Chapter 1

Criminal Law and the Criminal Justice System

Criminal law is the branch of law that deals with crimes and their punishment. As with all branches of law, criminal law developed over hundreds of years, and our modern criminal laws take parts from many sources, from the medieval practice of vendetta to the writ of habeas corpus created in England. In Chapter 1, we explore the development of criminal law, the theory and purpose of these laws, and the criminal justice system that evolved to administer justice when a person was accused of committing an offense against society.

1.1 Development of Criminal Law

What Is Law?

Countries, especially democracies, have tried to put their ideals and principles of fairness and order into effect through laws. These laws seek to control the conduct of a community or society while providing rights for the individual citizen. From accounts of Cain killing Abel in the Bible to stories of the latest homicide in our local newspapers, the need for criminal laws to either prohibit or require certain conduct to prevent a social harm has been evident throughout history. Most laws developed over the centuries relate to resolving disagreements between people that arise in the daily conduct of their affairs. We have developed laws that relate to the ownership of property, the granting of property by wills, the formation and execution of contracts, marriage, and taxes, and dozens of other areas of law. Fundamentally, the law is a mechanism by which we resolve disputes. It is not perfect and can be improved. We have to be careful and not equate law with *justice*. Justice means reaching a just result by fairness, honesty, and morality. There are many instances where unjust laws were ultimately repealed because laws were unfair, dishonest, or immoral. A good example of this is Jim Crow laws. Jim Crow laws mandated the segregation of public schools, public places, and public transportation, and the segregation of restrooms, restaurants, and drinking fountains for whites and blacks. They were enacted after the Reconstruction period in Southern states and were not repealed until 1965.

The Origin of Law

Although King Hammurabi created a set of 282 laws prior to 1750 B.C., known as the Code of Hammurabi, it was not until the development of English common law in the Middle Ages that the process of creating modern written law began. After 1066, when William of Normandy conquered England, the king established the Eyre, a system of traveling judges who heard cases throughout the kingdom and recorded their decisions. These decisions incorporated the unwritten common law of England that had developed based upon custom and usage throughout the land. This process of recording the decisions of courts has remained throughout modern history and is still used in the United States. When the first organized settlers came to the U.S. they brought something with them called *Commentaries on the Laws of England by Sir William Blackstone* or *Blackstone's Commentaries.* The *Blackstone's Commentaries* are often quoted as the definitive pre-Revolutionary source of common law by United States courts. Even today, Supreme Court opinions cite from Blackstone's work whenever they wish to engage in historical discussion on the intent of the Framers of the Constitution. The series of books explained in laymen's terms the laws as they were at that time in England. Today, a good thumbnail definition of common law is "judge-made law."

In modern times, the opinions of appellate courts are preserved in a book of decisions called a reporter. These decisions interpret statutory law and pass judgment on the constitutionality of both the statutes themselves and the actions of government officials and the courts in applying statutory law.

Statutory Law: Civil Law Versus Criminal Law

Generally, failing to exercise ordinary care is not subject to punishment as a crime unless the conduct has been forbidden by the legislature and codified in a statute. Civil law addresses a personal harm between two parties, and monetary compensation is the usual result of a civil suit. A violation of a civil law is a tort. Tort law covers the areas of negligence and intentional harms, and harms committed against businesses and property owners. In some instances, a tort is also a crime. The social harm that a criminal statute seeks to address separates criminal law from civil law. Even when a victim does not desire a prosecution for a criminal offense, the state decides, through a prosecutor, whether to charge an individual with a criminal offense. The prosecutor seeks to enforce the interests of the community and government, not the desires of a victim or witness. What distinguishes the criminal law from civil law is, or at least should be, the societal condemnation and stigma that accompanies the conviction. However, increasingly the line between civil and criminal processes is unfortunately blurred.

1.2 Purpose of Criminal Law

Elements of a Crime

To commit a crime, the following four elements must be present: (1) Mental State (*Mens rea*); (2) Conduct (*Actus reus*); (3) Concurrence, and (4) Causation, there must be a causal relationship between the defendant's act and actual harm.

State Created Law

Each state has the power to create its own criminal statutes pursuant to the Police Powers Clause of the Tenth Amendment to the United States Constitution. Each state is free to define its crimes as long as the statute satisfies the principle of legality. The doctrine of legality is quite simply that a person may not be punished unless his conduct was defined as criminal. In other words, there is a prohibition on retroactive criminal lawmaking. In addition, the statutes must also be understandable, not subject to ad hoc interpretation, and applied to favor the accused when there is any ambiguity. The Due Process Clause of the Fifth Amendment to the U.S. Constitution mandates these requirements. In most states, there are no longer any common-law crimes. Although the legislative branch of government now has primary lawmaking authority, the common law of crimes remains important to modern lawyers. The common law retains its significance because many jurisdictions have codified common-law felonies and most common-law misdemeanors. Therefore, these offenses are usually defined in common-law terms.

Federal Criminal Law

The power of the federal government to prosecute crime is restricted by the U.S. Constitution. Crimes can be prosecuted by the federal government when they are:

- Crimes that involve interstate or international travel or the use of federally controlled communications: These crimes include wire fraud, fleeing across state lines to avoid prosecution, interstate prostitution, and interstate kidnapping.
- Crimes committed in areas of federal jurisdiction that do not fall within state jurisdiction: These areas include aircraft, ships on navigable waters, and the District of Columbia.
- Crimes that impact federal government activities: These include crimes that use the U.S. Mail, robbery of federally insured banks, attacks upon federal personnel, and violation of federal tax laws.

State governments retain primary authority for defining and enforcing the criminal laws of the respective jurisdictions. Moreover, state legislative experimentation and interstate diversity is welcome in our federal system. For example, one state might consider polygamy a serious moral offense and prohibit and punish it as a felony, whereas the people of another state might consider polygamy morally tolerable conduct or too trivial a matter to prohibit.

Why Punishment? Retributive Theory and Utilitarian Theory

Societies have struggled with the issue of punishment since man first dealt with social deviance. Societies have to ask the following: Should we inflict punishment purely for the sake of punishment, or should we impose punishment for the purpose of deterrence or reform? The two theories that developed to justify punishment were the retributive theory and utilitarian theory. Under the retributive theory, the criminal deserves punishment for punishment's sake. Philosophers argued that society had a duty to punish, or else the guilt for the crime lay at the feet of society. Punishment must be used to reestablish moral order that was offended by the criminal act. The utilitarian theory looks at the consequences of punishment and imposes the punishment that accomplishes the most good for society in a particular case. The beneficial consequences of punishment include: general deterrence (deters others from committing the same criminal offense), individual deterrence (keeps the wrongdoer from committing the same or similar offense), incapacitation (guilty party is removed from society), reform (therapy and education to the offender), and vengeance (punishment makes the victim and the community feel better).

1.3 Structure of the System

Law Enforcement

Law enforcement is composed mainly of the sworn officers in police departments, sheriff's departments, state police agencies, and federal agencies. Law enforcement seeks to prevent crime and serves as guardian of the public peace through patrol efforts within their jurisdiction. The other main function of law enforcement is that of crime detection. This is accomplished through investigation, gathering and analysis of evidence, and cooperation with prosecutors in presenting a case in court. Whether through the exercise of their prevention or detection function, it is the role of law enforcement to bring criminal offenders into the criminal justice system.

Prosecutors and Defense Attorneys

The roles of attorneys in the criminal justice system are dictated by an adversary system that pits each attorney against the opposing side of the case in a competitive effort to prevail. The majority of prosecutors are employed by counties within each state. The district attorneys of each county are elected officials, with offices comprising assistant or deputy district attorneys. Some prosecutor's offices are small, and the district attorneys try their own cases. In most major cities, the district attorney's office has hundreds of deputies divided into teams that prosecute specific types of cases, such as gang or drug crimes. The sworn duty of a prosecutor is to seek justice, regardless of the result. If a complaining witness lacks credibility, justice demands that the case be dismissed. If the prosecutor is convinced of the truth of the charges, he should vigorously seek a conviction, regardless of the difficulty.

Pursuant to the Sixth Amendment to the U.S. Constitution, the law provides that "In all criminal prosecutions, the accused shall . . . have the Assistance of Counsel for his defense." If a person accused of a crime is indigent (which means that he cannot afford an attorney), the Supreme Court has recognized a constitutional right to have an attorney appointed for the accused at public expense. The Supreme Court held in *Gideon v. Wainwright* (1963) 372 US 335 that the Sixth Amendment requires indigent defendants in state court proceedings to have appointed counsel. This right was expanded in *Argersinger v. Hamlin* (1972) 407 US 25, wherein the Court ruled that an indigent defendant must be provided an attorney when imprisonment is a possible punishment even when the offense is only a misdemeanor. A defense attorney is an officer of the court and has a duty to the justice system, but he also has a duty to zealously defend his client within the bounds of the law, regardless of the outcome. He must protect his client's rights while vigorously challenging the evidence and seeking the best result possible.

The Courts

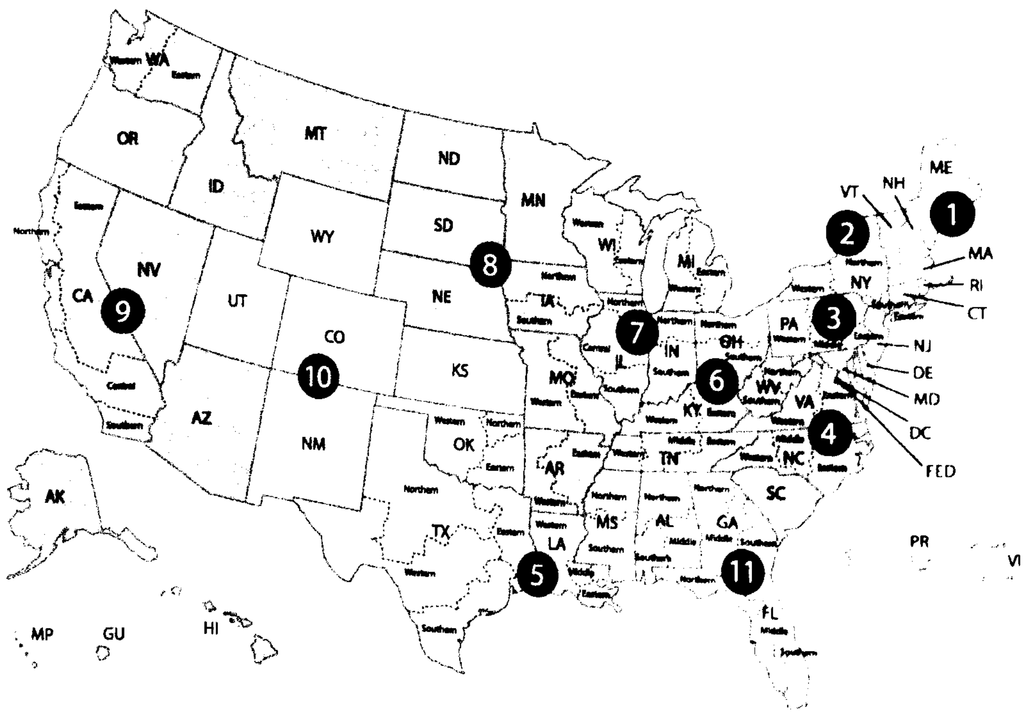
To hear a criminal case, a court must have jurisdiction over the offense charged and the person charged with the offense. Under the Sixth Amendment of the U.S. Constitution, the accused has a right to have a speedy public trial by an impartial jury in the state and district where the crime was committed. If the offense was committed in several counties or across state lines, the county or state in which an essential part of the offense was committed can assert jurisdiction.

Federal Courts

Federal crimes can be prosecuted in any of the 94 district courts across the country or within one of the limited jurisdiction courts, such as the U.S. Tax Court. Appeals from the district courts are heard by 1 of the 13 federal courts of appeal, which are set up in 12 circuits or geographical sections of the country plus the Federal Circuit Court in Washington, D.C. The United States Supreme Court hears cases only where it has consented by issuance of a *writ of certiorari.* This writ is the way in which the Supreme Court "agrees" to hear the case. Not all cases are granted *writs of certiorari.*

Geographic Boundaries

of United States Courts of Appeals and United States District Courts



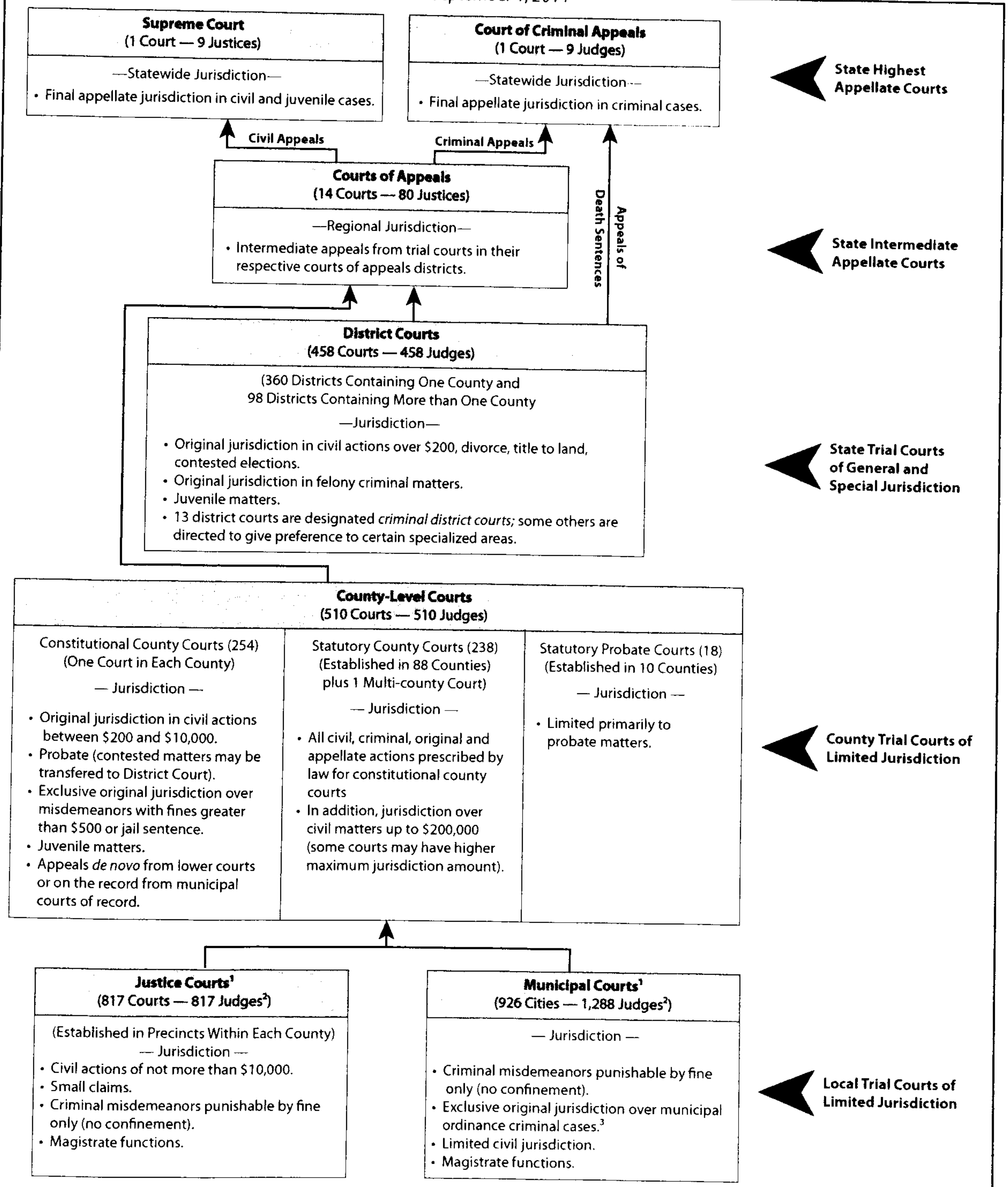
Adapted from http://www.uscourts.gov/court_locator.aspx

State Courts

State courts are usually set up with a court of last resort (Supreme Court), an intermediate appellate court (Court of Appeals), general trial courts (District Courts and County-Level Courts), and limited jurisdiction courts (Justice Courts and Municipal Courts).

Court Structure of Texas

September 1, 2014



1. All justice courts and most municipal courts are not courts of record. Appeals from these courts are by trial *de novo* in the county-level courts, and in some instances in the district courts. Some municipal courts are courts of record—appeals from those courts are taken on the record to the county-level courts. As of March 2014, 158 courts indicated that they were a court of record.
2. Some justices of the peace also serve as a judge in one or more municipal courts. Municipal judges may also serve in multiple courts.
3. An offense that arises under a municipal ordinance is punishable by a fine not to exceed: (1) $2,000 for ordinances that govern fire safety, zoning, and public health or (2) $500 for all others.

Source: Texas Office of Court Administration

Municipal Courts

These are the city courts of Texas. Terms, salaries, and qualifications for municipal judges vary across the state. Municipal courts have criminal jurisdiction to hear violations of city ordinances. Most of them are not courts of record, requiring that appeals from them require a trial de novo. Eighty four percent of the cases are Class C misdemeanors dealing with traffic violations with fines up to $500.

Justice of the Peace Courts

Each Texas county is required to have at least one and no more than eight justice of the peace (J.P.) courts. The county commissioners draw these up and the voters in each precinct elect justices to a 4-year term. The only qualification for holding office is to be a registered voter! J.P. courts have criminal jurisdiction in Class C misdemeanors with fines up to $500 and civil jurisdiction in cases involving less than $5,000. J.P.s also function as magistrate, notary public, and coroner in counties with no medical examiner. They can also perform marriages and preside over small claims courts. Most criminal cases in J.P. courts involve traffic violations. There were 835 J.P. courts in Texas as of 2001.

County Courts

Every county has a "constitutional county court," presided over by a county judge who is elected to a 4-year term. The only qualification is to be "well informed in the law"! County courts hear civil cases involving $200–$5,000 probate cases, and Class A and B misdemeanor criminal cases. The constitutional county judge has other administrative duties, the most important of which is presiding over the county's commissioners' court. To relieve this workload, the legislature created 187 county courts-at-law and probate courts. These courts have specialized jurisdiction and their judges are generally more qualified than a constitutional county judge. County courts at law have civil jurisdiction in cases under $100,000. As of 2001 there were 254 county courts, 195 county courts at law, and 16 probate courts in Texas.

District Courts

There are 418 district courts in Texas. These are the major trial courts in the state and have both criminal and civil jurisdiction (three fourths of their cases are civil cases.) All felony cases begin at the district court. They also hear civil cases involving $200 or more. District judges are elected to 4-year terms and must be at least 25 years old with four years' experience as a lawyer or judge. District courts in urban counties usually specialize as either criminal or civil courts. Each county in Texas must have at least one court designated as a juvenile court and in most counties the district court carries out this function.

Courts of Appeals

Texas has 14 intermediate appellate courts, which hear cases originating in the courts within their "supreme judicial district." They have both criminal and civil jurisdiction. These courts are multi-judge panels whose members are elected to staggered 6-year terms. Qualifications are the same as for the Supreme Court level. Most criminal appeals end at this level.

Court of Criminal Appeals

This is the highest appeals court for criminal cases. The nine judges on the court are elected to staggered 6-year terms. Qualifications are the same as for the Supreme Court. The Court of Criminal Appeals is the highest court for criminal cases in Texas. All death penalty appeals go directly to the Court of Criminal Appeals (thus bypassing the Courts of Appeals).

Texas Supreme Court

The Texas Supreme Court is the highest court for civil cases only and has only limited original jurisdiction. In addition to hearing appeals, the court issues rules of civil procedure and licenses lawyers to practice in Texas.

This court is composed of nine justices who are elected to staggered 6-year terms. A justice must be 35 years old, a U.S. and Texas citizen, and a lawyer and/or court-of-record judge for 10 years.

Juvenile Courts

Juvenile courts are usually a division within District Courts or County Courts in each state. These courts are designed to deal with juvenile offenders by way of a civil proceeding that seeks to rehabilitate and treat the youthful offender instead of punishing them in a criminal proceeding. Unfortunately, long sentences in juvenile facilities are now a reality in many states. In numerous states, juveniles can under specific circumstances be prosecuted as adults when they commit a felony.

Corrections

Correction involves the different levels of correctional institutions, such as state prisons and county jails, along with correction personnel who supervise offenders outside the confines of a locked facility. These include county probation officers and state parole officers. People awaiting trial or people sentenced to less than a year of incarceration are housed in county jails. These sentences include those for misdemeanors and felony probation terms. State prisons house only felons who cannot be rehabilitated through the use of probation and have received a sentence of greater than one year. For many offenses, mandatory sentencing laws require a state prison sentence. Depending upon the size of a state's prison system, there can be multiple institutions that house inmates based upon their security level.

Probation and Parole

Probation departments are often an arm of the trial court. They are responsible for investigating the background of a defendant and making recommendations to the court about an appropriate punishment or terms of probation. After a person is placed on probation, the probation officer is responsible for supervision of the probationer and provision of rehabilitative services. As part of their supervisory duties, probation officers might visit offender's homes, conduct searches, check for compliance with court orders, and bring the probationer before the court if probation is violated. Parole officers engage in similar functions as probation officers, except that they do not have much of an investigative function and are mainly occupied with supervisory functions involving felons released from state prisons. Parole officers can engage in efforts to aid in rehabilitation, such as working with the parolee on education, drug treatment issues, and employment. They investigate violations of parole and testify at parole hearings, which can result in further incarceration in state prison.

1.4 Operation of the Criminal Justice System

Federalism

The American system of government follows the principle of federalism. Although the federal government, through the U.S. Constitution, has a duty to prevent states from infringing upon the rights of citizens, the majority of power to regulate the conduct of citizens rests with the states. Only those powers expressly granted to the federal government by the Constitution are outside state control. For the most part, all state criminal laws and procedures must be adhered to unless they conflict with the U.S. Constitution.

Arrest

An officer can only make an arrest if probable cause exists. If the officer does have probable cause, the arrest can take place in any public area. To make an arrest in a private place, such as a residence, the officer must obtain an arrest warrant for the suspected perpetrator. Although arrests by police officers on patrol are usually made without the aid of a warrant, obtaining a warrant is the best procedure because it protects the conduct of the officer from later attack in court as long as the officer is acting in good faith. If an officer makes an arrest without a warrant and a court later determines that probable cause to arrest did not exist, there is a strong likelihood that crucial evidence will be suppressed by the court.

Pre-Trial Procedures

In most instances, when a suspect is arrested, he is entitled to have bail set. The amount of bail is not disturbed after it has been set unless there is a change in circumstances. When a suspect makes his first appearance for arraignment before a magistrate (a lower-level judge) in court, bail is normally set in accordance with a bail schedule. The magistrate can release the suspect upon the posting of the bail by cash, property, or posting of a bail bond or on his own recognizance.

Preliminary Hearing and Filing of Formal Charges

After a prosecutor has filed a criminal complaint, the defendant is entitled to a preliminary hearing within a short period of time. The purpose of a preliminary hearing is to weed out unfounded charges. The judge must determine if probable cause exists to believe that the crime has been committed and the accused is the person guilty of that offense. Defendants have the right to confront and cross-examine witnesses at the hearing and present evidence in their defense. Following the preliminary hearing, the prosecutor can charge the defendant with any offenses that were demonstrated. In states that do not use a preliminary hearing, the prosecutor presents evidence before a grand jury, and if the grand jury finds that sufficient evidence exists to support a charge, the grand jury issues an indictment.

Plea Bargaining and Pre-Trial Motions

There are several reasons why the parties in a criminal case enter into plea negotiations. In most jurisdictions, the court requires the parties to negotiate in an attempt to resolve the case. Plea bargaining is often viewed as a necessary evil. In reality, plea bargaining is used to handle large workloads with minimal resources. There is no law that mandates plea bargaining. However, simple mathematics tells us that a court capable of conducting only 45 jury trials per year cannot schedule 4,500 cases for trial. A prosecutor or public defender who is assigned to over 1,000 cases each year must engage in plea bargaining. Plea bargaining definitely does saves taxpayers money. Ultimately, the results of plea bargaining are a genuine attempt by the parties to anticipate what the likely outcome of a trial will be, while keeping in mind the background of the defendant and the desires of the victim.

Trial

Under the Sixth Amendment, the defendant has the right to a speedy public trial in front of an impartial jury. The jury is selected from a pool of potential jurors during a process called *voir dire*. It is during this time that both sides can deselect a certain number of jurors for whatever reason they see fit as long as they are not dismissed for impermissible reasons like a juror's race or gender. They do not have to specify the reason for the dismissal but if a judge suspects an impermissible reason for elimination he can inquire into the rationale behind the de-selection, *Batson v. Kentucky*, 476 U.S. 79 (1986). After the necessary numbers of jurors are selected, with an appropriate number of alternates, the trial then proceeds. Each trial follows the same format. The prosecutor gives an opening statement and outlines the evidence that will be presented to support the charges. The defense attorney can then give an opening statement or reserve it until the opening of the defense case.

After the opening statements, witnesses are called by the prosecution and are subject to cross-examination by the defense attorney. The right of confrontation is also guaranteed by the U.S. Constitution. At the conclusion of the prosecution's case, the defendant can move for dismissal of one or more charges if the charges have not been established by credible evidence. It is then time for the defense counsel to present the defendant's case. Because the charges must be proven beyond a reasonable doubt and the burden of proof rests with the prosecution, the defendant might elect to present no evidence at all and rely upon a failure of proof by the prosecution. Or, the defense can choose to present evidence to raise reasonable doubt regarding guilt. The defendant is also responsible for presenting any evidence of an affirmative defense, such as self-defense or duress. The prosecution can then present witnesses to rebut the defense case, followed by any defense rebuttal evidence. The drama of closing argument takes place after the evidence is in and both sides rest. The two attorneys argue their position based only upon evidence that has been admitted and inferences that can be drawn from that evidence.

The judge then has the responsibility of instructing the jury on the law they must follow to reach their verdict. Errors in instructing the jury are the number one reason why cases are reversed on appeal. If the jury is unable to reach a verdict, a mistrial is declared and double jeopardy does not attach. The defendant can be retried. A verdict of acquittal cannot be appealed by the prosecution due to the prohibition against double jeopardy.

Jury nullification occurs when jurors acquit a defendant if they believe that the criminal law he violated is immoral or unwise. A jury can acquit a defendant without stating its reasons and no matter what its justification may have been its verdict is non-reversible. Therefore, jurors possess the power to acquit a person whom they believe, beyond a reasonable doubt, is legally guilty of an offense. Jury nullification has been the subject of robust debate among scholars for many years. However, it remains a very rare occurrence in American jurisprudence.

Post-Conviction Remedies

If a defendant is convicted following trial, he can appeal the verdict and judgment of the court. Appeals are based upon errors of law and do not allow the appellate court to reevaluate the evidence. In general terms, the defendant can appeal on the grounds of errors made by the judge. Following sentencing, the case can be appealed to a district court of appeals or to the Supreme Court in a state that does not have an intermediate appellate court. The decision of the appellate court is the final decision in the vast majority of cases because most supreme courts have the discretion to hear or reject a case. If a defendant discovers new evidence or an illegality that caused the conviction, *habeas corpus* proceedings can be pursued. The usual basis for *habeas corpus* relief is a violation of a constitutional right, such as the right to a fair trial under the Sixth Amendment.

Summary

The criminal justice system is the result of hundreds of years of refinement and development of criminal laws by many societies, states, and national governments. It is only through a thorough understanding of the purpose of criminal law, the functions that each professional fulfills within the system, and the procedural steps required to reach a fair verdict and punishment can society understand the task of protecting society.

As stated, the first great code of laws was Hammurabi's. Our system fundamentally developed from the Norman system of laws, which greatly influenced the English Common-Law System. Do you know of any other systems that may have influenced our System of Laws? What can you say about them and the way they influenced our own?

The *Commentaries on the Laws of England* by Sir William Blackstone or *Blackstone's Commentaries* greatly influenced the early development of our system of laws. Do you know of any other books that may also have influenced our system? What can you say about them and their influence?

Texas is different from other states because it flies six flags that represent the nations that have had sovereignty over it; one of them is the very Republic of Texas. And Texas was a nation in the rough and tumble western frontier of the United States and had a very diverse population. As you studied the structure of the Texas Legal System were you able to identify those elements that allowed it to adapt the Common Law English tradition to its own particular needs?

Chapter 2

The Constitution and Criminal Law

In Chapter 2, we examine the restrictions that the U.S. Constitution places upon government agents, criminal laws, and the courts that attempt to enforce the laws.

2.1 Constitutionality of a Law

When Is a Law Unconstitutional?

When we say a law is unconstitutional, it is usually because the law is in conflict with the provisions of the U.S. Constitution or one of the amendments to the Constitution. Additionally, the law can be declared unconstitutional when it violates a provision of a state constitution. How do the written words of statute violate the Constitution? This has to be determined in one of two ways: (1) the content of the statute might seem unconstitutional at face-value and (2) if the law was enforced by the government in a manner that violated the Constitution.

The Bill of Rights

The first ten amendments to the United States Constitution, the so-called "Bill of Rights," restrict the power of the federal government in its relationship to individuals. The protections we enjoy today, which appear in the Bill of Rights, were not included in the original body of the U.S. Constitution. Critics of the Constitution pointed out that recognition of personal freedoms and protections from government intrusion were not included. The lack of a Bill of Rights sparked great debate. As soon as the first Congress convened, the first order of business was to propose a Bill of Rights. The states adopted 10 of the 12 proposed amendments to the Constitution. These ten amendments were made applicable to the states with passage of the Fourteenth Amendment.

The Bill of Rights provides for the following freedoms and protections:

Amendment I	Freedom of religion, freedom of speech, freedom of the press, right to petition, and right to peaceably assemble
Amendment II	Right to keep and bear arms
Amendment III	No quartering of soldiers
Amendment IV	Freedom from unreasonable searches and seizures and the requirement for probable cause to issue a warrant
Amendment V	Prohibition against double jeopardy, right against self-incrimination, and right to receive due process

Amendment VI	Right to a speedy public trial, right to impartial jury, right to notice of charges, right to confront witnesses, right to compulsory service of process, and right to assistance of counsel
Amendment VII	Right to jury trial in civil suits
Amendment VIII	Right to reasonable bail and prohibition against cruel and unusual punishments
Amendment IX	States' rights are in addition to these rights
Amendment X	Police powers reserved to the states

2.2 Procedural Criminal Law

Sources of Procedural Criminal Law

U.S. procedural criminal law is the basic constitutional provision that creates the rules and laws that govern how criminal laws are administered in states and nationally. The sources of procedural criminal law include the Fourth, Fifth, Sixth, and Fourteenth Amendments.

- The Fourth Amendment prohibits unreasonable searches and seizures.
- The Fifth Amendment prohibits double jeopardy, provides due process protection, and protects against self-incrimination.
- The Sixth Amendment provides the right to a speedy and public trial, the right to a trial by an impartial jury, the right to effective assistance of counsel, the right to confront opposing witnesses, the right to compel attendance of witnesses and the right to be informed of the nature and cause of the accusation.
- The Fourteenth Amendment provides the right to due process and equal protection.

Due Process

The due process clauses of the Fifth and Fourteenth Amendments provide that a person must be afforded due process (the principle that laws and procedures must be fundamentally fair) if the federal, state, or local government takes away his life, liberty, or property. In other words, a person has the right to be treated fairly under the law. Due process has elements that are both procedural and substantive. Under procedural due process, flexibility is applied to the amount of due process that must be afforded. If you are going to lose your liberty for the rest of your life, the level of due process must be more intense. As a general rule, due process requires fundamental fairness. Procedural due process is often equated with the following procedural rights and safeguards: notice of the charges, notice of the hearing or trial date and time to prepare the defense, right to representation by counsel, right to present a defense, right to confront and cross-examine adverse witnesses, hearing before an impartial fact finder, usually a judge or a jury, recording of the proceedings, and right to appeal. Substantive due process means that the state is without power to deprive a person of life, liberty, or property by an act having no reasonable relation to any proper governmental purpose no matter how fair the process of enactment and enforcement actually are.

Suppose that Fred is charged with speeding within the Bedrock city limits. If found guilty the maximum fine is $100. How much due process do you think Fred would require?

Equal Protection

The equal protection clause of the Fourteenth Amendment provides that no state shall deny any person the equal protection of the laws. All persons must be treated equally when a law is applied. Distinctions or applications of laws that treat people differently because of gender, religion, race, or socioeconomic status are unconstitutional.

Wilma would like to work for the city of Bedrock as a police officer. However, she was informed by Mayor Slate that women could not be police officers. What should Wilma do?

Bill of Attainder and Ex Post Facto Law

A bill of attainder is a legislative enactment that declares individuals or members of a group guilty of a crime and subject to punishment without trial. The U.S. Constitution prohibits such laws. When this occurs, the legislative branch has invaded the province of the courts (in other words, the legislative branch has violated the separation of powers clause—they have overstepped their bounds) and found members guilty of a crime without a trial or any of the other due process safeguards. An *ex post facto* law is a law passed after the criminal act has been committed and retroactively creates a new crime, aggravates the punishment for the existing crime, or inflicts a greater punishment than the law allowed when the crime was committed.

Void for Vagueness Doctrine and Fair Notice

For a statute to be constitutional, it must give fair notice of the conduct that violates the statute. The law must give a clear definition to allow a person to conform their conduct to the law. Acts that are made criminal must be defined with appropriate definiteness. A person of common intelligence must be able to ascertain the standard of guilt. The courts usually strike down statutes, which lack the requisite definiteness or specificity as to which persons come within the scope of the act, because it is said that they are "void for vagueness" or violate the doctrine of overbreadth.

Barney likes to recite poetry in the middle of the biggest park in Bedrock. Recently, he has attracted quite a crowd. Other residents like to read poems and snap their fingers at the conclusion of each poem. The Bedrock City Council passed a law that prohibits "meandering, performing and congregating in public places." What should Barney do?

2.3 Substantive Criminal Law

Free Speech

Substantive criminal law defines crimes and the punishments that attach to the commission of each crime. A state or federal law is unconstitutional if it inhibits the substantive rights contained in the Bill of Rights. The right to free speech in the United States is liberally construed and protects many forms of offensive and annoying speech. However, this right is not absolute. Speech that is intended to create imminent lawless action is not protected. General advocacy of lawlessness is protected, but when the speaker intends to move people to engage in immediate illegal action, protection is lost. Another type of speech that is not protected involves the use of "fighting words." If the speech is likely to evoke an immediate and violent response, it is not protected. A government can also impose reasonable restrictions upon the time, place, and manner of speech in the public arena. Courts have approved parade permit requirements and limiting speech to certain areas that do not pose harm to the general public. For this reason, a speaker might have the right to speak freely in a public park or on the steps of city hall but might be lawfully prohibited from standing in the middle of the city's busiest street while speaking.

Fred is upset that no African-Americans have been admitted into the Water Buffalo Lodge. He thinks the policy is racist and wants to demonstrate at Bedrock City Hall. What do you recommend Fred do?

Free Exercise of Religion

Americans cherish their right to practice their religion as they see fit without government interference. Unlike many countries that have a state-mandated religion, Americans are free to engage in any type of religious practice as long as the practice does not create harm to society. When there is a clash between the free exercise of religion and the enforcement of criminal laws, the clash is often over the use of drugs and controlled substances as part of a religious ritual. For example, a religious group cannot freely use marijuana under the guise of a religious practice. However, some Native Americans are exempt from prosecution when they engage in nondrug use of peyote in their ceremonies.

Recently, during the Water Buffalo Lodge meeting Barney suggested that the induction ceremony would have more meaning if they all smoked marijuana prior to the meeting. What do you recommend?

Freedom of Assembly

We have all seen reports on television and in newspapers of protests and marches. Sometimes these reports also contain violent interaction between law enforcement and protesters or spectators. If the people have the right to peaceably assemble, how can law enforcement be allowed to break up the protest by force? The answer to this question lies in the idea that public assemblies might threaten public health, safety, and welfare. To maintain public order and peace, the government can impose reasonable restrictions on the time, place, and manner of the assembly, just as it can impose the same restrictions on speech. The restrictions must be applied neutrally to all persons. The government can regulate expressive activities if the regulation is narrowly tailored, is without reference to the content of the speech, and leaves ample opportunity for speech in an alternative area. If the manner of expression is incompatible with a place at a particular time, time and place restrictions might be placed on an activity that disrupts the use of a facility, such as a university, church, or hospital.

Is There a Right to Bear Arms?

Despite the debate about whether an individual has a constitutional right to own and possess a firearm, there are no definitive cases that address the issue. Courts at all levels have consistently ruled that local, state, and federal governments can regulate the sale and possession of firearms. Statutes prohibit the possession of firearms by convicted felons and persons convicted of a crime involving domestic violence or other misdemeanor crimes of violence. The courts have upheld all these statutes, even when the individual needs the gun for his/her job (for example, military and law enforcement personnel). Federal and state gun control laws are directed at licensing requirements and do not address the overall issue of ownership. Most restrictions are limited to background checks, waiting periods, and the method of carrying a gun in public.

How Severe Can Punishment Be?

Punishments can be condemned as excessive under the prohibition against cruel and unusual punishment provision of the Eighth Amendment. Although government is given the power to hand out punishments in a fair and just manner to preserve justice in a society, it is an abuse of this power to administer severe punishments that have no legitimate purpose. The Supreme Court has been erratic in applying a proportionality analysis in noncapital cases. It has upheld the life sentence of a check forger with only two prior convictions for theft while setting aside the conviction of another forger who had seven prior convictions and was also sentenced to life in prison. The Court does recognize that the cruel and unusual punishments clause prohibits barbaric punishments and sentences that are disproportionate to the crime committed.

Right of Privacy

Though there is no right to privacy clause set forth in the Constitution; the Supreme Court first recognized this right in 1965 and found that a zone of privacy was a necessary part of the enforcement of the rights enumerated in the Bill of Rights. The Supreme Court has read the privacy right into many areas, including free exercise of religion, marital relations, procreation, and the possession of offensive materials within one's home. Statutes that invade these areas and take away a person's privacy have been consistently struck down over the past four decades. Some areas where the government must honor the right to privacy are medical records (especially mental health records), bodily privacy within bathrooms, genetic privacy (AIDS test results and other medical testing information), privacy of seclusion (National Do Not Call List), telephone communications, written communications (mail), and items maintained within one's home. Areas that many individuals believe they have a right to privacy but are not protected are Internet activity, the workplace, and records held by third parties (bank records).

Summary

For a statute to be deemed constitutional, it must not violate any requirements of procedural or substantive due process. The law must be definite in describing the conduct that is prohibited, and it must not interfere with the lawful exercise of any right guaranteed in the Bill of Rights. We must examine a statute to see if it is void for vagueness. A reasonable intelligent person would not know what conduct was forbidden. A statute must also not infringe the right of free speech. However, speech that involves hate crimes or fighting words is not protected. The enforcement of a criminal statute must not infringe upon constitutional rights and must satisfy constitutional mandates, both in content and in application.

Have you ever thought about why we have a Bill of Rights but we do not have a Bill of Obligations of the American Citizen? Why is that?

You cannot advocate lawlessness in a speech said in the middle of the street. Yet, it would seem that right now our busiest "street" is the Internet. Should such speech also be banned in the Internet?

Suppose that a group of Texans come together and create The Holy Church of the Great Storm and then declare that they will use crack cocaine in their ceremonies in order to see the Great Storm as it forms. How would you be able to identify that the church is a bona fide religion and not simply an attempt to hide behind the freedom of religion in order to use the drug?

Why is it that Americans insist so much on the right to privacy and then tell-it-all in a social media venue? What is going on?

Chapter 3

Criminal Responsibility

Chapter 3 deals with classification of crimes and determining criminal responsibility. After discussing how we classify crimes, the focus shifts to the four elements that must be present to establish criminal culpability. These include the physical act and intent requirements and a determination of whether the harm to the victim was caused by the defendant's act.

3.1 Classification of Crimes

The Difference Between Criminal and Civil Law

Some obvious differences exist between criminal and civil proceedings. In a criminal case the defendant receives punishment, fines are payable to the government, restitution paid to the victim is limited to actual loss, the defendant is afforded rights under the Fifth, Sixth, Eighth, and Fourteenth Amendments, and the government has the burden of proving the charges against the defendant beyond a reasonable doubt. In a civil case punitive damages can be assessed against the defendant, the plaintiff has the burden of proof by a preponderance of the evidence, and the money awarded goes to the plaintiff, not the government.

Are All Moral Wrongs a Crime?

To be culpable for a crime, the action of the accused must be defined in the state's penal code as a crime. Watching someone wander into traffic is not a crime. We expect responsible people to take action, but there is no legal duty to act. Moral wrongs are not always a crime of a tort.

Classification of Crimes by Their Severity

Another way to classify crimes is by the severity of punishment. This classification is important because persons convicted of felonies lose certain civil rights and suffer automatic immigration consequences if they are not American citizens. A felony is the most serious offense and punishable by more than 1 year behind bars. The average length of incarceration is 4.13 years. Approximately 54% of persons sentenced to prison on a felony offense committed a non-violent felony. Drug possession is still the most-punished offense in the United States. Typical misdemeanors include petty theft, driving under the influence, and battery. Several states have a classification of offenses called wobblers. These offenses can be charged at the discretion of the prosecutor. The least serious crime is a petty offense. Many states allow minor misdemeanors to be charged as a petty offense.

3.2 The Physical Act: Actus Reus

Elements of Criminal Culpability

All crimes are comprised of four elements: (1) *Mens rea,* (2) *Actus reus,* (3) Concurrence, and (4) Causation. The last means that there must be a causal relationship between the defendant's act and actual harm. The *actus reus* of any criminal offense is the act, or the omission of an act, that was against the law and the accused engaged in. Although there are a few crimes that punish a person for failure to act when a statutory duty demands it, the vast majority of criminal offenses involve some action by the perpetrator.

Words Alone Can Be a Criminal Act

The criminal statutes of many states contain crimes where the spoken word creates criminal culpability without any further action. In other words, just talking about committing a crime is a crime. Verbal conduct that is criminal arises in five areas:

- Solicitation: Asking another to commit a crime, such as solicitation of murder or some other felony, or solicitation of a misdemeanor, such as prostitution. In many states, solicitation can only be committed for crimes named in a specific solicitation statute.
- Threats: Criminal threats involve threatening to harm another with the apparent ability to carry out the threat.
- Indecent Language: Annoying and obscene telephone calls are the most common examples. Another is use of offensive and disruptive speech to interrupt a lawful assembly, such as when a person disrupts a meeting or church service.
- False Information: Lying when a person has a duty to tell the truth, such as giving false information to law enforcement during an investigation or making a false criminal accusation.
- False Directive: Intentionally giving instructions that harm another, such as telling a person to take incorrect medication or instructing someone to mix dangerous chemicals so that he harms himself.

Possession Alone Can Be the Crime

Each state has possessory offenses where the actual or constructive possession of an illegal substance or object suffices as the criminal act. To establish constructive possession, the prosecution must prove that the accused knew of the location of the illegal item (e.g., drugs, illegal weapon, explosive device) and that he had both the power and the intention to exercise control over it. Legal objects can be possessed illegally when someone possesses them with the intent to use them in an illegal manner.

3.3 The Mental State: Mens Rea

The Requirement of Mens Rea

There is a Latin proverb in law that states, "*actus non facit reum nisi mens sit rea,*" which means "an act does not make a person guilty unless the mind is guilty." To show that the mind is guilty, we show that the person acted with criminal purpose, with knowledge of the wrongfulness of the conduct, and with an evil intent. While some argue that mode is irrelevant in the substantive criminal law, it is still important for a variety of purposes. The jury might be more amenable to convict or acquit depending on the ability of the prosecution to establish a motive. Some specific intent crimes by definition require proof of a specified motive. This *mens rea* element of a crime is proven by evidence of the mental state required for the crime charged, which might be:

- Purposely
- Knowingly

- Recklessly
- Negligently

Proving Intent

The typical way the state proves the mental element of a crime is by demonstrating the acts of the defendant, showing the circumstances that surrounded those acts, and offering evidence of admissions or a confession by the defendant. The acts of the defendant are important to show because the law states that it is reasonable to infer that a person ordinarily intends the natural and probable consequences of his acts. A jury is allowed to infer that the defendant intended all the consequences that a person in his position, acting under similar circumstances and possessing the same knowledge, should reasonably have expected to result from his acts. This also defines general intent. Simply put, if you deliberately hit someone in the head with a baseball bat, it is reasonable to infer that you intended to hurt him.

What Is Specific Intent?

Specific intent is a special mental element that is required above and beyond any mental state required with respect to the *actus reus* of the crime. It is set forth in a statute by one of the following:

- An intention to do an act for the purpose of accomplishing some additional act. For example, kidnapping for the purpose of robbery.
- An intention to do an act to achieve some further consequences beyond the conduct or result that constitutes the *actus reus* of the offense. For example, touching a child with the intent to sexually arouse.

Transferred Intent

When the results of a defendant's criminal acts are not what were intended, the accused might still be criminally liable under a **theory of transferred intent**. The purpose of the theory is to keep a perpetrator from avoiding liability when he misses his intended target and injures an innocent third person. We regularly see a tragic story in a newspaper recounting the shooting death of an innocent child who was accidentally killed by a gang member in a drive-by shooting intended for a rival gang member. Transferred intent takes the intent to kill the rival gang member and transfers it to the murdered child. Some scholars have argued that the transferred intent doctrine is unnecessary. A close reading of the statute of murder requires the "killing of a human being by another human being." It does not state that one has to kill a specific person; any human being will do, so why transfer the intent?

Model Penal Code Classifications of Mental States

The Model Penal Code is a guideline that many states rely upon in writing their statutes. The MPC covers four types of mental states:

- *Acting with purpose*: You intend the actual result. For example, if a husband places a bomb in his wife's computer and sets it to go off while she is flying on an airplane on a business trip, we can say he acted with purpose.
- *Acting knowingly*: You didn't want to hurt anyone, but you did. For example, if the husband in the above example also kills several people on the airplane as a result of the bomb he planted in his wife's computer, we would say that he killed them knowingly because it should have been obvious to him that others would die if a bomb went off on the aircraft.
- *Acting recklessly*: You are actually aware that what you were doing involved a substantial and unjustified risk, but you ignored the risk and the likely outcome. For example, when you drag race 80 mph down Granite Dr., a residential street in Bedrock, you are acting recklessly.

- *Acting negligently:* You should be aware that a substantial and unjustified risk is created by your conduct. For example, when you inadvertently pass a red light on your way to work you are acting negligently.

3.4 Causation and Concurrence

Cause-in-Fact and But-For Tests

For crimes that result in a harm to someone, the state must prove that the act or omission of the accused was the ordinary and probable cause of the resulting harm. In cases where the harm is direct and immediate, determining that the defendant was the cause of the harm is not difficult. When there is a chain of events that eventually leads to death, causation is more difficult for the state to prove. The prosecutor must show that the defendant was the actual cause or cause-in-fact of the death. To do this, the court applies the but-for test or *sine qua non* test that asks whether the result would have occurred if the defendant had not acted.

The but-for test serves a limited, but critical, purpose it functions to exclude certain forces, including human ones, from potential responsibility for ensuing harm.

Proximate and Intervening Causes

"Mankind might still be in Eden, but for Adam biting an apple." *Welch v. State*, 235 So.2d. 906, 907 (1970) This quote illustrates the problem of the but-for test because the proximate or legal cause must be selected from the pool of possible causes. Determining if the defendant was the proximate cause of the harm is often made difficult by the occurrence of intervening causes. Is it fair to say that the defendant was the cause of the harm when another person or event was a greater or an unexpected cause? Determining proximate cause depends upon the factual situation of each case. We must determine if the intervening cause was a **dependent intervening cause** or an **independent intervening cause**. A dependent intervening cause is foreseeable and does not relieve the defendant of liability. For example:

- If the defendant stabs the victim and a doctor is unable to treat the victim appropriately because the hospital was understaffed/underequipped, it is foreseeable that a victim might die from subpar treatment.
- If the defendant steals the victim's car during a winter storm on a remote mountain road, 100 miles from the city, it is foreseeable that the victim might die of exposure before she can walk to safety.

An independent intervening cause gives the opposite result, relieving the defendant of criminal culpability. For example:

- If the same victim is operated upon by a doctor who is high on cocaine and who slices through an artery and is so high that he can't even attempt to stop the bleeding, this is not foreseeable and the chain of causation between the defendant and the result is broken.
- If the defendant steals the victim's car while the victim is staying at a fully stocked mountain cabin, it is not foreseeable that the victim would leave a safe and comfortable cabin and expose herself to elements that might kill her. When the victim tries to walk to town at night in a snowstorm and dies, the defendant is not the proximate cause of the death.

Union of Act and Intent

Thinking about committing a criminal act is not a crime. A person might fantasize about robbing a bank or killing a spouse, but if you do nothing to act upon these thoughts, you are guilty of nothing. Likewise, if you accidentally give your spouse the wrong medicine or pick up the wrong money bag at the bank, you have done an act that caused harm, but you did not possess the *mens rea* or evil intent. There must be a joint operation of act and intent that results in the social harm.

Suppose that Fred wants to kill his neighbor Barney. He thinks about it often but never sets the plan in motion. In fact, they become very good friends. One day Fred and Barney are hunting and Fred accidentally shoots Barney. Is Fred guilty of murder? After all, he did fantasize about killing Barney.

Summary

We classify crimes because the more serious the crime, the greater the harm to society and harsher the punishment for the defendant. To punish, we have to find that a crime was committed. After you know how the elements of *actus reus*, *mens rea*, causation, and harm are committed and proven, you are able to assess the conduct of an individual in society and make a determination if his conduct is criminal. We do not punish for moral wrongs, and no criminal liability is attached to an act unless it is forbidden in a criminal statute. After the act has been committed with the mental state called for in the statute, we must still determine if the criminal act was the cause of the resulting harm. We are not going to punish the accused for a result that was not normal or foreseeable.

What do you think would happen in a society in which all moral wrongs would also be crimes? Or, why do you think that not all moral wrongs are crimes?

What is it about drug possession that makes it the most punished crime in the U.S.? Is it not a private matter to possess drugs just as it is to choose so many other things? Could it be that it is the possession with intent to distribute that makes it a crime?

How can it be that words alone can be a crime? Are words that powerful/damaging?

In relation to the need to prove intention: do you think that doing something good with the intent to cause an eventual harm should be a crime, for instance: someone who pays for a younger person's college education in order to make that person vulnerable to sexual advances? (e.g., seekingarrangement.com)

Chapter 4

Parties to a Crime

Discussing parties to a crime establishes the conditions under which people incur liability for the conduct of another person for the second party's acts before, during, and after the crime was committed. In Chapter 4, we see how the acts and criminal intent of one person is assigned to the acts and intent of someone else. We look at how the person who bought the bullets and the person who also stood lookout are both as accountable as if they had been the ones who committed the act.

4.1 Principal Actor and Accomplice

Who Is a Party to a Crime?

This area of law has been simplified in modern times, and we rarely refer to the old common law labels of principal in the first degree, principal in the second degree, accessory before the fact, or accessory after the fact. The categories have been reduced to just two: the principal and the accessory.

Who Can Be an Accomplice?

Anyone who knowingly and willingly participates or assists in the commission of a crime is an accomplice. Accomplices aid and abet when they assist or facilitate that person in accomplishing the crime.

Accomplice Liability Versus Being an Accessory

Whether a person has accomplice liability or is only an accessory depends upon whether he assisted the perpetrator before or during the offense, or merely assisted a principal after the crime was completed. A principal is anyone who is present at the crime and participates in it in some way, whether directly or not, and whether as aiders, abettors, or accessories before the fact (anyone who intentionally counsels, solicits, or commands another in the commission of a crime). In other words, aiders, abettors, and accessories before the facts are all prosecuted as principles under modern law and fall under the domain of accomplice liability. The only exception is an accessory after the fact (one who assists after the crime has been committed). Most modern state statutes classify an accessory after the fact as a separate crime and treat it as a less serious offense, carrying a lighter punishment. Since all crimes require an *actus reus* and an accomplice does not directly commit the crime, how can he be held liable? The law states that an accomplice, by his assistance in the commission of the crime, has committed part of the crime. There is no requirement that the accomplice's affirmative acts be a major part of the crime. All efforts, no matter how small, that aid the perpetrator suffice as the *actus reus* of the crime.