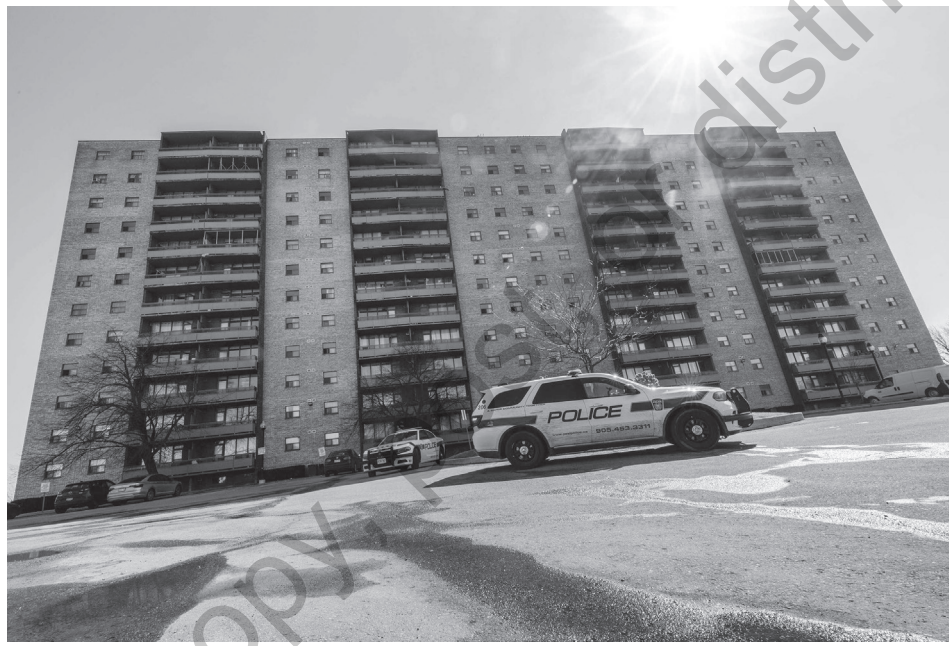
# Chapter 1

# Defining, Classifying, and Measuring Crime

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## Learning Objectives

**1.1** Explain why depictions of crime in the media often misrepresent reality.

**1.2** Examine the symbolic power of labeling someone a criminal.

**1.3** Identify different approaches to defining crime.

**1.4** List different criteria for classifying crime.

**1.5** Compare and contrast different ways of measuring crime.

**1.6** Describe the political incentives for manipulating crime data.

In this chapter, we will be discussing "crime." The word is between quotation marks here, because one of the things we need to keep in mind is that the concept of crime is not a very clear or precise one. Crime is not a static idea, it is not unchanging, and its meaning is certainly not uncontroversial. Moreover, our conception of "the criminal" is often shaped by popular stories and myths—not by reality. When you imagine a criminal, you probably think of a mugger, rapist, bank robber, and so on—perhaps a guy in a ski mask with a gun lurking in a dark alleyway. You probably don't think of the guy from your dorm who smokes pot or your friend who buys beer for the college party where some of the drinkers are underage. The mattresses that we sleep on come with a tag that warns us of criminal penalties if they are removed, but you probably don't consider yourself a criminal when you tear it off. Until a few years ago, people in certain states were criminals if they engaged in gay sex, and it was a crime to cheat on your husband or wife.

In some ways, this chapter will be the most philosophical part of the book, as we explore various ways to define, classify, and measure crime. In the first part, we will distinguish between the way that the media talks about crime in fictional dramas and in the news from the reality of crime. You've probably seen crime dramas or listened to true crime podcasts, which can give the public a very distorted idea of crime. Then we will examine different approaches to analyzing the concept of crime itself. They are all "definitions" of crime, but unlike definitions found in a dictionary, each provides a different framework for thinking about crime as a subject of study, essentially treating crime in a very different way. We will look at *legal, moral*, and *sociological* approaches to conceptualizing crime. Each of these takes on crime will have its own strengths and weaknesses, and none of them will be "the right one" in a definitive sense. In some contexts, a moral approach will look stupid, while in other contexts, it will make a great deal of sense. Sociological definitions of crime are great if you're a practicing sociologist, but if you're a lawyer, you probably don't care what Durkheim said about crime. There is no need to come to a final answer about the best way to think about crime, because it is such a complex phenomenon that it can be helpful to use a variety of lenses to examine it. Once we have set out these different ways to understand our subject, we will then turn to some of the different ways that we can classify various types of criminal activity.

## The Media and Crime

The media, be it the news, television drama, or social media, feeds us a steady diet of crime, and this is where most of us learn about the subject. Every day, local and national news programs feature stories about criminals, accompanied by grainy security cam footage, shaky phone videos, or courtroom sketches. These programs are then followed by either a crime-related TV drama or a documentary on crime (*Criminal Minds, America's Most Wanted, To Catch a Predator, Law &*

*Order, Bones*, etc.) showing police officers chasing crooks through crowded city streets or slamming a "perp" onto their car hood as they read him his rights and declare that he's going behind bars "for a long, long time." Fans flock to true crime podcasts and documentaries, playing amateur sleuths and developing theories about who murdered the victim. Crime is almost always on the minds of the public in one way or another, and it's probably safe to say that a large number of Americans are obsessed with the subject.

However, television and the news media are usually only invested in a certain type of crime: crimes that will attract viewers and will get them to sit through their advertisements. Ordinary everyday crime and crime that doesn't have an interesting "hook" are largely ignored by the press. Often, this hook is violence or sex in one form or another—"if it bleeds, it leads," as the journalistic cliché goes. The bigger reality of crime is often ignored in favor of the gory, the erotic, or otherwise sensational crimes. This can lead the uninformed viewer to develop a skewed perspective of the nature and reality of crime in America today, which can in turn lead many people to fear things that they need not fear and to overlook a lot of criminal activities that produce very real social harm.

To use one example, every year, thousands of people go missing, and news programs frequently feature stories on these unfortunate people. But not every person who disappears gets attention, and it is telling who the media chooses to focus on. Young, white girls often gather far more media attention than any other type of person, and noticeably, victims who are part of racial or ethnic minority groups are frequently ignored. A pretty blonde girl is sure to get attention, while a working-class Black woman or a Native American living on a remote reservation is likely to be overlooked. People like Natalee Holloway are featured for weeks on the news, while others are completely ignored. Movies like *Taken*, about a white American girl snatched from the streets and sold into slavery, framed how Americans think about human trafficking for years—ignoring the fact that this almost never happens. Observers began to label the phenomenon as *missing white woman syndrome* (Liebler, 2010). If you got all your news from the TV, you'd sincerely (and falsely) believe that kidnapping was common and that pretty young white girls were the primary victims of such crimes.

Another example of media misrepresenting crime is the public obsession with serial killers. Though we have no real hard numbers on the subject, there have been very few genuine serial killers in history, and dying at the hands of such a killer is very unlikely. According to FBI statistics, about 150 people are killed a year by serial killers, half the number killed by slipping in the bathtub. (Serial killers are simply people who have killed more than one person over an extended period; they need not be Hannibal Lecter–type slashers.) But if you watched news shows as well as crime dramas, you would believe that America was packed with brutal but colorful murderers who stalk and kill at random. Each year, Hollywood churns out dramas about vicious serial killers either in the horror genre (*Halloween, Saw*, etc.) or in the crime genre (*Dexter, The Silence of the Lambs*). The public is fascinated with people like John Wayne Gacy, the Zodiac Killer, and Jack the Ripper, who are regularly the subjects of documentaries, books, and movies, even though these figures register barely a ripple in the real world of homicide. You are significantly more likely to be killed by a family member than a serial killer.

The media will also often ignore crimes that are either too technical or too complex to make a good story. White-collar crimes like insider trading or securities fraud can cause massive

damage, robbing people of their savings and their homes, leaving innocent people destitute and their lives ruined. Environmental crimes like illegal dumping of dangerous materials can kill thousands. The 1984 Bhopal gas leak killed over 15,000 people in India. The problem with these crimes is that they often don't make good television: We get lost in the details, and the technical aspects of business or environmental law are confusing and often boring. They don't come wrapped up in a tidy story about good and evil and often take years to unfold. This means that few people know of Jeffrey Skilling (the president of Enron, a bankrupt energy corporation, who was convicted in a massive fraud and insider trading case) or Bernard Madoff (who was convicted of running a massive scam known as a *Ponzi scheme* that cost investors billions), while famous killers like Scott Peterson and O. J. Simpson are national celebrities. White-collar crime is pervasive and destructive but largely ignored by both the news and by television drama, unless it can be tied into something juicier.

Other times, the media will be briefly consumed by one genre of crime that will seem to sweep the nation. Out of nowhere, crimes that nobody had ever heard of seem to appear in epidemic proportions. In the 1980s, there was a great fear that heavy metal music and role-playing games were linked to crimes like kidnapping and murder and that they encouraged the practice of Satanism, even though there was scant evidence that the millions who listened to heavy metal were more prone to crime than anybody else. Similarly, youth crime has been blown out of proportion by a society that is understandably afraid of crime in schools; extreme cases like the shooting at Columbine High School haunted everybody's views about what high school students were like (again, despite the fact that high school is not a very violent place, particularly in affluent suburbs). In each case, an understandable fear, sometimes prompted by one or two extreme cases, was taken by the news media and blown way out of proportion, creating widespread public fear. This can create real problems as local criminal justice officials overreact to public fears—in the early 1990s, three young men were falsely convicted of multiple homicides in Arkansas, the so-called "West Memphis Three," and were convicted in part because they were goth kids who were accused of engaging in Satanism. (They were eventually released after serving 18 years in prison.) In the face of a frightened public, politicians and policymakers are obliged to respond with new policies that are meant to placate the public.

Sociologists call these phenomena *moral panics*. A moral panic is a public response to a perceived problem that is way out of proportion to the problem's reality. Whether it is freeway shootings, Satanism, child abduction, or teen sex, public fear and outrage is fostered by a media seeking to give the public what they want. Even crimes like terrorism can be seen as a moral panic, as the number of Americans killed by terrorists is miniscule compared to the number killed by other types of homicide. "Experts" appear on talk shows, lending these fears a veneer of legitimacy, and a few, admittedly awful cases become focal points for public discussion. Few of these experts, however, point out the boring reality that very few kids are abducted, teen sex rates are lower than they were a generation ago, and Satanic cults that conduct human sacrifices are largely a myth. As we will see, the reality of crime is a complex thing, and its causes are a continuing point of debate, but chasing the latest moral panic is not an effective way to prevent crime, much less study it.

The point of all of this is to say that the public's understanding of crime is shaped by a media that has no interest in portraying crime as it really is. Instead, it is seeking to attract viewers or readers to generate clicks and sell advertising space. The portrayal of crime on television and in movies usually says more about our society, the things that we care about as a people, than it does about crime itself. So why is the public so fascinated with certain types of crime, and why does it ignore other, more damaging sorts of crimes, the crimes that are far more likely to affect our lives? Our fear of losing control of our children in a world where they are increasingly targeted by advertisers turns into a fear that our children are being led to a life of crime or may be a victim of a child predator. Our sometimes strict understanding of what a "good girl" ought to do turns into an obsession with women who kill or teens who have sex. Our anxiety about our inability to be completely secure in our lives turns into an obsession with serial killers who could pop up out of nowhere. Public fear of crime says more about the public than it does about crime.

Many scholars have examined how race, violence, sex, and other issues have been used by the media to boost its ratings and how a prolonged exposure to these stories can affect a viewer's perception of crime and justice. Other scholars have examined how a single newspaper will depict similar crimes in very different ways depending on factors such as the race of the victim or the race of the person who committed an offense. Stories are not simply "there" to be reported in a neutral and objective way, but rather, the reporters frame the story in a particular way, picking out certain facts as important while downplaying others. Politicians have done the same. President Donald Trump frequently portrays immigrants as criminals, even though they commit crime at a much lower rate than American citizens (National Institute of Justice, n.d.). These choices are often the result of unconscious assumptions and prejudices on the part of the reporters, and in turn, they are seen by an audience that similarly has their own set of unconscious prejudices. Thus, the media's portrayal of crime is not simply an effort to get viewers but is also the result of a great deal of filtering and shaping during the reporting process. This means that we should be careful about separating the sensationalism about crime reporting from the realities of crime in modern America.

## The Rhetoric of "Crime"

While we all can easily conjure up an image of what we think a criminal looks like without much effort, the word itself is not as simple as it may first appear and can mean a lot of different things in different contexts. "Criminal" is *not* necessarily synonymous with a lawbreaker or with a "bad guy." People like Martin Luther King Jr. and Mohandas Gandhi were arrested and prosecuted as criminals for violating unjust laws, and few people would describe them as criminals today. Other people have done horrendous acts that were completely legal when they did them. What is a crime and what is a criminal is in many ways very complicated, both legally and socially.

It is helpful to remember that the terms *crime* and *criminal* are not merely descriptive but are also *normative*. Calling an action a crime or calling a person a criminal does not simply describe what she is or the act she does; it is also making a judgment about the act or the person.[1] We are not just describing them; we are also saying that they are bad and deserve to be condemned

by decent people. In this way, *crime* and *criminal* are a lot like the term *evil* or *ugly:* When you use these words to describe something, you're also rendering a verdict on it and casting it in a negative light. When you call somebody a criminal, you are saying something derogatory about her—that she is a lesser human being and therefore shouldn't be treated like other, law-abiding people.

It is because of this normative quality that the term *criminal* has so much power. It draws a moral line and puts a person, group, idea, or party on the wrong side of that line. This is why many different political groups try to use these terms to their advantage in public debate. Antiabortion activists want to label doctors who provide abortions as criminals, both liberal and conservative politicians paint the other side as criminal, and animal rights activists claim that "meat is murder." Each of these groups is using the language of crime rhetorically to try to get people to think about abortion providers, the president, or carnivores in the way that they think about murderers, rapists, and serial killers. Similarly, the term *terrorist* is often used to paint those we disagree with as dangerous and not fit for society. They are using the terms of crime and justice to win a war of ideas, usually without having to prove that their own ideas are the best ones. (The term *rhetoric* refers to the skillful manipulation of language to convince another to see the world the way you do.)

Of course, the rhetoric of crime is not just for antiabortion protestors or political extremists. It is used by and against all kinds of people trying to push all sorts of political agendas. Sometimes the language has been used so effectively that public opinion has changed, and acts that were once perfectly legal became criminal. Similarly, acts that were once criminal became legitimate because of similar rhetorical techniques—people convinced others that acts that were considered criminal weren't really so bad. Some things we are glad to see criminalized have only been criminalized because groups were able to convince others that they should be considered a crime. Dogfighting, for example, was outlawed because people were convinced that cruelty toward animals should be a crime, even though millions of animals are raised in miserable conditions and killed for food every day, and dogfighting was once a cherished tradition in the West (Villavicencio, 2007). Same-sex relationships were once considered criminal (and in some cases punishable by death) but are now considered socially acceptable by much of American society. Marijuana use is on a similar trajectory; it became a normal activity and has slowly become legalized. Crime shifts over time as different groups have changed public opinion about what behaviors we should accept and what we should condemn.

All of this is to say that we should use a critical eye when looking at the concept of crime. It's not a neutral term and means different things in different contexts, and often people who invoke the term are often promoting a specific agenda. *Crime* is what linguists call a *contested concept*—it is never a simple matter to determine what is or what should be a crime and who should be considered a criminal. Often, uses of this term are almost always open to debate. A lot of people who use the term are pretending that they're describing an act as a crime when really what they're saying is that these acts are bad and should be punished. They are further saying that the government should intervene to forcibly prevent people from engaging in these acts. Therefore, we need to carefully examine our ideas about *crimes* and *criminals* before reaching any conclusion about the best way to define them.

# Defining Crime

## Legal Definitions of Crime

The simplest and most obvious approach to defining a crime is to say that a crime is a violation of the law. These laws are passed by governments and set out on paper, and all we need to do is consult them to figure out which acts are criminal and which aren't. After all, police officers won't arrest someone for doing something that doesn't violate the law (in theory), and (again, in theory) they will probably arrest you if you do something that violates the law. Thus, a crime is any act that violates criminal law, and individuals who commit such acts are criminals. Enough said.

A crime isn't the only type of lawbreaking that can occur. Crimes can be distinguished from *torts*. A crime is a *public wrong*; it is a harm to the general community. A tort is a private wrong—an act that hurts only a single person. For example, if a person driving a car makes an error while driving and as a result hits a pedestrian and hurts her, the driver has committed a tort. The pedestrian can sue the driver for compensation, and if she wins, the driver must pay her. However, if that same driver was driving under the influence of alcohol or driving recklessly, she has committed a crime, and the government can step in and punish her even if the pedestrian doesn't care. An act can be both a crime and a tort. Take the famous example of O. J. Simpson's killing of his estranged wife Nicole Brown Simpson—he was acquitted of the crime of murder in 1994, but Brown Simpson's family sued O. J. for causing her death (a tort) and won a $33 million lawsuit.

Of course, there's obviously something compelling about this approach, and if you asked somebody who hadn't thought very carefully about it, she would probably give this as her answer. It makes sense: In many ways, the law is a useful guide for understanding the contours of the criminal justice system as a whole. The **criminal justice system** is the connected set of institutions that respond to crime, including criminal law, the police, the courts, and the correctional system. Usually, a person cannot be arrested unless she violates a criminal law, so an illegal act is usually an individual's entry point into the criminal justice system. The courts apply criminal law when they determine whether a person is guilty, and the law usually spells out the appropriate punishment for an individual. This means, obviously, that the law has a great deal to say about crime and criminal justice more generally.

However, there are some important problems with such a narrow way of understanding crime, and there are a lot of important aspects of crime that are overlooked if we focus solely on people who break the law. For example, the odds are that you have *never* actually looked at your state's criminal code or the federal criminal code. You may not even know what these are, much less where to find them. We all know that murder and robbery are crimes, but could you give the definition of murder in your state or explain the difference between murder in the first degree, murder in the second degree, and manslaughter in your state? That, of course, is assuming that your state makes these distinctions, as not every state has different degrees of murder in its criminal code. While we may think that we know what the law says, legal definitions ("constructions" to be more precise) of individual crimes are often strange—they are the products of legislative processes that can be confusing to somebody who doesn't closely follow them.

In addition to the fact that we usually don't know our local criminal laws, the law varies dramatically from state to state. There are 50 different criminal codes in different states, along with a federal code, and each state's constructions of crime are reflections of local politics, local history, and local values. Some acts might be a crime in Virginia but not in California (such as the use of marijuana—which is still a federal crime but is legal in several states). The same crime might have very different definitions in different states. This means that, technically speaking, one could commit the same act in one state and it would be a crime, and yet it would be perfectly legal in another. Some laws are "on the books" but are unenforced, such as the Comstock Law passed in 1873, which makes it a crime to mail pornographic material or material that could be used in an abortion. While these issues don't disqualify this legal definition of crime, it does show that it is limited: It is difficult to study crime across the various legal jurisdictions that make up the United States.

Finally, just because a person violated a criminal law doesn't mean that the state will enforce that law. The police, prosecutors, and judges may choose to ignore lawbreaking behavior for a host of reasons. The offense might be too small to be worth their time, the police might have other priorities, or the person who committed an offense may not be somebody who criminal justice professionals are interested in pursuing. This means that in some cases, determining whether an act violated the law is not a good guide to determining whether a person will be arrested or punished. Sometimes, the police will ignore your conduct or let you off with a warning. Other times, the officer may choose to intervene in behavior that is not really criminal. For example, being a nuisance may not always be a crime, but the police will intervene if they wish. The police don't strictly enforce many laws—they are just too busy to do that. Rather they will usually enforce laws only when the laws that are broken are serious ones (robbery, murder) or when they have a good reason to want to enforce the law.

As was already mentioned, there are many cases where there is a big difference between our beliefs about crime and what the law tells us is criminal. Martin Luther King Jr. was arrested and imprisoned for breaking laws in the South during his fight against segregation. So was Gandhi in his fight against British colonialism in India. Jesus, for that matter, was tried and punished under Roman law. Few of us would wish to call any of them criminals. Hitler's genocidal murder of Jewish people, Roma people, gay men, and others was perfectly legal under German law at the time he ordered them. History is full of cases where good people trying to fight clear injustice are arrested and imprisoned, and people who commit great evils are shielded by the law. The law is clearly an important lens through which to look at crime, but it cannot be the only one. The legal definition of crime is technically accurate, but it is only technically accurate, which is its biggest weakness.

## Moral Definitions of Crime

The reality is that the law has very little to do with our everyday thinking about crime or our interest in the subject. We don't find crime fascinating or upsetting because we care about what the law says—most of us don't know what it says beyond some basic crimes like murder or assault. When we get worked up about crime, we're usually angry about something deeper than mere lawbreaking—our blood boils when we see somebody do something horribly wrong,

regardless of what the law says about it. We consider crimes to be acts that are profoundly wrong, and we believe that criminals are bad people. Killers, rapists, and robbers are not just people who violate a rule—they are people who commit evil. This attitude reflects a very different idea of crime, one that sees crime as immoral and not solely illegal. We could go so far as to say that a moral definition of crime is something like, "Crime is an act of great immorality."

Criminal justice scholars distinguish between acts that are *malum prohibitum* and those that are *malum in se*. These Latin terms refer to two types of crimes that we can commit. *Malum prohibitum* describes acts that are wrong simply because they are prohibited, while *malum in se* refers to acts that are considered bad in themselves. Some acts may be criminal without necessarily being wrong. For example, it is illegal to drive the wrong way down a one-way street, and you can get in big trouble for doing it. However, it is not inherently wrong to drive this way—if nobody is harmed or inconvenienced, it doesn't make a difference where you drive. (In England, it's normal to drive on the left side of the road.) Acts that are *malum in se* are more classical crimes like murder and rape—murder is never okay. These terms point to the basic insight of the moral approach to crime—we believe that criminal acts are *wrong* because they are *wrong*, not because they are merely against the law.

This sense of wrongness explains why we get so worked up about crime in a way that we don't about other types of lawbreaking. It offends our moral sensibilities to see somebody hurt an innocent person or steal their money, and it gives us a great deal of satisfaction to see these people brought to justice. When we see a criminal "get away with it," that is, commit a crime without paying any price for it, many people are outraged and upset. The satisfaction we feel when we see justice done, the person who committed an offense caught and punished, is one of the reasons why we are glued to many TV crime dramas and the resolution where the bad guy is inevitably caught. (There's a whole genre of self-described "justice porn" videos that are meant to provoke pleasure by seeing bad people get their just deserts.) The resolution gives us a certain kind of satisfaction—we can't wait to see the criminal get what is coming to her.

Some legal experts have even gone so far as to assert that moral principles constitute a "higher law" that we should all obey even if it means violating the laws that are on the books. Theologians call this theory *natural law*, and this idea has been used to justify all kinds of acts of *civil disobedience*—deliberate lawbreaking based on a moral objection to the law. As the Catholic philosopher St. Augustine put the natural law perspective, "An unjust law is no law at all." In American history, Martin Luther King Jr. used natural law to justify his protests against segregation. In his famous "Letter From Birmingham Jail," King argued that any law that doesn't uphold human dignity isn't really a law and should be ignored by all decent people, regardless of whether or not a legislature passed it. For natural law, entire sets of criminal activity have nothing to do with the law.

The moral definition of crime has some advantages over the legal one: It feels more like what we mean when we talk about crime. It gets to the core of crime in a way that mere lawbreaking doesn't—violating the law by itself doesn't usually rile people up; hurting innocent people does. Many people who enforce criminal laws do so because they believe that there is an objective right and wrong and that the purpose of criminal justice is to promote goodness and fight evil. The law is different from justice, and most people prefer the latter to the former.

However, it shouldn't surprise you to learn that moral definitions of crime have problems, too. While we might agree that crimes can be defined as serious moral wrongs, this doesn't mean that we can agree on what these serious wrongs are. The world is full of vastly different moral codes with their own lists of right and wrong conduct, and people who live under these codes subscribe to very different moral views. Morality also changes over time as society's views about right and wrong evolve in new situations. This view is known as *moral relativism*—people have different views about right or wrong, and judging between them is often very difficult.

Even if we could find a few basic moral principles that we could agree upon, something like "murder is wrong" or "stealing is wrong," we still run into problems. While we can agree on a principle, when we try to apply it to actual cases, we often run into difficulties. Some people would find abortion to be completely acceptable, while others would call it murder. They might even disagree about whether abortion is "killing" in the first place—some arguing that destroying a "clump of cells" doesn't amount to killing and others arguing that a fetus gets a soul at conception. Many of you illegally download movies from the Internet but may not consider it stealing. We can all agree that Martin Luther King Jr. was correct to oppose segregation laws, but we might find other uses of natural law somewhat more objectionable. (It's been used by people who murdered abortion doctors, for example.) Many cultures have very different ideas about killing: "Honor killings" (the killing of a family member who has shamed the rest of the family) are considered noble by many people who live in some societies, but they would surely be considered murder elsewhere. The belief that some things are just plain wrong is fine, but that only leads to a whole new series of problems about what acts are wrong.

Homosexuality is a great example of the challenges facing a moral definition of crime. For centuries in the West, homosexuality was considered not only a sin but also a great crime. It was only thoroughly legalized in the United States in 2003, when the Supreme Court ruled that a Texas law criminalizing "sodomy" was unconstitutional. Similarly, in many parts of the world today, homosexuality is harshly punished. Many countries in Africa, the Middle East, and Asia punish consensual sexual relations between two people of the same sex, and several execute those convicted of homosexuality. To many in the modern West, homosexuality is completely acceptable, and punishing it seems absurd, but in our past and in other parts of the world, it remains a great moral wrong.

None of this is to say that relativism is right and that morality is simply a matter of opinion or a product of one's culture. (Philosophers and theologians have been debating this question for thousands of years.) Rather, it's just to point out that there are a lot of problems with simply accepting the moral definition of crime at face value. Thinking about the moral aspect of crime requires thinking about the nature of morality and its relation to culture, history, and the broader society. While theft may be immoral, stealing to feed one's family is clearly different from stealing purely out of greed. In addition, many acts of stealing are legal but perhaps shouldn't be. As the folk singer Woody Guthrie once sang, "Yes, as through this world I've wandered, I've seen lots of funny men. Some will rob you with a six-gun, and some with a fountain pen." Bankers and businessmen take from others all the time but do it "legally." Some of the biggest crimes can be committed with the blessing of the government, and the worst of all (the Holocaust, the genocide of the Native Americans, the killing of millions of Africans by the King of Belgium in the 19th century) have been committed by governments themselves.

## Sociological Definitions of Crime

Émile Durkheim, one of the founders of modern sociology, was fascinated with how people reacted to crime across different societies. Durkheim observed that crime and punishment are features of every society, even in places where there is no law or government in the modern sense, such as in the remote corners of the world. However, like the relativists, he noticed that acts that were considered "criminal" in one society would not necessarily be crimes in another—they might even be considered honorable. Within a single society, an act that would be considered a horrible crime in one context could be considered noble in another—killing a stranger in a bar fight is murder; killing him on a battlefield can be heroism. In addition, acts that cause a great deal of harm can be perfectly legal (such as certain banking practices), and acts that produce no harm whatsoever can be considered a crime, like homosexuality. In ancient Greece, an adult male having sexual relations with a boy was a common part of their cultural life and even praised by people like Plato, but it is considered a horrible abomination in the modern world. An infraction may seem trivial in our society but in another could be a shocking violation of social norms, one that demands serious punishment. Crime is everywhere, but criminal acts are dramatically different from place to place and even within the same society.

From these insights about crime, Durkheim reached an important conclusion: Regardless of what acts are considered criminal, crime and punishment are important for a society. But while they are necessary, they must serve a purpose beyond simply protecting the public from evildoers. Rather, any real understanding of crime cannot be found in the acts that a society believes to be criminal—they are just too varied to fall under a single definition. Crime and punishment must serve some kind of purpose for the society.

In Durkheim's view, the fact that crime exists in some form or another in all societies shows that society *needs* crime—that crime serves a function for the broader social order. He believed that all societies require a very strong set of rules to maintain their collective social bonds. When somebody breaches these rules by acting in a way that is different from everybody else, these social bonds (what Durkheim calls "collective consciousness") are threatened. As a consequence, our connection to others in our community is weakened. The way to deal with this weakness is to punish the individual who broke the rules, not because she "deserves it" but because this punishment reinforces the community's bonds. As Durkheim puts it, "Punishment constitutes essentially a reaction of passionate feeling . . . which society exerts through the mediation of an organized body [the government] over those of its members who have violated certain rules of conduct" (Durkheim & Halls, 1997, p. 52). The point of punishment for Durkheim is not to stop bad things from happening but rather to reinforce a community's values and its sense of solidarity. This allows society to remain intact, and if there were no crimes, it is likely that society would disintegrate.

Durkheim believed that the key to understanding crime is not to look at the criminal act itself but instead to look at a society's response to that act. What defines a crime is that society determines an act should be punished, regardless of whether the act is harmful in itself. The primary element of *all* crime is that people in a society think that these acts deserve punishment. People who act in ways that are different, that challenge society's values and beliefs, are a threat to society, and so society reacts by punishing these people. Through this punishment, the rules

are affirmed, as are the social connections. If society is deeply outraged or offended by something a person does, it is going to demand that the person be punished.

In Durkheim's view, the law is secondary when it comes to defining crime. Criminal law only follows a society's beliefs about what acts should be punished, but it does not really define criminality. When an outrageous act occurs that is not yet illegal, governments will race to follow popular opinion and quickly amend the criminal code so that it better matches society's values. If a government failed to criminalize acts that the public thought should be criminalized, it would quickly lose popular support. Similarly, if an act was considered a crime by the law but not considered something that should be punished by society (say, marijuana use), the law would be ignored by the public and be largely ineffective. Neither the nature of the act nor the law matters in defining crime for Durkheim: It is the beliefs of the larger society that count.

These three approaches to defining crime, the legal, the moral, and the sociological, are all very useful for understanding crime in different contexts, and each has its own uses. The point is not to say that one is "correct" but rather to understand that each definition highlights one aspect of a very complex phenomenon. There are other ways we could also define crime if we were so inclined: We could also discuss religious conceptions of crime (most religious texts have a set of activities that should be punished, for example), economic definitions of crime (that define crime in terms of its harm on economic activity), or other approaches. All of these are useful, and none is absolutely correct: They each provide different insights into what crime is and suggest ways to study it.

## Criminal (In)Justice

### Marijuana Laws

No drug illustrates the changing nature of crime better than marijuana. Originally criminalized at the beginning of the 20th century, it is now listed as a "Schedule I" drug alongside heroin, methamphetamine, and cocaine under federal law, meaning that it has a high abuse potential and no medical use. When Bill Clinton ran for president in 1990, he admitted that he has smoked marijuana but claimed that he did not inhale it. The use of marijuana and its criminality was linked closely to race: In earlier generations, it was considered a "ghetto drug" and a danger to white Americans. Harry Anslinger, head of the Federal Bureau of Narcotics in the 1930s, linked cannabis to Mexican immigrants, popularizing the term *marijuana* to make the drug sound like a foreign import. Anslinger also mercilessly targeted Black jazz musicians, most notably singer Billie Holiday, for their recreational use of the drug (Hari, 2015). Behind these attacks was a fear of the corruption of white America, and in particular white women, but they were largely small-time efforts compared to the later "war on drugs" and to more recent efforts to link illegal immigration to crime.

Now marijuana is mainstream. According to the Gallup polling company, 15% of Americans use marijuana, and 47% of Americans have tried it (Gallup, 2024). Many states have legalized the drug, either for medicinal uses or, in the case of nine states, recreational use. Even though it remains illegal under federal law, Congress passed

the Rohrabacher-Farr Amendment in 2003 that prevents the FBI or other federal law enforcement bodies from enforcing federal marijuana laws in states where it is legal for medical use. Both Presidents Biden and Trump supported some form of legalization for cannabis (NPR, 2024). It's likely that the walls of at least one dorm room at your college have posters glorifying the use of marijuana. It has become so common that it is barely even cool to smoke pot in a lot of places.

There is still an active antimarijuana movement in the United States that has sought to get rid of the Rohrabacher-Farr Amendment and push the United States back on the path of criminalization. According to the American Civil Liberties Union, marijuana still counts for 52% of all arrests in the United States. Marijuana arrests are also still linked to race: Despite the fact that Black and white people use marijuana in roughly the same numbers, Black people were 3.64 times more likely to be arrested for possession of the drug (American Civil Liberties Union, 2020). Even though many people use the drug, with few serious side effects stemming from casual usage, it remains heavily policed, mostly for people of color.

*Should marijuana be criminalized in your view? Why or why not? How could law enforcement prevent the uneven enforcement of marijuana laws?*

## Classifying Crime

Not all crime is the same, and we should distinguish between crimes so that we don't treat things that are fundamentally different as though they were the same. Both football and bowling are sports, but beyond this, they don't share a lot in common. If we tried to find connections between these two sports, we would find some (they both use teams, for example), but we'll probably get in trouble if we make too many connections or treat them too similarly. The same goes for crime. And just as for sports, we can break crimes down in different ways (pro sports versus amateur sports, sports that use a ball versus those that don't, sports that are competitive versus sports that are recreational, etc.). We can do the same thing with crime. Here are a few ways to break down crime.

### Severity of the Offense

One way that crimes are divided up, for example, is based on the severity of the offense—how much harm the crime causes. For example, most states in the United States distinguish between **misdemeanors** (relatively minor infractions) and **felonies** (major infractions that can lead to imprisonment for one year or more). Some legal systems, however, don't use this system or have more fine-grained distinctions, such as Class A, B, and C felonies (each with different punishments) and a similar structure for misdemeanors. For example, in New York, a Class A felony can result in sentences of up to life imprisonment (with a 15-year minimum sentence), while a Class B felony can lead to up to 25 years of imprisonment. These sentences are also affected by *aggravating factors*, that is, things that make a crime worse. When a person is convicted of a crime, the judge will weigh a variety of factors when determining how serious the crime is and therefore how severe the punishment should be.

## Classification Based on the Victim

More useful than distinctions based on the severity of the criminal act are classifications based on the type of victim. This can be useful because different types of crime may have different features. In many cases, different kinds of crimes are committed by different kinds of people for different kinds of reasons, and they should probably be separated. For example, a robber who steals property but hurts nobody is probably going to be a different type than a person who commits cold-blooded murder. A drug dealer is probably different from a drunk harassing people on a street corner. This means that distinctions need to be made. While there are a lot of different ways to break down crime, the most commonly used categories are **crimes against persons**, **crimes against property**, **crimes against public order**, and **crimes against the state**.

### Crimes Against the Person

This is probably the most serious category of crimes, but it is also the easiest to define. Crimes against persons are crimes that directly target individuals, usually by causing them bodily harm. These are crimes like rape, murder, and assault. (They are usually described as crimes against "the person" and not "against people" because it is only specific harms done to specific people that count.)

### Crimes Against Property

These are crimes where individuals are not bodily harmed by criminal activity, but their possessions or finances are affected. These can include burglary, arson, embezzlement, and so on. Of course, these crimes could lead an individual to be harmed (a person could be killed in a fire, or a person whose medications are stolen by a burglar could die), but then, if the prosecutor believed that the crime caused bodily harm, the person could be convicted for murder, and hence a crime against property would become a crime against the person.

### Crimes Against Public Order

These are acts where nobody specific is hurt and property is not damaged or taken, but the behavior is nonetheless harmful to society. These offenses typically make a place a less pleasant place to live, even if there is no single victim that one can point to. For example, public drunkenness, loitering, or panhandling (asking strangers for change) are behaviors where no individual person is often harmed, but they still affect everyone's quality of life.

Crimes against public order raise difficult questions about the role of criminal justice in a society. While it is obvious that the police should protect people, and almost as obvious that they should protect private property, it is not quite as clear why they should protect public order. Sometimes, loitering laws are used to harass people who are considered undesirable by society at large. A group of young men hanging out on a corner is often considered loitering, while a group of professionally dressed people engaged in the same activity would probably not. Antirioting laws have been used to suppress lawful forms of protest, and antinuisance legislation can be used to harass innocent people. What might seem like loitering to one person might be socializing to somebody else, and a group of young people, particularly people of color hanging out on a

corner, is apt to be seen very differently from a group of white people. While we all like public order, enlisting the police in protecting *our* definition of such order is tricky business and can lead to the mistreatment of people who are doing nothing worse than being "the wrong kind of person."

## Crimes Against the State

There is only one crime specifically defined in the U.S. Constitution: treason. Article III, Section 3, reads,

> Treason against the United States, shall consist only in levying War against them, or in adhering to their Enemies, giving them Aid and Comfort. No Person shall be convicted of Treason unless on the Testimony of two Witnesses to the same overt Act, or on Confession in open Court.

In such cases, the victim is the government (or more technically "the state") itself. Other crimes that often fall under this category are *espionage* (spying), sedition (attempting to stir up rebellion against the government), counterfeiting, and tax evasion. In each of these cases, the offense undermines the power and authority of the government to run public affairs.

The founding fathers cared a great deal about this, because they themselves were considered traitors by Great Britain. The Declaration of Independence was, to the British at least, an act of treason, and were an American group to declare independence now, they would be prosecuted as criminals if they acted on it. Nonetheless, other countries define treason much more broadly and use crimes against the state as the basis for arresting and punishing critics of the government. The term *treason* is often thrown around in political debate, and the line between legitimate dissent and treason is a tough one to draw in a country with passionate political disagreements like ours. Sedition, on the other hand, involves attempting to "destroy, by force, the Federal Government of the United States" and related activities (18 U.S. Code § 2384). Dissent, essential to democracy, is often seen by critics as a form of criminal insubordination.

Even though America has a long tradition of tolerating criticism, at different times, the government has criminalized public disagreement with the government. Under the Adams administration, Congress passed the Alien and Sedition Acts in 1798. These laws made it a crime (essentially) to criticize the government, and these were used to arrest numerous critics of his administration. The government passed similar laws in 1918 during World War I and used them to target critics of American participation in the war. When countries get swept away by events, their citizens can often consider dissent to be a form of treason and wish to use the organs of the state to stifle people who disagree with the strongly held views of the majority. Even in a country that cherishes its freedom, there are always those who want to suppress dissenting opinions, particularly radical ones.

## Victimless Crimes?

Some crimes are categorized as *victimless.* Gambling and prostitution are often seen as victimless crimes because everyone involved in the criminal activity chooses to be there. Nobody forces a person to lose their savings at an illegal card table, and if the game was indeed fair and square,

they have no reason to complain, just as if they went to a lawful casino in Las Vegas. There is a huge debate among crime scholars and politicians about whether sex workers, men and women who sell sex for money, are indeed victims or are simply people trying to make a living. Some criminologists argue that people who sell sex are just like any other working person; they're freely choosing to have sex for money. Others point out that these industries are filled with abuse and exploitation as pimps assault women who work in the field. Whether or not there are any truly victimless crimes is a matter of much disagreement.

## Other Ways to Classify Crime

There are a lot of other ways to distinguish between different types of crime. For example, we can distinguish between *street crime* and **white-collar crime**. Street crime is crime that happens in a public place and usually is done for financial gain, such as mugging, but could also include so-called stranger rape (where a man attacks a woman whom he doesn't know) or even murder. White-collar crimes are crimes committed in a business context, such as insider trading, price fixing, or embezzlement. When they're being clever, criminologists describe the split between the two types as one between "street crime" and "suite crime." Again, it's not too difficult to imagine that different kinds of people do these different kinds of crimes, and they probably shouldn't be examined in the same ways.

The concept of white-collar crime is a relatively new one. The term was developed by the criminologist Edwin Sutherland, who stirred up controversy when he coined the term (Sutherland, 1983). According to Sutherland, criminologists have overlooked white-collar criminality because the people who commit corporate fraud and other types of corporate criminal activity don't look or act like what we think of as a "criminal." They are often considered upstanding members of society and are given a great deal of respect by judges, politicians, and police officers. Simply because white-collar criminals are usually not physically dangerous does not mean that they are not criminals capable of causing great harm. By focusing on street crime and violent crime, we often miss out on a category of crime that can hurt millions of people.

Several other types of crime also should be mentioned. Environmental crimes are offenses that are committed against nature directly and secondarily against people. These include things like dumping toxic waste, destruction of natural resources, illegal poaching of endangered animals, and so on. **Corporate crimes** are crimes committed by corporations. Corporate crimes are like white-collar crimes insofar as they both take place in a business setting, but corporate crimes are done for the benefit of the corporation and not for private, personal gain. Corporate crime can include issues such as misrepresenting a company's fiscal status or bribing a public official to secure a lucrative contract. **Hate crimes** are crimes that are committed against a person because of the victim's race, religion, gender, sexual orientation, or disability. Racist attacks are hate crimes, as are attacks on gays and lesbians, and the perpetrators can face very stiff prison sentences under federal law. *Sex crimes* are crimes of a sexual nature. *Household crimes* can include child sexual abuse or intimate partner violence (sometimes called "domestic violence"). *War crimes* are crimes committed during armed conflicts, such as killing unarmed civilians, torturing people in prison, or using banned weapons like poison gas and biological weapons. *Cybercrimes* such as identity theft, fraud, or distributing child pornography take place over the

Internet. Each of these crimes has its own characteristics, including its own type of person who committed an offense, and criminologists usually study them separately. There are a vast number of overlapping categories of offenses, and one criminal act could be a combination of any number of them.

## Reality Check

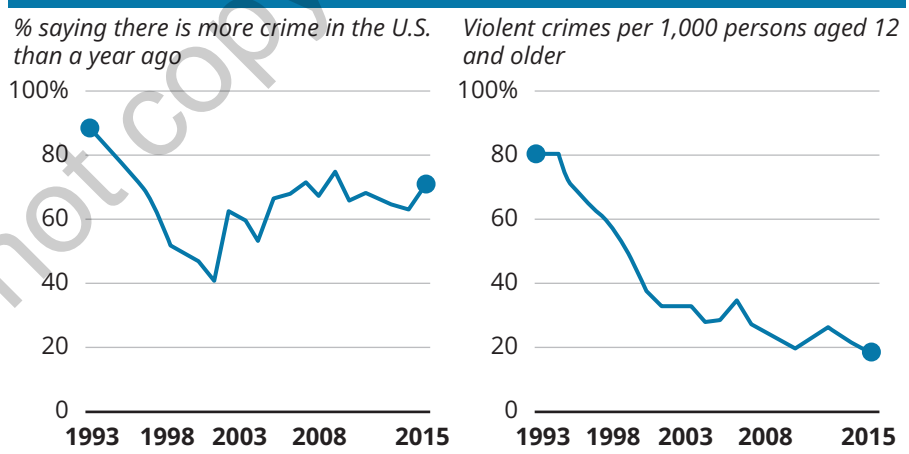
### Crime Versus Fear of Crime

Violent crime has dropped substantially over the past two decades. However, you may be surprised to learn that the American public's fear of crime has *increased* over this same period. Studies suggest that the public either does not know or does not believe the numbers, as Figure 1.1 shows.

The *General Social Survey* (GSS), a nationwide survey of public attitudes (including attitudes about crime), supports these numbers. Despite being safer than ever, the American public is more anxious than ever about crime—a fear that politicians have been eager to exploit for their own benefits.

The fear of crime varies among different sectors of the population in ways that are particularly telling. As one social scientist observed, "There is seemingly no identifiable statistical relationship between those who are the most at risk of becoming victims of crime and those who report being the most fearful" (Lee, 2007, p. 3). For example, older Americans are more often afraid of criminal behavior but are less likely to be victimized by violent crime than are younger people. While white people are less afraid of crime than Black people, social scientists have discovered that living near Black people

**Figure 1.1 ▪ Public Perception About Violent Crime, 1993–2015**




*Source:* "Public perception of crime rate at odds with reality." Pew Research Center, Washington, DC (2018). http://pewrsr.ch/2fxLhfk.

increases the fear of crime among white people (Skogan, 1995). Despite a prevalent fear in the United States of immigrants, they are less likely as a population to engage in criminal activities than native-born Americans (Jiang & Erez, 2018). The fear of crime, then, is the product of a complex network of social factors, only some of which are linked to the actual chance that a person will be a victim of a crime.

There are many possible explanations for this disconnect between crime and the fear of crime. Politicians and private security companies have a lot to gain by getting you to fear for your safety. Politicians can get tough on people who commit crimes (always a popular position in a political campaign) and target them with tougher laws, and security companies can sell you an array of home and personal security equipment to keep you safe—but only if you're already scared. Of course, the news media can increase its viewership by highlighting the most sensational crimes and concocting bogus crime trends (Romer et al., 2003). Finally, many of us don't think about crime until it affects our lives, that is, when we or people we know are victimized, meaning that we are inclined to focus on our negative experiences rather than on our relative safety. Our fear of crime is stoked and manipulated by a number of different groups and factors, each of which has its own interest in making sure we feel unsafe. In his 2016 inaugural address, President Trump bemoaned "the crime and gangs and drugs that have stolen too many lives and robbed our country of so much unrealized potential" and declared it an era of "American carnage." He has continued to push the narrative that crime is rampant, particularly in Democratic-controlled cities, and has blamed undocumented aliens for much of it.

Given these realities, it is unsurprising that criminal justice policies, that is, the government's approaches to preventing crime, are often driven by a public that is unaware of the facts about crime in America. Voters often cast their ballots based on what they think is going on, independent of facts. This means that, for politicians, "getting tough on crime" is almost always a safe bet when campaigning, regardless of whether or not getting tough—that is, handing out harsher sentences—actually reduces crime. In many parts of the criminal justice system, the influence of the fear of crime and the need to "get tough" has sometimes led to policies that are counterproductive but are profitable for businesses that work in the criminal justice field, such as private security companies or prison construction companies. While it is too simplistic to describe manipulation of fear of crime by the media and the proposal of "solutions" provided by the various businesses in the criminal justice world (prison construction, private security, etc.) as a conspiracy, it can often feel that way.

*Why do you think young people underestimate their likelihood of being victimized? Why do older people overestimate their chance of being victimized? How often do you think about being victimized?*

## Measuring Crime

Newspapers, TV, and radio often talk about the *crime rate*: It's going up, it's going down, it's leveled off, it's remained steady, and so on. But what do we mean by "the crime rate"? Where do we get these numbers from? Since so much crime happens in the shadows and a lot of crime goes unreported, how can we know whether crime is increasing or decreasing?

There isn't a "crime rate" in the sense of a single definitive measure of how much crime has occurred or whether crime is increasing or decreasing. There are many reasons for this, one of which we've already discussed: There is no consensus on how to define crime. Additionally, it is often difficult to determine how to measure a crime. For example, a thief breaks into a house carrying a sack full of cocaine, steals some money, and then punches one of the homeowners when she tries to stop the thief. Did four crimes happen here or just one? If we count all four separately, then it looks like there's a massive, sudden crime spree going on in the poor woman's living room. If we count only one or two of these as significant, then we are overlooking important crimes that might affect how people think of their neighborhood. If a person is initially charged with attempted murder but then accepts a plea bargain for a lesser crime, which offense actually took place on the night in question? If a person is arrested for a crime and then acquitted, was there really any crime at all?

As with definitions of crime, there are different ways to measure crime. There are different techniques for determining how many crimes have occurred, each of which has its strengths and weaknesses, along with its own blind spots, that is, crimes that it is likely to miss. Each measurement of the crime rate provides only a partial view of what is happening in American society today. We can add them together and develop a rough picture of what is happening, but we will never really know with complete accuracy how many crimes are being committed over a period of time.

Further, there are many different types of crime studies. Some are done at the national level, some at the state level, and some at the local level. There are even international crime surveys taken by the United Nations, combining reports from around the globe. You could do a crime analysis of your own by polling your classmates, seeing who had been a crime victim in the past year, or, if you're bolder, asking them who has committed a crime in the past year. All of these are useful, and all tell us different things about what crimes are happening and what people are doing and not doing about it. Typically, however, crime is measured in three ways: police reports, victimization surveys, and perpetrator surveys. In the section that follows, we will discuss each means for measuring crime, covering their respective strengths and weaknesses.

## Police Reports

The simplest way to get crime data is to consult the people who most often deal with crime: the police. Police reports tap into data that officers collect at the time of arrest to give us an idea of the crime rate. The best known of these is the **Uniform Crime Report (UCR)**. This data is gathered by officers on site and then sent to the FBI, where it is compared with other arrest data from around the country to give Americans a sense of the crime rate. Recently, the approach to organizing this crime data has undergone some changes, which affect how the police report crime and can affect "the crime rate" as we know it.

The UCR was originally developed in the 1920s by the International Association of Chiefs of Police in order to have a single, nationwide resource for understanding and studying crime in America. Material from the UCR is collected by the Justice Department and released in a series of publications, culminating in an annual study titled *Crime in the United States*. In this report,

the department breaks crime down into seven major categories: felonious homicide, rape, robbery, aggravated assault, burglary (breaking or entering), larceny-theft, and auto theft. The National Incident-Based Reporting System (NIBRS) was created in the 1970s and goes into more detail about the crimes that police respond to. In both systems, however, when the individual is arrested, the police enter the appropriate data into a database, and the data is then sent on to federal officials. However, not every crime is treated the same: The UCR has traditionally used what it calls the **hierarchy rule**—only the most serious crimes are recorded in the report, while lesser offenses are not (see Table 1.1). Thus, if an individual assaults another person and steals her car, the police will not report both crimes to the UCR; rather, only the more serious offense (assault) will appear. A lot of lesser offenses will not show up in the crime data reported to the FBI.

**Table 1.1 ▪ Crime Reported by UCR**

| Part I Offenses | |
|---|---|
| **1.** Criminal Homicide | **5.** Burglary |
| **2.** Forcible Rape | **6.** Larceny-Theft (except motor vehicle theft) |
| **3.** Robbery | **7.** Motor Vehicle Theft |
| **4.** Aggravated Assault | **8.** Arson |
| **Part II Offenses** | |
| **9.** Other Assaults | **20.** Offenses Against the Family and Children |
| **10.** Forgery and Counterfeiting | **21.** Driving Under the Influence |
| **11.** Fraud | **22.** Liquor Laws |
| **12.** Embezzlement | **23.** Drunkenness |
| **13.** Stolen Property: Buying, Receiving, Possessing | **24.** Disorderly Conduct |
| **14.** Vandalism | **25.** Vagrancy |
| **15.** Weapons: Carrying, Possessing, etc. | **26.** All Other Offenses |
| **16.** Prostitution and Commercialized Vice | **27.** Suspicion |
| **17.** Sex Offenses | **28.** Curfew and Loitering Laws (persons under 18) |
| **18.** Drug Abuse Violations | **29.** Runaways (persons under 18) |
| **19.** Gambling | |

*Note:* The UCR only studies a selection of crimes and breaks them down into two different categories (or "Parts").

The NIBRS was developed in part to avoid the problems created by the reporting of multiple crimes under the traditional UCR approach. By focusing on "incidents" rather than "crimes," the NIBRS gives a fuller understanding of criminality. Beyond the fact that a particular incident occurred, the NIBRS includes information regarding victims, known persons who committed an offense, any relationships between persons who committed an offense and their victims, and arrestees, as well as information on any property involved in the crime. Most of this information does not appear in the traditional approach of the UCR. This newer method provides a more nuanced and thorough understanding of a particular criminal incident. While this provides researchers with a better understanding of the reality of crime, fewer police departments participate in the NIBRS, leaving significant gaps in the data that it provides. As of January 1, 2021, the Justice Department stopped using the traditional approach and switched completely over to the NIBRS, which could lead to an artificial increase in the number of crimes that appear in the UCR (Asher, 2021).

CompStat is a system of police crime reporting that is widespread among police departments. Compstat stands for Computer Statistics. It was created in 1994 by the NYPD to track crime data in the city, and it has become widespread among police departments in the United States. It was designed to help police departments use officers more effectively, allowing them to predict where crime will occur based on existing statistical patterns. It uses a system called "crime mapping," locating geographic trends in crime across a city so that the police can respond more effectively, often including regular meetings among officers to discuss crime data in the city. However, like other systems, CompStat has generated controversy as departments have attempted to manipulate data for their own ends. In 2009, for example, NYPD officer Adrian Schoolcraft presented recordings of his fellow officers discussing manipulating arrests to look better in the CompStat data. For his efforts, the NYPD had Schoolcraft involuntarily institutionalized in a mental health facility.

Of course, there are some pretty significant problems with using police reports to determine the crime rate. For one thing, not every crime is reported to the police, and unreported crimes would not appear in either the UCR regardless of which system they use. Many victims have committed crimes themselves or have other reasons to be wary of the police and thus are disinclined to call 911 when they are victimized. Sex workers, drug dealers, and undocumented immigrants all tend to avoid calling the police, as would people who were already wanted for other crimes. (This makes people living outside the law such as undocumented aliens, sex workers, or people with outstanding warrants particularly vulnerable to criminals who can rip them off with little danger of being caught.) Also, some victims do not call the police because they think it would be futile to do so or would lead to other negative consequences. For example, many domestic violence cases go unreported because victims fear revenge from their abusive partner or losing the family's primary breadwinner to prison. Further, many crimes go *unnoticed* by their victims: If your wallet is stolen, you may mistakenly believe that you simply left it somewhere and think nothing further of it. In the perfect crime, the victim doesn't even know that she has been victimized. This means that there are a number of offenses that go unnoticed by the police and therefore do not appear on the UCR or NIBRS.

## Victimization Surveys

The second way to learn about crime rates is to study crime victims. **Victimization surveys** do this through numerous methods, including anonymous surveys, phone interviews, and visiting

households to ask people if they have been a victim of a crime over the past year or so. The most well-known victimization survey is the **National Crime Victimization Survey (NCVS)**. Created in 1972 by the Department of Justice as a supplement to the UCR, the NCVS is meant to provide a second window into crime in America. A random selection of homes is contacted every six months and asked about their experiences with crime. If an interviewee reports being victimized, then the interviewer asks follow-up questions about the crime itself, determining different aspects of the crime, the victim, and the perpetrator. The NCVS only focuses on more serious crimes like rape, assault, and theft, ignoring lesser offenses. This allows researchers to develop crime data alongside the UCR and figure out which crimes are underreported to the police and what factors make it more likely that a victim will turn to the police after a crime.

Like police reports, victimization surveys have weaknesses that may distort their findings. Of course, some crimes are perceived as "victimless," such as prostitution, buying and selling drugs, and so on, and these would probably not be reported by those involved in them. Not only does the NCVS ignore these and other minor crimes, but it is also limited in its research to people who are the heads of their households, meaning that the homeless are ignored, and minors are not interviewed. This can lead to the underreporting of domestic violence and other household crimes. In addition, respondents may misinterpret what happened, believing that they simply lost their MP3 player, when in fact it was stolen (or vice versa). Victims can also not realize that they were victims because they don't interpret what happened to them as a crime. Likewise, victims who do not own a phone, such as many homeless people, will not appear in the NCVS.

## Where Do I Fit In?

### Accessing Crime Data Online

Because it contains personal information, a lot of crime data is protected, but some of it is not. You can easily access information from the two largest sources of crime data (the UCR and the NCVS) by going online. The UCR and NIBRS can be found at https://ucr.fbi.gov/, which includes raw data as well as summaries and reports based on this data. The NCVS can be found at the Bureau of Justice Statistics (BJS) website (https://www.bjs.gov/), which also includes raw data and various reports. Many other reports are available online from different state and local police departments as well as private and academic research centers. If you hunt around the Internet, you can probably do some of your own research into crime statistics.

A lot of criminal justice students wind up doing research on crime, both gathering and analyzing data to look for broader trends in criminal activity. The BJS hires a variety of people, usually with graduate degrees, to examine crime data to help policymakers. The National Institute of Justice (NIJ) is a part of the federal Department of Justice that works to analyze crime data and present it to government officials and to the public. Other, smaller programs exist in different states and throughout the country. If you're interested in this kind of work, a strong background in statistics and methods for gathering crime data (commonly called "methods") is necessary.

## Perpetrator Self-Report Studies

The final means by which we can learn about crime data is through what are known as **perpetrator self-report studies**. In these cases, people voluntarily, though anonymously, report the crimes that they have committed. This can be done via a written or phone survey or through interviews where subjects are guaranteed anonymity. For example, many states conduct surveys in their schools about drug use among teens and preteens in order to understand the scope of the drug problem in their own states. These studies can create ethical gray areas, as researchers may have knowledge about illegal behavior that the police do not know about. Many of these studies are *longitudinal*, meaning that they examine behavior over time to determine which periods of a person's life are most vulnerable to criminal activity. Others can test how widespread a certain criminal activity is; thus, we can learn about stealing from a workplace, a minor crime that is probably very widespread in the working world. Self-report studies can provide another important way to understand the prevalence of crime and criminality, particularly in its most minor but widespread forms.

Obviously, self-report studies function on the honor system and, as a result, can easily be misleading. A person may not trust her interviewer and not admit her crimes. A person may want to exaggerate her criminal behavior in order to impress somebody, or just because it's fun to make things up. It's not difficult to imagine a bunch of teenagers in a class making up wild stories about sex and drugs when they're filling out a survey, and it's also not hard to imagine earnest crime researchers and the media falling for outlandish tales of teen misbehavior—just as they've done many times in the past. Nonetheless, despite their weaknesses, self-report studies can provide information that victimization surveys or police reports can't: For example, small-time white-collar crimes such as stealing from work would probably not appear in other crime studies. Small-scale drug abuse is similar: Many crimes are undiscovered by the police, and victims sometimes won't come forward about the crimes that they have endured but might own up to them in a situation of anonymity.

## The Crime Rate

Added together, these different ways of measuring crime provide a series of accounts of crime in the United States and, in some cases, around the world. While each approach provides only a partial understanding of the frequency of crime and the types of offenses that are committed, we can arrive at a few conclusions about the overall crime rate. For example, if the UCR and the NCVS both show an increase in crime over a certain period, we can conclude that there probably really was an increase in crime over that time. Though it is not a certainty, overlapping data can be a reliable guide to what is going on out there in terms of crime. Nonetheless, there is still what social scientists refer to as the **dark figure of crime**, that is, crime that does not appear in these data collection methods. This dark figure lurks behind all talk of crime rates. We can never know the true crime rate and can only make informed, educated guesses about it with the data from these various sources.

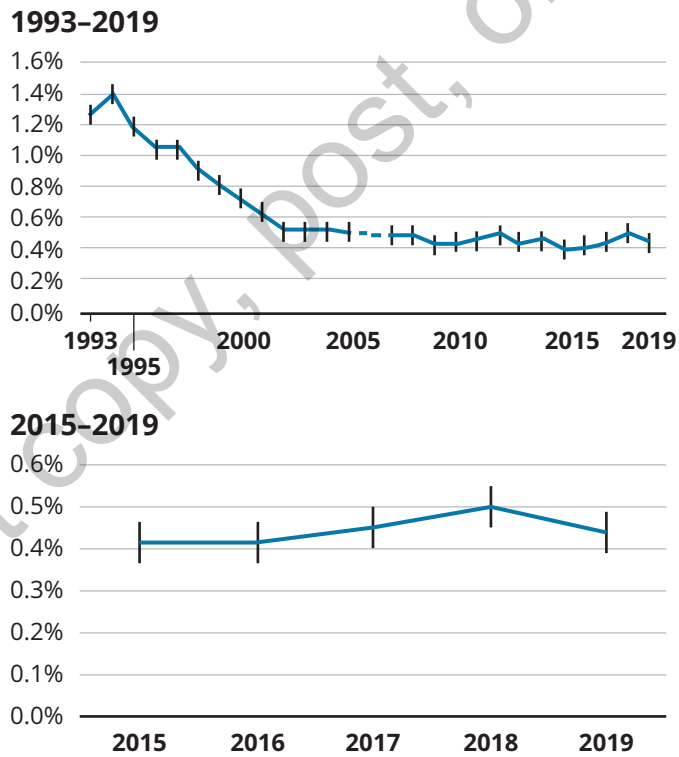
## Some Statistics . . .

### The Crime Drop

According to virtually all measures (the UCR, the NCVS, etc.), violent crime has significantly decreased throughout the country as murders, rapes, robberies, and other behaviors have decreased almost universally (see Figure 1.2). These numbers are reflected in the homicide rate in particular. We can further compare these crime trends with trends for property crime where, again, the decline is similar. Theft, burglary, and car theft follow remarkably similar paths.

It is also interesting to note that the crime drop is not only an American experience. In most of the industrialized world, crime has decreased. Though the numbers are hard to measure, as each country measures its crime rate in different ways using different standards and measuring tools, "There has been a significant and prolonged 'crime

**Figure 1.2 ▪ Violent Victimization, 1993–2019**




*Source:* Morgan and Truman (2020).

*Note:* Estimates for 2006 should not be compared to other years and are excluded from the 1993–2019 figure.

drop' in many industrialized nations" (Farrell et al., 2014, p. 436). While homicide rates have often been lower in Western Europe than in North America, there remains a similar *trend* in homicide in both countries: It increased dramatically and then sharply dropped in the 1990s. The only exception to this trend is in Latin America, where an increase in violent crime has helped contribute to the immigration crisis in North America.

Figure 1.3 can be misleading—keep in mind that we are looking at homicides per 100,000 people, not the total homicide rate.

**Figure 1.3 ▪ Homicide Trends Around the World, 1990–2015**

| Region | Change, 1990 to 2015 | Homicide rate, 1990 to 2015 |
|---|---|---|
| World | **–20%** | 6.1 → 4.9 |
| Northern America | **–46%** | 8.6 → 4.6 |
| Latin America | **–9%** | 20.6 → 22.6 |
| Western Europe | **–46%** | 1.9 → 1.1 |
| Eastern Europe | **–18%** | 8.6 → 7.1 |
| Asia | **–38%** | 3.8 → 2.4 |
| Oceania | **–22%** | 3.4 → 2.7 |

*Source:* Santos, M. R., & Testa, A. (2019, November 4). *Homicide is declining around the world—but why?* The Conversation. https://theconversation.com/homicide-is-declining-around-the-world-but-why-125365 licensed under CC-BY-ND https://creativecommons.org/licenses/by-nd/2.0/.

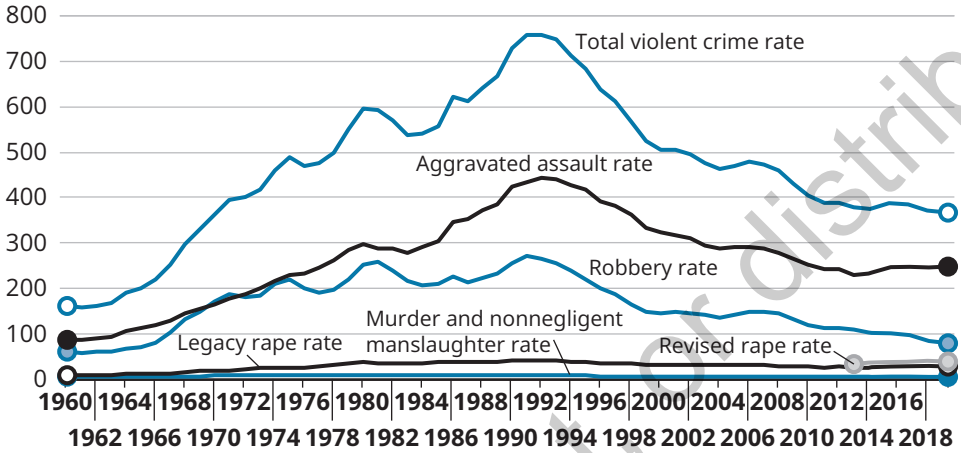
*Note:* Africa is not shown due to lack of data. "World" includes the 234 countries that had at least one year of available data between 1990 and 2015. Missing data were interpolated using an exponential weighted moving average.

It is important to note that preliminary statistics show an increase in homicides in 2020 and 2021. The reasons for this increase are as unclear as the causes of the crime drop were. Some have pointed to the fear generated by the COVID-19 pandemic, and others have pointed to unrest after the murder of George Floyd by Minneapolis police officer Derek Chauvin. Whether or not this increase is a "blip" or marks a return to higher crime rates will only be clear in the ensuing years. Even with this increase, however, violent crime is still very low when placed against the backdrop of American history. Despite the fact that many Americans still consider crime to be a serious problem, for the most part, Americans are safer than they have ever been.

As we have seen so far, there is good reason to be skeptical about our ability to have a completely accurate picture of the crime rate in the United States. There are a lot of unknowns about the world of crime, and any generalizations about it must be carefully qualified. Nonetheless, there are some things we can say about crime rates in the United States with some confidence. Most notably, there has been a marked decrease in violent crime over the past two decades

according to almost all measurements. This *crime drop* as it is known among social scientists seems to be a reliable phenomenon, and it follows a steep rise in the crime rate in the several decades that preceded it (see Figure 1.4).

**Figure 1.4 ▪ Estimated Violent Crime Rate in the United States, 1960–2019**




*Source:* Federal Bureau of Investigation (2020).

The crime drop has presented a challenge for criminologists who seek to discover the causes of crime and explain variations in the crime rate. Essentially, none of the commonly available theories predicted such a precipitous decline in criminality, and as a result, novel theories have been proposed to address the issue.

## The Politics of Crime Data

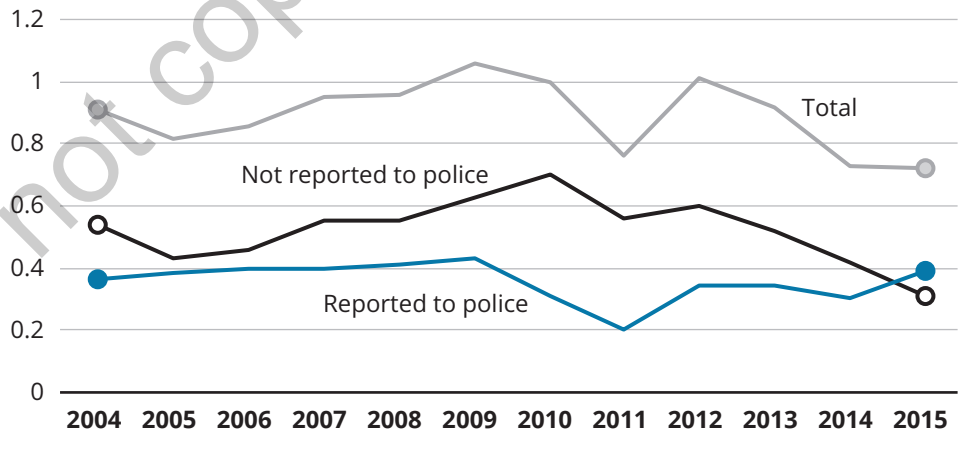
While resources like the UCR and the NCVS seem to provide a neutral way to determine what's going on in the world of criminality, crime data can be very political. Police officials and politicians often distort or misrepresent their crime data for a variety of reasons. Obviously, a low crime rate could reflect well on a local police force—it shows that they have crime under control in their jurisdiction. It could also help politicians, real estate developers, and others who want to portray a city or neighborhood as a safe place to live, raise a family, and do business. Surprisingly, however, there can also be a strong incentive to *inflate* crime statistics, that is, to make crime seem worse than it probably is. If crime rates are low, there isn't a pressing demand for additional funds for police officers, vehicles, training, weapons, and other tools of policing. A high crime rate can provide justification for additional funding and offer politicians a chance to talk tough. In statistics, the principle known as Goodhart's law states that when a measurement becomes a target, it ceases to be a good measure. When crime statistics (which purport to measure crime) are tied to things like popular support, promotions, or funding levels, the

temptation to manipulate them becomes very strong, and so it's difficult to determine if they are measurements of crime or a form of public relations.

There are many examples of crime statistics being manipulated for financial gain or for political advantage. In 2014, Dekalb County, Georgia, was found to have inflated its crime rates in order to secure $2.3 million in federal funding ("DeKalb Co.," 2014). The police department in Phoenix, Arizona, was investigated in 2011 for misreporting kidnapping statistics in order to get over a million dollars in federal stimulus money (Hermann, 2011). In 2011, the 77th Precinct in New York City was accused of manipulating its crime statistics by falsely stating that a crime had not happened (Yakas, 2011). A study by the magazine *Chicago* showed that a series of murders were classified as less serious crimes by the police or converted into noncriminal cases in 2013 (Bernstein & Isackson, 2014). A former police chief in Biscayne Park, Florida, was sentenced to three years in prison for ordering officers to arrest innocent Black people in order to give the impression that his department was solving crimes (Hauser, 2018). During the first Trump administration, federal officials frequently inflated the number of crimes committed by immigrants in order to justify funding for a border wall (Bump, 2019). Similar cases have occurred in many other cities in the United States as police departments and politicians manipulate the data to serve their own political or financial interests.

Hate crimes are particularly difficult to measure because they are widely underreported by local law enforcement officials (see Figure 1.5). A hate crime is a crime where the victim is targeted because of her race, religion, gender, or sexuality. The Department of Justice collects information submitted by local law enforcement regarding hate crimes, but the data that local law enforcement provides has been terrible in many cases, as many officers underrerport bigoted motives. Simply put, no local government wants its area to be associated with hate crimes, and so these jurisdictions do not provide accurate information to federal officials about it (Bjork-James, 2019).

**Figure 1.5 ▪ Violent Hate Crime Victimizations Reported and Not Reported to Police, 2004–2015**




*Source:* Masucci and Langton (2017).

*Note:* Latest data available.

Officers are less likely to record some types of offenses, such as hate crimes. Being associated with bigotry is not a "good look" for local officials, and therefore they do not report these offenses, and the public is left with a distorted view of hate in America.

Another thing to keep in mind when looking at crime statistics, particularly in relation to arrest rates, is that a net increase in crime does not necessarily mean that more crime has occurred, and a net decrease in crime doesn't mean that there is less crime. An increase in arrests may simply mean that more officers are being diligent in their job and arresting more people. A decrease in crime could mean that the police are slacking off or finding other ways to artificially lower their crime rate. Finally, just because a large number of people are arrested does not mean that these suspects are being convicted of any crime. A high arrest rate doesn't necessarily mean that there is a higher conviction rate: A lot of these arrests could be dismissed because they were faulty or because no actual crime occurred. Persons who committed an offense may be released because there is not enough evidence to hold them, they may be acquitted, or they may be convicted, but of a significantly lesser offense than the one that the officers arrested them for. Statistics are easily misleading and are often distorted for a whole array of reasons.

In the next chapter, we will turn away from crime as a social phenomenon and turn to one particular way of understanding crime, the legal one. Obviously, criminal law has a great deal to say about what crime is and is in many ways the most important way to classify crime. However, keep in mind the discussion in this chapter about law—seeing people who commit crimes as lawbreakers is only *one* way to look at crime. In further chapters in this section, we will examine psychological, sociological, and economic approaches to studying crime.

## What Would You Do?

### Measuring Crime

You are a crime statistician responsible for developing crime data for a city that has long struggled. For many years, there has been a high crime rate, and the city's reputation as a dangerous place has affected the property values in the city and made the problem worse, as wealthier residents have fled and businesses have been reluctant to invest there. Despite public perceptions, the crime statistics are misleading—crime is only bad in a few neighborhoods, and the rest of the city is generally safe. When you've tried to point out these differences in your data, nobody outside the city seems to care; all they see is a high crime rate in town.

In response to this problem, the city government and the police department have developed a plan to weigh crime in different neighborhoods differently. Crime in these few high-crime neighborhoods would count less in the overall crime rate than crimes in other neighborhoods. In part, this would come from the police, who would record offenses in these neighborhoods less often or as lesser offenses than those in other neighborhoods. In part, they have asked you to count each crime in these neighborhoods as only half of a crime. (Thus, for every two crimes there, you only count one.)

This, the officials believe, would provide a more accurate picture of crime in the city and would help boost investment, something that would benefit everybody. However, it does give the impression that the overall crime rate in the city is lower than it really is, and were this statistical "trick" exposed in the press, a lot of people, including yourself, could get in trouble.

*Would you be willing to participate in this project? Do you think such an approach to measuring crime in the city would be fairer or more accurate than taking all crime in the city as a whole?*

## Chapter Summary

Crime is not a straightforward concept. There are different ways to define it, including legal (crimes are violations of the law), moral (crimes are actions that are seriously immoral), and sociological (crimes are actions that society believes deserve punishment) approaches, each of which has its own strengths and weaknesses. Similarly, there are numerous ways to classify crime; it can be classified based on the type of victim (persons, property, public order, the state), the seriousness of the offense (misdemeanors, felonies), and where the crime happens (white-collar crime, domestic crime, street crime). Crime is measured through the examination of arrest rates, the surveying of crime victims, or from the self-reports of those who perpetrate crimes. These can be brought together to come up with some sense of the overall crime rate, though no measure is perfect. When discussing crime, one should always be careful about the way that crime is defined and measured, as many people have a political agenda when they discuss phenomena like "the crime rate."

## Review/Discussion Questions

1. Can you think of issues other than abortion where different groups use the rhetoric of crime to advance their cause?
2. The different ways of defining crime all have their own strengths and weaknesses. Which do you think is best? Why?
3. Which crime measurement technique do you think is best? If you were moving into a neighborhood and could research crime data about it, which type of crime data would mean the most to you?
4. Should communities be required to publicize their crime rates? Do you think this could lead to more governments fudging their crime data?
5. Why do you think groups that are least likely to be affected by violent crime (namely, the elderly) are most afraid of crime, while those most likely to be a victim (young people) are less likely?

## Key Terms

Corporate crimes
Crimes against persons
Crimes against property
Crimes against public order
Crimes against the state
Criminal justice system
Dark figure of crime
Felony
Hate crimes
Hierarchy rule
Misdemeanors
National Crime Victim Survey (NCVS)
Perpetrator Self-Report Studies
Uniform Crime Report (UCR)
Victimization surveys
White-collar crime

# Chapter 2

# Criminal Law

ANGELA WEISS/AFP via Getty Images

## Learning Objectives

**2.1** Describe the concept of the rule of law and its importance in American society.

**2.2** Describe the three elements of crimes.

**2.3** List the three major categories of criminal defenses and the five specific defenses.

**2.4** Describe the process by which otherwise normal behavior becomes criminalized.

When you think of the word *law*, what comes into your mind? Perhaps images of heavy, leather-bound books sitting on a dark wooden bookshelf. Perhaps the famous "Lady Justice" statue, standing blindfolded, holding a sword in one hand and a scale in the other. Maybe it's a robed judge banging her[1] gavel surrounded by expensively dressed lawyers and court officers in an oak-lined room as some unfortunate defendant glumly looks on. Images of law are everywhere in our culture and, as an institution, the law has an exalted position: Being a lawyer is usually taken to be a prestigious career, and knowledge of the law is considered a powerful weapon. Of course, practicing law can also be a way to make a lot of money, and if you're considering going to law school after graduation, you might be thinking of all of the nice things that a legal career would allow you to afford.

These pictures are not "the law," of course. They are symbols of law—images crafted to convey the power that law has over our lives and its importance in broader society. Many aspects of this image are cultivated by legal professionals to enhance the status of their work, making them seem important and deserving of a big paycheck. In the modern computer age, there is little need for leather-bound law books, and most of them are purely decorative. Judicial robes serve no practical purpose either. Gavels are fun, but there are better ways to silence a room. Some of these images are there to show that law deserves deference—the law is serious business, and those who work in the law must be treated with respect. The law is draped with ancient symbolism—much of which is irrelevant to modern society but nonetheless persists in order to convince the public that the law matters a great deal.

Given the obsession that our culture has with all things criminal, it is unsurprising that many people think of law first and foremost as criminal law and believe that most lawyers deal with criminals in one way or another. Criminal law is only one part of a much larger legal system, however. In fact, criminal law is a relatively small part of the legal profession, and among lawyers, it tends to be less prestigious than other fields. Only a small number of attorneys actually devote their careers to criminal law. Students who go to law school take courses in criminal law, as well as courses in corporate law, tax law, torts, constitutional law, and real estate law, among many others. In addition, there is a distinction between criminal law (sometimes called "crim" by law students) and criminal procedure (often referred to as "crim pro"). Criminal law, also known as *substantive criminal law*, deals with the legal definitions of crimes, while criminal procedure deals with things like the conduct of trials and the limitations on the police's ability to search a person's property, and so on, all of which will be discussed in later chapters. Substantive criminal law is only a small sliver of the legal world, but it is a very important one for many reasons.

## The Rule of Law

One useful thing to understand about our legal system is that different parts of the law are structured differently and serve different purposes. Constitutional law determines how the American people organize their government. Tort law deals with private injuries (when one person hurts another person, say in a car accident) and only allows for monetary compensation for victims. Family law determines issues such as marriage, divorce, and adoption. Criminal law, on the other

hand, can be understood as a set of lines that, if you cross them, the state will intervene and punish you—usually by taking away freedoms. Only a few other domains of law authorize the government to hold an individual against her will (laws regarding the institutionalization of the mentally ill or laws regarding immigration are other examples), and criminal law is the only portion of the law that allows the government to kill its own citizens (through execution) when we're not at war. While criminal law is not the only part of the law, it is the one that can affect our lives most dramatically.

This unique power to deprive people of their freedom makes criminal law an important part, if not the most important part, of our legal system. Bad criminal laws can be easily abused by powerful individuals or groups who want to crush dissent or target members of marginalized groups. Almost every dictatorship in the world uses its criminal laws as a weapon against its opponents, and the prisons of the world are full of people who were sent to prison for simply disagreeing with those in charge. China can arrest a person for "creating a disturbance" (Press, 2014), and countries like Egypt and Turkey use vague antiterrorism and public safety laws to arrest journalists and other people who criticize their governments. Criminal laws are necessary to ensure law and order in a society, but they are also very dangerous things for people who love their freedom.

Because criminal law is so dangerous, democratic societies place limits on it through the principles that make up *the rule of law*. The rule of law is an ideal meant to prevent criminal laws from becoming a tools for would-be dictators. They are not laws in and of themselves but are often used by judges to guide the interpreatation and application of the law. These principles include a ban on *ex post facto* laws, a ban on unclear laws ("*void for vagueness*"), and *strict construction* in legal interpretation. *Ex post facto* laws are laws that attempt to criminalize behavior that occurred before the laws were passed. For example, a law that was passed on Tuesday criminalizing the wearing of baseball hats could not be used to punish a student who wore one on Monday. This sounds obvious, but some laws are so unclear that a new interpretation of a law can function in an *ex post facto* way. For example, in one California case, a man kicked his estranged, pregnant wife in the belly, causing her to miscarry (*Keeler v. Superior Court*, 1970). At the time, the California penal code said that it was murder to kill a "human being." Whether or not you personally believe that an unborn child is a human being, there is probably no way that the defendant could have known with certainty that he was committing murder at the time of the attack. There was no clear determination as to whether a fetus was considered a "human being" under the law at the time. (In this case, the court ruled that it wasn't.) Without clear guidance in a case like this, it's easy to see how laws that are unclear can become *ex post facto* laws.

The *vagueness doctrine* asserts that valid laws must clearly describe which acts are prohibited by the law. Of course, all criminal laws prohibit certain activities, but describing which acts are wrong can be difficult. Criminal law must use language broad enough to apply to a variety of different situations, but not so broad that you don't know when you've violated them. Think of all the different ways that you can "assault" somebody: with a rock, with your fists, with your car; all of these are captured under the term *assault*, but what about assaulting people by yelling at them with a loudspeaker turned up so high that it makes their ears bleed? Or flinging water at them in a way that is annoying? All laws must be somewhat general to cover a bunch of different situations and to deal with new situations that nobody predicted, but the more general they get, the more they run the risk of being too vague.

The most notorious of these vague laws are loitering and public morals laws. These laws try to regulate something like "standing around doing nothing," which is very hard to precisely define. A group of teenagers standing on a corner might be "doing nothing," but they could just as easily be waiting for a friend to arrive or having a conversation about something that happened that day in school. If they walk around the block and then come back, are they "standing around"? Undeniably, loiterers can be annoying and sometimes lower the quality of life for a community, but when you try to pinpoint the exact activities that are "doing nothing," it becomes very confusing. People should have a fair warning about when they're about to break the law, so they can make a choice about what to do.

Not only are they difficult to define, but vague laws also invite themselves to be enforced selectively by police officers, who can pick and choose who violates the law and who doesn't. To use one famous case, in *Papachristou v. City of Jacksonville* (1972), a group of defendants challenged a city ordinance banning "wandering or strolling around from place to place without any lawful purpose or object." While some of the defendants in the case *may* have been engaged in suspicious activity, what the law means by these words isn't really clear. It is interesting to note that four of the defendants who had been cited together were Black men in the company of white women, which likely made the officers unhappy. Other cases have produced similar results as cities try to eliminate activities like loitering and vagrancy but struggle to define these activities. Vague laws can be abused by officers who selectively target people they considered undesirable: A group of middle-class white people drinking wine in front of their house is having a pleasant conversation, but a group of black men drinking beer in front of their house is loitering (Roberts, 1998). Poorly written laws can easily be applied in an unfair or biased way.

The final element of the rule of law is *strict construction*. This rule means that judges should interpret criminal laws as narrowly as possible. Whenever there are two equally plausible interpretations of a law, judges should apply the one that is more limited in scope. This prevents judges or the police from unfairly prosecuting people for violating a law that a person had every reason to believe they were obeying when they acted.

## Criminal Law and Common Law

America is a "common law" country, and common law principles are used in federal law as well as in laws in all but one state.[2] **Common law** is a legal tradition that dates to medieval England. Many important features of common law distinguish it from the *civil law* tradition used in much of the rest of the world. Most important for now, however, is the role that judges play in interpreting the law. In common law countries, judges have a lot of power in telling us what the law means: They interpret the law, and sometimes in doing so effectively create new laws. For this reason, the common law system is sometimes described as "judge-made law." Judges create new laws by writing down the reasons that they give for their interpretation, and by doing so, the judges create a binding *precedent* that the next judge must follow. (Judges are very hesitant to break with existing precedent.) The legal term for this is *stare decisis*, which translates roughly as "to stand by things decided." Therefore, when we talk about the law in America, we refer to cases like *Marbury v. Madison, Miranda v. Arizona*, or *Roe v. Wade*, rather than pieces of legislation or legal codes. In these cases, judges made influential decisions that created precedents.

Effectively, they made new laws. It is also one of the reasons why politicians fight so viciously about who gets to serve on the different courts, as judges have a huge role in shaping the law.

The common law tradition shapes many aspects of our criminal justice system beyond simply how the courts render their decisions. It shapes how crimes are organized under the law, how crimes are defined, and, most important, how trials are conducted. Almost all modern crimes were originally common law crimes, and how the common law defined crimes like rape, murder, and arson has shaped how we think of them now. The way our legal system is structured is in many ways an accident of history. Other societies have legal systems that are very different and, in some ways, much better.

## Federalism and Law

As was already mentioned, there is not one American criminal law. There are (at least) 54 distinct legal systems in the United States and many more depending on how you count them. There is federal criminal law, a series of laws passed by Congress and signed into law by the president. Federal criminal laws apply all over the country and can be found in Title 18 of the U.S. Code. There are also the legal codes of the 50 individual states, each of which was drafted by its respective state legislature. If we want to count it, we can include the common law, which still functions as a body of law standing in the background, as it were, providing judges with guides on how to interpret state and federal laws when they face ambiguities. A 53rd legal system would be the Uniform Code of Military Justice (UCMJ), which technically is a part of federal law but doesn't apply to people outside of the military. (It is in Title 10 of the U.S. Code.) There are also the legal codes of the various territories under the control of the U.S. government, such as Eastern Samoa and the Mariana Islands.

Alongside these is the *Model Penal Code* (MPC). This is not law per se, but it has an important influence on criminal laws around the country. The MPC was created by a group of lawyers and academics who were a part of an influential organization known as the American Law Institute (ALI). The ALI sought to provide order, logic, and uniformity to American law. Essentially, these lawyers looked through the different legal systems around the United States and developed a legal code that they believed made more sense than the haphazard laws on the books in many states. This reformed legal code became the MPC, and the states have used it to change or reform their legal codes so that they can be more rational and fairer. The MPC has never been adopted whole by the states, but it nonetheless has had a profound influence on American criminal law in many states, and judges sometimes refer to it in their decisions.

All of this means that there are different crimes in different states and that the same crime may be defined very differently in two different states. What is considered murder in one state might be manslaughter in another. What is considered assault in one state might be aggravated battery in another. To make things more complicated, even if an offense is defined the same way in two different states *using the exact same words*, the courts in each state may interpret the statute differently based on their own legal precedents. Because there are so many different sources for criminal law, it can be very difficult to determine what the law is in any given case. All of this makes American law a very complex set of rules that requires highly trained professionals to interpret and apply. This is one of the reasons why lawyers get paid so much money; the law

is complex, and *nothing* is straightforward in it. The law is too diverse to say what the law is in a simple and straightforward way, and there are too many different legal codes and precedents for it to be simple. We must account for these different factors when examining the law, and the law will look different depending on the state you're in and even the judge assigned to you.

## The "Ingredients" (Elements) of Crime

Despite the complexity of American criminal law, the laws in every state have a similar structure, and (almost) all crimes have the same basic elements. With only a few exceptions, all criminal offenses have two fundamental components: an *actus reus* (a guilty act) and a *mens rea* (a guilty mind), though some crimes have a third factor: *causation*. Therefore, in most cases, we can break crime down, legally speaking, into a simple equation:

ACTUS REUS + MENS REA + (CAUSATION) = CRIME

These factors are the main ingredients of criminal activity, and they are the things that a prosecutor must prove beyond a reasonable doubt in a courtroom to convict a defendant accused of a crime. Did the defendant commit the act? Did she have the specific mental state (the *mens rea*) the law describes when she committed the act? These are the issues that a court has to determine in a trial.

As we will see, there are some important exceptions to this formula, but for the moment, we can stick with it. We will discuss each of these aspects of the legal construction of crime in turn.

### *Actus Reus*

The first requirement of a crime is that there must be a "guilty act." A criminal must *do something* to commit a crime. Usually, this means that a criminal must move her body of her own free will and do some sort of harm. If a person passes out and is then moved onto private property, then she hasn't trespassed because she didn't do it of her own free will. Similarly, if I only contemplate killing a person but don't act on it, I haven't committed a crime. We don't punish somebody for doing something against her will, and we don't punish people who simply think about committing a crime. (Medieval English law made it a crime to "imagine the Death of our Lord the King.") As silly as it sounds, to be a criminal, one must *act* in an unlawful way.

While it is obvious that one must do something to commit a crime, there are many crimes where the **actus reus** is more ambiguous, and pinning down the criminal act is a matter of interpretation. The *actus reus* of murder is usually easy to determine, as it is for other more straightforward sorts of offenses. **Inchoate crimes**, however, are crimes where a person has not actually hurt somebody but will probably do so in the future. These crimes include solicitation, conspiracy, and attempt. For these offenses, the *actus reus* can be simply saying certain words to another person, such as asking a prostitute to exchange money for sex. Making an agreement with somebody else to commit an offense with another person can be the *actus reus* of conspiracy. However, the acts that compose many other crimes are unclear. For example, when has one committed the crime

of *attempted murder*? While aiming a gun at another, pulling the trigger, and missing your target (what is sometimes called a "completed attempt") is clear, other acts that might be attempted murder are not so clear. In September 2024, Ryan Routh was spotted pointing a rifle through a hole in a fence at a golf course where Donald Trump was playing. Routh was several hundred yards from where the former president was. Was this attempted murder? He never pulled a trigger and could have changed his mind at any time. (As of this writing, Routh's trial is ongoing.) The line between a criminal act and simply considering committing a crime, what lawyers call the distinction between *perpetration* and mere *preparation*, can sometimes be less clear than we imagine.

In the 2002 science fiction movie *Minority Report*, the police, aided by the power of psychics, are authorized to arrest somebody for "future crimes," crimes that this person will carry out in the future. Inchoate crimes are reminiscent of this film. These criminals have yet to hurt anybody when they are arrested, but they are probably going to do so in the future. The *actus rei* of solicitation, attempt, and conspiracy are harmless on their own. After all, agreeing with another person to murder a third person is not the same as murdering her, and it's possible that one or both conspirators will back out of their plan before anybody is hurt. A man who solicits a prostitute has not "done the deed," though he probably will. A person who buys a gun and drives to her ex-lover's house may kill her lover, or she may decide to go home instead. A child who draws a picture of their teacher decapitated and writes "that's what will happen to you" may want to murder their teacher but is likely blowing off steam, angry about a bad grade. When the police are allowed to arrest an individual for an inchoate crime, they can stop a crime before anybody is hurt, but this also raises the likelihood that a person who is ultimately harmless will be wrongly punished.

The law punishes acts, not failures to act. Usually, the law does not punish an individual for refusing to help another person in need, no matter how easy it might be to help them out. Unless we have some duty to act, the law doesn't require that we help others, only that we don't hurt them. In 1997, Jeremy Strohmeyer, a 20-year-old from Long Beach, California, murdered a 7-year-old girl, Sherrice Iverson, in the women's restroom in a Nevada casino. His friend, David Cash Jr., observed the attack from the next stall but did nothing to stop it. Instead of rescuing the girl, Cash left the bathroom and went for a walk. After the body was discovered and Strohmeyer was arrested, Cash was unmoved. As he put it, "I'm not going to get upset over somebody else's life. I just worry about myself first. I'm not going to lose sleep over somebody else's problems" (Zamichow, 1998). Despite demands from Iverson's family that Cash be prosecuted, there were no grounds for charging him, as the law did not criminalize doing nothing. In response to cases like these, some states have passed "good Samaritan" laws (including Nevada, which passed a law after Iverson's murder), which are meant to encourage people to help others if they can do it safely. Unless you have a legal duty to act, for example, if you were a cop or a lifeguard, a failure to act is not an *actus reus*. We have a duty to help family members, but not strangers—a parent must take care of their children but have no obligation to help other people's kids. The general rule remains that it is not a crime to do nothing when one could have prevented a crime from happening (Dressler & Garvey, 2015).

## Mens Rea

The other main element of a crime is the *mens rea* or culpable mental state. Most, though not all, criminal statutes spell out the required mental state that must accompany the *actus reus*.

The most common form of *mens rea* is intent (as in "intentional homicide"), but there are many others: recklessness, negligence, and so on. One thing to keep in mind, however, is that each of these terms has a special legal meaning that often differs from the way we use these terms in everyday life. Another thing to keep in mind is that we can never know for sure what is going on in a person's head when they commit a crime—all we can do is guess what a person is thinking from the way that they act.

There could be any number of different *mentes reae*, and some laws don't even include an explicit *mens rea* when they define an offense. Some statutes are very specific, such as Texas's kidnapping law, which states, "A person commits an offense if he intentionally or knowingly abducts another person" (here the offender must act either with intent or knowledge), while others are quite vague or use terms that we *never* use in our ordinary life. In California, murder is defined as "the unlawful killing of a human being with malice aforethought," though "malice aforethought" are not words that an ordinary person would understand. Massachusetts describes malicious damage in this way: "Whoever destroys or injures the personal property, dwelling house or building of another in any manner or by any means not particularly described or mentioned in this chapter shall, if such destruction or injury is willful and malicious," be guilty of malicious damage. There are hundreds of different terms that various legal codes use to define the *mens rea* of different criminal offenses.

The following are some of the most common *mentes reae* that are found in American criminal law. They are listed from most serious (those that are apt to be punished the harshest) to least serious (those that will likely receive a lighter punishment).

## Intent

To do something intentionally is to knowingly and purposely do it. The criminal wants to produce a certain outcome and acts to bring about that result. A person who sees another standing in front of her, pulls out a gun, aims it, and pulls the trigger is almost always acting intentionally, unless there are some very strange circumstances surrounding the shooting, such as a mistaken belief that the gun was only a toy or that the person was a mannequin. Unless the defendant shows compelling reasons to think otherwise, the law assumes that people intend the natural and probable consequences of their actions.

## Recklessness

This second form of *mens rea* refers to a crime where an individual did not want to cause harm but acted so dangerously that she made it very likely that something bad would happen. The technical legal language describes reckless behavior as a "*gross deviation* from the standard of conduct that a law-abiding person would observe in the actor's situation" (Hall, 2008, p. 63, italics added). An individual who fires her gun into the air in celebration is being reckless, as she knows that the bullet will eventually come down and could hurt someone. The shooter knew serious harm or even death was a possible result of her action—even if she did not want to hurt anyone when she pulled the trigger. It is reckless to drive drunk, to speed, and to throw rocks from an overpass onto a busy freeway. While people who are reckless are not usually punished as severely as people who intentionally commit crimes, crimes of recklessness are usually considered serious.

### Negligence

It is often difficult to distinguish negligence from recklessness, and it's sometimes a bit of a guess as to which applies to a case. When a person has acted negligently, she did not know that she was doing something wrong or dangerous but *should have known* that she was. In fact, any reasonable person would have known that the actions were risky. As Oregon's criminal code defines it, criminal negligence occurs when

> a person fails to be aware of a substantial and unjustifiable risk that the result will occur or that the circumstance exists. The risk must be of such nature and degree that the failure to be aware of it constitutes a gross deviation from the standard of care that a reasonable person would observe in the situation. (ORS § 161.085, 2017)

A person who *genuinely* believes that there is nobody below her window and drops a brick without looking is negligent. If she thought somebody could be there but did not check, she was reckless. It is perhaps fair to describe negligence as a form of "criminal stupidity"—negligent persons aren't bad; they are simply behaving in a way that is so thoughtless and careless that they ought to be punished. People who are negligent are clearly not as bad as a person who harms another person intentionally or who acts recklessly, but they are still acting in a way that is criminal, even if they didn't know that someone would be hurt by their actions.

Often, the difference between recklessness and negligence is vague and hinges on the beliefs of the person who committed an offense at the time that she acts—something that is extremely difficult to know. To be reckless requires that the individual be aware of the risks in her actions, while negligence requires that she be unaware of the risk. A person who truly and sincerely believes that a house is empty before setting it on fire is negligent if somebody is killed, but a person who suspects that there *may* be somebody in the house when she strikes the match is reckless. This may sound like splitting hairs, but in cases where an accident causes another to be hurt or killed, the accused's awareness can mean the difference between a lengthy prison term and a relatively short one. Moreover, if the prosecutor cannot prove in court that the defendant was aware of the dangers of her actions, the jury may elect to convict the defendant, but only for a lesser crime with a **mens rea** of negligence.

The actor Alec Baldwin was indicted in 2024 for involuntary manslaughter in the death of a film crew member on the set of the movie *Rust.* He had been handed a gun by the film's armorer and told it was unloaded (it was called a "cold gun," which on film sets means the gun is unloaded). When he pulled the trigger, a bullet shot out and killed cinematographer Halyna Hutchins. Some argued that Baldwin was reckless because guns are inherently dangerous and he knew this. Others argued that he was merely negligent because, though Baldwin believed the gun was unloaded, he should have checked the gun before pulling the trigger. Still others thought it was just a tragic accident and that the fault was solely on the armorer (who was also indicted). The case against Baldwin was ultimately dropped because of prosecutorial misconduct, so the issue of Baldwin's responsibility for Hutchins's death was never ultimately resolved.

## Other *Mentes Reae*

While intent, reckless, and negligence are the most common forms of *mens rea*, criminal statutes can specify any number of different *mentes reae* with greater or lesser specificity. For example, a

statute can use the term *malicious* as a *mens rea*. Other legal codes might use antiquated terms like *wicked, fraudulently*, or *wantonly* for their offenses, leaving judges to figure out what they mean in a modern context. As a rough guide, the portion of the statute that refers to the psychological state of the alleged person who committed an offense is usually the *mens rea* of the offense. Some *mens rea* terms may sound strange or use out-of-date language (such as "depraved heart murder"), and it is usually up to the courts to determine what they mean and how to apply them in a modern context.

### Strict Liability

Most criminal offenses have an *actus reus* and a *mens rea* that are explicitly stated in the legal statute. However, this is not always the case. Some laws fail to mention a *mens rea* and leave it up to the courts to figure out what is appropriate for the crime. Others, however, do not require any *mens rea* for the individual to be prosecuted. To use one example from the South Carolina criminal code ("Carrying fire on lands of another without permit"),

> It shall be unlawful for any person to carry a lighted torch, chunk or coals of fire in or under any mill or wooden building or over and across any of the enclosed or unenclosed lands of another person at any time without the special permit of the owner of such lands, mill or wooden building, whether any damage result therefrom or not. (SC Code § 16-11-160, 2012)

Notice that the law does not say anything about whether the person carried the lighted torch intentionally, recklessly, or negligently—all that matters is that she was carrying a lighted torch without the appropriate permit. Laws like this, laws without a *mens rea* component to them create a different form of criminal liability, known as strict liability. Other examples of **strict liability offenses** are statutory rape laws (that is, the crime of having consensual sex with a minor) as well as many laws regulating the sale of alcohol to minors. Under strict liability, individuals can be punished for violating the law independent of whether they were reckless, negligent, or acting intentionally. All that matters is that they committed the *actus reus* of the crime.

The rationale behind strict liability offenses is that individuals who participate in risky sorts of activities accept a higher standard of responsibility for their conduct than those who don't. That is, if you want to sell alcohol, mess around with explosives, use torches, or engage in extramarital sex, you understand that the state won't accept any excuse for your behavior if you inadvertently violate the law. The lawmakers believe that saying "I didn't know that the girl was underage, and she looked like a grownup to me" is a cop-out in these circumstances—and it gives the statutory rapist an easy excuse later when he gets caught. People who run liquor stores have an economic interest in not knowing the age of their customers and would probably consciously decide to remain ignorant about it if they thought that they could get away with it. While most strict liability offenses are misdemeanors, some, like statutory rape, are felonies, and those who committed an offense can end up being imprisoned for a long time independent of whether they knew they were breaking the law at the time.

## Causation

The final element of a crime is *causation*. The individual's act must have caused actual harm. For example, an attacker's bullet must have caused the death of the victim for the suspect to be

charged with murder. If the victim was already dead, then it is obviously not murder. Not every crime requires causation (for example, possession of a controlled substance does not), but for those that do require a specific result, such as homicide, there must be a causal link between the *actus reus* and the outcome. While this may sound obvious, determining the cause of death can be difficult, and despite what you may have seen on TV, forensic medicine is not an exact science.

Not only must the criminal act cause the outcome, but it must also have been the *proximate cause* of the outcome. If a man hits another guy with a baseball bat, and the person he struck dies in the hospital a few days later, he caused the victim's death. However, if in fact the cause of death was gross malpractice on the part of the hospital staff, which failed to adequately treat the wound and left it open to infection, then it is not so clear that the attacker is truly responsible for his victim's death. In criminal law, proximate causes are those actions that make a person criminally responsible for the outcome, usually the death of a victim. In some cases, there are many different causes for a result, but the prosecutors must determine who is responsible. One helpful way to think about it is to say that every proximate cause is a cause, but not every cause is a proximate cause.

In April 2016, a fight broke out between a group of girls in a Delaware high school. Several girls ambushed Amy Inita Joyner-Francis in a bathroom, jumping on her and punching her. One of the girls smashed Joyner-Francis's head into the sink while other girls filmed the fight on their phones. While the fight was brutal, it wasn't any worse than the many other fights that happen in high schools across America every day. However, nobody involved in the fight knew that Joyner-Francis had a rare heart and lung condition—a hole in her atrium and narrow arteries in her lungs. Joyner-Francis's autopsy concluded that the fight had exacerbated her condition, causing her death. The physical stress of the fight sent her into cardiac arrest, and she died shortly after the fight ended. One of her attackers, Trinity Carr, was charged with homicide.

Carr was convicted of criminally negligent homicide for causing Joyner-Francis's death. She appealed, arguing that there was no way she could have known that the assault would lead to the victim's death. She further argued it was highly unlikely that Joyner-Francis would have died had she had a fully functioning heart. The case ultimately went to the Delaware Supreme Court, which exonerated Carr of homicide, stating, "No reasonable factfinder could conclude that [Carr's] attack—which inflicted only minor physical injuries—posed a risk of death so great that [she] was grossly deviant for not recognizing it." Though the defendant caused Carr's death in some sense, Joyner-Francis's death was so unexpected that the defendant could not be held liable for it.

## Homicide

One crime that has undergone a great deal of change in American legal history is criminal *homicide*. There is a big difference in how homicides are treated under the law, and homicide law varies a great deal from state to state. To use the example we discussed earlier, some states distinguish between first- and second-degree murder in their penal codes, but others don't. Some states distinguish between murder and manslaughter, while others don't. There is no single way to distinguish between different types of homicide, and the different legal approaches to killing in different states have a long history. They reflect broader changes in American law and politics, but they also reflect our views about the morality of human behavior: Which homicides are the worst, and which killings are a little more excusable—though still criminal?

Modern homicide law developed out of the common law—the laws created by English judges and passed on to America during the colonial period. Under the common law, murder was described as "the unlawful killing of another being with malice aforethought." *Malice aforethought* (the *mens rea* of murder) meant many different things, but for simplicity's sake, it meant intentional homicide (Dressler & Garvey, 2015, p. 253). Thus, accidental killings were not considered murder, even if they were the result of negligence. In traditional common law, a person convicted of murder was automatically given the death penalty, unless there were extraordinary circumstances dictating otherwise.

Murder was not the only form of homicide in the common law, however. An exception was carved out for *manslaughter*, often described as intentionally killing "in the heat of passion." While still intentional homicide, manslaughter was not considered as bad as traditional murder and did not merit the death penalty. Manslaughter referred to killings such as the murder of a cheating spouse or other situations where a person was presented with an immediate, highly emotional situation that caused her to kill another person. These killings weren't lawful but were not punished as severely as murder. Hence, the key distinction in homicide law under common law was between the killers who should be executed (murder) and those who should be allowed to live (manslaughter).

The distinction between degrees of murder, such as first- or second-degree murder, only came later. In 1793, the Commonwealth of Pennsylvania resolved that all murder perpetrated by poison or by lying in wait, or by any kind of willful, premeditated, and deliberate killings, shall be deemed murder in the first degree, and all other kinds of murder shall be murder in the second degree (Keedy, 1949, p. 771). A conviction for first-degree murder meant execution, but neither second-degree murder nor manslaughter were considered **capital offenses**, that is, a crime that merited execution. This led to greater diversity in the law and restricted execution to the "worst" forms of homicide.

While many states followed Pennsylvania's lead in distinguishing between degrees of murder, not every state agreed with Pennsylvania's way of formulating this distinction. There are several different ways that states have sought to distinguish between degrees of murder. Some states distinguish between first-degree murder and second-degree murder by describing first-degree murder as intentional homicide and second-degree murder as reckless homicide. Others distinguish them in different ways based upon what sorts of killings they deem to be worse than others. The point is that first-degree and second-degree murder are legal terms with different meanings in different states. You can look up your own state's criminal code online and discover how it classifies different forms of homicide.

One final element of homicide law is the *felony-murder rule*. This rule, inherited from the common law, says that a person can be convicted of murder if, in the act of committing a felony, she kills another person. This killing does not need to be malicious, intentional, or reckless for it to be murder. For example, if, in the middle of a kidnapping, the victim has a heart attack and dies, the kidnapper could be convicted of murder, even though in many senses, she did not kill the victim. If a person commits a felony and somebody dies as a result, it's usually murder, regardless of whether or not killing the victim was a part of the original plan.

## Criminal (In)Justice

### Life in Prison for Loaning Keys

Ryan Holle, a Florida man, was sentenced to life in prison as an accomplice to murder, because he loaned his keys to friends who used his car to commit a burglary in 2003. When a woman was killed in the burglary, Holle was charged as an accomplice. Since the victim was killed during the commission of the robbery, Holle was charged with first-degree murder under the felony-murder rule, despite being miles from the killing. The prosecutor argued that Holle knew his friends were using his car to commit the robbery, and thus he bore responsibility for the girl's death. (As the prosecutor put it, "No car, no crime") (Liptak, 2007a). Before his trial, Holle rejected a plea bargain that would have given him a 10-year sentence, because he did not believe he was guilty of any wrongdoing. The actual killer, the man who pulled the trigger, received the exact same sentence as the man who loaned the robber keys. Holle's sentence was reduced to 25 years, and he was released in 2024.

*Do you believe that it is fair to punish Holle so severely? If not, how much punishment would be appropriate in this case? Why? If he thought that there could be trouble during the burglary but still loaned the keys, would that affect your decision?*

## Defenses

A *defense* in the law is anything that the accused uses in court to either get herself acquitted or have her punishment reduced by the judge. There are three general categories of defenses, and under these are several different specific defenses. The first form of defense is known as a *failure-of-proof* defense. This defense simply means that the prosecution has failed to prove that the defendant committed the crime—that she is not guilty. The second category of defense is called a *justification*. This defense acknowledges that the defendant committed the crime but argues that she shouldn't be punished, because it was the right thing to do at the time. This would include *self-defense* and *necessity*. A third category of defense, *excuses*, acknowledges that the defendant committed the crime, but she should not be punished because she is not really to blame for her actions. An example of this is *insanity*.

DEFENSES

Failure of Proof
"The prosecution did not prove that I committed the crime."

Justification
"I committed the crime but it was the right thing to do."
Self-Defense
Necessity

Excuse
"I committed the crime, but I shouldn't be punished."
Insanity
Duress

## Failure of Proof

The failure-of-proof defense simply states that the defendant is not guilty because the prosecutor failed to show beyond a reasonable doubt that the defendant committed the crime. To be more specific, however, the defendant argues that the prosecution did not show that she committed the *actus reus* with the required *mens rea*. The burden of proof is on the prosecution in a criminal trial. This means that the defendant is considered innocent until the prosecution has proven that she is guilty beyond a reasonable doubt. The defendant does not need to prove that she is innocent, merely that the prosecution did not sufficiently show that she is guilty—which is why an acquitted defendant is found "not guilty" rather than "innocent" at trial. We will discuss this issue more in later chapters when we examine criminal trials.

### Justifications

A justification defense asserts that the accused individual committed the criminal act, technically speaking, but also that she should not be punished for her actions because, given the circumstances, they were the right thing to do. The most common examples of this are *self-defense* and *necessity*.

**Self-Defense.** Though it is usually the government's job to protect people and to catch the "bad guys," the law understands that the police cannot protect everybody all the time and that people sometimes need to act on their own when their safety is threatened. Hence, the law allows for individuals to use force to protect themselves when they are under attack.

However, just because an individual believes that she has been threatened by somebody, does not mean that she may automatically resort to force whenever she feels threatened. People sometimes see threats that aren't really there or overreact to threats that are present. We do not live in the Wild West, where anybody can take the law into her own hands whenever they see fit. This means that the law places some strict limitations on our right to self-defense. Like all laws, the laws of self-defense vary from state to state, but here are a few common limitations placed on our right to self-defense:

1. *Last resort*. In most cases, you cannot use force in self-defense unless you've tried every other option. This means retreating when necessary. In most cases, if someone acts aggressively against you, you do not have the right to stand up to her in self-defense. You are obliged to be a grown-up and walk away from the conflict if it is possible. Only if that doesn't work and all other options are exhausted (you have "retreated to the wall" as the saying goes) are you allowed to use force in self-defense.
2. The exception to this rule is the *castle doctrine*. This doctrine says that persons need not retreat from their own home or similar locations if they are threatened.
3. *Proportionality*. A second limitation on the use of force in self-defense law regards the amount of force a person may use in self-defense. Deadly force may only be used when there is a reasonable fear that an individual will either be killed or seriously harmed by

an attacker. A fistfight, for example, does not usually justify using a gun in self-defense, unless the defender fears for her life.

4. *Reasonable belief.* Individuals must reasonably believe that they are in immediate danger when they act in self-defense. A mere suspicion or fear that a person could hurt them is insufficient for self-defense.

5. *Nonaggressor.* Individuals may not claim self-defense if they themselves were aggressors in the encounter. If an individual initiated the violent encounter of her own free will, for example, if she attacked another person or mutually agreed to fight (so-called mutual combat), she cannot then claim to have acted in self-defense if she used force to protect herself against another.

Many states, particularly states that are more politically conservative, have begun to expand the right of self-defense. **Stand-your-ground laws** are laws that have been created to make it easier for a defendant to claim that she acted in self-defense. The common element of stand-your-ground laws is that they expand the castle doctrine beyond the confines of your home to any place where a person is lawfully allowed to be. Essentially, individuals are no longer required to retreat from any public place if they are threatened. If you can be there lawfully and somebody confronts you, you are not required to retreat and may legally use force against an aggressor. Among the biggest proponents of these laws is the National Rifle Association, which aggressively seeks to expand the scope of gun rights in the United States (Dionne, 2012).

On one level, stand-your-ground laws make sense: It seems weird that a person can threaten you in public, and you have a legal obligation to flee. However, these laws also make conflicts much more likely to become violent—a refusal to back down means that the situation can easily escalate, particularly if either individual is armed. Critics charge that these laws are a recipe for unnecessarily violent confrontations under the guise of self-defense. Others point out that the culturally entrenched fear of Black Americans means that they are more likely to be killed by people acting in self-defense if the restrictions on it are relaxed—one study of stand-your-ground laws showed a "quantifiable racial bias" in these laws (Ackermann et al., 2015). People (particularly white people) are much more likely to interpret the actions of young Black men as dangerous and therefore use force against them. Further, it is usually possible to call the police and ask for their assistance in exercising your rights rather than using force against a person who is threatening you, especially in an era of cell phones. Like many aspects of criminal law, your views about individual rights, politics, and gun ownership are likely to shape your views about the importance of stand-your-ground laws.

## Where Do I Fit In?

### Armed Students

Along with laws making it easier to use lethal force in self-defense, gun rights groups have aggressively promoted laws allowing college students to be armed and even to carry concealed weapons on campus. Proponents of "campus carry" laws argue

that armed students would be better able to protect themselves from attacks such as the 2007 Virginia Tech shooting, when senior Seung-Hui Cho murdered 32 people and wounded 17. Rather than relying on campus security, an armed student body could better protect itself in an immediate and dire emergency, they argue. Different states have different laws on the issue. Some have state laws allowing armed students, including students armed with concealed weapons, but many states have no laws on the subject. Many public and private universities have campus rules banning armed students.

Critics argue that more guns on campus will not make students any safer and may make violence more likely, as armed teachers, students, and staff may be tempted to draw their guns in a fit of anger. Critics also argue that the presence of armed students in a classroom could intimidate their peers and instructors, disrupting the learning environment, particularly when discussing controversial subjects. As one professor put it, "Many of us entered the profession without knowing that we would have to consider whether a student who is upset about his grade, uncomfortable with a lecture on black queer sexuality, or disagrees with our placing slavery and white supremacy at the center of American history might have a gun holstered on his waist" (Makalani, 2016). They argue that guns have no place in a learning environment.

This will surely continue to be an issue, as campus shootings are on the rise in the United States. According to CNN.com, there has been a consistent increase in campus shootings over the past 15 years (Matthews et al., 2025). While these shootings are largely centered on states in the South, surprisingly, more than half of the shooters were not students or employees of the college or university where they attacked, though most of the victims were students.

*Do you support allowing students to carry concealed weapons on campus? Do you think this will increase violence on campus or decrease it? Would you feel differently about your classroom if you knew that one or more of your peers was carrying a gun? If so, how do you think it would change the classroom dynamics?*

**Necessity.** The second major form of justification defense is *necessity*. A necessity claim means that the defendant was forced to break the law in order to prevent something worse from happening. For example, if an individual is lost in the woods during a snowstorm and must break into a locked cabin to survive the cold, she can use this defense against a charge of breaking and entering (Schwartz, 2008). The difference between self-defense and necessity is that only property is damaged or taken in a case of necessity, while in self-defense, individuals are using force against another person to protect themselves. Also, in necessity, the harm prevented by breaking the law must be greater than the harm done by breaking the law, whereas in self-defense, if we are legitimately acting in self-defense, we could kill many people to save ourselves. Self-defense and necessity are similar, but one is about the right to use violence against another person, and the other is aimed at breaking the law to prevent a worse outcome.

## What Would You Do?

### Self-Defense and Joe Horn

Joe Horn was a 61-year-old (white) retiree living with his daughter in Pasadena, Texas, when he spotted two men robbing the house next door in November 2007. His neighbors were on vacation at the time of the incident. Horn picked up the phone and called 911 to report the incident. Here is the transcript of his conversation with the 911 dispatcher (iyarah, 2007):

*Horn:* He's coming out the window right now, I gotta go, buddy. I'm sorry, but he's coming out the window.
*Dispatcher:* Don't, don't—don't go out the door.
Mr. Horn? Mr. Horn?
*Horn:* They just stole something. I'm going after them, I'm sorry.
*Dispatcher:* Don't go outside.
*Horn:* I ain't letting them get away with this shit. They stole something. They got a bag of something.
*Dispatcher:* Don't go outside the house.
*Horn:* I'm doing this.
*Dispatcher:* Mr. Horn, do not go outside the house.
*Horn:* I'm sorry. This ain't right, buddy.
*Dispatcher:* You're going to get yourself shot if you go outside that house with a gun, I don't care what you think.
*Horn:* You want to make a bet?
*Dispatcher:* OK? Stay in the house.
*Horn:* They're getting away!
*Dispatcher:* That's all right. Property's not worth killing someone over, OK?
*Horn:* [*curses*]
*Dispatcher:* Don't go out the house. Don't be shooting nobody. I know you're pissed and you're frustrated, but don't do it.
*Horn:* They got a bag of loot.
*Dispatcher:* OK. How big is the bag . . . which way are they going?
*Horn:* I'm going outside. I'll find out.
*Dispatcher:* I don't want you going outside, Mr. Horn.
*Horn:* Well, here it goes, buddy. You hear the shotgun clicking and I'm going.
*Dispatcher:* Don't go outside.
*Horn:* [*yelling*] Move, you're dead! [*Gunshots*]

An officer arriving on the scene saw Horn shoot the burglars in Horn's own front yard and that both burglars "had received gunfire from the rear." Both burglars were undocumented aliens with criminal records, neither carried guns (though one apparently had a sharp metal tool in his pocket), and both had died from gunshots in the back delivered by Horn.

*What would you do if you were in Horn's position? Would you use your weapon to protect your neighbor's property? Should there be limits regarding your ability to use lethal force in self-defense? What should these limits be?*

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*Source:* iyarah. (2007, December 11). *The complete Joe Horn 9-11 call*. YouTube. https://www.youtube.com/watch?v=LLtKCC7z0yc.

## Excuses

When she uses an excuse defense, a defendant is saying that her acts were criminal, but for some reason, she shouldn't be punished for her actions. Given her situation, she isn't really to blame for breaking the law, because she ultimately isn't responsible for her behavior. The most common excuse defenses are *insanity* and *duress*.

### Insanity

Even though we associate *insanity* with mental illness, the term itself is not used by professional psychologists. Insanity is a legal concept designed for criminal trials, not a term used by mental health professionals. (If you use the word *insane* in your psychology class to describe a person, you will probably get confused or dirty looks from your professor.) The terms *insanity* and *mental illness* are meant to do different things. A person who is mentally ill needs treatment for her condition, whatever that may be. A person who is declared insane by a court of law is determined to not be responsible for her actions. You can be both mentally ill and insane, but you can also be mentally ill, even severely mentally ill, but not be considered legally insane.

For the most part, courts and legal experts (not psychologists) have developed the insanity defense. There are several different versions of the defense in criminal law, they vary state by state and have changed over time. The most common version of the insanity defense is called the *M'Naghten rule*, which was the very first one used in a court. It was formulated during the trial of Daniel M'Naghten, a British man who murdered a civil servant in 1843. The M'Naghten rule states that a person is *not guilty by reason of insanity* (sometimes abbreviated as NGRI) if at the time of the committing of the act, the party accused was laboring under such a defect of reason, from disease of mind, and not to know the nature and quality of the act he was doing or, if he did know it, that he did not know he was doing what was wrong.

Thus, to be declared insane under the M'Naghten rule, a defendant must not know that she should not have committed the crime. A person who suffers delusions, believing that her roommate is in fact an alien monster and then attacks her, is probably insane under this definition. However, if a person who is mentally ill murders an ex-lover out of a paranoid and delusional jealousy and then flees the scene of the crime, she is most likely *not* insane under this definition, because she knew that her acts were wrong. (Otherwise, she would not have fled.) The fact that it requires the defendant to believe that she was right makes the M'Naghten rule the most difficult form of the insanity defense to prove in a court of law and it is rarely successful.

The M'Naghten rule is not the only version of the insanity defense in American criminal law. A second formulation, the so-called *irresistible impulse* test, states that, alongside the M'Naghten rule, a defendant can claim insanity if she is unable to control herself because of her mental illness. Thus, a person could *know* an act is wrong but nonetheless be unable to stop herself from acting out—for example, a person who acts out of an obsession but who understands that this obsession is irrational. Finally, the broadest definition of insanity is the so-called *Durham Test*, which says that a defendant is not guilty by reason of insanity if the defense can show that the defendant's actions were "a product of mental disease or defect" (Dressler & Garvey, 2015). Different versions of each of these rules appear in different state penal codes around the country, although with somewhat different language in each state.

The insanity defense is not the only way that a court can consider a defendant's mental health in a trial—it is just the only way that a defendant can be acquitted because of her mental illness. If a defendant's condition is bad enough, a court can conclude that she is not competent for trial, meaning that the trial cannot go forward because the defendant cannot understand the charges against her. Other times, the defendant can claim to suffer from *diminished capacity*, claiming that her mental illness was so severe that she could not formulate the *mens rea* of an offense. For example, if a defendant believed that a police officer was in fact an alien, she could not form the *mens rea* required for the crime of intentionally killing a police officer (*Clark v. Arizona*, 2006). In other cases, the trial can go forward, and the defendant is declared *guilty but mentally ill*, referred to as GBMI. This means that the defendant will undergo psychiatric treatment along with punishment but is still guilty of the crime. Finally, a mentally ill person can be civilly committed, meaning that she is placed in a mental hospital for mental health care without having been convicted of a crime. (See Chapter 12 for more on this.) While many consider these options to be easier or preferable to normal imprisonment, involuntary commitment can be more restricting and last longer than would a traditional prison sentence.

## Reality Check

### The Insanity Defense

Several high-profile cases involving defendants who claimed such a defense have given the insanity defense a bad reputation. Perhaps the two most famous are John Hinckley Jr., who attempted to assassinate Ronald Reagan in 1981, and Dan White, a San Francisco politician who killed two colleagues in 1978. Both successfully used the insanity defense in their cases. White notoriously used his intake of sugary foods as evidence of his insanity, a defense that was widely mocked as "the Twinkie defense." Because of these cases, there was a great deal of backlash against the insanity defense, and many states either abolished it outright or highly restricted its use. At the time, many in the public were skeptical about mental health concerns and considered the insanity defense to be simply an excuse for people to get away with breaking the law.

However, both of these cases are more complicated than they might first appear. Hinckley had claimed that his obsession with the actress Jodie Foster led him to try to kill the president so that he could prove his love for her. While he was acquitted of the charges against him, he was not set free. He was institutionalized in a mental hospital for 35 years as he underwent treatment, probably a longer term than he would have served had he been convicted of attempted murder. He was finally let out on supervised released in 2016 but forbidden to have contact with any of his victims, including Foster.

White's Twinkie defense was harshly attacked in the media, and many reported a false story that he had claimed that the sugary snacks led him to kill. In truth, White's lawyers had argued that he suffered from mental illness, and as part of this illness, his diet had changed. They did not claim that junk food made him into a killer; it was just a piece of evidence that pointed to his mental instability. White was not acquitted of the killings but was convicted of the lesser offense of manslaughter rather than murder on account of his mental health challenges. He spent five years in prison and committed suicide in 1985, two years after his release.

Our views about the insanity defense are closely connected to our beliefs about mental illness more generally. A skeptical person who thinks that people with mental health issues are "whiners" is unlikely to take the defense seriously. However, the more seriously you take mental health issues, the more likely you are to take the insanity defense seriously. As our culture becomes more aware of mental health issues and more open to discussing these issues, the defense may ultimately become more effective. Despite our attitudes toward mental health issues, however, the legal barriers are high for the insanity defense, and it is only rarely used. It is a difficult case to make in court, and juries as well as the general public are often skeptical about it (Hans & Slater, 1983).

## Duress

In December 2004, a gang of men invaded the homes of two executives of the Northern Bank in Belfast, Northern Ireland, and held their families hostage. The gangsters demanded that the executives assist them in robbing their employers, or they would kill their loved ones (Caollai, 2010). The men obliged their captors, walking into the bank, essentially filling duffel bags with cash, returning home, and presenting them to the gang. Then, after the bank closed, the executives held the doors open for the robbers and allowed them to ransack the bank, clearing out as much cash and other forms of currency as they could get their hands on. After the robbers took the money, they fled the area while their accomplices released the hostages. Later, members of the terrorist organization known as the Irish Republican Army (IRA) were arrested for what is now known as one of the biggest robberies in that region's history—with a take of over $33 million.

The executives essentially robbed the bank, but they weren't prosecuted because they acted under *duress*. Provided that the threat is both credible and serious, a person cannot be prosecuted for criminal acts committed while under duress. The law does not expect you to risk your life or the lives of others to avoid breaking the law. When you act under duress, you commit a crime against your will—you have no realistic choice in the matter.

There is one important limitation to the defense of duress, however. A defendant cannot use it as a defense for murder. Were a gun put to an individual's head and she were ordered to kill an innocent person, she could not then claim that she was forced to do it. This means that, practically speaking, the law requires you to die or face prosecution for murder in these cases. The fear is that, were duress accepted in such cases, people would too easily give in and commit the most horrible of crimes, figuring that they would not pay any price for their unwillingness rather than trying to escape. If duress is recognized as a defense to the killing of innocents, then a street or prison gang need only create an internal reign of terror and murder can be justified, at least by the actual killer. Persons who know they can claim duress will be more likely to follow a gang order to kill instead of resisting than would those who know they must face the consequences of their acts (*People v. Anderson*, Supreme Court of California, 28 Cal. 4th). Therefore, they could theoretically continue to murder with impunity. In addition, in many killings committed under duress, the killer put herself in the situation, such as by joining a gang. While most criminal laws don't expect people to be particularly heroic, in cases like these, it's up to the individual to find a way out, and no excuses will be accepted for failing to do so.

## Some Statistics . . .

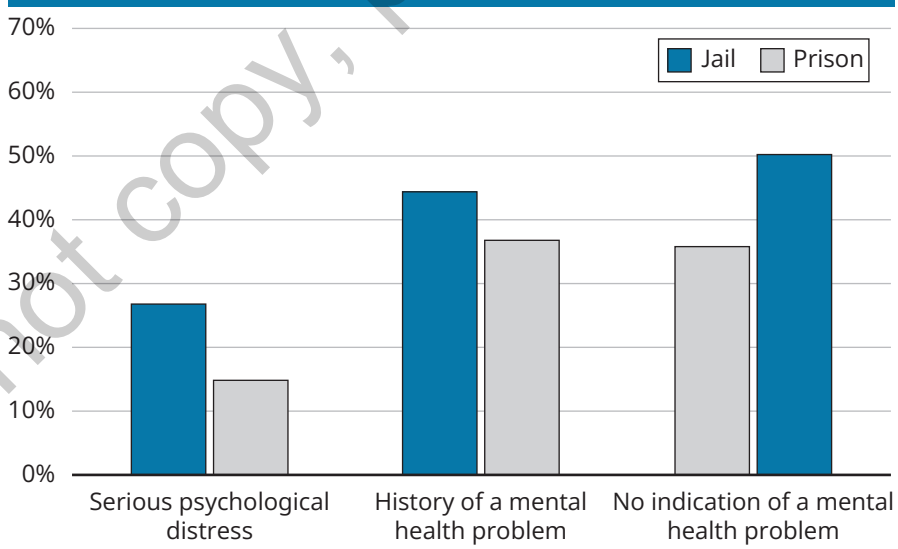
### Mental Illness in the Criminal Justice System

Very few defendants use the insanity defense, and even fewer use it successfully. The legal bar is just too high for many defendants to meet, even when they have serious mental illnesses. According to one study, *the insanity defense is invoked in less than 1% of all criminal cases and is only successful in about 26% of these cases* (Callahan et al., 1991). Research among the different insanity cases shows that those diagnosed with schizophrenia (60%) are most likely to get an insanity acquittal (Lymburner & Roesch, 1999). In one study of Georgia criminal courts, after the state created a "guilty but mentally ill" defense in 1981, there was an increase in the number of people convicted of crimes and a decrease in the number of people who committed an offense found not guilty by reason of insanity.

Georgia juries, when given the options of either finding a defendant "not guilty by reason of insanity" or "guilty but mentally ill," were more likely to choose the latter, everything else being equal.

This low rate of insanity defense claims means that there are a *lot* of incarcerated people who have serious mental illnesses but not legally insane (see Figure 2.1). The Bureau of Justice Statistics points out that about half of all people incarcerated have some kind of mental health issue, either in their past or in recent history.

**Figure 2.1 ▪ Mental Health Status of People Incarcerated in Prison and Jail, 2011–2012**




*Source:* Bronson and Berzofsky (2017).

Some of these individuals receive counseling or medication while incarcerated, but many go undiagnosed and untreated. Mental health and criminal justice are often closely connected in the modern world, and imprisonment can often be an inadequate and expensive substitute for mental health care.

## Jaywalking: The Invention of a Crime

We often think of crime as being obviously wrong. Rape is wrong. Murder is wrong. But many acts become criminal because society's views on certain kinds of behavior change, and oftentimes, these views change because some people benefit from these changes. Take, for example, the case of "jaywalking." Jaywalking usually involves a pedestrian crossing a street at a point other than a crosswalk or designated pedestrian crossing area. In some states, jaywalking is a misdemeanor; in others, it is a noncriminal infraction that can lead to a citation; and in others, it is not illegal. Chances are you have probably jaywalked many times in your life, particularly if you live in a big city. Jaywalking wasn't always considered a crime, and the reasons why it became criminalized are very interesting. Until the 1920s, roads were considered public spaces that belonged to everyone—bicycles, horses, carts, and pedestrians were all equally free to use the road as they saw fit. However, because they were so fast, heavy, and dangerous, cars upended this balance, and public roads were no longer safe for everyone. As the number of cars on the road increased, pedestrian fatalities skyrocketed, and the public cried out for regulations to keep cars in check and reduce accidents. Many cities banned cars in city centers, particularly in the daytime, to allow for pedestrians to roam freely and businesses and restaurants to operate freely in public roadways. Rather than restricting the use of cars in cities, however, automobile manufacturers and enthusiasts began supporting the idea that it is the responsibility of pedestrians to avoid cars, not vice versa, and they lobbied in support of laws that enforced this perspective. Marketers for these groups promoted the term "jaywalking" to stigmatize people who crossed the streets outside of intersections. "Jay," a term used in the early 20th century to describe an uneducated, unsophisticated country bumpkin, was used to shame people who refused to comply with the new laws. Eventually, cars took over public roads, pedestrians were pushed to sidewalks, and bicyclists were forced onto bike lanes (when they were available) in most cities. As with many other criminal laws, jaywalking laws have disproportionately impacted minorities. In New York City, for example, almost 90% of jaywalking tickets are given to Blacks or Hispanics (Kuntzman, 2020). A study in Washington State showed that, when they were stopped for jaywalking, "Black pedestrians experience detentions 4.7 times and receive tickets 2.7 times more frequently than their share of the population. Notably, nearly half of those stopped and cited for jaywalking are homeless, and 80% are male" (Campbell, 2024). In 1991, the rapper Tupac Shakur sued the Oakland Police Department after he was stopped by officers for jaywalking and then assaulted (he settled with he department for $42,000). Recently, many state governments have begun to decriminalize jaywalking and are opening some roads to improve access to pedestrians and bicylists, but clearly for the moment, most American roads belong to cars, and the law is on their side.

## Chapter Summary

In this chapter, we have discussed various elements of substantive criminal law, but, except for the analysis of murder, we have largely stuck to its general features. We haven't gone into the details of what constitutes assault, robbery, possession of a controlled substance, and so on. Each of these offenses could have its own section in this chapter, as each type of crime has a history, shows a remarkable variation from state to state, and raises important questions about law, order, and justice. When looked at closely, each individual offense in modern criminal law is fascinating and raises unique questions about the contours of right and wrong.

Rather than going into these specific crimes, however, I have tried to give you the tools to look at these various laws and understand how to read them. That means that you should be able to examine a statute, separate its *actus reus* from the *mens rea*, and understand how to interpret these aspects of a statute. Because there is such a variety among the criminal laws in the different states, it would be too time-consuming to do more than this. If you want to know more about your own state's criminal code, you can probably find it online without much effort. But without understanding the broader legal context of these statutes, that is, the way that lawyers interpret and apply them, by themselves they are not very useful.

In this chapter, we have looked at the legal construction of crime: how law is seen by lawyers and legislatures. In the next chapter, we will begin to examine crime as it is seen by those who study it. There we will look at how biologists, psychologists, anthropologists, and sociologists examine criminal behavior, rather than lawyers. *Criminology* encompasses these scientific approaches to crime, though as we will see, criminology is a widely diverse field with many different perspectives on the nature and causes of criminal behavior.

## Review/Discussion Questions

1. Go online and find your own state's criminal code. Pick one criminal offense and find the *mens rea* and *actus reus*. How did you know where they were in the law?
2. What are the main kinds of defenses? Do you think that each defense should be allowed in criminal law? Which ones might you want to get rid of?
3. Many Americans now question whether the law is applied fairly to different groups. How could the legal system be changed to give people more confidence in how it operates?

## Exercise: *Actus Reus* and *Mens Rea*

Can you find the *actus reus* and *mens rea* of the crime?

### Texas

§ 28.03. Criminal Mischief.

**a.** A person commits an offense if, without the effective consent of the owner:
  **1.** he intentionally or knowingly damages or destroys the tangible property of the owner;
  **2.** he intentionally or knowingly tampers with the tangible property of the owner and causes pecuniary loss or substantial inconvenience to the owner or a third person; or
  **3.** he intentionally or knowingly makes markings, including inscriptions, slogans, drawings, or paintings, on the tangible property of the owner.

### Vermont

§ 1101. Bribing public officers or employees

**a.** A person shall not, directly or indirectly, corruptly, give, offer or promise to an executive, legislative or judicial officer, or to any employee, appointee or designee of any executive, legislative or judicial officer, or to a person who is a candidate or applicant for an executive, legislative or judicial office, a gift or gratuity
  **1.** with intent to influence his or her finding, decision, report or opinion in any matter within his or her official capacity or employment.

### Alaska

§ 11.41.270. Stalking in the second degree.

**a.** A person commits the crime of stalking in the second degree if the person knowingly engages in a course of conduct that recklessly places another person in fear of death or physical injury, or in fear of the death or physical injury of a family member.

## Key Terms

Actus reus
Capital offenses
Common law
Inchoate crimes
Mens rea
Stand-your-ground-laws
Strict liability offenses