# Criminal Law

11th Edition

Joel Samaha

# CRIMINAL LAW

11th EDITION


## Joel Samaha

Horace T. Morse Distinguished Teaching Professor
University of Minnesota



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**Joel Samaha**

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For My Students

# About the Author

Professor Joel Samaha teaches Criminal Law, Criminal Procedure, and Introduction to Criminal Justice at the University of Minnesota. He is both a lawyer and a historian whose primary interest is crime control in a constitutional democracy. He received his BA, JD, and PhD from Northwestern University. Professor Samaha also studied under the late Sir Geoffrey Elton at Cambridge University, England. He was named the College of Liberal Arts Distinguished Teacher in 1974. In 2007, he was awarded the title of University of Minnesota Distinguished Teaching Professor and inducted into the Academy of Distinguished Teachers.

Professor Samaha was admitted to the Illinois Bar in 1962, where he practiced law briefly in Chicago. He taught at UCLA before going to the University of Minnesota in 1971. He has taught both television and radio courses in criminal justice and co-taught a National Endowment for the Humanities seminar in legal and constitutional history. At the University of Minnesota, he served as chair of the Department of Criminal Justice Studies from 1974 to 1978.

In addition to *Law and Order in Historical Perspective* (1974), an analysis of law enforcement in pre-industrial English society, Professor Samaha has transcribed and written a scholarly introduction to a set of local criminal justice records from the reign of Elizabeth I. He has also written several articles on the history of criminal justice, published in the *Historical Journal, American Journal of Legal History, Minnesota Law Review, William Mitchell Law Review,* and *Journal of Social History*. In addition to *Criminal Law,* he has written two other textbooks, *Criminal Procedure*, now in its eighth edition, and *Criminal Justice,* now in its seventh edition. He continues to teach and write full time.

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# PREFACE

Criminal Law was my favorite class as a first-year law student at Northwestern University Law School in 1958. I've loved it ever since, a love that has only grown from teaching it at least once a year at the University of Minnesota since 1971. I hope my love of the subject comes through in *Criminal Law*, which I've just finished for the eleventh time. It's a great source of satisfaction that my modest innovation to the study of criminal law—the text-casebook—has endured and flourished. *Criminal Law*, the text-casebook, brings together the description, analysis, and critique of general principles with excerpts of cases edited for nonlawyers.

Like its predecessors, *Criminal Law,* Eleventh Edition, stresses both the general principles that apply to all of criminal law and the specific elements of particular crimes that prosecutors have to prove beyond a reasonable doubt. Learning the principles of criminal law isn't just a good mental exercise, although it does stimulate students to use their minds. Understanding the general principles is an indispensable prerequisite for understanding the elements of specific crimes. The general principles have lasted for centuries. The definitions of the elements of specific crimes, on the other hand, differ from state to state and over time because they have to meet the varied and changing needs of new times and different places.

That the principles have stood the test of time testifies to their strength as a framework for explaining the elements of crimes defined in the fifty states and in the U.S. criminal code. But there's more to their importance than durability; it's also practical to know and understand them. The general principles are the bases both of the elements that prosecutors have to prove beyond a reasonable doubt to convict defendants and of the defenses that justify or excuse defendants' criminal conduct.

So *Criminal Law*, Eleventh Edition rests on a solid foundation. But it can't stand still, any more than the subject of criminal law can remain frozen in time. The more I teach and write about criminal law, the more I learn and rethink what I've already learned; the more "good" cases I find that I didn't know were there; and the more I'm able to include cases that weren't decided and reported when the previous edition went to press.

Of course, it's my obligation to incorporate into the eleventh edition these now-decided and reported cases, and this new learning, rethinking, and discovery. But obligation doesn't describe the pleasure that preparing now eleven editions of *Criminal Law* brings me. It's thrilling to find cases that illustrate a principle in terms students can understand and that stimulate them to think critically about subjects worth thinking about. It's that thrill that drives me to make each edition better than the last. I hope it will make my students—and you—more intelligent consumers of the law and social reality of criminal law in the U.S. constitutional democracy.

## ORGANIZATION/APPROACH

The chapters in the text organize the criminal law into a traditional scheme that is widely accepted and can embrace, with minor adjustments, the criminal law of any

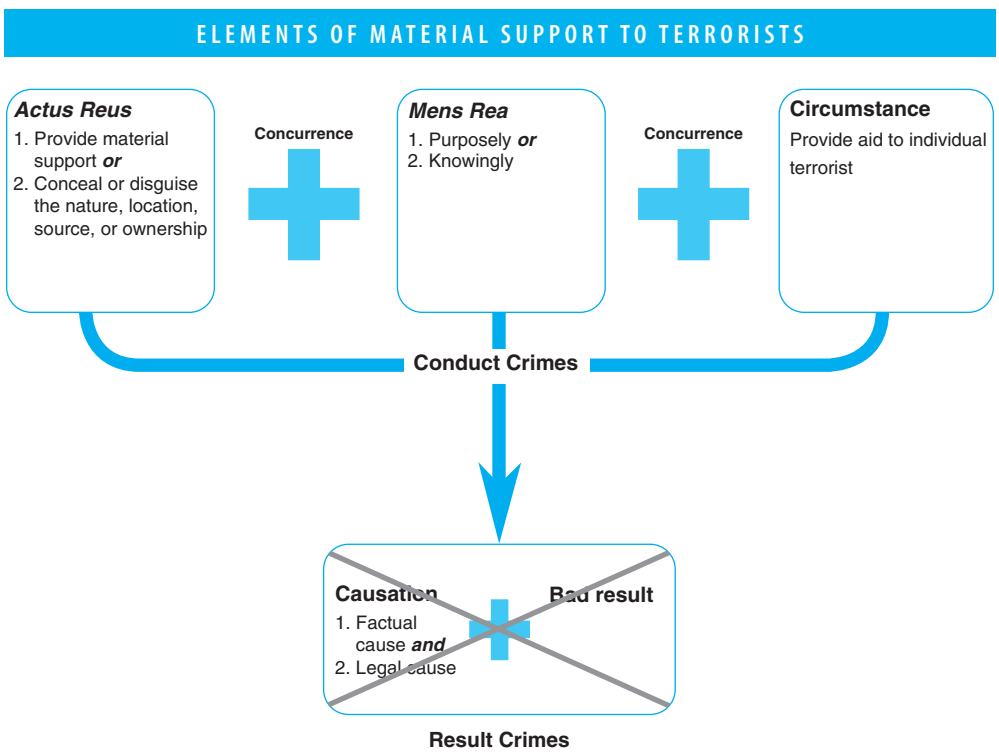
state and/or the federal government. The logic of the arrangement is first to cover the general part of the criminal law—namely, principles and doctrines common to all or most crimes—and then the special part of criminal law—namely, the application of the general principles to the elements of specific crimes.

Chapters 1 through 8 cover the general part of criminal law: the sources and purposes of criminal law and criminal punishment; the constitutional limits on the criminal law; the general principles of criminal liability; the defenses of justification and excuse; parties to crime; and incomplete crimes.

Chapters 9 through 13 cover the special part of the criminal law: the major crimes against persons; crimes against homes and property; crimes against public order and morals; and crimes against the state.

*Criminal Law* has always followed the three-step analysis of criminal liability (criminal conduct, justification, and excuse). *Criminal Law* brings this analysis into sharp focus in two ways. First, the chapter sequence: Chapters 3 and 4 cover the general principles of criminal conduct (criminal act, criminal intent, concurrence, and causation). Chapter 5 covers the defenses of justification, the second step in the analysis of criminal liability. Chapter 6 covers the defenses of excuse, the third step. So the chapter sequence mirrors precisely the three-step analysis of criminal liability.

*Criminal Law* also sharpens the focus on the three-step analysis by means of the *Elements of Crime* art. The design of the boxes is consistent throughout the book. All three of the analytic steps are included in each Elements of Crime graphic, but elements that aren't required—like crimes that don't require a "bad" result—have a gray "X" through the elements. The figures go right to the core of the three-step analysis of criminal liability, making it easier for students to master the essence of criminal law: applying general principles to specific individual crimes.



## CHANGES TO THE ELEVENTH EDITION

*Criminal Law*, Eleventh Edition includes new case excerpts; an increased selection of relevant legal and social science research; a rich collection of examples to illustrate main points; all new chapter-opening vignettes to enhance student relevancy; and numerous new "Ethical Dilemmas" to give students an opportunity to prepare for on-the-job challenges.

For the first time, we have also included a running glossary to define terms as each chapter progresses—a tool we think students will find invaluable. Additionally, the Eleventh Edition includes entirely new sections, including some on such high-profile topics as the ban on carrying concealed guns in churches, mandatory life without parole for juveniles, the duty to intervene (as exemplified in the Penn State child sex assault case), physician-assisted suicide, "homegrown" (U.S. born and/or longtime resident non–U.S. born) terrorists, and more.

There are also new charts and tables, and all retained graphics are updated to reflect the most recent information available. Finally, I've included a few *sample documents* that criminal justice professionals encounter in their daily work—a police report (Chapter 1), a probation report (Chapter 2), a grand jury presentment (Chapter 3), and a forfeiture order (Chapter 11). Here are the highlights of the changes in each chapter.

### Chapter 1, Criminal Law and Criminal Punishment: An Overview

**NEW**

- **Case Excerpt** *State v. Chaney* (1970) "Did the punishment devalue the victim?" Did the sentence of one year in prison with early parole send the message that the suffering he caused the woman he raped twice and then robbed was worthless?
- **Figure** "Elements of Criminal Liability"
- **Table** "Crimes and Torts: Similarities and Differences"
- **Ethical Dilemma** "Are the private paparazzi informants doing ethical work?"
- **Sample Document** Sample police report

**REVISED** Explanation of the distinction between *mala in se* and *mala prohibita* with examples

- **Figure** Updated "World Imprisonment Rates, 2009"
- **Table** Updated "Estimated Number of Arrests, 2010"

### Chapter 2, Constitutional Limits on Criminal Law

**NEW**

- **Section** "Life without Parole for Juveniles"
- **Case Excerpts:**
  - *GeorgiaCarry.Org, Inc. v. Georgia* (2011) "Did he have a right to carry a gun in church?" Tests a "hot button" issue—the constitutionality of a Georgia ban on carrying guns in churches
  - *Lawrence v. Texas* (2003) "Do consenting adults have a right to privacy in their private sexual conduct?" Tests whether there's a constitutional right to privacy, involving adult consensual homosexual sex
  - *State v. Ninham* (2011) "Is it cruel and unusual punishment to sentence Omer Ninham to "death in prison"? Tests the constitutionality of a sentence of life in prison without parole for a fourteen-year-old convicted of murder
- **Table** "The U.S. Supreme Court and the Right to Privacy," with leading cases on the issue from *Griswold* to *Lawrence*
- **Sample Document** Probation form

REVISED

- "The 'Right to Bear Arms'" Major revision reflects extension of *D.C. v. Heller* (2008) to states in *McDonald v. Chicago* (2010)
- Expansion of the Ethical Dilemma, "Is Shaming 'Right'?"

### Chapter 3, The Criminal Act: The First Principle of Criminal Liability

NEW

- **Vignette** "Was His Sleep Sex a Voluntary Act?"
- **Section** "Epileptic Seizures" New information from the Epilepsy Therapy Project on the effects of failing to take medication, auras, and warning signs of imminent seizures
- **Case Excerpts**
  - *State v. Burrell* (1992) "Did he fire the gun voluntarily?" Tests whether Burrell's last act before firing the gun that killed his friend had to be voluntary
  - *People v. Decina* (1956) "Was killing while driving during an epileptic seizure voluntary?" Leading epileptic seizure case tests the culpability of Emil Decina who, during an epileptic seizure as he drove his vehicle, hit six schoolgirls, killing four
  - *Miller v. State* (1999) "Did he possess illegal drugs?" Tests whether Miller legally "possessed" the drugs in the car in which he was a passenger
- **Exploring Further**
  - Voluntary acts—"Is sleep sex a voluntary act?" Did he commit rape in his sleep?
  - Possession—"Did she possess alcohol?" Did the minor "possess" the alcohol in the car in the DWI case?
- **Ethical Dilemma** "Did Assistant Coach Michael McQueary (of Penn State) have a moral duty to intervene in the alleged sexual assault he witnessed?"
- **Sample Document** Excerpt of grand jury indictment in the Penn State case

### Chapter 4, The General Principles of Criminal Liability: *Mens Rea*, Concurrence, Causation, Ignorance, and Mistake

NEW

- **Vignette** "Did He Intend to Give Them AIDS?"

REVISED

- **Section** "Ignorance and Mistake" section to clarify the "failure of proof" theory

### Chapter 5, Defenses to Criminal Liability: Justifications

NEW

- **Vignette** "When Seconds Count, the Police Are Only Minutes Away"
- **Section** "Proving Defenses" Revised and expanded "Affirmative Defenses and Proving Them" from *Criminal Law* 10
- **Case Excerpts**
  - *U.S. v. Haynes* (1998) "Can a sneak attack be self-defense?"
  - *Toops v. State* (1994) "Was driving drunk a lesser evil than a car out of control?" Choice of evils and drunk driving
- **Table** Hot-button issue—"Summary of Florida Castle Law Changes"

REVISED

- **Section** "Self-Defense" Expanded, adding new material on inevitable and imminent attack and sneak attacks and self-defense
- **Figure** "Castle Doctrine Map" Updated to reflect state statutes in 2009

## Chapter 6, Defenses to Criminal Liability: Excuses

### NEW

- **Vignette** "Did He Know It Was 'Wrong' to Kill His Father?"
- **Major Sections**
  - "The History of Insanity Defense" Explores the history of the insanity defense from Plato (350 B.C.) to modern times, with emphasis on historical cases, especially from eighteenth-century England to the right-wrong test created in the famous *McNaughtan* case and its development up to the present. I've stressed the major legal and historical evidence regarding the myth that the insanity defense is a way to escape punishment.
  - "The Insanity Defense: Myths and Reality" Explores the enormous gap between the public *perception* of how the insanity defense works and how it actually works. The myth is that the defense allows many dangerous people to escape punishment for the crime; the reality is that few do escape.
- **Subsection** "The Product of Mental Illness Test (*Durham* Rule)"
- **Case Excerpts**
  - *U.S. v. Hinckley* (2009) "Should his furlough releases be expanded?" Latest decision in the series of opinions expanding John Hinckley's furlough privileges since he attempted to kill President Reagan in 1981
  - *State v. Odell* (2004) "Did he know 'the nature and wrongfulness' of his acts?" Insanity case tests whether Darren Odell knew it was wrong to kill his father
- **Table** "Juveniles Tried as Adults" Briefly summarizes cases
- **Figure** "Duress Statutes" Highlights examples of defense of duress statutes from three states

### REVISED Sections

- "The Right-Wrong Test" Expanded to explain the controversy between lawyers and mental health experts on the definition of insanity, especially on reason (cognition) and will (volition)
- "The Substantial Capacity Test (Model Penal Code)" Expanded to include criticisms of this test of insanity

## Chapter 7, Parties to Crime and Vicarious Liability

### NEW

- **Vignette** "Was He an Accessory?
- **Figure** Examples of "Accomplice *Mens Rea*"

**REVISED Section** "Parties to Crime" Expanded explanation and discussion of the two theories of liability for someone else's crime—"agency" and "forfeited personal identity"

## Chapter 8, Inchoate Crimes

### NEW

- **Vignette** "Did He Attempt to Rape?"
- **Major Section** "The Racketeer and Corrupt Organizations Act (RICO)" describes the history of RICO; **Four New Subsections** "Prosecuting Organized Crime," "Prosecuting White-Collar Crimes," "Prosecuting Government Corruption," and Punishing RICO Offenders"
- **Section** Added "Defenses to Attempt Liability" to clarify and simplify two concepts, which are now two **New Subsections** under defenses: "Legal Impossibility" and "Voluntary Abandonment"

- **Case Excerpts**
  - — *Mims v. U.S.* (1967) "Did he attempt to rob the bank?" (application of the Model Penal Code "substantial steps")
  - — *Alexander v. U.S.* (1993) "Was the forfeiture an excessive fine?"
  - — *State v. Schleifer* (1923) "Did he solicit his audience to destroy their employers' homes and businesses?"

**REVISED Sections**

- "Attempt *Actus Reus*" Revised to clarify and simplify the tests of the criminal act in attempt law, adding **New Subsections** for each test—all but the last act test; dangerous proximity to success test; indispensable element test; unequivocality test; probable desistance test; and the substantial steps (Model Penal Code) test
- Expanded "Solicitation *Actus Reus*"

### Chapter 9, Crimes against Persons I: Murder and Manslaughter

**NEW**

- **Vignette** "Is Doctor-Assisted Suicide Murder?
- **Section** "The Deadly Weapon Doctrine" History and modern application of the doctrine, explaining how prosecutors can prove the element of intent to kill by proving the defendant attacked the victim with a deadly weapon
- **Subsection** "Provocation by Nonviolent Homosexual Advance (NHA)" Debate over whether "gay panic" killings are murder or voluntary manslaughter
- **Case Excerpts**
  - — *State v. Snowden* (1957) "Did he premeditatedly and deliberately murder?"
  - — *People v. Phillips* (1966) "Is 'grand theft' an underlying felony for felony murder?"
  - — *Commonwealth v. Carr* (1990) "Did seeing the lesbian lovemaking cause a 'gay panic'?"
- **Table** "Stage of Fetal Development in Feticide Statutes"
- **Figures**
  - — "The FBI's Index of Serious Crimes in the United States (2010)"
  - — "Inherently Dangerous to Life in the Abstract Felonies" Cases illustrating the range and variety of felonies that qualify for the felony murder rule
  - — "Model Penal Code Homicide Sections"
- **Sample Document** Sample jury instruction on provocation

**REVISED Sections**

- "When Does Life Begin?" More emphasis on fetal death, especially feticide statutes
- "Felony Murder" Includes the history, the debate over, and the modern trend toward restricting, and even abolishing, the ancient rule
- "Manslaughter" Expanded by adding an introduction providing more background and history of manslaughter
- "Adequate Provocation" Expanded to clarify and elaborate on the complex definition and application of the concept, including a new list of the definition of legally accepted provocations

### Chapter 10, Crimes against Persons II: Sex Offenses, Bodily Injury, and Personal Restraint

**NEW**

- **Vignette** "Did He Seduce or Rape Her?"
- **Case** *People v. Evans* (1975) "Was it rape or seduction?"

- **Figures**
  - — "Relationship of Rape Victim to Rapist"
  - — "Michigan Criminal Sexual Conduct Statute"

### Chapter 11, Crimes against Property

**NEW**

- **Vignette** "Did He Commit Credit Card Fraud?"
- **Sections**
  - — "Ponzi Schemes" History and impact of the 2007 "Great Recession" on Ponzi crimes
  - — "White-Collar Crime" History and application to federal mail fraud
- **Case Excerpts**
  - — *People v. Gasparik* (1981) "Did he 'steal' the leather jacket?" Description and analysis of adapting the ancient offense of larceny to fit the modern crime of shoplifting
  - — *U.S. v. Maze (1974)* "Did he commit federal mail fraud?" Maze stole his roommate's credit card to pay for his road trip from Kentucky to California

**REVISED Section** "Cybercrimes" Added history, showing that "digital people" weren't the first "victims" of data collection and mining, giving an example of how GM used it in the 1920s to "steal" Ford's customers by "target marketing"

### Chapter 12, Crimes against Public Order and Morals

**NEW**

- **Vignette** "Violent Video Games"
- **Sections**
  - — "Violent Video Games" Do they cause violent behavior like the killings at Columbine and other schools?
  - — "Prostitution" Focuses on the inequality issue captured in this opener to the section: "The law's desire to punish bad girls has often been moderated by its wish to save nice boys from harm, inconvenience or embarrassment" **Subsections** include:
    - The History of Prostitution Laws
    - The Double Standard Today
    - Court Remedies for the Double Standard
    - Local Government Programs Targeting Johns (car forfeiture, driver's license revocation, and publishing the names of arrested johns in local newspapers and online)
- **Case Excerpts**
  - — *Interactive Digital Software Association v. St. Louis County* (2002) "Can counties ban juveniles from playing violent video games in arcades?"
  - — *Commonwealth v. An Unnamed Defendant* (1986) "Is it constitutional to arrest only prostitutes and not johns?"
- **Figure** "Male–Female Prostitution Arrests, 2010"

**UPDATED Table** "Estimated Number of Arrests, 2010"

### Chapter 13, Crimes against the State

**MAJOR CHAPTER REVISION** In response to reviewers' excellent suggestions, and to developments in the law, as well as my own interests in the history of espionage and its

application to present law, this is almost a 75 percent rewrite of the old chapter. The result: a chapter that engages more deeply the issues of the substantive criminal law and crimes against the state.

### NEW

- **Vignette** "Did He Provide Material Support to a Terrorist Organization?" *Holder v. Humanitarian Law Project* (2010); U.S. Supreme Court case
- **Ethical Dilemma** "Which of the following actions is it ethical to ban as 'material support and resources' to terrorists?"
- **Table** Statute "Attempted Intentional Damage to Protected Computer"

### REVISED Sections

- "Espionage" Major rewrite includes:
  - — **New Subsection** "The History of the Espionage Act" Discussion of leading cases of the WWI era
  - — **New Subsection** "The Espionage Act Today" Includes analysis of major cases
    - Bradley Manning and WikiLeaks
    - Thomas Drake, former executive in the NSA, whistleblower charged with transferring top secret national defense documents
    - Jeffrey Sterling, former CIA agent who disclosed secret national defense information to the *New York Times* reporter James Risen, which later appeared in Risen's *Secret History of the CIA* book
    - John Kiriaku, former CIA officer and member of the team that captured and "waterboarded" the top Al Qaeda hierarchy, who disclosed the identity of a CIA analyst that interrogated Zubaydah
- "Antiterrorist Crimes" Major rewrite includes:
  - — **New Subsections** All new text for "The Top Terrorist Plot Cases," which discusses cases since 9/11, and "'Homegrown' Terrorists"
  - — **Table** "Statutes Charged in Top 50 Terrorist Plots, 2001–2010"
  - — **Figures** "Top 50 Plot Prosecutions, 2001–2010" and "Homegrown Terrorist Defendants Born in the United States, 2001–2010"
- "Material Support to Terrorists and Terrorist Organizations" Major rewrite places special emphasis on constitutional challenges on First Amendment speech and assembly rights
- "Sabotage" Expanded explanation of its use and added an extended analysis of the case of Douglas James Duchak, a computer analyst responsible for updating the TSA "No Fly List" who tried to destroy it because he was laid off
- **NEW U.S. Supreme Court Case** *Holder v. Humanitarian Law Project* (2010), upholding "material support" provisions of the USA Patriot Act

## Supplements

### RESOURCES FOR INSTRUCTORS

- **Instructor's Resource Manual with Test Bank** The manual, which has been updated and revised by Valerie Bell of Loras College, includes learning objectives, key terms, a detailed chapter outline, a chapter summary, discussion topics, student activities, media tools, and a newly expanded test bank. The learning objectives are correlated with the discussion topics, student activities, and media tools. Each

chapter's test bank contains questions in multiple-choice, true–false, completion, and essay formats, with a full answer key. The test bank is coded to the learning objectives that appear in the main text and includes the page numbers in the main text where the answers can be found. Finally, each question in the test bank has been carefully reviewed by experienced criminal justice instructors for quality, accuracy, and content coverage. Our Instructor Approved seal, which appears on the front cover, is our assurance that you are working with an assessment and grading resource of the highest caliber. The manual is available for download on the password-protected website and can also be obtained by e-mailing your local Cengage Learning representative.

- **ExamView® Computerized Testing** The comprehensive Instructor's Manual is backed up by ExamView, a computerized test bank available for PC and Macintosh computers. With ExamView, you can create, deliver, and customize tests and study guides (both print and online) in minutes. You can easily edit and import your own questions and graphics, change test layouts, and reorganize questions. And using ExamView's complete word-processing capabilities, you can enter an unlimited number of new questions or edit existing questions.
- **PowerPoint Lecture Slides** Helping you make your lectures more engaging while effectively reaching your visually oriented students, these handy Microsoft PowerPoint® slides outline the chapters of the main text in a classroom-ready presentation. The PowerPoint® slides are updated to reflect the content and organization of the new edition of the text and feature some additional examples and real-world cases for application and discussion. Available for download on the password-protected instructor book companion website, the presentations can also be obtained by e-mailing your local Cengage Learning representative. The PowerPoint® slides were updated for the current edition by Mark Brown of the University of South Carolina.
- **Lesson Plans** The Lesson Plans, which were updated by Valerie Bell of Loras College, bring accessible, masterful suggestions to every lesson. This supplement includes a sample syllabus, learning objectives, lecture notes, discussion topics and in-class activities, a detailed lecture outline, assignments, media tools, and "What if…" scenarios. The learning objectives are integrated throughout the Lesson Plans, and current events and real-life examples in the form of articles, websites, and video links are incorporated into the class discussion topics, activities, and assignments. The lecture outlines are correlated with PowerPoint slides for ease of classroom use. Lesson Plans are available on the instructor website.
- **Real-World Resources: Tools to Enhance Relevancy** The media tools from across all the supplements are gathered into one location and organized by chapter and learning objective. Each item has a description of the resource and a directed learning activity. Available on the instructor website, WebTutor and CourseMate, these can be used as resources for additional learning or as assignments.
- **Wadsworth Criminal Justice Video Library** So many exciting new videos—so many great ways to enrich your lectures and spark discussion of the material in this text. Your Cengage Learning representative will be happy to provide details on our video policy by adoption size. The library includes these selections and many others.
  - — **ABC® Videos.** ABC videos feature short, high-interest clips from current news events as well as historic raw footage going back forty years. Perfect for discussion starters or to enrich your lectures and spark interest in the material in the text, these brief videos provide students with a new lens through which to view the past and present, one that will greatly enhance their knowledge and

understanding of significant events and open up to them new dimensions in learning. Clips are drawn from such programs as *World News Tonight*, *Good Morning America*, *This Week*, *PrimeTime Live*, *20/20*, and *Nightline*, as well as numerous ABC News specials and material from the Associated Press Television News and British Movietone News collections.

— **Introduction to Criminal Justice Video Series.** This Cengage Learning video series features videos supplied by the BBC Motion Gallery. These short, high-interest clips from CBS and BBC news programs—everything from nightly news broadcasts and specials to *CBS News Special Reports, CBS Sunday Morning*, *60 Minutes*, and more—are perfect classroom discussion starters. They are designed to enrich your lectures and spark interest in the material in the text. Clips are drawn from the BBC Motion Gallery.

- **Criminal Justice Media Library** Cengage Learning's Criminal Justice Media Library includes nearly three hundred media assets on the topics you cover in your courses. Available to stream from any web-enabled computer, the Criminal Justice Media Library's assets include such valuable resources as Career Profile Videos, featuring interviews with criminal justice professionals from a range of roles and locations; simulations that allow students to step into various roles and practice their decision-making skills; video clips on current topics from ABC® and other sources; animations that illustrate key concepts; interactive learning modules that help students check their knowledge of important topics; and Reality Check exercises that compare expectations and preconceived notions against the real-life thoughts and experiences of criminal justice professionals. The Criminal Justice Media Library can be uploaded and used within many popular Learning Management Systems, and all video assets include assessment questions that can be delivered straight to the grade book in your LMS. You can also customize it with your own course material. Please contact your Cengage Learning representative for ordering and pricing information.
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## RESOURCES FOR STUDENTS

- **Study Guide** An extensive student guide has been developed for this edition by Mark Brown of the University of South Carolina. Because students learn in different ways, the guide includes a variety of pedagogical aids to help them. Each chapter is outlined and summarized, major terms and figures are defined, plus media tools for directed learning and self-tests are provided.
- **CourseMate** Cengage Learning's Criminal Justice CourseMate brings course concepts to life with interactive learning, study, and exam preparation tools that support the printed textbook. CourseMate includes an integrated e-book, quizzes mapped to chapter learning objectives that have been updated for the current edition by Roreita Joy Walker of Bauder College, flashcards, videos, and more, and EngagementTracker, a first-of-its-kind tool that monitors student engagement in the course. The accompanying instructor website offers access to password-protected resources, such as an electronic version of the instructor's manual and PowerPoint® slides.

- **Careers in Criminal Justice Website** (Can be bundled with this text at no additional charge) Featuring plenty of self-exploration and profiling activities, the interactive Careers in Criminal Justice website helps students investigate and focus on the criminal justice career choices that are right for them. Includes interest assessment, video testimonials from career professionals, resume and interview tips, links for reference, and a wealth of information on "soft skills," such as health and fitness, stress management, and effective communication.
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  - Introduction to Criminal Justice
  - Community Corrections
  - Cyber Crime
  - Victimology
  - Juvenile Justice
  - Racial Profiling
  - White-Collar Crime
  - Terrorism and Homeland Security
  - Public Policy and Criminal Justice
  - Technology and Criminal Justice
  - Ethics in Criminal Justice
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  - Policy in Criminal Justice

## Acknowledgements

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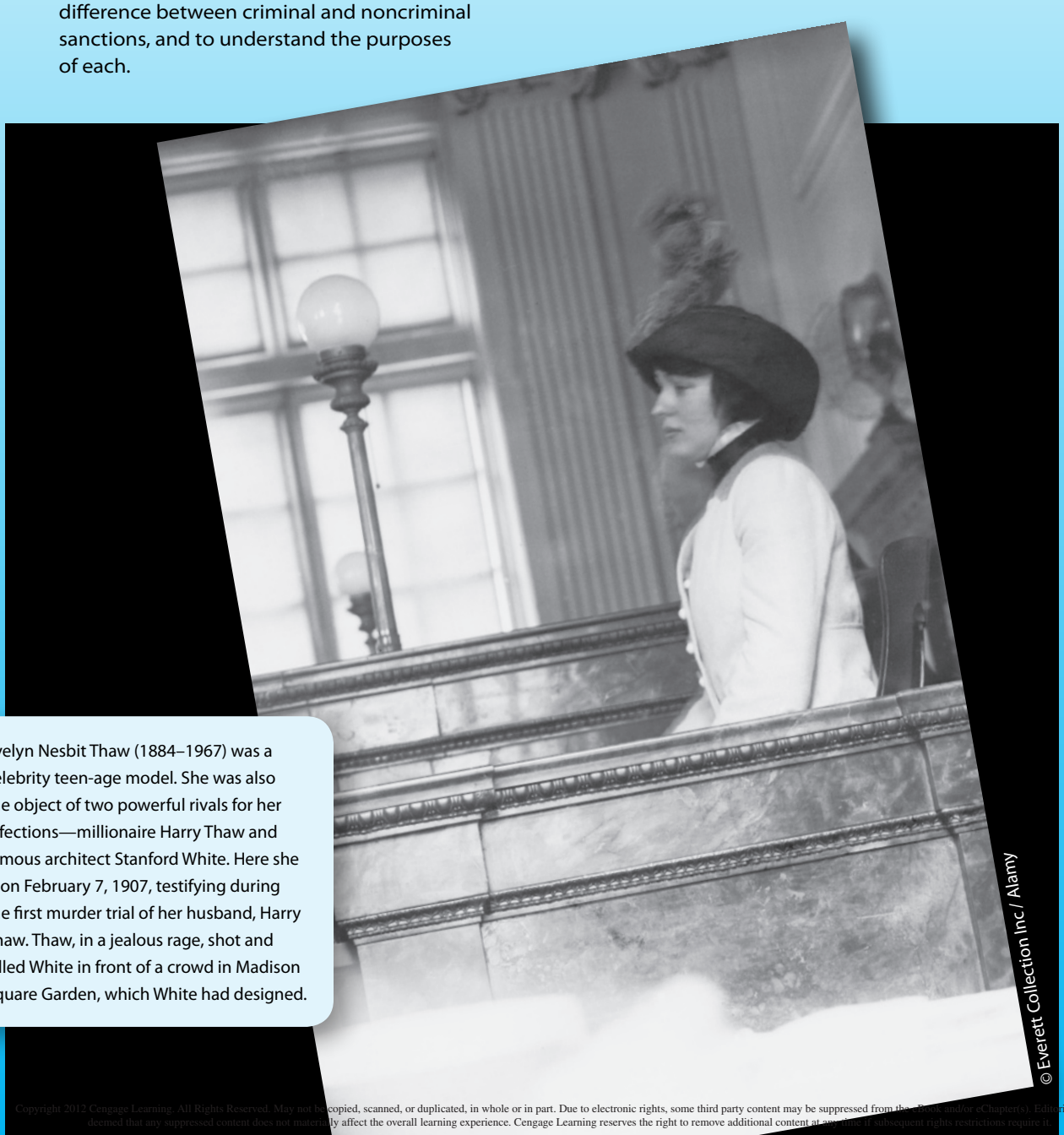
**Joel Samaha**
*Minneapolis*

## LEARNING OBJECTIVES

1. To define and understand what behavior deserves criminal punishment.
2. To understand and appreciate the relationship between the general and special parts of criminal law.
3. To identify, describe, and understand the main sources of criminal law.
4. To define criminal punishment, to know the difference between criminal and noncriminal sanctions, and to understand the purposes of each.
5. To define and appreciate the significance of the presumption of innocence and the burden of proof as they relate to criminal liability.
6. To understand the role of informal discretion and appreciate its relationship to formal criminal law.
7. To understand the text-case method and how to apply it to the study of criminal law.



Evelyn Nesbit Thaw (1884–1967) was a celebrity teen-age model. She was also the object of two powerful rivals for her affections—millionaire Harry Thaw and famous architect Stanford White. Here she is on February 7, 1907, testifying during the first murder trial of her husband, Harry Thaw. Thaw, in a jealous rage, shot and killed White in front of a crowd in Madison Square Garden, which White had designed.

# 1 CRIMINAL LAW AND CRIMINAL PUNISHMENT

## An Overview

CHAPTER OUTLINE



***Two Years in Prison for the Unlawful Sale of Liquor?***

Joseph Pete sold a bottle of Gilbey's vodka and a bottle of Seagram's Seven Crown whiskey to Edward N. Sigvayugak. The prosecuting witness, Edward N. Sigvayugak, had been engaged by a state police officer to buy liquor from Pete with money provided by the officer, and was paid for his services by the officer.

(*State v. Pete* 1966)

"Every known organized society has, and probably must have, some system by which it punishes those who violate its most important prohibitions" (Robinson 2008, 1). This book explores, and invites you to think critically about, the answers to the two questions implied in Professor Robinson's quote:

1. What behavior deserves criminal punishment?
2. What's the appropriate punishment for criminal behavior?

Criminal law, and most of what you'll read about it in this book, boils down to varying answers to these questions. To introduce you to the possible answers, read the brief summaries presented from real cases that we'll examine deeper in the remaining chapters. After you read each summary, assign the case to one of the five following categories. Don't worry about whether you know enough about criminal law to decide which category it belongs in. In fact, try to ignore what you already know; just choose the category you believe best describes the case.

1. **CRIME.** If you put the case into this category, then grade it as very serious, serious, or minor. The idea here is to stamp it with both the amount of disgrace (stigma) you believe a convicted "criminal" should suffer and roughly the kind and amount of punishment you believe the person deserves.
2. **NONCRIMINAL WRONG.** This is a legal wrong that justifies suing someone and getting money, usually for some personal injury. In other words, name a price that the wrongdoer has to pay to another individual, but don't stamp it "criminal" (Coffee 1992, 1876–77).
3. **REGULATION.** Use government action—for example, a heavy cigarette tax to discourage smoking—to discourage the behavior (Harcourt 2005, 11–12). In other words, make the price high, but don't stamp it with the stigma of "crime."
4. **LICENSE.** Charge a price for it—for example, a driver's license fee for the privilege to drive—but don't try to encourage or discourage it. Make the price affordable, and attach no stigma to it.
5. **LAWFUL.** Let individual conscience and/or social disapproval condemn it, but create no legal consequences.

## HERE ARE THE CASES

1. A young man beat a stranger on the street with a baseball bat for "kicks." The victim died. (*Commonwealth v. Golston* 1977, "Atrocious Murder" in Chapter 9, p. 318)
2. A husband begged his wife, who had cheated on him for months, not to leave him. She replied, "No, I'm going to court, and you're going to have to give me all the furniture. You're going to have to get the hell out of here; you won't have nothing." Then, pointing to her crotch, she added, "You'll never touch this again, because I've got something bigger and better for it."

   Breaking into tears, he begged some more, "Why don't you try to save the marriage? I have nothing more to live for."

   "Never," she replied. "I'm never coming back to you."

   He "cracked," ran into the next room, got a gun, and shot her to death. (Commonwealth v. Schnopps 1983, Chapter 9, "Voluntary Manslaughter," p. 335)
3. Two robbers met a drunk man in a bar, displaying a wad of money. When the man asked them for a ride, they agreed, drove him out into the country, robbed him, forced him out of the car without his glasses, and drove off. A college student, driving at a reasonable speed, didn't see the man standing in the middle of the road waving him down, couldn't stop, and struck and killed him. (*People v. Kibbe* 1974, Chapter 4, "Proximate Cause," p. 147)
4. During the Korean War, a mother dreamed that an enemy soldier was on top of her daughter. In her sleep, she got up, walked to a shed, got an ax, went to her daughter's room, and plunged the ax into her, believing she was killing the enemy soldier. The daughter died instantly; the mother was beside herself with grief. (*King v. Cogdon* 1951, Chapter 3, "Voluntary Act," p. 100)
5. A neighbor told an eight-year-old boy and his friend to come out from behind a building, and not to play there, because it was dangerous. The boy answered belligerently, "In a minute."

Losing patience, the neighbor said, "No, not in a minute; get out of there now!"

A few days later, he broke into her house, pulled a goldfish out of its bowl, chopped it into little pieces with a steak knife, and smeared it all over the counter. Then, he went into the bathroom, plugged in a curling iron, and clamped it onto a towel. (*State v. K.R.L.* 1992, Chapter 6, "The Excuse of Age," p. 212)

6. A young man lived in a ground-level apartment with a large window opening onto the building parking lot. At eight o'clock one morning, he stood naked in front of the window eating his cereal in full view of those getting in and out of their cars. (*State v. Metzger* 1982, Chapter 2, "Defining Vagueness," p. 46)
7. A man knew he was HIV positive. Despite doctors' instructions about safe sex and the need to tell his partners before having sex with them, he had sex numerous times with three different women without telling them. Most of the time, he used no protection, but, on a few occasions, he withdrew before ejaculating. He gave one of the women an anti-AIDS drug, "to slow down the AIDS." None of the women contracted the HIV virus. (*State v. Stark* 1992, Chapter 4, "MPC Mental Attitudes: Purpose," p. 132)
8. A woman met a very drunk man in a bar. He got into her car, and she drove him to her house. He asked her for a spoon, which she knew he wanted to use to take drugs. She got it for him and waited in the living room while he went into the bathroom to "shoot up." He came back into the living room and collapsed; she went back to the bar. The next morning she found him "purple, with flies flying around him." Thinking he was dead, she told her daughter to call the police and left for work. He was dead. (*People v. Oliver* 1989, Chapter 3, "Omissions as Acts," p. 109)

## WHAT BEHAVIOR DESERVES CRIMINAL PUNISHMENT?

LO 1

"Welcome to Bloomington, you're under arrest!" This is what a Bloomington, Minnesota, police officer, who was a student in my criminal justice class, told me that billboards at the city limits of this Minneapolis suburb should read.

"Why," I asked?

"Because everything in Bloomington is a crime," he replied, laughing.

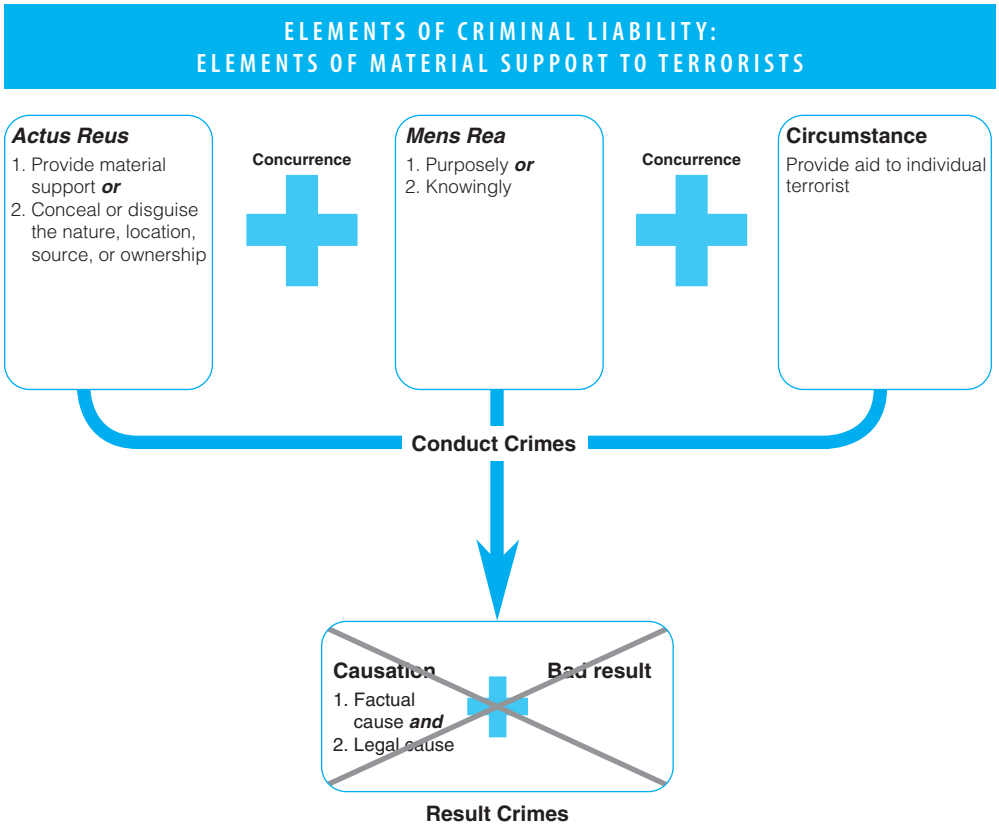
Although his comments were exaggerated, the officer spoke the truth. Murders, rapes, robberies, and other "street crimes" have always filled the news and stoked our fears. "White-collar crimes" have also received attention in these early years of the twenty-first century. And, of course, since 9/11, crimes committed by terrorists have also attracted considerable attention. These types of crimes will also receive most of our attention in this book—at least until Chapter 12, when we turn to the "crimes against public order and morals." In numbers, crimes against public order and morals dwarf all the others combined (see Table 1.1). But from now until Chapter 12, you'll read about the 600,000 violent and 2.5 million property crimes in Table 1.1, not the 17.7 million minor offenses.

Let's look briefly at the American Law Institute's (ALI) Model Penal Code (MPC) definition of behavior that deserves punishment. It's the framework we'll use to guide our analysis of **criminal liability**, "conduct that unjustifiably and inexcusably inflicts or threatens substantial harm to individual or public interests" (ALI 1985, § 1.02(1)(a)).

**criminal liability,** conduct that unjustifiably and inexcusably inflicts or threatens substantial harm to individual or public interests

Here's a breakdown of the words and phrases in the definition:

1. Conduct that
2. Unjustifiably and inexcusably
3. Inflicts or threatens substantial harm
4. To individual or public interests




The Elements of Criminal Liability figure illustrates these elements as they apply to the crime of providing support to terrorists (which we'll discuss in Chapter 13).

These few words and phrases are the building blocks of our whole system of criminal law and punishment. We'll spend the rest of the book exploring and applying them to a wide range of human behavior in an equally wide range of circumstances. But, first, let's examine some propositions that will help prepare you to follow and understand the later chapters. Let's begin by looking at the difference between criminal wrongs and other legal wrongs that aren't criminal.

LO 4

## CRIMES AND NONCRIMINAL WRONGS

The opening case summaries demonstrate that criminal law is only one kind of social control, one form of responsibility for deviating from social norms. So in criminal law, the basic question boils down to "Who's criminally responsible for what crime?" We won't often discuss the noncriminal kinds of responsibility in this book. But you should keep them in mind anyway, because in the real world, criminal liability is the exceptional form of social control. The norm is the other four categories mentioned in the beginning of the chapter (p. 4). And they should be, because criminal liability is the harshest and most expensive form of social control.

**torts,** private wrongs for which you can sue the party who wronged you and recover money

In this section, we'll concentrate on the noncriminal wrongs called **torts**, private wrongs for which you can sue the party who wronged you and recover money.

Crimes and torts represent two different ways our legal system responds to social and individual harm (Table 1.2). Before we look at their differences, let's look at how they're similar. First, both are sets of rules telling us what we can't do ("Don't steal") and what we must do ("Pay your taxes"). Second, the rules apply to everybody in the

TABLE 1.1

**Estimated Number of Arrests, United States, 2010**

| CRIME | ARRESTS* |
|---|---|
| Murder and nonnegligent manslaughter | 11,201 |
| Forcible rape | 20,088 |
| Robbery | 112,300 |
| Aggravated assault | 408,488 |
| Burglary | 289,769 |
| Larceny-theft | 1,271,410 |
| Motor vehicle theft | 71,487 |
| Arson | 11,296 |
| Violent crime† | 552,077 |
| Property crime† | 1,643,962 |
| Other assaults | 1,292,449 |
| Forgery and counterfeiting | 78,101 |
| Fraud | 187,887 |
| Embezzlement | 16,616 |
| Stolen property; buying, receiving, possessing | 94,802 |
| Vandalism | 252,753 |
| Weapons; carrying, possessing, etc. | 159,020 |
| Prostitution and commercialized vice | 62,668 |
| Sex offenses (except forcible rape and prostitution) | 72,628 |
| Drug abuse violations | 1,638,846 |
| Gambling | 9,941 |
| Offenses against the family and children | 111,062 |
| Driving under the influence | 1,412,223 |
| Liquor laws | 512,790 |
| Drunkenness | 560,718 |
| Disorderly conduct | 615,172 |
| Vagrancy | 32,033 |
| All other offenses | 3,720,402 |
| Suspicion | 1,166 |
| Curfew and loitering law violations | 94,797 |

*Total 13,120,947. Does not include suspicion.

†Violent crimes are offenses of murder and nonnegligent manslaughter, forcible rape, robbery, and aggravated assault. Property crimes are offenses of burglary, larceny-theft, motor vehicle theft, and arson.

Source: FBI Uniform Crime Report 2011 (Sept.), Table 29.

## ETHICAL DILEMMA

### *Are the private paparazzi informants doing ethical work?*

With his dapper red scarf and orange-tinted hair, Kim Rae-in is a card-carrying member of the "paparazzi" posse, cruising Seoul on his beat-up motorcycle on the lookout for the next "gotcha" moment. He's not stalking starlets or pop singers. He's after moneymaking snapshots: the salary man lighting up in a no-smoking area, the homeowner illegally dumping trash, the merchant selling stale candy to kids. Kim, 34, a former gas-station attendant, isn't choosy. Even small crime pays big time—more than $3,000 in January alone. "It's good money," he says. "I'll never go back to pumping gas. I feel free now."

Kim is among a new breed across South Korea—referred to as "paparazzi," although their subjects are not the rich and famous but low-grade lawbreakers whose actions caught on film are peddled as evidence to government officials. In recent years, officials have enacted more than 60 civilian "reporting" programs that offer rewards ranging from 50,000 won, or about $36, for the smallest infractions to 2 billion won, or $1.4 million, for a large-scale corruption case involving government officials. (That one has yet to be made.) The paparazzi trend even has inspired its own lexicon. There are "seon-parazzi," who pursue election-law violators; "ssu-parazzi," who target illegal acts of dumping garbage, and "seong-parazzi," who target prostitution, which is illegal.

Amid the nation's worsening economic crisis, officials say there are fewer government investigators to maintain public order. So they increasingly rely on a bounty-hunter style of justice. Many paparazzi are out-of-work salary men, bored homemakers, and college students who consider themselves deputized agents of the government.

To meet a growing demand, scores of paparazzi schools have sprung up, charging students $250 for three-day courses on how to edit film, tail suspected wrongdoers, and operate button-sized cameras. Schools estimate 500 professional paparazzi now work in South Korea. Few officials question the ethics of arming a citizenry against itself with zoom video and long-range lenses. "They don't violate any laws, so there's no reason to restrict them," said a National Tax Service official, who declined to give his name.

Some paparazzi students say they hate ratting out their neighbors, but the money is too good to resist. "It's shameful work—I'm really not proud of it," said one student who declined to give her name. Said another, who also asked to remain anonymous, "Let's put it this way: I don't want to be called a paparazzi; I'm a public servant" (Glionna 2009).

Others disagree.

Bang Jae-won, 56, an eight-year veteran of the trade, said he felt proud of the times he caught people dumping garbage at a camping site or exposed marketing frauds, one of which once bankrupted him. "I regret the early, desperate days when I reported the misdemeanors of people as poor as I was," said Mr. Bang, who turned to this work after he was told he was too old by prospective employers. "I don't tell my neighbors what I do because it might arouse unnecessary suspicions," he said. "But, in general, I am not ashamed of my work. To those who call us snitches, I say, 'Why don't you obey the law?'"

Critics, however, say the reward program has undermined social trust. "The idea itself is good, but when people make a full-time job of this, it . . . raises ethical questions," said Lee Yoon-ho, a professor of police administration at Dongguk University in Seoul (Sang-Hun 2011).

**Instructions**

1. List all the crimes the paparazzi report.
2. Which, if any, do you consider it ethical to report?
3. Which, if any, do you consider it unethical to report?
4. Would you recommend that your state adopt a reporting reward policy? Why would it be ethical (or unethical)?

Sources: Glionna, John. 2009. "South Korean Cameras Zero in on Crime." *Los Angeles Times*, February 17. Accessed October 13, 2011. http://seattletimes.nwsource.com/html/nationworld/2008751061_korea17.html.

Sang-Hun, Choe. 2011. "Help Wanted: Busybodies with Cameras." *New York Times*, September 28. Accessed October 13, 2011. http://www.nytimes.com/2011/09/29/world/asia/in-south-korea-where-digital-tattling-is-a-growth-industry.html?_r=1&scp=1&sq=Bang%20Jae-won&st=cse.

**Crimes and Torts: Similarities and Differences** TABLE 1.2

| CRIMES | TORTS (PRIVATE WRONGS) |
|---|---|
| Crimes originate from a list of "can'ts" and "musts." | Torts originate from a list of "can'ts" and "musts." |
| The list applies to everybody. | The list applies to everybody. |
| Crimes injure another individual and the whole community. | Torts injure another individual and the whole community. |
| Criminal prosecutions are brought by the state against individuals. | Private parties bring tort actions against other parties. |
| Convicted offenders pay money to the state or serve time in the custody of the state. | Defendants who lose in tort cases pay money to the plaintiff who sued. |
| Criminal conviction is the condemnation by the whole community, the expression of its "hatred, fear, or contempt for the convict." | The tort award compensates the plaintiff who brought the suit. |
| The state has to prove all elements of the crime by "proof beyond a reasonable doubt." | The burden on the plaintiff is to prove responsibility by a preponderance of the evidence. |

community, and they speak on behalf of everybody, with the power and prestige of the whole community behind them. Third, the power of the law backs up the enforcement of the rules (Hart 1958, 403).

How are they different? Some believe that crimes injure the whole community, whereas torts harm only individuals. But that's not really true. Almost every crime is also a tort. Many crimes and torts even have the same name (there's a crime and a tort called "assault"). Other crimes are torts even though they don't have the same names; for example, the crime of murder is also the tort of wrongful death. In fact, the same killing sometimes is tried as murder and later as a civil wrongful death suit.

One famous example is in the legal actions against the great football player O. J. Simpson. He was acquitted in the murder of his ex-wife and her friend in a criminal case but then lost in a tort case for their wrongful deaths. Also, torts don't just harm other individuals; they can also harm the whole community. For example, breaches of contract don't just hurt the parties to the contract. Much of what keeps daily life running depends on people keeping their word when they agree to buy, sell, perform services, and so on.

Are crimes just torts with different names? No. One difference is that criminal prosecutions are brought by the government against individuals; that's why criminal cases always have titles like "*U.S. v. Rasul*," "*People v. Menendez*," "*State v. Erickson*," or "*Commonwealth v. Wong*." (The first name in the case title is what that government entity calls itself, and the second name, the defendant's, is the individual being prosecuted.) Nongovernment parties bring tort actions against other parties who may or may not be governments.

A second difference is that injured plaintiffs (those who sue for wrongs in tort cases) get money (called *damages*) from defendants for the injuries they suffer. In criminal actions, defendants pay fines to the state and/or serve time doing community service, in jail, or in prison.

The most important difference between torts and crimes is the conviction itself. It's "the expression of the community's hatred, fear, or contempt for the convict . . ." (Hart 1958). Professor Henry M. Hart sums up the difference this way:

> [Crime] . . . is not simply anything which a legislature chooses to call a "crime." It is not simply antisocial conduct which public officers are given a responsibility to

> suppress. It is not simply any conduct to which the legislature chooses to attach a criminal penalty. It is conduct which . . . will incur a formal and solemn pronouncement of the moral condemnation of the community. (405)

But you should understand that words of condemnation *by themselves* don't make crimes different from torts. Not at all. When the legislature defines a crime, it's issuing a threat—"Don't steal, *or else* . . ." "File your taxes, *or else* . . ." What's the "or else"? The threat of punishment, a threat that society will carry out against anyone who commits a crime.

In fact, so intimately connected are condemnation and criminal punishment that some of the most distinguished criminal law scholars say that punishment has two indispensable components, condemnation and "hard treatment." According to Andrew von Hirsch, honorary professor of Penal Theory and Penal Law at the University of Cambridge, England, a prolific writer on the subject, and his distinguished colleague, Andrew Ashworth, the Vinerian Professor of Law at Oxford University, "Punishment conveys censure, but it does not consist solely of it. The censure in punishment is expressed through the imposition of a deprivation ('hard treatment') on the offender" (Von Hirsch and Ashworth 2005, 21).

If the threat isn't carried out when a crime is committed, condemnation is meaningless, or worse—it sends a message that the victim's suffering is worthless. Punishment has to back up the condemnation. According to another respected authority on this point, Professor Dan Kahan (1996), "When society deliberately forgoes answering the wrongdoer through punishment, it risks being perceived as endorsing his valuations; hence the complaint that unduly lenient punishment reveals that the victim is worthless in the eyes of the law" (598).

You're about to encounter your first case excerpt, in which the Alaska Supreme Court examined the importance of condemnation and hard treatment. (Unless your instructor recommends otherwise, I strongly recommend that before you read the excerpt, you take the time to study "The Text-Case Method," later in the chapter, p. 33.])

## CASE

**State v. Chaney (*1970*)** *explores the idea that the trial court's "light treatment" of sentencing U.S. Army soldier Donald Scott Chaney to one year in prison with early parole would send the message that the suffering he caused the woman he raped twice and then robbed was worthless.*

### *Did the punishment devalue the victim?*

***State v. Chaney***

477 P.2d 441 (Alaska 1970)

#### HISTORY

A jury convicted Donald Scott Chaney on two counts of forcible rape and one count of robbery and the trial court sentenced him to concurrent one-year terms of imprisonment with provision for parole in the discretion of the Parole Board. The state appealed. The Supreme Court was of the opinion that the sentence was too lenient and was not well-calculated to achieve the objective of reformation of the defendant, condemnation of the community, and reaffirmation of societal norms for the purpose of maintaining respect for the norms themselves. The Supreme Court disapproved the sentence.

RABINOWITZ, J., JOINED BY BONEY, CJ., AND DIMOND, CONNOR, AND ERWIN, JJ.

#### FACTS

At the time Donald Chaney committed the crimes of forcible rape and robbery, he was an unmarried member of the United States Armed Forces stationed at Fort Richardson, near Anchorage, Alaska. His commanding officer stated, prior to sentencing, that

Chaney "was an excellent soldier, takes orders well, and was on the promotion list before his crimes." He was born in 1948, the youngest of eight children. His youth was spent on the family's dairy farm in Washington County, Maryland. He played basketball on the Boonsboro High School team, was a member of Future Farmers of America and the Boy Scouts. Chaney did not complete high school, having dropped out one month prior to graduation. He asserts he was forced to take this action because his father needed his help on the family dairy farm. After a series of varying types of employment, he was drafted into the United States Army in 1968. At sentencing, it was disclosed that he did not have any prior criminal record, was not a user of drugs, and was only a social drinker.

. . . It appears that Chaney and a companion picked up the prosecutrix [victim] at a downtown location in Anchorage. After driving the victim around in their car, Chaney and his companion beat her and forcibly raped her four times. She was also forced to perform an act of fellatio with Chaney's companion. During this same period of time, the victim's money was removed from her purse. Upon completion of these events, the victim was permitted to leave the vehicle to the accompaniment of dire threats of reprisals if she attempted to report the incident to the police.

The presentence report which was furnished to the trial court prior to sentencing contains Chaney's version of the rapes. According to Chaney, he felt "that it wasn't rape as forcible and against her will on my part." As to his conviction of robbery, Chaney states: "I found the money on the floor of the car afterwards and was planning on giving it back, but didn't get to see the girl." At the time of sentencing, Chaney told the court that he "didn't direct any violence against the girl."

The State of Alaska has appealed from the judgment and commitment which was entered by the trial court.

## OPINION

[According to the Alaska Sentence Appeal Act of 1969,]

(a) A sentence of imprisonment lawfully imposed by the superior court for a term or for aggregate terms exceeding one year may be appealed to the supreme court by the defendant on the ground that the sentence is excessive. . . .

(b) A sentence of imprisonment lawfully imposed by the superior court may be appealed to the supreme court by the state on the ground that the sentence is too lenient; however, when a sentence is appealed by the state and the defendant has not appealed the sentence, the court is not authorized to increase the sentence but may express its approval or disapproval of the sentence and its reasons in a written opinion.

Sentencing is a discretionary judicial function. When a sentence is appealed, we will make our own examination of the record and will modify the sentence if we are convinced that the sentencing court was clearly mistaken in imposing the sanction it did. Under Alaska's Constitution, the principles of reformation and the necessity of protecting the public constitute the touchstones of penal administration.

Multiple goals are encompassed within these broad constitutional standards. Within the ambit of this constitutional phraseology are found the objectives of (1) rehabilitation of the offender into a noncriminal member of society, (2) isolation of the offender from society to prevent criminal conduct during the period of confinement, (3) deterrence of the offender himself after his release from confinement or other penological treatment, as well as (4) deterrence of other members of the community who might possess tendencies toward criminal conduct similar to that of the offender, and (5) community condemnation of the individual offender, or in other words, reaffirmation of societal norms for the purpose of maintaining respect for the norms themselves.

The determination of the exact period of time that a convicted defendant should serve is basically a sociological problem to be resolved by a careful weighing of the principle of reformation and the need for protecting the public. The Division of Corrections, in its presentence report, recommended Chaney be incarcerated and parole be denied. The assistant district attorney who appeared for the state at the time of sentencing recommended that he receive concurrent seven-year sentences with two years suspended on the two rape convictions, and he be sentenced to a consecutive five-year term of imprisonment on the robbery conviction, and that this sentence be suspended and he be placed on probation during this period of time.

*(continues)*

*(continued)*

At the time of sentencing, a representative of the Division of Corrections recommended that Chaney serve two years on each of the rape convictions and be sentenced to two years suspended with probation on the robbery conviction. In his opinion, there was "an excellent possibility of early parole." Counsel for Chaney concurred in the Division of Corrections' recommendation.

The trial court imposed concurrent one-year terms of imprisonment and provided for parole at the discretion of the parole board. These were minimum sentences under the applicable statutes. Rape carries a potential range of imprisonment from 1 to 20 years while a conviction of robbery can result in imprisonment from 1 to 15 years. The trial judge further recommended that appellee be placed in a minimum security facility.

In imposing this sentence, the trial judge remarked that he was sorry that the (military) regulations would not permit keeping (Chaney) in the service if he wanted to stay because it seems to me that is a better setup for everybody concerned than putting him in the penitentiary. Collateral consequences flowing from an accused's conviction may be considered by the trial judge in arriving at an appropriate sentence. In addition to giving weight to the fact that military regulations prohibited Chaney's retention in the service, the trial judge also took into consideration that Chaney's conviction would result in an undesirable discharge from the military service.

At a later point in his remarks, the trial judge said:

> Now as a matter of fact, I have sentenced you to a minimum on all 3 counts here but there will be no problem as far as I'm concerned for you to be paroled at the first day, the Parole Board says that you're eligible for parole. If the Parole Board should decide 10 days from now that you're eligible for parole and parole you, it's entirely satisfactory with the court.

Supreme Ct.R. 21(f) requires that: "At the time of imposition of sentence the judge shall make a statement on the record explaining his reasons for imposition of the sentence." The basic reasons for this requirement are that a statement of the reasons by the sentencing judge should greatly increase the rationality of sentences, such a statement can be of therapeutic value to the defendant, and the statement can be of significance to an appellate court faced with the prospect of reviewing the sentence.

Exercising the appellate jurisdiction vested in this court, we express our disapproval of the sentence which was imposed by the trial court in the case at bar. In our opinion, the sentence was too lenient considering the circumstances surrounding the commission of these crimes. It further appears that several significant goals of our system of penal justice were accorded little or no weight by the sentencing court.

Forcible rape and robbery rank among the most serious crimes. In the case at bar, the record reflects that the trial judge explicitly stated, on several occasions, that he disbelieved Chaney and believed the prosecutrix's version of what happened after she entered the vehicle which was occupied by Chaney and his companion. Considering both the jury's and the trial judge's resolution of this issue of credibility, and the violent circumstances surrounding the commission of these dangerous crimes, we have difficulty in understanding why one-year concurrent sentences were thought appropriate.

Review of the sentencing proceedings leads to the impression that the trial judge was apologetic in regard to his decision to impose a sanction of incarceration. Much was made of Chaney's fine military record and his potential eligibility for early parole. A military spokesman represented to the sentencing court that: "An occurrence such as the one concerned is very common and happens many times each night in Anchorage. Needless to say, Donald Chaney was the unlucky 'G.I.' that picked a young lady who told."

On the one hand, the record is devoid of any trace of remorse on Chaney's part. Seemingly all but forgotten in the sentencing proceedings is the victim of Chaney's rapes and robbery. On the other hand, the record discloses that the trial judge properly considered the mitigating circumstance that the victim, who at the time did not know either Chaney or his companion, voluntarily entered Chaney's car. But the crux of our disapproval of the sentence stems from what we consider to be the trial judge's de-emphasis of several important goals of criminal justice.

In view of the circumstances of this record, we think the sentence imposed is not well calculated to achieve the objective of reformation of the accused. Considering the apologetic tone of the sentencing proceedings, the court's endorsement of an extremely

early parole, and the concurrent minimum sentences which were imposed for these three serious felonies, we fail to discern how the objective of reformation was effectuated. At most, Chaney was told that he was only technically guilty and minimally blameworthy, all of which minimized the possibility of appellee's comprehending the wrongfulness of his conduct.

We also think that the sentence imposed falls short of effectuating the goal of community condemnation, or the reaffirmation of societal norms for the purpose of maintaining respect for the norms themselves. In short, knowledge of the calculated circumstances involved in the commission of these felonies and the sentence imposed could lead to the conclusion that forcible rape and robbery are not reflective of serious antisocial conduct. Thus, respect for society's condemnation of forcible rape and robbery is eroded and reaffirmation of these societal norms negated. We also doubt whether the sentence in the case at bar mitigates the persistent problem of disparity in sentences. What is sought is reasonable differentiation among sentences.

We believe that a concurrent sentence calling for a substantially longer period of incarceration on each count was appropriate in light of the particular facts of this record and the goals of penal administration. A sentence of imprisonment for a substantially longer period of imprisonment than the one-year sentence which was imposed would unequivocally bring home to appellee the seriousness of his dangerously unlawful conduct, would reaffirm society's condemnation of forcible rape and robbery, and would provide the Division of Corrections of the State of Alaska with the opportunity of determining whether appellee required any special treatment prior to his return to society. Operation of our system of penal administration in Alaska is dependent upon a properly staffed and functioning Division of Corrections which has, in addition to probation and parole functions, the responsibility for treatment, rehabilitation, and custody of incarcerated offenders.

### QUESTIONS

1. Summarize the trial judge's arguments for Donald Chaney's sentence.
2. Summarize the reasons the Alaska Supreme Court unanimously disapproved the sentence.
3. What sentence in your opinion would best further the purpose of retribution? Of rehabilitation? Back up your answer with information from the text and the court's opinion.
4. Does the trial court judge's sentence fit the two components of retribution—condemnation and hard treatment? Defend your answer with information in the text and in the court's opinion.

## EXPLORING FURTHER

### *Punishment*

### *Did the appeals court have the power to reduce the trial court's sentence?*

*State v. Pete,* 420 P.2d 338 (Alaska 1966)

### FACTS

Joseph Pete was found guilty by a jury of two counts involving the unlawful sale of intoxicating liquor. One count involved the sale of a 4/5 bottle of Gilbey's vodka to Edward N. Sigvayugak, and the other, the sale of a 4/5 bottle of Seagram's Seven Crown whiskey to the same person on the same day. The prosecuting witness, Edward N. Sigvayugak, had been engaged by a state police officer to buy liquor from Pete with money provided by the officer, and was paid for his services by the officer. The trial court convicted Pete on both counts, and sentenced him to two one-year sentences, to be served consecutively. Pete appealed, arguing that the sentence was unduly harsh. Did the appellate court have the power to reduce the sentence?

### DECISION

Yes, answered the Alaska Supreme Court. The court held that consecutive sentences of one year each on two counts involving the unlawful sale of intoxicating liquor was excessive where the two offenses were part of one general transaction. Under the circumstances, the sentence would be modified to the term of imprisonment that Pete already served, approximately seventeen and one-half months. "In light of the fact that the two offenses were really part of one general transaction involving the unlawful sale of liquor, we believe the judgment of conviction should be modified so as to limit appellee's sentences to the term of imprisonment that he has now served" (338).

We'll come back to the subject of punishment later in this chapter, where we'll discuss its purposes more fully, and again in Chapter 2, where we'll discuss the constitutional ban on "cruel and unusual punishment." But here it's important to emphasize the intimate connection (often overlooked) between punishment and the meaning of crime itself.

Even on this important point of expression of condemnation backed up by punishment, the line between torts and crime can get blurred. In tort cases involving violence and other especially "wicked" circumstances, plaintiffs can recover not only compensatory damages for their actual injuries but also substantial punitive damages to make an example of defendants and to "punish" them for their "evil behavior" (Black 1983, 204).

Now that you've got some idea of what criminal wrongs are and how they differ from private wrongs, let's go inside criminal law to see how the law classifies crimes so we can make sense of the enormous range of behavior it covers.

LO 2

## CLASSIFYING CRIMES

There are various ways to classify crimes, most of them with ancient roots. One scheme divides crimes into two categories: *mala in se* crimes and *mala prohibita* offenses.

***mala in se* (inherently evil) crimes,** offenses that require some level of criminal intent

***mala prohibita* offenses,** are crimes only because a specific statute or ordinance prohibits them

***Mala in se* (inherently evil) crimes** require some level of criminal intent (discussed in Chapter 4). We don't need a law to tell us murder, rape, robbery, and stealing are crimes because they're inherently evil.

***Mala prohibita* offenses** are crimes only because a specific statute or ordinance prohibits them. They include minor offenses, such as parking illegally, drinking in public, and the countless other minor offenses that don't require criminal intent, only a voluntary act (Chapter 3). Professor Wayne Logan (2001, 1409) calls them "the shadow criminal law of municipal governance." For a selection from Professor Logan's (1426–28) list, see the "Municipal Ordinances" section (p. 20).

**felonies,** crimes punishable by death or confinement in the state's prison for one year to life without parole

**misdemeanors,** offenses punishable by fine and/or confinement in the local jail for up to one year

The most widely used scheme for classifying crimes is according to the kind and quantity of punishment. **Felonies** are crimes punishable by death or confinement in the state's prison for one year to life without parole; **misdemeanors** are punishable by fine and/or confinement in the local jail for up to one year.

Notice the word "punishable"; the classification depends on the possible punishment, not the actual punishment. For example, Viki Rhodes pled guilty to "Driving under the Influence of Intoxicants, fourth offense," a felony. The trial court sentenced her to 120 days of home confinement. When she later argued she was a misdemeanant because of the home confinement sentence, the appeals court ruled that "a person whose felony sentence is reduced does not become a misdemeanant by virtue of the reduction but remains a felon" (*Commonwealth v. Rhodes* 1996, 532).

Why should the label "felony" or "misdemeanor" matter? One reason is the difference between procedure for felonies and misdemeanors. For example, felony defendants have to be in court for their trials; misdemeanor defendants don't. Also, prior felony convictions make offenders eligible for longer sentences. Another reason is that the legal consequences of felony convictions last after punishment. In many states, former felons can't vote, can't serve in public office, and can't be attorneys. Felony conviction also can be a ground for divorce. This isn't true of misdemeanor offenders.

Now, let's turn from the classifications of crimes to the two divisions of criminal law: the general and special parts.

## THE GENERAL AND SPECIAL PARTS OF CRIMINAL LAW

LO 2

Criminal law consists of a general part and a special part. The **general part of criminal law** consists of principles that apply to more than one crime. Most state criminal codes today include a general part.

**general part of criminal law,** principles that apply to more than one crime

The **special part of criminal law** defines specific crimes and arranges them into groups according to subject matter. All states include the definitions of at least some specific crimes, and most group them according to subject matter.

**special part of criminal law,** defines specific crimes and arranges them into groups according to subject matter

The special part of criminal law is more than a classification scheme; it's part of the larger organizational structure of the whole criminal law and the one followed in this book. So we'll discuss the classification scheme in the context of the general and special parts of the criminal law.

### THE GENERAL PART OF CRIMINAL LAW

The general principles of criminal law are broad propositions that apply to more than one crime. Some general principles (Chapters 3–8) apply to all crimes (for example, all crimes have to include a voluntary act); other principles apply to all felonies (for example, criminal intent).

In addition to the general principles in the general part of criminal law, there are two kinds of what we call "offenses of general applicability" (Dubber 2002, 142). The first is **complicity**, crimes that make one person criminally liable for someone else's conduct. There's no general crime of complicity; instead, there are the specific crimes of accomplice to murder; accomplice to robbery; or accomplice to any other crime for that matter (Chapter 7).

**complicity,** crimes that make one person criminally liable for someone else's conduct

Other crimes of general applicability are the crimes of attempt, conspiracy, and solicitation. There are no general crimes of attempt, conspiracy, or solicitation. Instead, there the specific crimes of attempting, conspiring, or solicitation to commit specific crimes, such as attempting to rape, conspiring to murder, or solicitation to sell illegal drugs.

Finally, the general part of criminal law includes the principles of justification (Chapter 5, self-defense) and excuse (Chapter 6, insanity), the principles that govern most defenses to criminal liability.

### THE SPECIAL PART OF CRIMINAL LAW

The special part of criminal law (Chapters 9–13) defines specific crimes, according to the principles set out in the general part. The definitions of crimes are divided into four groups:

1. Crimes against persons (such as murder and rape, discussed in Chapters 9–10)
2. Crimes against property (stealing and trespass, discussed in Chapter 11)
3. Crimes against public order and morals (illegal immigration, gang crimes, aggressive panhandling, and prostitution, discussed in Chapter 12)
4. Crimes against the state (domestic and foreign terror, discussed in Chapter 13)

The definitions of specific crimes consist of the elements prosecutors have to prove beyond a reasonable doubt to convict defendants. From the standpoint of understanding how the general principles relate to specific crimes, every definition of a specific crime is an application of one or more general principles.

To show you how this works, let's look at an example from the Alabama criminal code. One section of the general part of the code reads, "A person is criminally liable

for an offense [only] if it is committed by his own behavior" (Alabama Criminal Code 1975, ß 13A-2-20). This general principle of *criminal liability* (liability is the technical legal term for responsibility) is required in the definition of all crimes in Alabama.

In the special part of the Alabama Criminal Code, Chapter 7, "Offenses Involving Damage to and Intrusion upon Property," defines the crime of first-degree criminal trespass as, "A person is guilty of criminal trespass in the first degree if he . . . enters or remains unlawfully in a dwelling" (ß 13A-7-4). So the general principle of requiring behavior is satisfied by the acts of either entering or remaining.

Now, let's turn from the subject of classifying crimes to the sources of criminal law and where you're most likely to find them.

LO 3

## THE SOURCES OF CRIMINAL LAW

Most criminal law is found in state criminal codes created by elected representatives in state legislatures and municipal codes created by city and town councils elected by the people. There's also a substantial body of criminal law in the U.S. criminal code created by Congress.

Sometimes, these elected bodies invite administrative agencies, whose members aren't elected by the people, to participate in creating criminal law. Legislatures weren't always the main source of criminal lawmaking. Judges' court opinions, not statutes or constitutions, were the original source of law. This judge-made law was called the **common law**.

**common law,** judge-made law, the original source of law, in which judge's court opinions formed the law

Let's look first at the crimes created by judges' opinions and then at the legislated criminal codes, including state and municipal codes and the Model Penal Code (MPC). Then, we'll look briefly at criminal lawmaking by administrative agencies.

### COMMON LAW CRIMES

Criminal codes didn't spring full-grown from legislatures. They evolved from a long history of ancient offenses called **common law crimes**. These crimes were created before legislatures existed and when social order depended on obedience to unwritten rules (the *lex non scripta*) based on community customs and traditions. These traditions were passed on from generation to generation and modified from time to time to meet changed conditions. Eventually, they were incorporated into court decisions.

**common law crimes,** crimes created before legislatures existed and when social order depended on obedience to unwritten rules (the *lex non scripta*) based on community customs and traditions that over the centuries became incorporated into court decisions

The common law felonies still have familiar names and have maintained similar meanings (murder, manslaughter, burglary, arson, robbery, stealing, rape, and sodomy). The common law misdemeanors have familiar names too (assault, battery, false imprisonment, libel, perjury, corrupting morals, and disturbing the peace) (LaFave 2003a, 75).

Exactly how the common law began is a mystery, but like the traditions it incorporated, it grew and changed to meet new conditions. At first, its growth depended mainly on judicial decisions (Chapter 2). As legislatures became more established, they added crimes to the common law. They did so for a number of reasons: to clarify existing common law; to fill in blanks left by the common law; and to adjust the common law to new conditions. Judicial decisions interpreting the statutes became part of the growing body of precedent making up the common law. Let's look further at common law crimes at both the state and federal levels.

#### *State Common Law Crimes*

The English colonists brought this common law with them to the New World and incorporated the common law crimes into their legal systems. Following the American Revolution, the thirteen original states adopted the common law. Almost every state created after that enacted "reception statutes" that adopted the English common law.

For example, the Florida reception statute reads: "The Common Law of England in relation to crimes shall be of full force in this state where there is no existing provision by statute on the subject" (West's Florida Statutes Annotated 2005, Title XLVI, § 775.01).

Most states have abolished the common law crimes. But it isn't that easy to kill the common law. Several states still recognize the common law of crimes. Even in *code states* (states that have abolished the common law), the codes frequently use the names of the common law crimes without defining them. So to decide cases, the courts have to go to the common law definitions and interpretations of the crimes against persons, property, and public order and morals (Chapters 9–12); the common law of parties to crime (Chapter 7) and attempt, conspiracy, and solicitation (Chapter 8); and the common law defenses, such as self-defense and insanity (Chapters 5–6).

Take California for a good example. It's a code jurisdiction that includes all of the common law felonies in its criminal code (West's California Penal Code 1988, § 187(a)). The California Supreme Court relied on the common law to determine the meaning of its murder statute in *Keeler v. Superior Court* (1970; see Chapter 9, "When Does Life Begin?" section). Robert Keeler's wife Teresa was pregnant with another man's child. Robert kicked the pregnant Teresa in the stomach, causing her to abort the fetus. The California court had to decide whether fetuses were included in the murder statute. To do this, the court turned to the sixteenth-century common law, which defined a human being as "born alive." This excluded Teresa's fetus from the reach of the murder statute.

### *Federal Common Law Crimes*

In *U.S. v. Hudson and Goodwin* (1812), the U.S. Supreme Court said there are no federal common law crimes. During the War of 1812, Hudson and Goodwin published the lie that President Madison and Congress had secretly voted to give $2 million to Napoleon. They were indicted for criminal libel. But there was a catch; there was no federal criminal libel statute. The Court ruled that without a statute, libel can't be a federal crime. Why? According to the Court:

> The courts of [the U.S.] are [not] vested with jurisdiction over any particular act done by an individual in supposed violation of the peace and dignity of the sovereign power. The legislative authority of the Union must first make an act a crime, affix a punishment to it, and declare the Court that shall have jurisdiction of the offence. Certain implied powers must necessarily result to our courts of justice from the nature of their institution. But jurisdiction of crimes against the state is not among those powers. (34)

The rule of *U.S. v. Hudson and Goodwin* seems perfectly clear: there's no federal criminal common law. But, like many other rules you'll learn in your study of criminal law, the reality is more complicated. It's more like:

> There is no federal criminal common law. But there is. . . . The shibboleth that there is no federal criminal common law—that Congress, not the courts, creates crimes—is simply wrong. There are federal common law crimes. (Rosenberg 2002, 202)

Here's what Associate U.S. Supreme Court Justice Stevens had to say about federal criminal common lawmaking:

> Statutes like the Sherman Act, the civil rights legislation, and the mail fraud statute were written in broad general language on the understanding that the courts would have wide latitude in construing them to achieve the remedial purposes that Congress had identified. The wide open spaces in statutes such as these are most appropriately interpreted as implicit delegations of authority to the courts to fill in the gaps in the common law tradition of case-by-case adjudication. (*McNally v. U.S.* 1987)

According to Professor Dan Kahan (1994), Congress has accepted the prominent role Justice Stevens ascribes to the federal courts in developing a "federal common law" in noncriminal subjects. Moreover, Kahan contends that Congress actually prefers "law-making collaboration" to a "lawmaking monopoly" (369). Judicial common criminal lawmaking can be a good thing when it punishes conduct "located not on the border but deep within the interior of what is socially undesirable" (400).

## STATE CRIMINAL CODES

From time to time in U.S. history, reformers have called for the abolition of the common law crimes and their replacement with criminal codes created and defined by elected legislatures. The first criminal codes appeared in 1648, the work of the New England Puritans. The Laws and Liberties of Massachusetts **codified** (put into writing) the colony's criminal law, defining crimes and spelling out punishments.

**codified,** written definitions of crimes and punishment enacted by legislatures and published

John Winthrop, the author of the code, stated the case for a code this way: "So soon as God had set up political government among his people Israel he gave them a body of laws for judgment in civil and criminal causes. . . . For a commonwealth without laws is like a ship without rigging and steerage" (Farrand 1929, A2).

Some of the codified offenses sound odd today (witchcraft, cursing parents, blasphemy, and idolatry), but others—for example, rape—don't: "If any man shall ravish any maid or single woman, committing carnal copulation with her by force, against her own will, that is above ten years of age he shall be punished either with death or some other grievous punishment" (5).

Another familiar codified offense was murder: "If any man shall commit any willful murder, which is manslaughter, committed upon premeditated malice, hatred, or cruelty not in a man's necessary and just defense, nor by mere casualty against his will, he shall be put to death" (6).

Hostility to English institutions after the American Revolution spawned another call by reformers for written legislative codes to replace the English common law. The eighteenth-century Enlightenment, with its emphasis on reason and natural law, inspired reformers to put aside the piecemeal "irrational" common law scattered throughout judicial decisions and to replace it with criminal codes based on a natural law of crimes. Despite anti-British feelings, reformers still embraced Blackstone's *Commentaries* (1769) and hoped to transform his complete and orderly outline of criminal law into criminal codes.

Reformers contended judge-made law was not just disorderly and incomplete; it was antidemocratic. They believed legislatures representing the popular will should make laws, not aloof judges out of touch with public opinion. Thomas Jefferson proposed such a penal code for Virginia (Bond 1950). The proposed code never passed the Virginia legislature, not because it codified the law but because it recommended too many drastic reductions in criminal punishments (Preyer 1983, 53–85).

There was also a strong codification movement during the nineteenth century. Of the many nineteenth-century codes, two codes stand out. The first, the most ambitious, and least successful, was Edward Livingston's draft code for Louisiana, completed in 1826. Livingston's goal was to rationalize into one integrated system criminal law, criminal procedure, criminal evidence, and punishment. Livingston's draft never became law.

The second, David Dudley Field's code, was less ambitious but more successful. Field was a successful New York lawyer who wanted to make criminal law more accessible, particularly to lawyers. According to Professors Paul Robinson and Markus Dubber (2004):

> Field's codes were designed to simplify legal practice by sparing attorneys the tedium of having to sift through an ever rising mountain of common law. As a result, Field was more concerned with streamlining than he was with systematizing or even reforming New York penal law. (3)

Field's New York Penal Code was adopted in 1881 and remained in effect until 1967, when New York adopted most of the Model Penal Code (described next in "The Model Penal Code (MPC)" section).

The codification movement gathered renewed strength after the American Law Institute (ALI) decided to "tackle criminal law and procedure" (Dubber 2002, 8). ALI was founded by a group of distinguished jurists "to promote the clarification and simplification of the law and its better adaptation to social needs, to secure the better administration of justice, and to encourage and carry on scholarly and scientific legal work" (8). After its first look at criminal law and procedure in the United States, the prestigious group "was so appalled by what it saw that it decided that . . . what was needed was a fresh start in the form of model codes (8).

## THE MODEL PENAL CODE (MPC)

The Great Depression and World War II stalled the development of a model penal code. But after the war, led by reform-minded judges, lawyers, and professors, ALI was committed to replacing the common law. From the earliest of thirteen drafts written during the 1950s to the final version in 1962, in the **Model Penal Code (MPC)**, ALI (1985) made good on its commitment to draft a code that abolished common law crimes.

**Model Penal Code (MPC),** proposed criminal code drafted by the American Law Institute and used to reform criminal codes

Section 1.05, the first of its core provisions, provides: "No conduct constitutes an offense unless it is a crime or violation under this Code or another statute of this State" ([1], § 1.01 to 2.13).

After its adoption in 1962, more than forty states changed their criminal codes. None adopted the MPC completely; but criminal law in all states, not just states that rewrote their codes, felt its influence (Dubber 2002, 6). More than two thousand opinions from every state, the District of Columbia, and the federal courts have cited the MPC (7). Many of the case excerpts are from those two thousand. Moreover, this book follows the general structure and analysis of the MPC, because if you understand the MPC's structure and analysis, you'll understand criminal law itself. Although you'll encounter many variations of the MPC throughout the book, "If there is such a thing as a common denominator in American criminal law, it's the Model Penal Code" (Dubber 2002, 5). So let's look at an analysis of the MPC.

The structure of the MPC follows closely the description of "The General and Special Parts of Criminal Law" section, so we won't repeat it here. Here, we'll focus on the **MPC's analysis of criminal liability**—namely:

**MPC's analysis of criminal liability,** analysis of statutes and cases to determine what behavior deserves criminal punishment and its definition of criminal liability: "conduct that unjustifiably and inexcusably inflicts or threatens substantial harm to individual or public interests"

- How it analyzes statutes and cases to answer the question posed at the beginning of the chapter, "What behavior deserves criminal punishment?"
- The MPC's definition of criminal liability: "conduct that unjustifiably and inexcusably inflicts or threatens substantial harm to individual or public interests." (ALI 1985, MPC § 1.02(1)(a))

There you have, in a nutshell, the elements of criminal liability in the states and the federal government that we'll elaborate on and apply to the definitions of individual crimes throughout the book. Let's turn next to another source of criminal law: municipal ordinances.

## MUNICIPAL ORDINANCES

City, town, and village governments enjoy broad powers to create criminal laws, a power local governments are enthusiastically using in today's atmosphere of "zero tolerance" for drugs, violence, public disorder, and other "quality of life" offenses that violate community standards of good manners in public (Chapter 12). Municipalities have a "chorus of advocates" among criminal law reformers who've helped cities write a "new generation" of their old vagrancy and loitering ordinances that "cleanse" them of prior objections that they're unconstitutional and discriminatory (Logan 2001, 1418).

Municipal criminal lawmaking isn't new; neither is the enthusiasm for it. In his provocative book *The People's Welfare*, historian William Novak (1996) convincingly documents the "powerful government tradition devoted in theory and practice to the vision of a well-regulated society" from 1787 to 1877:

> At the heart of the well-regulated society was a plethora of bylaws, ordinances, statutes, and common law restrictions regulating nearly every aspect of early American economy and society. . . . These laws—the work of mayors, common councils, state legislators, town and county officers, and powerful state and local judges . . . taken together . . . demonstrate the pervasiveness of regulation in early American versions of the good society: regulations for public safety and security; . . . the policing of public space . . . ; all-important restraints on public morals (establishing the social and cultural conditions of public order). (1–2)

Here's a sample from current ordinances collected by Professor Wayne Logan (2001):

> Pick-pocketing; disturbing the peace; shoplifting; urinating in public; disorderly conduct; disorderly assembly; unlawful restraint; obstruction of public space; harassment over the telephone; resisting arrest; obscenity; nude dancing; lewdness, public indecency, and indecent exposure; prostitution, pimping, or the operation of "bawdy" houses; gambling; graffiti and the materials associated with its inscription; littering; aggressive begging and panhandling; vandalism; trespass; automobile "cruising"; animal control nuisances; excessive noise; sale or possession of drug paraphernalia; simple drug possession; possession of weapons other than firearms; possession of basic firearms and assault-style firearms; discharge of firearms; sleeping, lying, or camping in public places; driving under the influence of drugs or alcohol; carrying an open container of alcohol; underage drinking; and public drinking and intoxication; vagrancy and loitering; curfews for minors; criminal assault and battery. (1426–28)

Municipal ordinances often duplicate and overlap state criminal code provisions. When they conflict, state criminal code provisions are supposed to trump municipal ordinances. A number of technical rules control whether they're in conflict, and we don't need to get into the details of these rules, but their gist is that unless state criminal codes make clear that they're preempting local ordinances, local ordinances remain in effect (*Chicago v. Roman* 1998).

In *Chicago v. Roman*, Edwin Roman attacked 60-year-old Anthony Pupius. He was convicted of the Chicago municipal offense of assault against the elderly and was sentenced to ten days of community service and one year of probation. However, the ordinance contained a mandatory minimum sentence of at least ninety days of incarceration. The city appealed, claiming that the sentence violated the mandatory minimum required by the ordinance. The Illinois Supreme Court overruled the trial court's decision. According to the court, the Illinois legislature can restrict Chicago's power to create crimes, but it has to pass a law specifically spelling out the limit. Because the

legislature hadn't passed a law preempting the penalty for assaulting the elderly, Chicago's mandatory minimum had to stand.

The long list of ordinances Professor Logan found illustrates the broad power of municipalities to create local crimes. But, as the example of *Chicago v. Roman* indicates, the power of municipalities goes further than creating crimes; it includes the power to determine the punishment, too. They also have the power to enact forfeiture laws.

Under New York City's alcohol and other drug-impaired driver's law, thousands of impaired drivers have forfeited their vehicles (Fries 2001, B2). Another example: an Oakland, California, ordinance authorizes forfeiture of vehicles involved in "solicitation of prostitution or acquisition of controlled substances." The ordinance was passed after residents complained about individuals driving through their neighborhoods looking to buy drugs or hire prostitutes (*Horton v. City of Oakland* 2000, 372).

Don't get the idea from what you've just read that municipalities have unlimited powers to create crimes and prescribe punishments. They don't. We've already noted two limits—constitutional limits (which we'll discuss further in Chapters 2 and 12) and the power of states to preempt municipal criminal lawmaking and punishment. Municipalities also can't create felonies, and they can't prescribe punishments greater than one year in jail.

### ADMINISTRATIVE AGENCY CRIMES

Both federal and state legislatures frequently grant administrative agencies the authority to make rules. One example is familiar to anyone who has to file a tax return. The U.S. Internal Revenue Service income tax regulations are based on the rule-making authority that Congress delegates to the IRS. Another example, this one from the state level: state legislatures commonly authorize the state highway patrol agencies to make rules regarding vehicle safety inspections. We call violations of these federal and state agency rules **administrative crimes**; they're a controversial but rapidly growing source of criminal law.

**administrative crimes,** violations of federal and state agency rules that make up a controversial but rapidly growing and source of criminal law

## CRIMINAL LAW IN THE U.S. FEDERAL SYSTEM

Until now, we've referred to criminal law in the singular. That's inaccurate, and you'll see this inaccuracy repeated often in the rest of the book because it's convenient. But let's clear up the inaccuracy. In our **federal system**, there are fifty-two criminal codes, one for each of the fifty states, one for the District of Columbia, and one for the U.S. criminal code.

**federal system,** fifty-two criminal codes, one for each of the fifty states, one for the District of Columbia, and one for the U.S. criminal code

The U.S. government's power is limited to crimes specifically related to national interests, such as crimes committed on military bases and other national property; crimes against federal officers; and crimes that are difficult for one state to prosecute—for example, drug, weapons, organized and corporate crime, and crimes involving domestic and international terrorism (Chapter 13). The rest of criminal law, which is most of it, is left to the state codes. These are the crimes against persons, property, and public order and morals in the special part of the criminal law (Chapters 9–12).

So we have fifty-two criminal codes, each defining specific crimes and establishing general principles for the territory and people within it. And they don't, in practice, define specific crimes the same. For example, in some states, to commit a burglary, you have to actually break into and then enter a building. In other states, it's enough that you enter a building unlawfully, as in opening an unlocked door to a house the owners forgot to lock, intending to steal their new 3D TV inside. In still other states, all you have to do is stay inside a building you've entered lawfully—for example, hiding until after closing time in your college bookstore restroom during business hours, so you can steal your criminal law textbook and sneak out after the store closes (Chapter 11).

The defenses to crime also vary across state lines. In some states, insanity requires proof both that defendants didn't know what they were doing and that they didn't know it was wrong to do it. In other states, it's enough to prove either that defendants didn't know what they were doing or that they didn't know that it was wrong (Chapter 6). Some states permit individuals to use deadly force to protect their homes from intruders; others require proof that the occupants in the home were in danger of serious bodily harm or death before they can shoot intruders (Chapter 5).

Punishments also differ widely among the states. Several states prescribe death for some convicted murderers; others prescribe life imprisonment. Capital punishment states differ in how they execute murderers: by electrocution, lethal injection, the gas chamber, hanging, or even the firing squad. The death penalty is only the most dramatic example of different punishments. Less-dramatic examples affect far more people. For example, some states lock up individuals who possess small quantities of marijuana for private use; in other states, it's not a crime at all.

This diversity among the criminal codes makes it clear there's no single U.S. criminal code. But this diversity shouldn't obscure the broad outline that's common to all criminal laws in the United States. They're all based on the general principles of liability that we touched on earlier in this chapter and that you'll learn more in depth about in Chapters 3 through 6. They also include the defenses of justification and excuse, which you'll learn about in Chapters 5 and 6.

The definitions of the crimes you'll learn about in Chapters 9 through 12 differ more, so there we'll take account of the major differences. But even these definitions resemble one another more than they differ. For example, "murder" means killing someone on purpose; criminal sexual assault includes sexual penetration by force; "robbery" means taking someone's property by force or threat of force; "theft" means taking, and intending to keep permanently, someone else's property. And the crimes against the state (Chapter 13) and other crimes in the U.S. criminal code don't recognize state lines; they apply everywhere in the country.

Now, let's turn to the other big question in the big picture of American criminal law, the law of punishment.

LO 4

## WHAT'S THE APPROPRIATE PUNISHMENT FOR CRIMINAL BEHAVIOR?

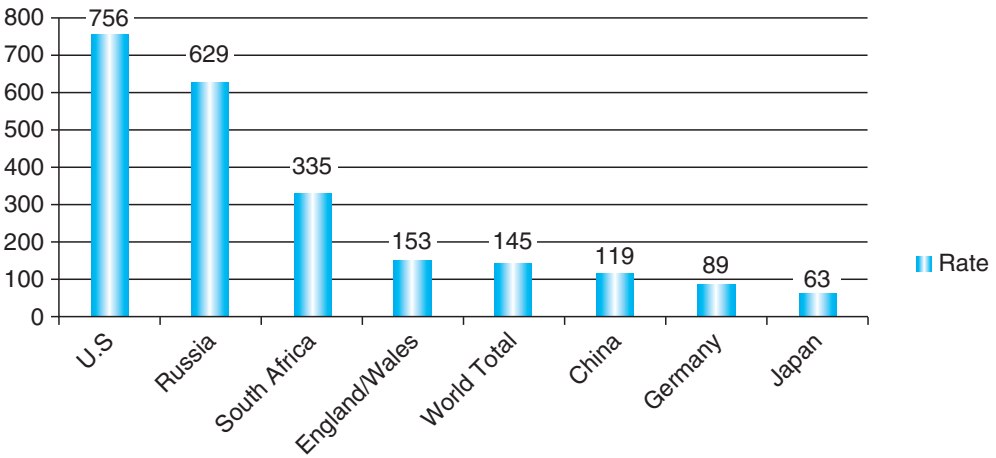
The United States has less than 5 percent of the world's population. But it has almost a quarter of the world's prisoners. Indeed, the United States leads the world in producing prisoners, a reflection of a relatively recent and now distinctive American approach to crime and punishment. Americans are locked up for crimes—from writing bad checks to using drugs—that would rarely produce prison sentences in other countries. And in particular they're kept locked up far longer than prisoners in other countries (Liptak 2008).

**rates of imprisonment,** measured by the numbers of prisoners per 100,000 people in the general population

Most telling are the **rates of imprisonment,** measured by the numbers of prisoners per 100,000 people in the general population. Here, too, the United States clearly leads the world (see Figure 1.1).

It's not just the numbers of prisoners and rates of imprisonment that stand out. Gender, age, race, and ethnicity aren't equally represented in the prisoner population. Black men are imprisoned at the highest rate, 6.5 times higher than White men, and 2.5 times higher than Hispanic men. Similarly, the imprisonment rate for Black women is nearly double the imprisonment rates for Hispanic women and three times the rate for White women (West and Sabol 2009, 4). With all the attention imprisonment deservedly receives, you should keep in mind that there are millions more Americans on probation and parole and other forms of "community corrections" than are locked up in prisons and jails. Also, a few convicted offenders are executed (Chapter 2).

**WORLD IMPRISONMENT RATES, 2009** FIGURE 1.1




*Source:* Walmsley 2009.

These numbers tell us the quantity of punishment, which we should surely acknowledge and accept—that for good or ill—it's probably not going to change any time soon. But the quantity of punishment doesn't tell us anything about other essential aspects of punishment:

- It doesn't define "punishment" as we use it in criminal law.
- It doesn't explain the purposes of (also called justifications for) criminal punishment.
- It doesn't tell us what the limits of criminal punishment are. (You'll learn about the limits of punishment in Chapter 2 in the sections on the U.S. Constitution's Eighth Amendment ban on "cruel and unusual punishments," the Sixth Amendment's "right to trial by jury," and the due process requirement of proof beyond a reasonable doubt.)
- It doesn't tell us about the social and cultural reality of punishment, such as the geography (rural, urban, and suburban), demography (class, race, ethnicity, age, gender, and education), and culture of punishment.

Let's turn now to the definition of, and the justifications for, "punishment."

## THE DEFINITION OF "CRIMINAL PUNISHMENT"

**punishment,** intentionally inflicting pain or other unpleasant consequences on another person

In everyday life, **punishment** means intentionally inflicting pain or other unpleasant consequences on another person. Punishment takes many forms in everyday life. A parent grounds a teenager; a club expels a member; a church excommunicates a parishioner; a friend rejects a companion; a school expels a student for cheating—all these are punishments in the sense that they intentionally inflict pain or other unpleasant consequences ("hard treatment") on the recipient.

However, none of these is criminal punishment. To qualify as **criminal punishment**, penalties have to meet four criteria:

**criminal punishment,** penalties that meet four criteria: (1) inflict pain or other unpleasant consequences; (2) prescribe a punishment in the same law that defines the crime; (3) administered intentionally; (4) administered by the state

1. They have to inflict pain or other unpleasant consequences.
2. They have to prescribe a punishment in the same law that defines the crime.
3. They have to be administered intentionally.
4. The state has to administer them.

The last three criteria don't need explanation; the first does. "Pain or other unpleasant consequences" is broad and vague. It doesn't tell us what kind of, or how much, pain. A violent mental patient confined indefinitely to a padded cell in a state security hospital suffers more pain than a person incarcerated for five days in the county jail for disorderly conduct. Nevertheless, only the jail sentence is criminal punishment. The difference lies in the purpose of the confinement. Hospitalization aims to treat and cure the mental patient; the pain is a necessary but unwanted side effect, not the reason for the confinement. On the other hand, the pain of confinement in the jail is inflicted intentionally to punish the inmate's disorderly conduct.

This distinction between criminal punishment and treatment is rarely clear-cut. For example, the government may sentence certain convicted criminals to confinement in maximum-security hospitals; it may sentence others to prison for "treatment" and "cure." Furthermore, pain and pleasure don't always distinguish punishment from treatment. Shock treatment and padded cells inflict more pain than confinement in some minimum-security federal prisons with their "country club" atmospheres. When measured by pain, those who receive it may well prefer punishment to treatment. Some critics maintain that the major shortcoming of treatment is that "helping" a patient can lead to excessive measures, as it sometimes has, in such examples as massive surgery, castration, and lobotomy (Hart 1958, 403–5).

LO 4

## THE PURPOSES OF CRIMINAL PUNISHMENT

Thinking about the purposes of criminal punishment has divided roughly into two schools that have battled for five centuries, maybe even for millennia. Those on the **retribution** side of the divide, retributionists, insist that offenders can only pay for their crimes by experiencing the actual physical and psychological pain ("hard treatment") of having punishment inflicted on them. In other words, punishment justifies itself. Those on the **prevention** side of the divide, utilitarians, insist with equal passion that the pain of punishment can—and should—be only a means to a greater good, usually the prevention or at least the reduction of future crime. Let's look at each of these schools.

**retribution,** inflicting on offenders physical and psychological pain ("hard treatment") so that they can pay for their crimes

**prevention,** punishment is only a means to a greater good, usually the prevention or at least the reduction of future crime

### *Retribution*

Striking out to hurt what hurts us is a basic human impulse. It's what makes us kick the table leg we stub our toe on. This impulse captures the idea of retribution, which appears in the texts of many religions. Here's the Old Testament version:

> Now a man, when he strikes down any human life, he is put to death, yes death! And a man, when he renders a defect in his fellow, as he has done, thus is to be done to him—break in place of break, eye in place of eye, tooth in place of tooth. (Fox 1995, translating Leviticus 24:17, 19–20)

Of course, we don't practice this extreme form of payback in the United States, except for murder—and, even for murder, the death penalty is rarely imposed (Chapter 2). In other cases, the Old Testament version of retribution is unacceptable to most retributionists; it's also highly unrealistic: raping a rapist? robbing a robber? burning down an arsonist's house?

Retribution looks back to past crimes and punishes individuals for committing them, because it's right to hurt them. According to the great Victorian English judge and historian of the criminal law Sir James F. Stephen (1883), the wicked deserve to suffer for their evil deeds:

> The infliction of punishment by law gives definite expression and a solemn ratification and justification to the hatred, which is excited by the commission of the offense. The

> criminal law thus proceeds upon the principle that it is morally right to hate criminals, and it confirms and justifies that sentiment by inflicting on criminals punishments, which express it. I think it highly desirable that criminals should be hated, that the punishments inflicted upon them should be so contrived as to give expression to that hatred. . . . The forms in which deliberate anger and righteous disapprobation are expressed, and the execution of criminal justice is the most emphatic of such forms. . . . (81–82)

Retributionists contend that punishment benefits not only society, as Stephen emphasized, but also criminals. Just as society feels satisfied by "paying back" criminals, giving criminals their "just deserts," offenders benefit by putting right their evil. Society pays back criminals by retaliation; criminals pay back society by accepting responsibility through punishment. Both paybacks are at the heart of retribution.

But retribution is right only if offenders choose between committing and not committing crimes. In other words, we can blame criminals only if they had these choices and made the wrong choice. So in the popular "Do the crime, do the time," what we really mean is, "You chose to do the crime, so you have to do the time." Their wrong choice makes them blameworthy. And their blameworthiness (the criminal law calls it their "culpability") makes them responsible (the criminal law calls it "liable"). So as culpable, responsible individuals, they have to suffer the consequences of their irresponsible behavior.

Retribution has several appealing qualities. It assumes free will, thereby enhancing individual autonomy. Individuals who have the power to determine their own destinies aren't at the mercy of forces they can't control. Retribution also seems to accord with human nature. Hating and hurting wrongdoers—especially murderers, rapists, robbers, and other violent criminals—appear to be natural impulses (Gaylin 1982; Wilson and Herrnstein 1985, ch. 19).

Retribution's ancient pedigree also has its appeal. From the Old Testament's philosophy of taking an eye for an eye, to the nineteenth-century Englishman's claim that it's right to hate and hurt criminals, to today's "three strikes and you're out" and "do the crime, do the time" sentences (Chapter 2), the desire for retribution has run strong and deep in both religion and criminal justice. Its sheer tenacity seems to validate retribution.

Retributionists, however, claim that retribution rests not simply on long use but also on two firm philosophical foundations, namely, culpability and justice. According to its proponents, retribution requires **culpability**. Only someone who intends to harm her victim deserves punishment; accidents don't qualify. So people who load, aim, and fire guns into their enemies' chests deserve punishment; hunters who fire at what they think is a deer and hit their companions who they should know are in the line of fire, don't. Civil law can deal with careless people; the criminal law ought to punish only people who harm their victims "on purpose."

**culpability,** only someone who intends to harm her victim deserves punishment; accidents don't qualify

Retributionists also claim that **justice** is the only proper measure of punishment. Justice is a philosophical concept whose application depends on culpability. Culpability depends on blame; we can punish only those whom we can blame; we can blame only those who freely choose, and intend, to harm their victims. Therefore, only those who deserve punishment can justly receive it; if they don't deserve it, it's unjust. Similarly, justice is the only criterion by which to determine the quality and quantity of punishment (see "Disproportionate Punishments," in Chapter 2).

**justice,** depends on culpability; only those who deserve punishment can justly receive it

Opponents find much to criticize in retribution. First, it's difficult to translate abstract justice into concrete penalties. What are a rapist's just deserts? Is castration for a convicted rapist justice? How many years in prison is a robbery worth? How much offender suffering will repay the pain of a maimed aggravated assault victim? Of course, it's impossible to match exactly the pain of punishment and the suffering caused by the crime.

Another criticism is that the urge to retaliate isn't part of human nature in a civilized society; it's the last remnant of barbarism. Retributionists can only *assume* that human nature cries out for vengeance; they can't *prove* it. So it's time for the law to reject retribution as a purpose for punishment.

Determinists, which include many criminologists, reject the free-will assumption underlying retribution (Mayer and Wheeler 1982; Wilson and Herrnstein 1985). They maintain that forces beyond human control determine individual behavior. Social scientists have shown the relationship between social conditions and crime. Psychiatrists point to subconscious forces beyond the conscious will's control that determine criminal conduct. A few biologists have linked violent crime to biological and biochemical abnormalities. Determinism undermines the theory of retribution because it rejects blame, and punishment without blame is unjust.

Probably the strongest argument against retribution is the vast number of crimes that don't require culpability to qualify for criminal punishment (Diamond 1996, 34). This includes almost all the crimes against public order and morals (mentioned earlier and discussed in Chapter 12). It includes some serious crimes, too—for example, statutory rape—where neither the consent of the victim nor an honest and reasonable mistake about the victim's age relieves statutory rapists from criminal liability (discussed in Chapter 10)—and several kinds of unintentional homicides (discussed in Chapters 4 and 9).

**general deterrence,** aims, by the threat of punishment, to prevent the general population who haven't committed crimes from doing so

**special deterrence,** aims, by punishing already convicted offenders, to prevent them from committing any more crimes in the future

**incapacitation,** prevents convicted criminals from committing future crimes by locking them up, or more rarely, by altering them surgically or executing them

**rehabilitation,** aims to prevent future crimes by changing individual offenders so they'll want to play by the rules and won't commit any more crimes in the future

**hedonism,** the natural law that human beings seek pleasure and avoid pain

**rationalism,** the natural law that individuals can act to maximize pleasure and minimize pain, permitting human beings to apply natural laws *mechanistically* (according to rules) instead of having to rely on the discretionary judgment of individual decision makers

**deterrence theory,** rational human beings won't commit crimes if they know that the pain of punishment outweighs the pleasure gained from committing crimes

### *Prevention*

Prevention looks forward and inflicts pain, not for its own sake, but to prevent (or at least reduce) future crimes. There are four kinds of prevention:

1. **General deterrence** aims, by the threat of punishment, to prevent the general population who haven't committed crimes from doing so.
2. **Special deterrence** aims, by punishing already convicted offenders, to prevent them from committing any more crimes in the future.
3. **Incapacitation** prevents convicted criminals from committing future crimes by locking them up, or more rarely, by altering them surgically or executing them.
4. **Rehabilitation** aims to prevent future crimes by changing individual offenders so they'll want to play by the rules and won't commit any more crimes in the future.

As you can see, all four forms of prevention inflict pain, not for its own sake, but to secure the higher good of preventing future crimes. Let's look at each of these forms of prevention.

**Deterrence** Jeremy Bentham, an eighteenth-century English law reformer, promoted deterrence. Bentham was part of the intellectual movement called "the Enlightenment." At the Enlightment's core was the notion that natural laws govern the physical universe and, by analogy, human society. One of these "laws," **hedonism**, is that human beings seek pleasure and avoid pain.

A related law, **rationalism**, states that individuals can, and ordinarily do, act to maximize pleasure and minimize pain. Rationalism permits human beings to apply natural laws *mechanistically* (according to rules) instead of having to rely on the discretionary judgment of individual decision makers.

These ideas, oversimplified here, led Bentham to formulate classical **deterrence theory**. According to the theory, rational human beings won't commit crimes if they know that the pain of punishment outweighs the pleasure gained from committing crimes.

Prospective criminals weigh the pleasure they hope to get from committing a crime now against the threat of pain they believe they'll get from future punishment. According to the natural law of hedonism, if prospective criminals fear future punishment

more than they derive pleasure from present crime, they won't commit crimes. In short, they're deterred.

Supporters of deterrence argue that the **principle of utility**—permitting only the minimum amount of pain necessary to prevent the crime—limits criminal punishment more than retribution does.

**principle of utility,** permits only the minimum amount of pain necessary to prevent the crime

English playwright George Bernard Shaw, a strong deterrence supporter, put it this way: "Vengeance is mine saith the Lord; which means it is not the Lord Chief Justice's" (Morris 1974). According to this argument, only God, the angels, or some other divine being can measure just deserts. Social scientists, on the other hand, can determine how much pain, or threat of pain, deters crime. With this knowledge, the state can scientifically inflict the minimum pain needed to produce the maximum crime reduction.

Deterrence supporters concede that there are impediments to putting deterrence into operation. The emotionalism surrounding punishment impairs objectivity, and often, prescribed penalties rest more on faith than evidence. For example, the economist Isaac Ehrlich's (1975) sophisticated econometric study showed that every execution under capital punishment laws may have saved seven or eight lives by deterring potential murderers. His finding sparked a controversy having little to do with the study's empirical validity. Instead, the arguments turned to ethics—whether killing anyone is right, no matter what social benefits it produces. During the controversy over the study, one thoughtful state legislator told me that he didn't "believe" the findings, but if they were true, then "we'll just have to deep-six the study."

Critics find several faults with deterrence theory and its application to criminal punishment. According to the critics, the rational, free-will individual that deterrence supporters assumes exists is as far from reality as the eighteenth-century world that spawned the idea. Complex forces within the human organism and in the external environment, both of which are beyond individual control, strongly influence behavior (Wilson and Herrnstein 1985).

Furthermore, critics maintain that individuals and their behavior are too unpredictable to reduce to a mechanistic formula. For some people, the existence of criminal law is enough to deter them from committing crimes; others require more. Who these others are and what the "more" consists of hasn't been sufficiently determined to base punishment on deterrence. Besides, severity isn't the only influence on the effectiveness of punishment. Certainty and speed may have greater deterrent effects than severity (Andenæs 1983, 2:593).

Also, threats don't affect all crimes or potential criminals equally. Crimes of passion, such as murder and rape, are probably little affected by threats; speeding, drunk driving, and corporate crime are probably greatly affected by threats. The leading deterrence theorist, Johannes Andenæs (1983), sums up the state of our knowledge about deterrence this way:

> There is a long way to go before research can provide quantitative forecasts. The long-term moral effects (both good and evil) of the criminal law and law enforcement are especially hard to isolate and quantify. Some categories of crime are so intimately related to specific social situations that generalizations of a quantitative kind are impossible. An inescapable fact is that research will always lag behind actual developments. When new forms of crime come into existence, such as hijacking of aircraft or terrorist acts against officers of the law, there cannot possibly be a body of research ready as a basis for the decisions that have to be taken. Common sense and trial by error have to give the answers. (2:596)

Finally, critics maintain that even if we could obtain empirical support for criminal punishment, deterrence is unjust because it punishes for example's sake. Supreme Court Justice Oliver Wendell Holmes (Howe 1953) offered this analogy: If I were having a

philosophical talk with a man I was going to have hanged (or electrocuted) I should say, "I don't doubt that your act was inevitable for you but to make it more avoidable by others we propose to sacrifice you to the common good. You may regard yourself as a soldier dying for your country if you like. But the law must keep its promises" (806).

Punishment shouldn't be a sacrifice to the common good; it's only just if it's administered for the redemption of particular individuals, say the retributionists. Punishment is personal and individual, not general and societal. Deterrence proponents respond that as long as offenders are in fact guilty, punishing them is personal; hence, it is just to use individual punishment for society's benefit.

**Incapacitation** *Incapacitation* restrains convicted offenders from committing further crimes. At the extreme, incapacitation includes mutilation—castration, amputation, and lobotomy—or even death in capital punishment. Incapacitation in most cases means imprisonment. Incapacitation works: dead people can't commit crimes, and prisoners don't commit them—at least not outside prison walls. Incapacitation, then, has a lot to offer a society determined to repress crime. According to criminologist James Q. Wilson (1975):

> The chances of a persistent robber or burglar living out his life, or even going a year with no arrest, are quite small. Yet a large proportion of repeat offenders suffer little or no loss of freedom. Whether or not one believes that such penalties, if inflicted, would act as a deterrent, it is obvious that they could serve to incapacitate these offenders and, thus, for the period of the incapacitation, prevent them from committing additional crimes. (209)

Like deterrence and retribution, incapacitation has its share of critics. They argue that incapacitation merely shifts criminality from outside prisons to inside prisons. Sex offenders and other violent criminals can and do still find victims among other prisoners; property offenders trade contraband and other smuggled items. As you might imagine, this criticism finds little sympathy (at least among many of my students, who often answer this criticism with an emphatic, "Better them than me"). Of course, because almost all prisoners "come home," their incapacitation is always temporary.

**Rehabilitation** In his widely and rightly acclaimed book *The Limits of the Criminal Sanction*, Herbert Packer (1968) succinctly summarized the aims of rehabilitation: "The most immediately appealing justification for punishment is the claim that it may be used to prevent crimes by so changing the personality of the offender that he will conform to the dictates of law; in a word, by reforming him" (50).

**medical model of criminal law,** crime is a "disease," and criminals are "sick" in need of "treatment" and "cure

Rehabilitation borrows from the **"medical model" of criminal law**. In this model, crime is a "disease," and criminals are "sick" in need of "treatment" and "cure." According to rehabilitationists, the purpose of punishment is to "cure" criminal patients by "treatment." The length of imprisonment depends on how long it takes to cure the patient. Supporters contend that treating offenders is more humane than punishing them.

**determinism,** forces beyond offenders' control cause them to commit crimes

Two assumptions underlie rehabilitation theory. The first is **determinism**; that is, forces beyond offenders' control cause them to commit crimes. Because offenders don't choose to commit crimes, we can't blame them for committing them.

Second, therapy by experts can change offenders (not just their behavior) so that they won't want to commit any more crimes. After rehabilitation, former criminals will control their own destinies. To this extent, rehabilitationists adopt the idea of free will and its consequences: criminals can choose to change their life habits; so society can blame and punish them.

The view that criminals are sick has profoundly affected criminal law—and generated acrimonious debate. The reason isn't because reform and rehabilitation

are new ideas; quite the contrary is true. Victorian Sir Francis Palgrave summed up a seven-hundred-year-old attitude when he stated the medieval church's position on punishment: it was not to be "thundered in vengeance for the satisfaction of the state, but imposed for the good of the offender; in order to afford the means of amendment and to lead the transgressor to repentance, and to mercy." Sixteenth-century Elizabethan pardon statutes were laced with the language of repentance and reform; the queen hoped to achieve a reduction in crime by mercy rather than by vengeance. Even Jeremy Bentham, most closely associated with deterrence, claimed that punishment would "contribute to the reformation of the offender, not only through fear of being punished again, but by a change in his character and habits" (Samaha 1978, 763).

Despite this long history, rehabilitation has suffered serious attacks. First, and most fundamental, critics maintain that rehabilitation is based on false, or at least unproven, assumptions. The causes of crime are so complex, and the wellsprings of human behavior as yet so undetermined, that sound policy can't depend on treatment. Second, it makes no sense to brand everyone who violates the criminal law as sick and needing treatment (Schwartz 1983, 1364–73).

Third, critics call rehabilitation inhumane because the cure justifies administering large doses of pain. British literary critic C. S. Lewis (1953) argued:

> My contention is that good men (not bad men) consistently acting upon that position would act as cruelly and unjustly as the greatest tyrants. They might in some respects act even worse. Of all tyrannies a tyranny sincerely exercised for the good of its victims may be the most oppressive. It may be better to live under robber barons than under omnipotent moral busybodies.
>
> The robber baron's cruelty may sometimes sleep, his cupidity may at some point be satiated; but those who torment us for our own good, will torment us without end for they do so with the approval of their own conscience. They may be more likely to go to Heaven yet at the same time likelier to make a Hell of earth.
>
> Their very kindness stings with intolerable insult. To be "cured" against one's will and cured of states which we may not regard as disease is to be put on a level with those who have not yet reached the age of reason or those who never will; to be classed with infants, imbeciles, and domestic animals. But to be punished, however severely, because we have deserved it, because we "ought to have known better," is to be treated as a human person made in God's image. (224)

## TRENDS IN PUNISHMENT

Historically, societies have justified punishment on the grounds of retribution, deterrence, incapacitation, and rehabilitation. But the weight given to each has shifted over the centuries. Retribution and rehabilitation, for example, run deep in English criminal law from at least the year 1200. The church's emphasis on atoning for sins and rehabilitating sinners affected criminal law variously. Sometimes, the aims of punishment and reformation conflict in practice.

In Elizabethan England, for example, the letter of the law was retributive: the penalty for all major crimes was death. Estimates show that in practice, however, most accused persons never suffered this extreme penalty. Although some escaped death because they were innocent, many were set free because of their chances for rehabilitation. The law's technicalities, for example, made death a virtually impossible penalty for first-time property offenders. In addition, the queen's general pardon, issued almost annually, gave blanket clemency in the hope that criminals, by this act of mercy, would reform their erring ways (Samaha 1974, 1978).

Gradually, retribution came to dominate penal policy, until the eighteenth century, when deterrence and incapacitation were introduced to replace what contemporary humanitarian reformers considered ineffective, brutal, and barbaric punishment in the name of retribution. By 1900, humanitarian reformers had concluded that deterrence was neither effective nor humane. Rehabilitation replaced deterrence as the aim of criminal sanctions and remained the dominant form of criminal punishment until the 1960s. Most states enacted **indeterminate sentencing laws** that made prison release dependent on the rehabilitation of individual prisoners.

**indeterminate sentencing laws,** prison release depends on the rehabilitation of individual prisoners

Most prisons created treatment programs intended to reform criminals so they could become law-abiding citizens. Nevertheless, considerable evidence indicates that rehabilitation never really won the hearts of most criminal justice professionals, despite their strong public rhetoric to the contrary (Rothman 1980).

In the early 1970s, there was little convincing evidence to show that rehabilitation programs reformed offenders. The "nothing works" theme dominated reform discussions, prompted by a highly touted, widely publicized, and largely negative study evaluating the effectiveness of treatment programs (Martinson 1974). At the same time that academics and policy makers were becoming disillusioned with rehabilitation, public opinion was hardening into demands for severe penalties in the face of steeply rising crime rates. The time was clearly ripe for retribution to return to the fore as a dominant aim of punishment.

In 1976, California, a rehabilitation pioneer in the early 1900s, reflected this shift in attitude. In its Uniform Determinate Sentencing Law, the California legislature abolished the indeterminate sentence, stating boldly that "the purpose of imprisonment is punishment," not treatment or rehabilitation. Called "just deserts," retribution was touted as "right" by conservatives who believed in punishment's morality and as "humane" by liberals convinced that rehabilitation was cruel and excessive. Public opinion supported it, largely on the grounds that criminals deserve to be punished (Feeley 1983, 139). The new philosophy (actually the return to an old philosophy) replaced the indeterminate sentence with **fixed (determinate) sentences**, in which the sentence depends on the criminal harm suffered by the victim, not the rehabilitation of the offender.

**fixed (determinate) sentences,** sentence depends on the criminal harm suffered by the victim, not the rehabilitation of the offender

Since the mid-1980s, reformers have championed retribution and incapacitation as the primary purpose of criminal punishments. The Model Penal Code (p. 19) clung to prevention, namely, in the form of rehabilitation from its first version in 1961, when rehabilitation dominated penal policy. After thoroughly reviewing current research and debate, its reporters decided to retain rehabilitation but to replace it as the primary form of punishment with incapacitation and deterrence (ALI 2007). According to the new provisions, the purpose of sentencing is retribution—namely, to impose sentences "within a range of severity proportionate to the gravity of offenses, the harms done to crime victims, and the blameworthiness of offenders. . . ."

And only "when reasonably feasible, to achieve offender rehabilitation, general deterrence, incapacitation of dangerous offenders, restoration of crime victims and communities, and reintegration of offenders into the law-abiding community, provided these goals are pursued within the boundaries of proportionality" . . . (1).

Before the government can punish criminal behavior—however it's defined and classified and whatever source it's derived from—the government has to prove that the defendant committed the crime. Let's turn now to some of the basics of proving defendants are guilty.

**presumption of innocence,** which means that the prosecution has the burden of proof when it comes to proving the criminal act and intent

**burden of proof,** to have to prove beyond a reasonable doubt "every fact necessary to constitute the crime charged"

## THE PRESUMPTION OF INNOCENCE AND PROVING CRIMINAL LIABILITY

LO 5

Under our legal system, criminal defendants enjoy the **presumption of innocence**, which means that the prosecution has the burden of proof when it comes to proving the criminal act and intent. The **burden of proof** means the government has to prove beyond a

reasonable doubt, "every fact necessary to constitute the crime charged" (*In re Winship* 1970, 363).

**Criminal conduct** is defined as voluntary criminal acts triggered by criminal intent. As you learned earlier in the chapter (p. 5), proving criminal conduct is *necessary* to impose criminal liability and punishment. But it's not enough. The criminal conduct must be without justification or excuse. Here, the burden of proof can shift from the prosecution to the defense. Let's look at the burden of proof of criminal conduct and the burden of proof in justification and excuse defenses.

**criminal conduct,** voluntary criminal acts triggered by criminal intent

## THE BURDEN OF PROOF OF CRIMINAL CONDUCT

LO 5

According to the U.S. Supreme Court (*In re Winship* 1970), the government has the burden of proof of criminal conduct. **Proof beyond a reasonable doubt** is the highest standard of proof known to the law. Notice that highest doesn't mean beyond all doubt or to the level of absolute certainty. "A **reasonable doubt** is an actual and substantial doubt, [not] a doubt arising from mere possibility, from bare imagination, or from fanciful conjecture" (*Victor v. Nebraska* 1994, 20).

**proof beyond a reasonable doubt,** evidence that removes an actual and substantial doubt about the defendant's guilt

**reasonable doubt,** a real and substantial uncertainty about guilt, an uncertainty that would cause a reasonable person to hesitate before acting on an important matter

The great Victorian Massachusetts judge Lemuel Shaw (1850) wrote this about trying to define reasonable doubt:

> Reasonable doubt is a term often used, probably pretty well understood, but not easily defined. It is not a mere possible doubt; because every thing relating to human affairs . . . is open to some possible or imaginary doubt. It is that state of the case, which after all the comparison and consideration of the evidence, leaves the minds of the jury in that condition that they cannot say they feel an abiding conviction, to a moral certainty, of the truth of the charge. (320)

Judge Shaw refers to proving guilt to juries, whom we usually associate with trials. But not all trials are jury trials. In **bench trials**, the accused give up their right to a jury trial and are tried by judges who decide whether prosecutors have proved their guilt.

**bench trials,** cases where the accused give up their right to a jury trial and are tried by judges who decide whether prosecutors have proved their guilt

We need to clear up an often-misunderstood and wrongly used term related to the proof of criminal behavior: **corpus delicti** (Latin for "body of the crime"). The misunderstanding arises from associating the term only with the body of the victim in homicides. However, it also properly applies to the elements of criminal conduct (for example, stealing someone's property in theft; Chapters 3 and 4) and bad result crimes (for example, criminal homicide; Chapters 9–13).

**corpus delicti,** Latin for "body of the crime," it refers to the body of the victim in homicides and to the elements of the crime in other offenses

## PROVING THE DEFENSES OF JUSTIFICATION AND EXCUSE

The defenses of justification (Chapter 5) and of excuse (Chapter 6) are called **affirmative defenses** because defendants have to present evidence. Affirmative defenses operate like this: Defendants have to "start matters off by putting in some evidence in support" of their justification or excuse (LaFave and Scott 1986).

**affirmative defenses,** defendants have to "start matters off by putting in some evidence in support" of their defenses of justification and excuse

We call this the **burden of production**. Why put this burden on defendants? Because "We can assume that those who commit crimes are sane, sober, conscious, and acting freely. It makes sense, therefore, to make defendants responsible for injecting these extraordinary circumstances into the proceedings" (52).

**burden of production,** to make defendants responsible for presenting evidence in their own justification or excuse defense

The amount of evidence required "is not great; some credible evidence" is enough. In some jurisdictions, if defendants meet the burden of production, they also have the **burden of persuasion** (see p. 32), meaning they have to prove their defenses by a **preponderance of the evidence** (see p. 32), defined as more than 50 percent. In other jurisdictions, once defendants meet the burden of production, the burden shifts to the government to prove defendants weren't justified or excused (Loewy 1987, 192–204).

FIGURE 1.2 A LAW ENFORCEMENT REPORT FORM

**Plymouth Police Department**
3400 Plymouth Blvd. • Plumouth, MN 55447
(763) 509-5160
fax: (763) 509-5167

PLYMOUTH POLICE MINNESOTA

| No. | Type | MOC |
|---|---|---|
| | | |
| | | |
| | | |
| | | |
| | | |

Reported: Date; call; asn; arr; clr
Location
Occurred: date; time; SAA
Badge no.: report; assist

**Person 1** ☐ Complainant ☐ Victim ☐ Witness ☐ Mentioned

| Name (last, first, middle) | DOB | ☐ M ☐ F Sex |
|---|---|---|
| Address | home phone | work phone |
| City, state, zip | school | misc/insurance |
| Driver's license | ☐ White ☐ African Am ☐ Am Indian ☐ Hispanic ☐ Asian race ☐ Other | |
| misc/parents/work | | |

**Person 2** ☐ Complainant ☐ Victim ☐ Witness ☐ Mentioned

| Name (last, first, middle) | DOB | ☐ M ☐ F Sex |
|---|---|---|
| address | home phone | work phone |
| city, state, zip | school | misc/insurance |
| driver's license | ☐ White ☐ African Am ☐ Am Indian ☐ Hispanic ☐ Asian race ☐ Other | |
| misc/parents/work | | |

☐ **Additional names/vehicle supplement attached**

**Patrol Investigation**
☐ solvability factors ☐ written statement ☐ video tape ☐ photos taken ☐ prints lifted ☐ audio tape (statement or evidence) ☐ forced entry ☐ attached garage ☐ domestic/vic info ☐ none
**victim will prosecute** ☐ yes ☐ no **SFD** ☐

**Narrative**

☐ Continued

**Disposition** ☐ pending ☐ assist and advised ☐ unfounded ☐ clear arrest ☐ clear exceptionally

| Patrol supervisor | Inv Supervisor | Inv assigned | Entry |
|---|---|---|---|
| | | | |

Source: Hess, Kären M. and Orthmann, Christine Hess. "Police Report." In *Criminal Investigation,* 9th edition, 76–77. Delmar: Cengage Learning, 2010.

**burden of persuasion,** defendants have to prove their justification or excuse defenses by a preponderance of the evidence

**preponderance of the evidence,** more than 50 percent of the evidence proves justification or excuse

All that you've learned up to now, valuable as it is, neglects an entire dimension to criminal law and punishment—informal discretionary decision making hidden from view. Let's look briefly at this enormously important dimension.

## DISCRETIONARY DECISION MAKING

LO 6

Most of what you'll learn in this book focuses on decisions made according to formal law—namely, rules written and published in the Constitution, laws, judicial opinions, and other written sources. But you can't really understand what's happening in your journey through criminal law and punishment without understanding something about decision making that's not visible in the written sources. This invisible **informal discretionary decision making**—consisting of judgments made by professionals, based on unwritten rules, their training, and their experience—is how the process works on a day-to-day basis.

**informal discretionary decision making,** the invisible day-to-day process, in which law enforcement professionals make judgments based on unwritten rules, their training, and their experience

Think of each step in the criminal process as a decision point. Each step presents a criminal justice professional with the opportunity to decide whether or not to start, continue, or end the criminal process. The police can investigate suspects, or not, and arrest them, or not—initiating the formal criminal process, or stopping it. Prosecutors can charge suspects and continue the criminal process, divert suspects to some social service agency, or take no further action—effectively terminating the criminal process. Defendants can plead guilty (usually on their lawyers' advice) and avoid trial. Judges can suspend sentences or sentence convicted offenders to the maximum allowable penalty—hence, either minimizing or maximizing the punishment the criminal law prescribes.

Justice, fairness, and predictability all require the certainty and the protection against abuses provided by written rules. These same goals also require discretion to soften the rigidity of written rules. The tension between formal law and informal discretion—a recurring theme in criminal procedure—is as old as law; arguments raged over it in Western civilization as early as the Middle Ages.

One example of the need for discretionary decision making comes up when laws are applied to behavior that "technically" violates a criminal statute that the legislature never really meant to be enforced. This happens because it's impossible for legislators to predict all the ramifications of the statutes they enact. For example, it's a misdemeanor to drink in public parks in many cities, including Minneapolis. Yet, when a gourmet group had a brunch in a city park, because they thought the park had just the right ambience in which to enjoy their salmon mousse and imported French white wine, not only did the police not arrest the group for drinking in the park, but the city's leading newspaper wrote it up as a perfectly respectable social event (see Figure 1.2 on p. 32).

A young public defender wasn't pleased with the nonarrest. He pointed out that the police had arrested, and the prosecutor was at that moment prepared to prosecute, a Native American caught washing down a tuna fish sandwich with cheap red wine in another Minneapolis park. The public defender—a bit of a wag—noted that both the gourmet club and the Native American were consuming items from the same food groups.

This incident displays both the strengths and weaknesses of discretion. The legislature obviously didn't intend the statute to cover drinking of the type the gourmet club engaged in; arresting them would have been foolish. On the other hand, arresting and prosecuting the Native American might well have been discriminatory, a wholly unintended and unacceptable result of law enforcement that is discretionary and selective.

## THE TEXT-CASE METHOD

LO 7

Now that you've got the big picture of criminal liability and punishment, the overarching principles that apply to all of criminal law, the sources of criminal law in a federal system, proving criminal conduct and the justifications and excuses to criminal liability, and the