legally binding on states. While non-binding, it has been suggested that the MPC comes close to operating as an American criminal code.[12]

As this discussion makes clear, the origins of U.S. criminal law are broad. In some instances, an individual may be responsible for deciding and making the law in a particular case. Common law and executive orders are examples of lawmaking by individuals. In other instances, groups of people write and adopt criminal laws. The U.S. Constitution and the fifty state constitutions are examples of lawmaking by groups. Laws passed by federal, state, and local legislatures are another example. Finally, in the case of treaties, countries voluntarily unite to establish rules for resolving conflicts.

Classifications, Distinctions, and Limitations in Criminal Law

Felony Versus Misdemeanor

In the hierarchy of crimes, a felony offense is more serious than a misdemeanor offense. A felony conviction may subject an offender to more than one year behind bars. A felony conviction may also result in a fine. Additional sanctions may attach to a felony conviction, such as disenfranchisement—loss of the right to vote (see Chapter 11 for a more detailed discussion of punishment). A person who is charged with a felony is entitled to a jury trial. A misdemeanor conviction may result in a jail sentence of up to one year or a fine. For a misdemeanor charge, a jury trial is only guaranteed if the punishment would result in more than six months behind bars. Both the federal and state systems distinguish between felonies and misdemeanors. Many state statutes also include a third tier of criminal offending, known as infractions. Infractions are petty offenses that are subject to fines but do not result in jail time. Examples include littering, jaywalking, and disturbing the peace.

Crime Versus Tort

A criminal action differs from a **tort** action. A tort is a civil action. Civil actions are brought in civil courts, which hear noncriminal cases. Examples of civil actions include a homeowner suing a construction company for failure to complete the work on a house, a driver filing a lawsuit against the owner of a vehicle who ran a red light and crashed into his car, and a patient suing a surgeon after she discovers that a surgical sponge was not removed from her abdomen following a medical procedure.

There are three key distinctions between a crime and a tort. First, the goal of a criminal case is to get a conviction and impose a sentence against the offender. However, with a tort action, the goal is to force someone to pay money damages for causing harm. Second, in a criminal action, the party who brings the case to court is a municipality, state, or the federal government. In a civil action, the suit is brought by an individual person, groups of individuals, or by the government. Third, the burden of proof is higher in a criminal case than in a civil action. In a criminal case, the prosecution is required to prove its case "beyond a reasonable doubt." By comparison, the

burden of proof for the plaintiff in a civil case is by a "preponderance of the evidence." It is much harder to find someone liable in a criminal case because the defendant may face incarceration, a loss of physical freedom, or even death. These are not risks typically faced by a defendant in a civil action.

In some instances, a single incident can result in both criminal and civil charges. For example, in 1995 O.J. Simpson was tried and acquitted of two counts of murder. The following year, in a separate action (in a different court, with a different judge, and jury), he was sued by the parents of one of the murder victims. Simpson was found liable for wrongful death and a civil judgment was entered against him for thirty-three million dollars. As noted above, the burden of proof in a criminal case is much higher (beyond a reasonable doubt) than the one in a civil case (by a preponderance of the evidence). As noted, it is easier to find someone guilty in a civil action than in a criminal one.

The September 11, 2001, terrorist attacks are another example of how criminal and civil actions may arise from a single incident. Criminal charges were filed against members of Al Qaeda who were suspected of planning the strikes. Numerous civil actions were filed as result of the September 11 attacks. For instance, victims' family members filed tort claims against various corporations and agencies, including United Airlines and New York's Port Authority for pain and suffering, economic loss, and medical costs. Also, in 2010, thousands of Ground Zero rescue and maintenance workers reached a $675.5 million settlement against New York City for health-related injuries.

Capital Offenses Versus Non-Capital Offenses

Some offenses are considered so horrible that they may be punished by state-sanctioned death. These are capital offenses. The term "capital" refers to a method of execution practiced centuries ago—the severing of one's head with the guillotine. A **capital offense** is a type of aggravated murder. Examples of crimes that may trigger a death sentence include killing an on-duty law enforcement officer, killing two or more people, killing someone during a burglary, or killing someone for pecuniary gain. Capital cases are rare. Less than 1 percent of all homicide cases are charged as death penalty cases. Thirty-two states, the U.S. military, and the federal government permit the death penalty for the society's most heinous crimes. In 2013, there were approximately 3,100 people on death row in the United States. For more detailed discussions of capital punishment, see Chapters 8 and 11.

Ex-Post Facto Laws

Article 1 of the U.S. Constitution prohibits ex-post facto laws. Ex-post facto laws punish conduct that was *not* unlawful at the time the "crime" was committed. Written laws give us notice that certain actions violate the law. In fact, the Constitution requires that our laws be made public, not kept secret. Accordingly, a person can only be punished for actions that were criminal *prior* to the time of his action. Imagine the harm that would occur if people faced criminal punishment for actions that were not known to be criminal at the time of their actions. It would make deterrence—one of the stated purposes of punishment (see Chapter 11)—impossible to achieve. We cannot deter people from committing crimes that are nonexistent. We would question the law's fairness if someone could be charged with

wrongdoing when she had no reasonable way of knowing her actions were against the law. Further, studies show that people are less likely to respect and obey the law if they think it is arbitrary and unfair.

To determine whether a law is ex-post facto, the courts examine two factors. First, they consider whether the law is retrospective (applies to events that occurred before its enactment) and second, whether it would disadvantage the offender. The **U.S. Supreme Court**'s decision in *Lynce v. Mathis* (1977)[13] offers a case discussion of ex-post facto laws. In 1986, Kenneth Lynce was convicted of attempted murder and sentenced to twenty-two years in prison. While serving time, he earned credit for good behavior, which reduced his sentence. Beginning in 1982, in response to the problem of overcrowded prisons, Florida passed legislation that allowed some prisoners to receive an early release. In 1992, Lynce, who had accumulated good time credits, was released from prison. However, later that year, Florida decided to cancel the early release credit system. Lynce was rearrested and returned to prison. The Supreme Court held that Florida could not cancel early release credits for prisoners. They agreed with Lynce's argument that the new law violated the ex-post facto clause of the U.S. Constitution.[14]

This section reviews and discusses key material about the criminal justice system. Keep this discussion in mind as we continue to develop the framework for understanding the detailed working of the justice system. The next part of this chapter examines the people *in* the justice system—those under its control. This is followed by an outline of the key stages of the justice system.

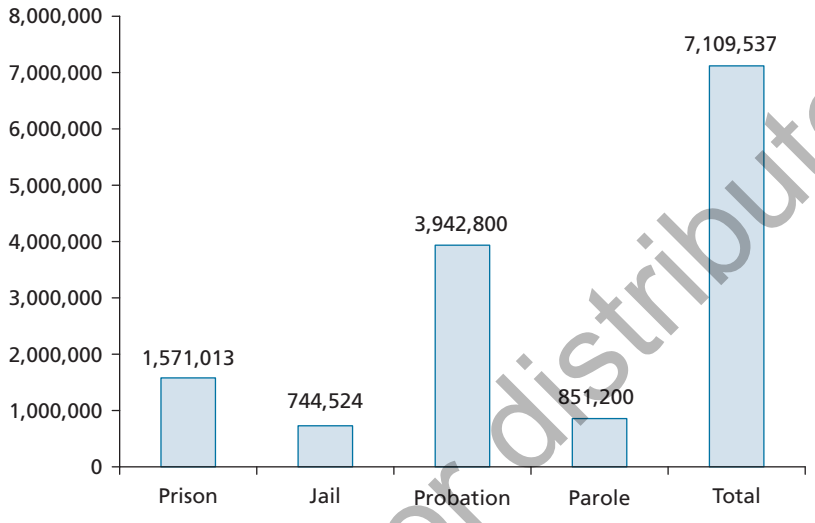
Crime and People in the Criminal Justice System

In 2012, U.S. law enforcement officers made over twelve million arrests. Less than 5 percent were for violent crimes, such as murder, rape, robbery, and aggravated assault. Approximately 12 percent were for property offenses, such as burglary, theft, and arson. The overwhelming majority of arrests were made for low-level, nonviolent crimes.

As Figure 1.3 indicates, there are millions of people in the American correctional system. There are four ways someone can be under the supervision of the criminal justice system. Correctional supervision includes prison, jail, probation, and parole. In 2012, the Department of Justice estimated that there were approximately seven million people under correctional supervision in the United States. The majority were on probation (57 percent), followed by those serving prison sentences (21 percent), those on parole (12 percent), and those in jail (11 percent).[15]

Department of Justice statistics show that one of every thirty-three adults is in the correctional system. The millions of people tethered to the justice system result in a huge societal cost. The Vera Institute estimates that it costs American taxpayers approximately $31,286 per year to incarcerate one person.[16] A look at the racial breakdown of those in state and federal prisons show some noteworthy racial trends. More than 38 percent of the people incarcerated in the United States are African Americans. Whites make up approximately 34 percent of the incarcerated population, and Hispanics constitute over 20 percent. The next section examines the of the criminal justice system process—from arrest to sentencing—and an overview of the court system.

Figure 1.3 U.S. Total Population in Prison, Jail, Probation, Parole, 2012



Source: Department of Justice

Notes: "Prisoners in 2012" DOJ, Dec. 2011; "Jail Inmates at Midyear 2012-Statistical Tables" DOJ May 2013; and "Correctional Population in the United States, 2012" DOJ Dec. 2013.

The Structure of the Criminal Justice System

The Criminal Justice System Process

http://www.cartoonstock.com/cartoonview.asp?catref=dcrn983

The American criminal justice system is both mammoth and complex. It is made up of three main parts: police, courts, and corrections (Figure 1.4). As the cartoon illustrates, people who enter the justice system face a daunting legal maze. An attorney is an important "user's guide" and can help an alleged or convicted offender navigate his way through the system—from criminal charges to post conviction. A person who has been charged with a crime is typically represented by either a private attorney or a public defender. In *Gideon v. Wainwright* (1963),[17] the Supreme Court held that the state must provide legal counsel to criminal defendants who cannot afford to hire their own attorneys. This section provides a structural overview for understanding the justice system. First, there is a discussion of the main parts of the justice system. Second, there is a discussion of how to prepare a **case brief**. Given that case law is the central focus of this material, we will also look at the organization of the American court system.

Figure 1.4 Police, Courts, and Corrections

* For more detail, see Figure 1.5 on pages 16-17.

The criminal justice system typically begins with an arrest by a police officer (in some cases it begins with a grand jury investigation). The next part is the court system, which is followed by the corrections system. Each year, the number of reported crimes is much larger than the number of arrests. Further, the number of arrests is much larger than the number of cases that end in criminal punishment. This explains why the criminal justice system is commonly referred to as a funnel. Figure 1.5 is a streamlined snapshot of the key components of the criminal justice system process.

Arrest

The arrest of a suspected offender signals the starting point of the criminal justice system. Depending upon the location of the offense, an arrest may be made by local, state, or federal law enforcement officials. In some instances, there may be what is called a "citizen's arrest." When a non-law enforcement officer witnesses a crime, she may detain the suspect until a law enforcement officer arrives on the scene.

Formal Charging Process

At this stage, an alleged offender is officially charged with violating a specific section or sections of the criminal code under local, state, or federal law. The criminal charge is sometimes referred to as an "information," a formal criminal charge brought by the prosecutor. If the charge is a felony, it may also come in the form of a grand jury indictment, which is a criminal charge brought by a special jury.

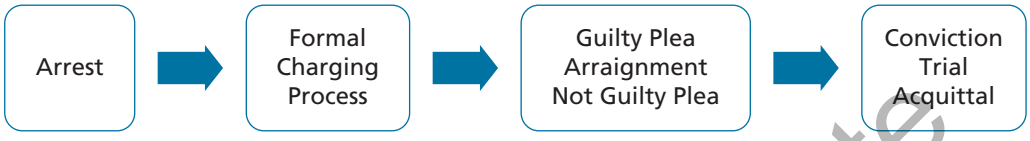
Arraignment

After a person is charged with a specific crime, he is taken to court to stand before a judge. At this court appearance, the judge reads the charges to the accused and asks him to enter a plea. Most defendants enter a plea of "not guilty" at this early stage of the process. The judge often makes the bail decision at the arraignment hearing. The judge decides whether the person should remain free until his case is resolved, whether to impose a bond fee, or whether to detain the suspect. A defendant is detained when he cannot afford to pay bail, is deemed a danger to the community, or is determined to be a flight risk—someone unlikely to show up for his trial.

Guilty Plea

There is usually a status hearing at a later stage of the process during which the defendant informs the court whether he intends to go to trial or enter a guilty

Figure 1.5 The Criminal Justice System, Streamlined View



plea. The prosecutor may offer the defendant the option of pleading guilty to a lesser offense in exchange for his agreement to give up his right to a trial—a process known as "plea bargaining." If the person pleads guilty, the judge may determine the punishment at that time or at a sentencing hearing scheduled at a later date. If the person pleads not guilty, the judge sets a date for trial. Approximately 95 percent of all cases, federal and state, result in a guilty plea. In some states, a person accused of a crime may enter a plea of *nolo contendere* or "no contest"—he neither admits nor denies the offense. A person who pleads nolo contendere faces the same penalties as person who pleads guilty.

Jury Selection and Trial

A criminal case may be decided by either a jury or a judge. A person who faces a crime that could be punished with a sentence of six months or more behind bars is entitled to a jury trial. During the selection process, potential jurors are asked questions by the judge, the prosecutor, and the defense attorney. Based on their responses, they may be excused or selected as members of the jury. The names of eligible jurors are typically drawn from a state's list of registered voters or licensed drivers. After the prosecution presents its case, the defense may present evidence that refutes the charges but is not required to do so. After hearing all the evidence, the judge or jury either finds the defendant guilty or acquits him. When a jury cannot agree on a verdict, the judge declares a mistrial, which generally means that the court will retry the case from the beginning.

Sentencing

Following a guilty verdict, the judge imposes a sentence. State and federal codes establish the sentencing range for each crime. The more serious the crime, the greater the criminal sanction. For instance, rape and murder are punished more severely than lower-level crimes, such as theft and assault. The length of an offender's prison sentence and the amount of restitution an offender is required to pay will vary according to the seriousness of an offense. (See Chapter 11 for a detailed discussion of sentencing.)

Appeals

Following a conviction, a defendant may file an appeal. By initiating the appeals process, the defendant is asking a higher court to review his case to determine whether there were procedural or constitutional errors. If the appeals court agrees with the defendant, it will overturn his conviction. However, if the appeals court agrees with the trial court, it will uphold the conviction.

Punishment

The punishment phase of the justice system typically begins after the defendant is sentenced. Most defendants begin serving their time while their cases are being appealed. In some instances, judges will allow a defendant to remain free until his appeal is resolved. In cases where the defendant is detained before trial and ultimately found guilty, he will receive credit for the time he has already served behind bars. (See Chapter 11 for a detailed discussion of punishment.)

The U.S. Court System

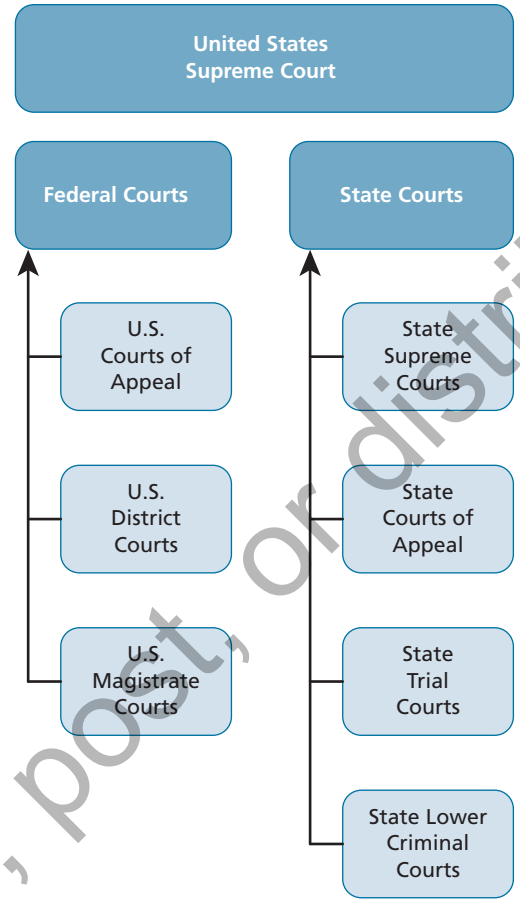
U.S. courts have a heavy caseload of criminal cases. In 2010 alone, there were more than twenty million criminal cases brought in state courts. In 2012, more than one hundred and fifty thousand cases involving criminal matters were received by the U.S. Attorneys' office.[18] In the United States, there are two separate court systems that adjudicate criminal cases: the federal court system and the state court system. The U.S. Supreme Court, the "highest court in the land," sits at the top of both court systems, making it the court of last resort. Figure 1.6 provides a sketch of the two court systems. Cases begin in the lower courts and sometimes make their way farther up the court ladder. A typical state criminal case that goes to trial begins in the state's lower criminal court or trial court. These are sometimes referred to as district courts. At the federal level, cases start in U.S. magistrate or U.S. district court. This "district court" language can be confusing since both state and federal lower courts may be referred to as district courts. When reading a case, it is best to initially determine whether the case is in state or federal court. When lower federal courts issue conflicting decisions on a legal issue, the Supreme Court often decides to accept an appeal involving that issue to resolve the conflict and determine the law. In any given year, the Supreme Court hears fewer than one hundred cases—a tiny fraction when compared with the hundreds of thousands of criminal cases handled by U.S. courts each year.

In the federal system there is an additional tier of courts, including bankruptcy courts and courts of special jurisdiction (e.g., Military Court, Tax Court, and the Court of Appeals for the Armed Forces).

Case Briefing

Court cases are used throughout this textbook to illustrate how criminal law is applied and interpreted by the courts. With few exceptions, the case excerpts are decisions by appeals courts—courts that review the decisions of lower courts. The "State Courts of

Figure 1.6 Federal and State Courts



Appeals" in Figure 1.6 above are examples of lower courts. These courts are "lower" than the U.S. Supreme Court and the State Supreme Courts. Most of the case excerpts are from either State Supreme Courts or State Courts of Appeal. Federal cases are also highlighted in this textbook, including numerous decisions by the U.S. Supreme Court. Reading and understanding court opinions takes practice. The first step is learning *how* to read the cases.

In this section, we will identify and define the key components of a court opinion. Following this, we will locate these parts in an actual judicial opinion. The case summary process is known as "briefing a case." The written summary is a "case brief." For a case brief, there are six main parts to focus on:

- *Citation*: The name of the case and the case citation, including the court and the year of the decision.
- *Prior Proceedings*: If the case is now before an appeals court, the prior proceedings are an overview of the legal decisions reached by the lower courts. In other words, the prior proceedings state what happened in court *before* the

current court's decision, such as the crime the defendant was convicted of committing, the statute she violated, and the sentence she received.

- *Facts*: The facts refer to the specific details of the case that led to the filing of criminal charges against the defendant. For instance, if there was an altercation between the defendant and the victim, the facts section would include the who, when, where, how, what, and why of the incident.
- *Issue*: The issue is a statement of the legal question(s) that the court is asked to address in the specific case. Generally speaking, the court is being asked to answer a question by the appellant—the side that lost in the court that previously heard the case. An issue may involve a question about the interpretation of a constitutional right, whether the trial court provided the proper instructions of law to the jury, or whether three was sufficient evidence to support the conviction.
- *Holding*: The holding is a statement of the court's decision. It is the court's answer to the issues and questions posed by the appealing party. The court's "disposition," the directive from the court, may also be included in this section. Examples of case dispositions include "Affirmed" or "Reversed and remanded." This language usually appears at the end of a case.
- *Rationale*: The rationale is an explanation of the court's reason for reaching its decision. The court's reasoning may include a range of factors, including prior case law (precedent) or public policy. Judicial opinions typically offer more than one rationale for their decisions.

When a case is appealed from a lower court to a higher court, the appeal may be heard by a court with more than one judge. For instance, the U.S. Supreme Court has nine justices, and in many cases, the justices who do not agree with the majority write separate dissenting opinions. Judges do not always agree on what the proper legal resolution should be in a case. This means that in some cases, there is a majority opinion, followed by either a "concurring" opinion or a "dissenting" opinion. A judge may write a concurring opinion when she agrees with the decision of the majority but for different reasons. For reasons of space, this textbook does not include concurring and dissenting opinions. If you are interested in reading concurring and dissenting opinions in a particular case, use the citation information to look up the full opinion.

- *Concurring Opinion*: The opinion of a judge (or judges) who agrees with the decision of the judges who are in the majority, but for different legal reasons.
- *Dissenting Opinion*: The opinion of one or more of the judges who disagrees with the legal decision and findings of the judges in the majority. Sometimes important facts that were not discussed in the majority opinion are discussed in a dissenting or concurring opinion.

There are nine justices on the U.S. Supreme Court. One of the justices in the majority is assigned to write the court's opinion in a case. In some instances, an opinion is written by the Court and is not authored by an individual Justice (these are known as "per curiam" decisions).

Next, we turn to the case of ***State v. Woll*** (1983). As you read through the court opinion, underline and highlight the sections that address the key parts of a case brief (detailed above). Following the decision, review the sample brief.

State v. Woll (1983)

668 P.2d 610

Court of Appeals of Washington

PETRIE, J. Plaintiff, the State of Washington, appeals an order dismissing "all charges against and prosecution" of defendant, Robert H. Woll . . . Woll [was convicted] by jury verdict of the crime of first degree theft . . .

The State's appeal raises [the] question [of] whether . . . theft under RCW 9A.56.020(1)(c) requires proof of an intent by the accused to deprive the owner permanently of the property.

On February 1, 1979, defendant Woll deposited $448 in his checking account at the Aberdeen Branch of the Seattle-First National Bank (Sea-First). The bank mistakenly credited Woll's account with $4,448. The defendant discovered this error when he received his next bank statement several days later. Woll testified that he contacted a person, whose name and title he did not obtain, at Sea-First about the mistake and was told to "keep it in limbo until the error has been found." For the next 3 months, Sea-First continued erroneously to credit Woll's account. Then, on April 18, 1979, Woll closed the Sea-First account by cashing a check in the amount of $4,223.93 and depositing the proceeds in an interest-bearing account in another bank. Although Woll denied that he had any "intention to deprive Sea-First of the money" and denied that he had any "intent to permanently take the money," he subsequently spent it all within 2 months.

The Federal Reserve Board detected the bank's mistake on February 21, 1980, and notified Sea-First of its error. The bank then demanded reimbursement from Woll. Because Woll did not timely repay Sea-First, the bank reported the matter to the prosecuting attorney who then initiated these criminal proceedings. On June 11, 1980, Woll was charged with having committed first degree theft "on or about April 18, 1979," by appropriating lost or misdelivered property under RCW 9A.56.020(1)(c). Three days before trial, Woll repaid the bank from the proceeds of a second mortgage he placed on his house . . .

We turn, then, to the central issue of whether theft by the appropriation of lost or misdelivered property requires proof of the intent to deprive the owner permanently of the property . . .

The wrongful withholding of property delivered by mistake, with knowledge of the mistake acquired *subsequent to the receipt,* may be punishable by statute under the name of larceny, but it is an offense distinct from common law larceny [R. Perkins, *Criminal Law* 254 n. 76 (2d ed. 1969)].

Thus, the common law of larceny required proof that the defendant's intent to steal concurred with his mistaken *receipt* of the property,[7] whereas, under RCW 9A.56.020(1)(c) the "intent to deprive" must exist at the time of the appropriation. In the case at bench, Woll was charged with having committed the crime on or about April 18, 1979. Thus, under the charge and under the trial court's instruction, the prosecution had to prove defendant's intent on the date he transferred the funds—not the date or dates on which he subsequently spent the money. Under Washington law, "[t]he gravamen of the offense is the appropriation of the property *after having received it.*" (Italics ours.) *State v. Heyes,* 44 Wn.2d at 588.

We are persuaded that in order to prove a charge of theft under the statutory offense of appropriation of misdelivered property, the quality of the intent required is the same as that required under the statutory offense of embezzlement. Embezzlement, also, was not larceny at common law. Washington courts have, accordingly, declined to read into the crime of embezzlement the common law requisite for larceny (the intent to deprive permanently). Embezzlement requires proof only of the intent to deprive, and the crime is completed when the accused fraudulently misappropriates the property . . .

Therefore, we reject the defendant's contention that theft by the appropriation of misdelivered property incorporates the intent to commit common law larceny. We hold that this crime requires proof of the intent merely to deprive, at any time, the property appropriated and not necessarily coincidental with the wrongful receipt, precisely as the jury was instructed.

Therefore, we reverse the trial court's order granting a new trial as well as the order dismissing the information. The jury's verdict is reinstated, and the cause is remanded for imposition of sentence.

PETRICH, C.J., and WORSWICK, J., concur.

Sample Case Brief

Prior Proceedings

I. Trial Court: Jury found defendant guilty of first degree theft under Washington state statute.

II. Trial Court: After the guilty verdict, the judge dismissed the charge against Woll and granted a new trial.

III. Court of Appeals (current case)

Facts

- February 1, 1979, Robert Woll, the defendant (D) deposited $448 into his checking account at the Seattle-First National Bank (Sea-First). The bank made an error and credited him with $4,448 (!)
- D discovered the bank's error some days later when he received his bank statement. D testified that he contacted someone at the bank who told him to "keep it in limbo." The extra $4,000 remained in D's account for three months.
- April 18, 1979, D closed his Sea-First bank account. He then deposited the money into a checking account at another bank. Over the next two months, D spent the entire amount.
- February 21, 1980, the Federal Reserve Board discovered the error and notified Sea-First. Sea-First demanded repayment by D. When D did not repay in a timely manner, the bank contacted the prosecutor. Criminal charges were initiated against D. D said he had no intent to permanently take the money.
- June 11, 1980, D was charged with first degree theft under state code, "by appropriating lost or misdelivered property" [RCW 9A.56.020(1)(c)]. D made repayment prior to trial.

Issue

Does a conviction for first degree theft require that D intend to deprive the bank of the money (misdelivered property) at the time he received it?

Holding

No, D can be convicted of larceny/theft if there was intent to deprive so long as D intended to deprive the owner of the property at some point after he received it.
The court upholds D's conviction for larceny.

Rationale

- Intent for theft can be established when D forms intent to deprive the owner *subsequent to the receipt* of the property. Intent does not have to be formed at the time D receives the property.
- The intent required to establish theft is the same as the intent required for the crime of embezzlement.
- There is a difference between the intent required for larceny and the intent required for common law larceny. There is a higher standard for common law larceny. This case involves theft only.

Concurring Opinion

- Judges Petrich and Worswick concur (no separate opinion).

The case brief has several purposes and benefits. It provides a short, one-page summary of the case. It is also useful for students as a learning tool during class lectures. When a case is reviewed in class, write notes and comments on the brief and make any necessary additions and corrections. Case briefs are also useful during preparation for midterms and final exams. Briefs allow for quick reviews and comparisons between court cases.

Writing case briefs is a skill that improves with repetition. Initially, it may be a challenge to determine the facts, issue, holding, and rationale. It will also be a challenge to confine the brief to one page. The more cases you read and discuss in class, the easier it will be to determine which facts matter the most and should be included in the case brief. With practice, it will become easier to spot the issue in a case, understand the holding, and identify a court's reasoning for its decision.

Concluding Note

This chapter has provided an overview and roadmap of criminal law and criminal justice issues that will be covered in detail in this textbook. Now test yourself on the material we have covered in this chapter. Good luck with the Issue Spotter exercise for this chapter. The exercise requires that you review and apply the case brief material discussed in this chapter.

IssueSpotter

Read the court case below and prepare a case brief. Use the case brief structure outlined above (prior proceedings, facts, issue, holding, rationale, concurring, and dissenting opinions). Be sure to include each of the elements of a case brief.

People of New York v. Sirico (2011)
Court of Appeals of New York
17 N.Y. 3d 744

Memorandum.

The order of the Appellate Division should be affirmed. Following a jury trial, defendant was convicted of murder in the second degree (Penal Law § 125.25 [1] [intentional murder]). The charges arose after defendant, an experienced archery hunter, shot an arrow from his compound bow towards his neighbor's yard, fatally striking the victim. On appeal, defendant principally contends that he was entitled to an intoxication charge (*see* Penal Law § 15.25). That section provides, in its entirety:

Intoxication is not, as such, a defense to a criminal charge; but in any prosecution for an offense, evidence of intoxication of the defendant may be offered by the defendant whenever it is relevant to negative an element of the crime charged.

An intoxication charge is warranted if, viewing the evidence in the light most favorable to the defendant, "there is sufficient evidence of intoxication in the record for a reasonable person to entertain a doubt as to the element of intent on that basis" (*People v. Perry,* 61 NY2d 849, 850 [1984]; *see also People v. Farnsworth,* 65 NY2d 734, 735 [1985]). A defendant may establish entitlement to such a charge "if the record contains evidence of the recent use of intoxicants of such nature or quantity to support the inference that their ingestion was sufficient to affect defendant's ability to form the necessary criminal intent" (*People v. Rodriguez,* 76 NY2d 918, 920 [1990]). Although a "relatively low threshold" exists to demonstrate entitlement to an intoxication charge, bare assertions by a defendant concerning his intoxication, standing alone, are insufficient (*People v. Gaines,* 83 NY2d 925, 927 [1994]).

Here, there is insufficient evidence to support an inference that defendant was so intoxicated as to be unable to form the requisite criminal intent. Indeed, the uncontradicted record evidence, including defendant's own account, supports the conclusion that his overall behavior on the day of the incident was purposeful. Accordingly, defendant was not entitled to an intoxication charge.

We have reviewed defendant's remaining contentions and find them to be without merit.

Jones, J. (dissenting). It is uncontroverted that defendant, on the day of the criminal incident, consumed two large glasses (approximately 12 to 15 ounces each) of Southern Comfort whiskey and ingested a Xanax pill. Shortly thereafter, he threatened friends and neighbors with a bow and arrow, fired an arrow into the side of a truck, and then fatally shot the victim—actions that call into question defendant's state of mind. Thus, given this record evidence and the "relatively low threshold" a defendant is required to meet for entitlement to a jury charge of intoxication, I respectfully dissent and would reverse the Appellate Division.

People v. Perry (61 NY2d 849, 850 [1984]) established that "[a] charge on intoxication should be given if there is sufficient evidence of intoxication in the record for a reasonable person to entertain a doubt as to the element of intent on that basis." . . . [T]here must be objective evidence in the record, "such as the number of drinks, the period of time during which they were consumed, the lapse of time between consumption and the event at issue, whether [the defendant] consumed alcohol on an empty stomach, whether his [or her] drinks were high in alcoholic content, and the specific impact of the alcohol upon his [or her] behavior or mental state" (*People v. Gaines,* 83 NY2d 925,927).

The record evidence in this case satisfies the rule of *Perry* and *Gaines* and may serve to negate the mens rea element of intent for murder in the second degree (*see* Penal Law §§ 15.25, 125.25 [1]). Thus, it was error for the trial court to deny defendant's request for a charge of intoxication.

The People contend that defendant's testimony establishes that an issue with the mechanism of his prosthetic leg, and not intoxication, precipitated the fatal firing of the bow and arrow. However, it should be emphasized that in determining whether a theory of defense should be charged, a defendant is entitled to the "most favorable view of the record," and a trial court is obligated to charge a theory of defense where it is supported by a reasonable view of the trial evidence . . . Here, contrary testimony should not preclude the charge of intoxication where there is a reasonable view of the record evidence that would support such an instruction . . .

A trial court simply cannot forgo its obligation to properly charge a theory of defense when there is record support. Ultimately, whether a jury credits or discredits the testimony of defendant in rendering its factual determinations is a matter beyond our purview. But before reaching its final decision, the trier of fact should be presented with all relevant instructions, as supported by the record, for its due consideration.

. . . .

Order affirmed in a memorandum.

Key Terms and Cases

Administrative regulations 6
Capital offense 12
Case brief 14
Common law 1
Crime 2
Executive order 6
Ex-post facto law 7
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Notes

1. Jennifer Truman and Michael Planty, "Criminal Victimization, 2011," NCJ 239437 (Washington, DC: U.S. Department of Justice, 2012).
2. Minn. Stat. 2011 §609.36(1).
3. Norval Morris and Gordon Hawkins, *The Honest Politician's Guide to Crime Control* (Chicago: University of Chicago Press, 1970) 2.
4. Dallin H. Oaks, *The Popular Myth of the Victimless Crime*, Commissioner's Lecture Series. (Provo, UT: Brigham Young University Press, 1974) 5–13.
5. *Commonwealth v. Mochan*, 177 Pa. Super. 454 (Pa. Super. Ct. 1955).
6. Fla. Stat. §812.014.
7. Anchorage, Alaska, AO No. 2009-71, "An Ordinance Repealing and Re-Enacting Anchorage Municipal Code Chapter 8.80 Regarding Fees for Excessive Police Responses," http://www.muni.org/Departments/Assembly/legislation/2009%20Ordinances/ao2009-071.pdf
8. Official City of Los Angeles Municipal Code, https://law.resource.org/pub/us/code/city/ca/LosAngeles/Municipal/chapter11.pdf
9. Executive Order No. 9066, February 19, 1942.
10. *Korematsu v. United States,* 323 U.S. 214 (1944).
11. *Bond v. United States,* 564 U.S. _____ (2014).
12. Paul H. Robinson and Mark Dubber, "The American Model Penal Code: A Brief Overview," *New Criminal Law Review* 10, no. 3 (2007): 319–341.
13. *Lynce v. Mathis,* 519 U.S. 443 (1997).
14. In some cases, the Supreme Court has upheld what would otherwise be an ex-post facto law. For instance, where there is a great benefit to society in imposing an additional punishment, a law may not be construed as ex-post facto. In *Smith v. Doe,* 538 U.S. 84 (2003), the Supreme Court held that convicted sex offenders can be required to register (and this information can be posted on the Internet).

15. U.S. Department of Justice, "Correctional Populations in the United States, 2012," Table 2, *BJS Bulletin*, December 2013, NCJ 243936, http://www.bjs.gov/content/pub/pdf/cpus12.pdf

16. Christian Henrichson and Ruth Delaney, *The Price of Prisons: What Incarceration Costs Taxpayers* (New York: Vera Institute of Justice, 2012).

17. *Gideon v. Wainwright*, 372 U.S. 335 (1963).

18. *United States Attorneys' Annual Statistical Report, Fiscal Year 2012* (2013) p. 6, http://www.justice.gov/usao/reading_room/reports/asr2012/12statrpt.pdf