21st Century Criminology: A Reference Handbook

Criminal Law

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This chapter examines the principles that underlie substantive criminal law from a historical context by chronicling the influences that led to its development and evolution. It also examines the foundation on which existing criminal law doctrines are premised. Topics like federalism and the U.S. Constitution are assessed, and the impact on criminal law is discussed. The chapter also identifies the ever-changing forces involved in redefining crime and criminal liability. Together, these ideas illustrate the rapid changes in criminal law.

Principles of Criminal Law

Criminal law is the area of law that deals with crimes and their respective punishments. Like other laws, criminal law has evolved over hundreds of years and remains in a constant state of flux (McClain & Kahan, 2002). Today, modern criminal law is merely the culmination of a great many influences. Those influences are as old as the traditional common law or as current as the Model Penal Code (Low, 1998). These influences tend to increase and decrease over time. In time, new laws will be adopted and old laws will be repealed (Frase, 2002). However, there is one overarching principle that remains constant: The goal of all criminal laws is the protection of the health, safety, and welfare of society.

What is Criminal Law?

Laws seek to control the conduct of a community or society while providing for the rights of the citizenry (Dressler, 2001). Most laws developed over the centuries relate to resolving disagreements between people that arise in the daily conduct of their affairs. One of the earliest known sets of laws dates back to 1750 BC (Garland, 2003). King Hammurabi of Babylon created a set of 282 laws, known as the Code of Hammurabi. However, it was not until the development of English common law in the Middle Ages that the process of creating modern written law began. Once William of Normandy conquered England, he established the Eyre, a circuit court held by itinerant royal justices who heard cases throughout the kingdom and recorded its decisions. These decisions integrated the unwritten common law of England based upon custom and usage throughout the land (LaFave, 2003).

Today, the practice of recording a court's opinion is still in use. In the United States, the opinions of some trial and most appellate courts are preserved in a book of decisions called a reporter. Typically, decisions interpret the law, both substantively and procedurally, and decide the constitutionality of both the statute and the action of government officials in enforcing the law.

What Isn't Criminal Law?

Criminal law and torts, a branch of civil law, are very similar in some respects. Typically, tort law includes negligence, libel, slander, assault, battery, and fraud. In some instances, a tort can be a crime. However, it is important to note that tort law is primarily concerned with a financial loss, and bad conduct is only of secondary importance. Conversely, criminal law is concerned with bad conduct irrespective of financial losses (Singer, 2002). A central theme in criminal law is that conduct that jeopardizes the health, safety, and welfare of the community should be punished despite the absence of actual harm. For example, if Fred, unbeknownst to Barney, aims and shoots a handgun outfitted with a silencer at Barney but misses, he is

still criminally culpable. The fact that Barney is completely unaware of the attempted murder does not clear Fred of wrongdoing. However, Barney would likely be precluded from suing Fred at tort, having suffered no visible physical or mental damages because he is totally unaware of the attempt. The social harm that a criminal statute seeks to address distinguishes criminal law from tort law.

Tort law addresses a personal harm, and monetary compensation is typically the goal of a tort lawsuit. Moreover, the party that is harmed bears the responsibility of bringing suit and proving its case (Schulhofer, 2001). Conversely, under the criminal law regime, the government brings suit irrespective of the desires of the victim. 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 crime. The prosecutor seeks to enforce the interests of the community and government, not the desires of a victim (Kadish, 1987). For example, suppose that Fred strikes Wilma and is arrested for spousal abuse. Shortly thereafter, the couple reconciles and Wilma does not want to pursue the charges against her husband, Fred. It is solely the prosecutor's decision, however, to pursue the charges against Fred. Moreover, Wilma might be compelled to appear and testify despite her desire to have the charges dropped.

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 powers to regulate the conduct of citizens rest 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. For example, under the police powers of the Tenth Amendment of the Constitution, Texas has the right to regulate conduct that is dangerous to its citizens. However, when Texas forbids the broadcast of any beer commercials within its state, it has created an unconstitutional law. The power to regulate commercial speech has been specifically granted to the federal government by preventing any state regulation of commercial speech in this area (Hazard, 1983).

Differences Between Criminal and Civil Law	
In a criminal	*case In a civil case*
Fines are payable to the government and restitution is limited to actual loss.	The money awarded goes to the plaintiff, not the government, and punitive damages can be assessed against the defendant.
The government has the burden of proving the charges against the defendant beyond a reasonable doubt.	The plaintiff has the burden of proof by a preponderance of the evidence.

Each state has the power to create its own criminal statutes pursuant to the police powers clause of the Tenth Amendment of the U.S. Constitution. Each state is free to define its crimes as long as the statute satisfies the principle of legality. Moreover, the statutes must also be understandable, not subject to ad hoc interpretation, and applied in favor of the accused when there is any ambiguity (Wallace & Roberson, 1996, p. 225). These requirements are mandated by the due process clause of the Fifth and Fourteenth Amendments (Torcia, 1995).

In most states, there are no longer any common-law crimes. An act or omission is not criminal unless it is defined as a crime in a statute (Frase & Weidner, 2002). 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 among the following:

- Crimes that involve interstate commerce or the use of federally controlled communications: These crimes include wire fraud, crossing 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.

Prosecutors and Defense Attorneys

The sworn duty of a prosecutor is to seek justice, regardless of the result. However, some have argued that the adversarial system, which pits each attorney against the opposing side in a case, sometimes interferes with that duty (Neubauer, 2008). For example, if a complaining witness lacks credibility, justice demands that the case be dismissed. However, if the prosecutor is convinced of the truth of the charges, he or she should vigorously seek a conviction, irrespective of the challenges.

Most prosecutors are employed by counties within each state. The district attorneys of each county are elected officials, with offices that include assistant or deputy district attorneys. Some prosecutor's offices are small, and the district attorneys try their own cases. In most major cities, however, the district attorney's office has hundreds of deputies divided into teams that prosecute specific types of cases, such as gang or drug crimes (Greenwalt, 2002).

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 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) that the Sixth Amendment requires indigent defendants in state court proceedings to have appointed counsel. This right was expanded in *Argersinger v. Hamlin* (1972), in which 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's duty is always to the justice system, but he or she has a duty to zealously advocate on behalf of his or her client within the bounds of the law, regardless of the outcome. The defense attorney must protect his or her client's rights while vigorously challenging the evidence and seeking the best result possible. To hear a criminal case, a court must have jurisdiction over the offense charged and the person charged with the offense (Neubauer, 2008). Under the Sixth Amendment, 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 prosecutor bears the burden of proving that an essential part of the offense was committed in his or her jurisdiction (Fletcher, 2002).

In hearing the criminal case, the court applies the law of the jurisdiction in which it sits (Reitz,

2002). For example, a trial court in Hennepin County (Minneapolis) is governed by Minnesota law. If a kidnapping starts in Minneapolis and ends with the arrest of the defendant in New York, jurisdiction lies in Minnesota, New York, the federal courts, and any state where it can be proven that some part of the kidnapping was perpetrated.

State courts are usually set up as follows (Robinson, 1992):

- A court of last resort (supreme court)
- An intermediate appellate court (court of appeals)
- General trial courts (superior courts)
- Limited jurisdiction courts (probate and small claims)

The Constitution and Criminal Law

When a law is said to be 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. In addition, the law can be declared unconstitutional when it violates a provision of a state constitution (Demleitner, Berman, Miller, & Wright, 2007). Not all laws are constitutional. A statute can be deemed unconstitutional for one of two reasons (Chevigny, 2002):

- The content of the statute seems unconstitutional at face value. For example, if a statute made it illegal to practice one's religion or a statute made it a crime for men to operate a sewing machine.
- The law was enforced by the government in a manner that violated the Constitution. For example, if the chief of police targeted members of an unpopular church for arrest for disturbing the peace with their singing but left other acceptable churches free to be loud without fear of arrest, this is an unconstitutional application of the public disturbance statute. The chief of police is applying a lawful statute in an unlawful way that violates the constitutional right of freedom of religion.

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 must be fair) if the federal, state, or local government intends to take away his or her 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 (Tiffany, McIntyre, & Rotenberg, 2003, p. 210).

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. If a person is going to be fined only $100 for a traffic ticket, the degree of procedural safeguards need not be as great. As a general rule, due process requires fundamental fairness.

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. For example, the government has no authority to deny a person the right to a jury trial because it costs money to heat the courthouse in the winter.

Equal Protection

The equal protection clause of the Fourteenth Amendment, which states that no state shall deny any person the equal protection of the laws, provides that 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. For example, if there is a law that punishes men who have improper sexual relations with children and does not punish women for the same offense, that statute would be in violation of the equal protection clause of the Fourteenth Amendment.

Illegal Laws: Bill of Attainder and Ex Post Facto Law

The U.S. Constitution specifically prohibits bills of attainder and ex post facto laws (Dressler, 2001). The following is an example of what is referred to as a *bill of attainder:* The Bedrock Water Buffalo Lodge invites political extremists from another country to participate in a symposium discussing all that is wrong with America. The state legislature then passes a law stating that the members of the Water Buffalo Lodge have engaged in treason, shall all be put to death, and all their property shall be forfeited to the government.

Although some government officials might not be happy with the members of the lodge because of their activities, the law passed by the legislature is an illegal bill of attainder. Such laws are prohibited by the U.S. Constitution. The legislative branch has invaded the province of the courts (in other words, the legislative branch has violated the separation of powers clause—it has overstepped its bounds) and singled out the lodge members, declaring them 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 that 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 (Dressler, 2001). The following is an example of an ex post facto law: Fred commits his third drunk-driving offense, but his two prior convictions are 8 years old and priors can be used only to increase the offense to a felony if the convictions were during the past 5 years. The Bedrock legislature then passes a law that makes drunk-driving priors viable for 10 years. The prosecutor amends the charges against Fred and charges him with a felony. Because Fred can receive greater punishment for a crime he committed prior to the new law being enacted, the new drunk-driving law is an ex post facto law.

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 his or her conduct to the law (Frankel, 1983). The following is an example of what is referred to as a *fair notice doctrine:* Wilma is charged with violating a state statute that prohibits conduct that “causes others to be concerned with their safety or is generally annoying to the public at large.” In this case, it is unclear what might cause others to be concerned for their safety or what other members of the public might find annoying. Acts that are made criminal must be clearly and appropriately defined. A person of common intelligence must be able to ascertain the standard of guilt. Moreover, statutes that lack the requisite definiteness or specificity as to which persons come within the scope of the act are usually struck down by the courts because it is said that they are “void for vagueness” or that they violate the doctrine of overbreadth (Frankel, 1983, p. 140).

Elements of a Crime

To punish someone, the government must prove that a crime was committed. Generally speaking, there are five elements to every crime: (1) actus reus, (2) mens rea, (3) concurrence of the actus reus and mens rea, (4) causation, and (5) harm (Garland, 2003). The criminal law does not punish for moral wrongs, and no criminal liability is attached to an act unless it is forbidden in a criminal statute.

The *actus reus* of any criminal offense is the act or an omission that the accused engaged in that was against the law. 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 act by the perpetrator (LaFave, 2003). The actus reus for a crime might be performed in several ways. For example, all three of these acts supply the actus reus for a murder:

- Fred helps Barney and Betty plan a murder.
- Barney commits the murder.
- Betty acts as the lookout.

Although the typical crime involves an affirmative physical act, crimes can be committed by a person's failure to act. Definitions of various crimes refer to an omission that provides the basis for criminal liability. The omission might be specifically designated in the statute. For example, it could be illegal to not pay child support or income taxes. Some states criminalize the failure to carry appropriate worker's compensation insurance or vehicle liability insurance. Other omissions are based upon a special relationship, which creates a duty to act. The accused might fail to perform altogether or be grossly negligent in his or her performance. For example, parents have a duty to provide children with food, shelter, clothing, and medical care or be liable for child neglect. The relationship can be created by contract (such as a lawyer–client relationship) or by the defendant's act of creating a risk (such as the requirement to help put out a fire that the defendant accidentally started) (Schulhofer, 2001).

Under special circumstances, words alone can be the basis of criminal liability. 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 can be a crime. There are five areas where words can be the basis for criminal liability (Frase, 2002):

- Solicitation occurs when a person asks 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.
- A criminal threat involving threats to harm another with the apparent ability to carry out the threat can be the basis of criminal liability.
- The use offensive, annoying, or disruptive speech that would offend a reasonable person could become the basis of criminal liability. This includes annoying or indecent phone calls or interruption of a lawful assembly, such as when a person disrupts a meeting or church service.
- Providing false information 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 could be criminally liable.
- Intentionally providing a false directive can result in criminal sanctions. For example, a person that intentionally gives instructions that harm another, such as telling a person to take incorrect medication or instructing someone to mix dangerous chemicals so that she

harms herself. (p. 599)

Similarly, there are times when merely possessing an item can be the basis of criminal liability. Every state has possessory offenses where the actual or "constructive" possession of an illegal substance or object is deemed illegal. To establish constructive possession, the government must prove that the accused knew of the location of the illegal item (e.g., controlled substance, illegal weapon, improvised explosive device) and that he or she had both the power and the intention to exercise control over it (McClain & Kahan, 2002). For example, Fred is in actual possession if drugs are in his pocket. Moreover, he is in constructive possession of drugs if they are located in his garage. However, if Fred shares his garage with his neighbor Barney, proving constructive possession might be difficult.

The second requirement of criminal liability is the *mens rea*, or the guilty mind. There is a Latin maxim 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" (Garner, 2004). To show that the mind is guilty, it must be proven that the person acted with criminal purpose, knowledge of the wrongfulness of the conduct, and an evil intent. Typically, a statute will require a particular mental state or intent that must be proven to sustain a conviction. For example, a statute might require that a person act purposely, knowingly, recklessly, or negligently. At times, proving intent can be difficult. However, the prosecution can prove the mental element of the crime by demonstrating the actions of the defendant, showing the circumstances that surrounded those actions, and offering evidence of an admission or a confession by the defendant (Reitz, 2002).

The actions 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 or her acts. In fact, a jury is permitted to infer that the defendant intended all the consequences that a person in that position, acting under similar circumstances and possessing the same knowledge, should reasonably have expected to result from the defendant's actions. That is the definition of something the law calls the *general intent*. For example, if you brandish a weapon, show it to the bank teller, and pull the trigger all while pointing it in her direction, it is reasonable to infer that you intended to kill her. That was your general intent (Schulhofer, 2001).

Some crimes are not general-intent crimes but require a *specific intent*—a special mental element 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 (Frankel, 1983)—a good example would be kidnapping for the purpose of raping at another location; 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, the filing of a false tax return to avoid payment of taxes.

When a defendant commits a criminal act but accidentally harms an unintended party, the accused might still be criminally liable under the *theory of transferred intent*. The rationale for the theory is that a person should not be absolved of liability simply because he or she has poor aim. Transferred intent keeps a perpetrator from avoiding liability when he misses his intended target and injures an innocent third person (Schulhofer, 2001). For example, if Fred throws a stone at Barney but Barney ducks and the stone hits Wilma instead, Fred is still criminally liable.

Model Penal Code and Mental States

The Model Penal Code (MPC) is a set of principles that many states rely upon when drafting criminal statutes. The MPC covers four types of mental states:

• *Purposely:* You intend the actual result. For example, when you buy a gun, load the weapon, wait in the parking lot for your victim, hide in the bushes when you see him approach, and then leap out and discharge your weapon into the other person, there can be little doubt that you have purposely taken the life of another.

• *Knowingly:* Perhaps you didn't want to hurt anyone, but you did. For example, you might keep a gun in your desk for self-defense. Then your coworker tells jokes at your expense and insults you in front of others. Angry, you shoot him dead. Maybe you didn't plot and scheme to kill your coworker, but you knowingly took the life of another because everyone knows that if you shoot a person with a gun, the person can die.

• *Recklessly:* You are actually aware that you were involved in an activity that created a substantial and unjustified risk, but you ignored the risk and the likely outcome. For example, if you decide to street race another car and reach speeds of 70 miles per hour on a residential street, and an 80-year-old lady walking home from church steps off the curb to cross the street and you strike and kill her, you have recklessly taken the life of another.

• *Negligently:* You should be aware that a substantial and unjustified risk is created by your conduct. For example, if it is nighttime and you fail to turn on your headlights and a 10-year-old boy riding his bicycle is playing in the street and you strike and kill him with your car, you have negligently taken the life of another because driving without headlights creates a substantial and unjustifiable risk to bicyclists or pedestrians.

Causation and Concurrence

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. For example, when Barney hits Betty on the head with a baseball bat and she dies from a massive brain hemorrhage, causation is not an issue. However, when there is a chain of events that eventually leads to death, causation is more difficult for the state to prove. In those instances, the prosecutor must show that the defendant was both the causein-fact and proximate cause of the death. Typically, courts will first ascertain whether the actions were the causein-fact of the injury. This is sometimes called the “but-for” test (Dix, 1993). For example, if Fred cuts the brake line on Barney's car and Barney crashes and dies, Barney would not have been killed “but for” the act of cutting the brake line by Fred.

After the accused is shown to be the cause-in-fact of the harm, the state must also prove that the defendant's act was the proximate cause of the resulting harm. Determining this is often made difficult by the occurrence of intervening causes (Beale, 2002). For example, using the previous example, would it be fair to charge Fred with murder when Barney was only slightly harmed in the accident and was taken to the hospital where he dies after waiting for a physician for 16 hours in the emergency room?

Determining proximate cause depends upon the factual situation of each case. It must be determined whether 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 Barney stabs Fred and a doctor is negligent in treating Fred at Bedrock Hospital, it was foreseeable that a victim might die from subpar treatment. An independent intervening cause gives the opposite result, relieving the defendant of criminal culpability. Using the example above, if Fred is operated upon by an intoxicated doctor who slices through an artery and is so drunk 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. Again, the key is forseeability (Katz, 2002).

Equally important is the union of the act and the 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 the individual does nothing to act upon these thoughts, the person is guilty of nothing. Moreover, if someone accidentally gives her spouse the wrong medicine or picks up the wrong money bag at the bank, the person has done an act that caused harm, but she had no mens rea or evil intent. There must be a joint operation of act and intent that results in the social harm (Beale, 2002).

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. At times, the acts and criminal intent of one person are assigned to the acts and intent of someone else (Chevigny, 2002). For example, in a plot to kill Wilma, if Fred buys the bullets, Betty is a lookout, and Barney shoots the victim, all are equally culpable for the murder.

The area of law that helps to determine who is a party to a crime is sometimes referred to as the *law of parties*. It has been simplified in modern times, and 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 are rarely used. The categories have been reduced to just two: the principal and the accessory. Anyone who knowingly and willingly participates in the commission of a crime with others or who aids and abets the commission of a crime is an accomplice (LaFave, 2003).

A person aids a crime when he or she does an act that assists in the commission of a crime. A person abets a crime when he or she has knowledge of the perpetrator's unlawful purpose to commit a crime, and as the accomplice, has the intent to facilitate the perpetrator's unlawful purpose and engages in any of the following acts of instigating, encouraging, promoting, counseling, directing actions, or supporting by presence. Some examples of aiding and abetting include driving a getaway car, acting as a lookout, drawing a diagram to assist with a burglary, or loaning a gun with knowledge that it will be used in a murder (Robinson, 1992).

Determining if someone is an accomplice or an accessory can be tricky. Whether a person has accomplice liability or is only an accessory depends upon whether he or she assisted the perpetrator before or during the offense, or merely assisted a principal after the crime was completed. Obviously, a principal is anyone who commits the crime, but it can also include anyone who commits the following: aiding and abetting the crime, advising and encouraging the crime, or forcing another to commit a crime. Conversely, an accessory aids a principal whom he or she knows has committed a felony by assisting the principal in avoiding detection, avoiding arrest, disposing of or destroying evidence, avoiding prosecution, or avoiding punishment (McClain & Kahan, 2002, pp. 400–412).

Since all crimes require an actus reus and an accomplice does not commit the underlying crime, it can be difficult to determine what constitutes the actus reus. The law states that an accomplice, by his or her assistance in the commission of the crime, has committed the actus reus 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. Seemingly insignificant acts that have been deemed sufficient to serve as the actus reus for an accomplice include loaning a screwdriver, buying a sweatshirt, providing a piece of rope or tape, and loaning money for gas (LaFave, 2003, p. 671).

In some instances, an omission can be the basis of criminal liability for an accomplice. For example, if Fred works as a part-time security guard at the rock quarry and he permits Barney to steal valuable equipment from the quarry, his dereliction of duty can be the basis of accomplice liability. If an omission is for the purpose of facilitating a crime, that person is liable if he or she has a legal duty to act or intervene. It is important to note that the law will only attach criminal liability when it is reasonably safe and possible to protect the victim or property. Therefore, a schoolteacher would have a duty to stop a schoolyard fight and a parent might have a duty to stop someone from abusing his or her child if it is reasonably safe and possible to protect the victim. However, in some states, mere knowledge of the crime and failing to take action to stop it is insufficient to finding criminal liability (Dressler, 2001).

Traditionally, an accomplice cannot be found guilty of the crime unless the principal is convicted. Liability flowed through the principal to the accomplice. Today, however, states can get a conviction of the accomplice regardless of the outcome of the principal's case as long as the prosecutor can prove that a crime was actually committed. The accomplice can be convicted even if the principal is never found, has fled the jurisdiction, or has been acquitted (Garland, 2003).

When an aider and abettor decides that she desires to remove herself from the commission of the target offense (before it has been committed), she must take active steps to undo the aid she has provided in order to avoid liability. The aider and abettor cannot go home and hide and hope that all of her troubles just go away. She must (1) inform the principal that she wishes to withdraw her support, (2) indicate that she no longer wants the crime to be committed, and (3) attempt to make any aid she has provided ineffectual. For example, if the accomplice has loaned her shotgun to a potential bank robber, she must state her intent to withdraw and attempt to do everything within her power to recover the weapon and prevent the crime. If major steps have already been accomplished toward the commission of the robbery, she might also have to inform law enforcement so that the crime can be stopped (Tiffany et al., 2003).

There is a difference between criminal liability based upon a conspiracy theory and accomplice liability. A conspirator agrees to be part of a criminal enterprise that might encompass numerous crimes committed by various members of the conspiracy. Conspirator liability extends to crimes that individual conspirators might not even know about or consent to. A conspirator does not have to do any act to aid in the conspiracy. All that is necessary to establish criminal liability is an agreement to achieve a criminal purpose with at least one conspirator committing an overt act (Frase, 2002).

A conspirator is liable for all acts of his or her coconspirators that are committed during the course of and in furtherance of the conspiracy. If Fred steals a getaway car to be used in a robbery, all conspirators are guilty of car theft, even if they never consented to or agreed with Fred's act. This liability is based upon agency theory. Each conspirator acts as an agent for

every other conspirator. Any act, planned or unplanned, committed by a coconspirator that is a foreseeable consequence of the criminal agreement, creates liability for each conspirator under the *extended liability theory*, also known as the *Pinkerton doctrine* (Demleitner et al., 2007).

Incomplete Crimes

Because society wants to prevent serious social harm before it happens, governments created the crime categories of solicitation, conspiracy, and attempt. Even though these offenses are crimes all by themselves, the main reason for their creation was the understanding that each crime was a preliminary or anticipatory offense that was committed with the same evil intent but a greater target in mind (Scheb & Scheb, 2006). The inchoate offenses of solicitation, conspiracy, and attempt are discussed below.

Solicitation

Solicitation is a substantive crime in and of itself. This crime occurs as soon as the solicitation is made. Simply put, the crime of solicitation is in the asking. It does not matter if the solicited person accepts the offer or rejects the advance. The *actus reus* of solicitation consists of words that create an inducement, which is defined as any of the following: begging, ordering, counseling, commanding, inducing, instructing, advising, tempting, imploring, asking, instigating, urging, requesting, entreating, persuading, inciting, procuring, or enticing another to commit a crime included in the list of prohibited target offenses in a state's solicitation statute. The elements of solicitation for most jurisdictions include the soliciting of another to commit a crime specified in the statute with the intent that such crime will be committed. Most states also include the following evidentiary burden: The charge must be supported by the testimony of two witnesses or one witness and corroboration (Hazard, 1983). Solicitation was first recognized in 1801 in the case of *Rex v. Higgins* (1801). In this case, a person asked a servant to steal the property of his master. The servant refused. Though the facts of this case were simple, it demonstrates that solicitation is committed when a person requests another to commit a crime, even if the person solicited refuses to cooperate.

Solicitation remains a specific-intent crime in most states, as it was a common law. In other words, one must have the *mens rea* (guilty intent) for solicitation. The reason for this element is to protect First Amendment rights of speakers (e.g., it is lawful to advocate for civil disobedience) and to keep people from being prosecuted for solicitation when their comments to another were made in jest, with no intent that the crime actually be committed. Solicitation can be committed even if it is impossible to commit the target offense due to a circumstance unknown to the solicitor. For example, if Fred solicits Barney to kill Mr. Slate but Mr. Slate was killed in a car accident the day before, Fred can still be convicted of solicitation of murder if he did not know that Mr. Slate was deceased. If the specific intent exists at the same time as the solicitor's request, the crime of solicitation has been committed.

Conspiracy

The definition of *conspiracy* is an agreement between two or more people to commit an unlawful act or to do a lawful act by unlawful means. This common law definition does not require any act beyond the agreement (Scheb & Scheb, 2006, p. 97).

Most state statutes now require the following five elements to prove a conspiracy has

occurred: There must be (1) an agreement or understanding (2) between two or more persons (3) with the specific intent to commit (4) either a crime or a lawful purpose by unlawful means (5) when accompanied by some overt act beyond mere agreement (Singer, 2002, p. 1546).

An overt act doesn't have to be part of an attempt to commit the target crime. It can be any act, even a trivial one that is done in furtherance of the conspiracy. A single overt act by any party to a conspiracy is sufficient for the prosecution of all participants of the conspiracy. A conspirator can join the conspiracy after the overt act is done and still be liable. This overt act does not have to be a crime itself. Some examples of overt acts include the following: paying a hit man, telephoning a supplier to arrange delivery of drugs, calling a friend to give an insider tip in a stock-trading conspiracy, buying gasoline in an arson conspiracy. Overt acts provide proof that the agreement to commit a crime was sincere (Scheb & Scheb, 2006, pp. 92–96).

Attempted Crimes

Unlike solicitation and conspiracy, which are infrequently charged, attempts to commit crimes are regularly prosecuted. This is due to the increase in reporting by victims and witnesses and the availability of more obvious evidence of guilt. In general terms, an attempt consists of the following: (1) an overt act, (2) beyond mere preparation, that moves toward committing a crime that is legally possible to commit, (3) done with the specific intent to commit the target crime, (4) which, if it is not interrupted or stopped, would result in completion of the crime (Neubauer, 2008, p. 351).

Immoral thoughts alone are not enough to charge an attempt. Each statute requires that the defendant try to commit the crime he or she is charged with attempting. The prosecutor must show some overt act that demonstrates this. The acts must go so far that they would result in the completion of the crime if not prevented by factors unknown to the defendant. All attempts are specific-intent crimes. Even if the target offense is a general-intent crime, the defendant must intentionally commit the acts that constitute the actus reus, and these acts must be done with the specific intention of committing the target crime (Kadish, 1987). For example, Fred shoots a gun at Barney and misses. Fred intended to kill Barney and committed an act —shooting the gun—which would have resulted in murder if the act had been completed. The act was not completed because the bullet did not strike Barney. Fred has committed an attempted murder.

Actus Reus of Attempt

When looking at an attempt to commit a crime, the primary issue is determining when a perpetrator has gone from mere preparation to beginning actual commission of the target offense. To aid in making this determination, courts from various states have created the following tests that will be examined here in more detail: the last act test, physical proximity test, dangerous proximity test, indispensable element test, unequivocality test, and substantial step test (Dressler, 2001).

The *last act test* looks at whether an attempt has occurred, at least by the time a person has performed all the acts believed to be necessary to commit the target offense. For example, an attempted robbery does not occur until the robber displays his or her gun and demands property (Dressler, 2001).

The *physical proximity test* determines that the defendant's conduct need not reach the last

act but must be “proximate” to, or near, the completed crime. The conduct must be a first or subsequent step beyond planning. For example, Fred's attempted robbery of a store occurs when Fred leaves his car and walks toward the door of the store with his gun in his hand (Dressler, 2001).

The *dangerous proximity test* decides that an attempt occurs when the defendant's conduct is in “dangerous proximity to success,” or when an act “is so near to the result that the danger of success is very great.” For example, Barney and Betty plan a home invasion robbery. They wait in the park next to the victim's home with tape, guns, and ski masks. The intended victim appears. Police spot Barney and Betty and make an arrest for attempted robbery (Dressler, 2001).

The *indispensable element test* looks at whether an attempt occurs when the defendant has obtained control of an indispensable feature of the criminal plan. This test is disfavored because it does not give enough weight to criminal intent. For example, a robber is outside a jewelry store, but she is waiting for her brother to show up with a gun. She is missing her indispensable element: the gun (Dressler, 2001).

The *unequivocality test* looks at whether an attempt occurs when a person's conduct, standing alone, unambiguously manifests his or her criminal intent. This test focuses on the overall conduct of the accused. An example with ambiguous conduct would be when Fred goes to the area of a jewelry store with a gun but does not approach the store. An example of a more obvious robbery attempt occurs when Fred drives to the store and walks across the parking lot toward the store with a gun (Dressler, 2001).

The *substantial step test* decides if an attempt occurs when the suspect has done something that constitutes a substantial step toward the commission of the target offense that strongly corroborates the suspect's criminal intent. For example, the suspect purchases a handgun for the purpose of robbing a store. This substantial step test is the easiest for the prosecutor to apply to prove an attempt. The suspect does not have to be in close proximity and might be lacking the instrumentality to commit the crime. This test is criticized because ambiguous conduct can create criminal liability (Dressler, 2001).

When a suspect is interrupted and does not complete the crime, he is probably guilty of an attempt. However, if a suspect voluntarily and completely renounces her criminal purpose before the crime is completed, the affirmative defense of abandonment can be argued. There can be no circumstance that caused the suspect to abandon her efforts. If the crime is interrupted by another person, a barking dog, or the suspect's tools break or malfunction, then abandonment does not apply. In those instances, the defendant did not voluntarily cease commission of the crime and would have continued if not for the interruption. When a suspect does completely stop her efforts and demonstrates her intent to not commit a crime, she is rewarded for her good judgment, and it is found that she never had a fully formed intent. Therefore, no crime was committed (Beale, 2002). For example, Barney is planning on robbing a store in Bedrock. After purchasing the gun, he will use in the robbery, he has second thoughts the morning before the crime is scheduled and decides that he will not carry out his plan and returns the gun for a full refund.

Defenses to Crimes

The law recognizes that people engage in conduct that is considered criminal but that might be excused or justified because their mens rea was negated or society excuses their conduct.

These justifications and excuses are defenses to criminal offenses. The U.S. system places the burden of proof upon the government to prove the charges beyond a reasonable doubt. The defendant is presumed innocent until proven guilty. Moreover, as part of the criminal process, the accused is given an opportunity to present a defense. There are many types of defenses, from alibi to self-defense. Sometimes, the defense can be based upon the prosecution's inability to prove the charge, or the defense can be a so-called affirmative defense where the defendant presents evidence and witnesses to disprove an element of the offense (Torcia, 1995).

Failure of Proof or True Defenses

When a defendant is on trial, she might rely upon the prosecution's inability to prove the case against her. The accused might remain silent throughout the trial and have no duty to present any evidence. The defense might attack the government's case through cross-examination or simply take the position that the government has failed to prove the case against her. These strategies rely upon a *failure of proof* for the defense (Greenwalt, 2002).

When the defendant actively presents evidence of an excuse or a justification, it is said that he is presenting a *true defense*. If a true or affirmative defense is established, the defendant is entitled to an acquittal, even if the government has proven all the elements of the crime against him. After the defendant has presented evidence of a true defense, the burden is on the prosecution to disprove the defense beyond a reasonable doubt. When a defendant relies upon an affirmative defense, he is admitting that there is a basis for criminal liability but is offering a legally recognized reason why he should still be acquitted. When an affirmative defense is used, the burden of raising the defense lies with the defendant. After the defense is raised, the burden of proof shifts back to the government, and the prosecutor must prove beyond a reasonable doubt that there is a lack of justification or excuse (Reitz, 2002). Suppose Fred walks into his home and finds his wife, Wilma, injured on the bedroom floor. He then encounters a burglar and kills him. Fred admits that he intentionally killed the burglar but insists that the killing was justified. The prosecutor must prove that Fred did not kill the intruder in self-defense. If the defense is accepted by the jury, Fred will be acquitted even though he admitted a homicide.

There are two general categories of affirmative defenses. Under a justification defense, conduct by the accused that is otherwise criminal is deemed to be socially acceptable and is not subject to punishment because of the circumstances of the case. This defense focuses on the nature of the conduct and the surrounding circumstances. Under an excuse defense, the defense focuses on the accused's moral culpability and whether he possessed the mens rea (guilty intent) required to commit the crime. In such a case, society recognizes that the defendant has caused some social harm but agrees that he should be excused from blame or punishment (Frase, 2002).

Affirmative Defenses	
Justification Defenses	*Excuse Defenses*
Self-defense	Duress
Defense of others and habitation	Age/Infancy
Necessity	Intoxication/Diminished capacity
Use of lawful force for crime prevention	Insanity

	Mistake

The law permits self-defense (a) when you are not the aggressor, (b) when you reasonably believe it is necessary to defend yourself, and (c) to avoid an unlawful and imminent attack. Moreover, most states have adopted a rule that allows defense of another when it reasonably appears that unlawful force is being applied to the defended person by an aggressor. Note that the use of deadly force is appropriate only when a person must defend herself or another person in an effort to prevent imminent death or serious bodily harm (Garland, 2003).

When an aggressor uses any force to gain entry into a residence, the resident can stand his or her ground and use all force reasonably necessary to defend himself or herself. This is the so-called *castle doctrine*. In some states, reasonableness is presumed, and the resident can use deadly force whenever an aggressor enters his or her home by force. The force can be as simple as opening a door or window (Dressler, 2001).

Necessity is sometimes referred to as the *lesser-of-twoevils defense*. A person can avail herself of the necessity defense when the following conditions are met: (1) The person must be faced with a clear and imminent danger; (2) the greater harm must be the direct cause of the law violation; (3) the person cannot have a lawful legal alternative to the law violation; (4) the harm that the defendant causes by violating the law must be less serious than the harm she seeks to avoid; and (5) the defendant must come to the situation with “clean” hands—that is, she must not have wrongfully placed herself in a situation that requires the choice of evils (LaFave, 2003, p. 523).

In addition to the five requirements that show when a person is justified in violating criminal law, some states place three additional limitations on the use of the necessity defense: (1) The defense might be limited to situations created by natural forces—for example, looting a store might be a necessity following a hurricane or earthquake; (2) the defense does not apply to homicide case—a person cannot kill someone to save his own life; (3) the defense can be used only to protect persons and property, not to protect pure economic interests or personal reputation—a person cannot assault someone merely to protect his own honor (Frankel, 1993, pp. 138–139).

Defenses Based on Excuses

To assert a defense of duress, the defendant must admit that he committed the crime but did so under the following circumstances (all circumstances must be met): (1) Someone threatened to kill or cause great bodily harm to the defendant or a third party unless he committed the offense; (2) the actor reasonably believed that the threat was genuine; (3) the threat was present, imminent, and impending at the time of the criminal act; (4) there was no reasonable means of escape other than for the defendant to commit the crime; and (5) the defendant must not be at fault in exposing himself to the threat. However, it is important to note that duress is not an acceptable legal defense for murder (Perlin, 2002, p. 650).

The defense of infancy has been asserted for hundreds of years. Courts have recognized that children under a certain age were incapable of forming criminal intent. Today, states have set this age at anywhere from 10 to 14 years. Some states, such as California, allow for culpability under a set age of 14 if there is clear proof that at the time of committing the act charged against her, the child knew its wrongfulness. Oklahoma uses the same language but sets the age at 16. In addition to allowing prosecution in a juvenile court setting, most states allow juveniles to be prosecuted as adults when they have committed a violent felony and are a

certain age. Some states set that age as low as 10, whereas others set it as high as 16. Juveniles tried as adults can be sent to prison (LaFave, 2003, p. 485).

Voluntary intoxication is not a valid defense for crimes that have a general intent. For crimes with a specific intent, voluntary intoxication can be used to negate the element of intent if the level of intoxication was so high “as to render [the accused] incapable of purposeful or knowing conduct” (Lafave, 2003, pp. 472–473). Several states have eliminated the defense of intoxication in its entirety. A jury is not allowed to consider evidence of intoxication. The judge can consider it only as a mitigating fact at sentencing. Involuntary intoxication is a defense if the jury finds evidence that both of the following happened: (1) The defendant did not voluntarily take the drug or intoxicant and was forced or tricked into taking it, and (2) the defendant was so intoxicated that he couldn't form the requisite mens rea for the charged offense (Fingarette & Hassle, 1993, p. 742).

In many states, a defendant who has insufficient evidence to prevail on an insanity plea might still present evidence of a mental condition on the issue of whether he had the requisite mental state for the offense. This is a *diminished capacity* defense. This is not a true defense as much as it is a failure-of-proof defense that negates mens rea. However, diminished capacity can be used as a true defense in a murder prosecution to mitigate the offense to manslaughter. During the past 20 years, there has been a movement to abolish diminished capacity in several states (Garland, 2003).

The law recognizes that people are not criminally liable for acts committed when they are not sane at the time of the offense. Sanity is determined by the jury applying the irresistible impulse test, the substantial capacity test, or the so-called M'Naghten Rules. Four states have abolished the insanity defense altogether, while only four use the irresistible impulse test. A person is insane under this test if, at the time of the offense, (1) she acted from an irresistible and uncontrollable impulse, (2) she was unable to differentiate between right and wrong behavior, and (3) she did not have the will necessary to control her actions (Fingarette & Hassle, 1993, p. 744–746).

The substantial capacity test provides that a person is not responsible for her criminal conduct if, at the time of the conduct, as the result of a mental disease or defect, she lacked substantial capacity to do one or both of the following: (1) appreciate the criminality or wrongfulness of her conduct and (2) conform her conduct to the requirements of the law. The substantial capacity test has been adopted by just under half of the states (McClain & Kahan, 2002, p. 412).

Half of all states determine sanity by applying the M'Naghten Rules. A defendant is not legally responsible for his acts if at the time he was “laboring under such a defect of reason, from diseases of that mind, as not to know the nature and quality of the act he was doing, or if he did know, that he did not know that what he was doing was wrong” (Neubauer, 2008, p. 306).

In general terms, mistake of law is not a defense. If, however, a law is ambiguous and might prevent a reasonable person from knowing whether her conduct is prohibited by the statute, the defendant might have a defense against application of the law to her. This is actually a constitutional defense because an ambiguous law fails to meet the requirements of due process under the Fifth and Fourteenth Amendments to the U.S. Constitution (Chevigny, 2002).

A mistake of fact is a defense if it negates the mental state required to establish any element of the offense. If a defendant makes a mistake and takes the wrong coat from a closet at a

party, his mistake negates the intent to steal that is necessary for a theft to have occurred (Chevigny, 2002).

Conclusion

This chapter has outlined many of the most salient aspects of the criminal law. In so doing, historical and traditional applications of law were discussed en route to an examination of more recent developments. The criminal code is continuously evolving because it continually adapts to new environments and situations. Recall that one of the first known sets of laws, the Code of Hammurabi, dates back to 1750 BC. Since that time, societies have of course developed and recorded new laws, reworked existing laws, and discarded antiquated laws. The Code of Hammurabi, for example, included some 282 laws. Today, developed nations like the United States have authored volumes of criminal sanctions that would require a vast library to compile. Although idiosyncrasies of the historical evolution of criminal law are more complex than could be outlined here, it is important to note that the overarching goal of the criminal law is to protect the health, safety, and welfare of society. As societies develop and face new and unforeseen circumstances, the criminal law must, and will, follow suit. It is in this way that the criminal law protects its citizens and remains one of the hallmarks of civilized societies.

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