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Concepts of Law and Justice

Learning Objectives

- Compare how criminal law differs from civil law
- Identify the historical influences of modern American criminal law
- Describe the four different sources of law
- Discuss the burden of proof required in a criminal case
- Define the four components of a criminal act
- Explain the different types of criminal defenses

On July 20, 2012, during a midnight showing of the film *The Dark Knight Rises*, James Holmes entered a Century 16 movie theater in Aurora, Colorado. Dressed in tactical clothing, Holmes set off tear gas grenades and opened fire into the theater audience. At the end of his rampage, 12 people were dead and 70 others were injured. He was apprehended outside of the movie theater.¹

In addition to filing 24 counts of first-degree murder, 116 counts of attempted first-degree murder, and one count of illegal possession of explosives,² the district attorney stated that the state would seek the death penalty in the case. At the time, Colorado had only three people residing on death row, and the last execution had been carried out in 1997.³ Holmes's attorneys indicated that they would be pursuing an insanity defense. The state sent out juror summonses to 9,000 candidates, and 12 jurors and 12 alternates were selected. The trial began on April 27, 2015.⁴ After more than 11 weeks of testimony, the trial concluded and jury deliberations began. It took 12 hours for the jury to find Holmes guilty of all crimes. Although the court-appointed forensic scientist testified that Holmes suffered (and continues to suffer) from significant mental illness, jurors believed Holmes understood that his actions were wrong at the time of the crime.⁵ This finding made it such that an insanity defense was unsuccessful, and the jury found Holmes guilty.

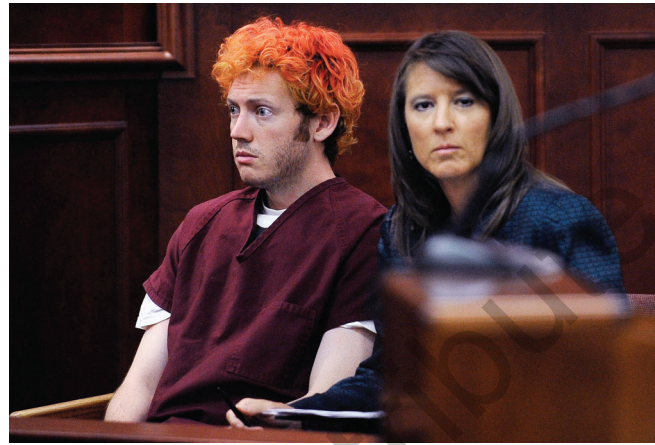
The same jury was then faced with the task of determining whether James Holmes should be sentenced to death for his crimes or if he should be sentenced to life without the possibility of parole. They heard stories about Holmes's childhood and evidence about his history of delusions and mental illness. They heard stories about the victims and the lives that were lost or irrevocably damaged as a result of Holmes's actions.⁶ In the end, the jury could not reach a unanimous verdict on the death penalty. Holmes received 12 sentences of life without the possibility of parole—one for each victim—and an additional 3,318 years for the nonlethal crimes.⁷

In this chapter, you will learn about the development of law and how it relates to the criminal justice system. The chapter begins with a discussion on the different sources of law in the United States. The chapter then focuses on the different types of law and their relationship to the criminal justice system. You'll also learn about the different legal defenses that are used in the criminal courts to explain or justify criminal behaviors. The chapter concludes with two Current Controversy debates. The first, by Clayton Mosher and Scott Akins, looks at the debate over legalizing marijuana. The second, by Alissa Ackerman, questions whether we should identify sexual harassment as a form of sexual assault.

Types of Law

Civil Cases

In the United States, we have two separate court systems to respond to our two primary areas of law: civil law and criminal law. **Civil law** governs disputes between individuals or private parties (which can include corporations) and generally involves violations of private acts, such as contracts, property disputes, and family law. In these cases, the person who initiates the case is referred to as the **plaintiff**, and the person who is responding to the case is the defendant. The burden to prove the case is placed on the plaintiff. Under civil law, the plaintiff must provide evidence to prove her or his case by the **preponderance of the evidence**. This means that if the evidence presented is more likely to prove that the law was violated, then the plaintiff wins the case. Under civil law, the form of punishment is financial.



James Holmes appears in a Colorado courtroom with his attorney shortly after his arrest. Holmes was convicted of a mass shooting in an Aurora, Colorado, theater during a screening of *The Dark Knight Rises*. Why was his insanity defense unsuccessful?
Pool/Getty Images News/Getty Images

Civil law: Law that governs disputes between individuals or private parties and generally involves the violation of private acts.

Plaintiff: A person who brings a suit in a civil case.

Preponderance of the evidence: The burden of proof in a civil case. Refers to when the totality of the evidence exceeds a 50% likelihood that the law was violated.

One of the most famous civil court cases was *Liebeck v. McDonald's Restaurants* (1994), otherwise referred to as the McDonald's hot coffee case. Ms. Liebeck ordered a cup of coffee from the drive-thru at a local McDonald's. While sitting in the passenger's seat, she placed the cup between her knees to steady the coffee while she removed the lid to add cream to the beverage. She subsequently spilled the contents of the cup over her groin and legs and suffered third-degree burns as a result of the high temperature of the beverage. Her burns were so extensive that she required several skin grafts and was partially disabled for two years as a result of her injuries. Ms. Liebeck sought assistance from McDonald's to cover her medical expenses. Despite several requests for a settlement, McDonald's refused. She filed a suit with the civil court of New Mexico (where she resided), and her lawyers alleged that by serving the coffee at such a high temperature, McDonald's was guilty of gross negligence. The jury in the case agreed with Ms. Liebeck and awarded her \$160,000 in damages for her pain and suffering. The jury also awarded punitive damages in the case of \$2.7 million.⁸

Criminal Cases

In contrast to civil law, criminal law cases are brought by the government against a defendant for violating a specific law. In a criminal law case, the burden of proof is **beyond a reasonable doubt**. Figure 2.1 demonstrates how this burden of proof is different from other forms of proof that are used throughout our justice system. This means that in order to convict a defendant of a crime, the court must find that there is little doubt according to the reasonable or typical individual that the defendant committed the crime. Depending on the type of crime that the defendant is convicted of, he or she may receive probation, spend time in jail or prison, or be executed as punishment for the crime. You'll learn more about the different types of punishment in Chapter 10.

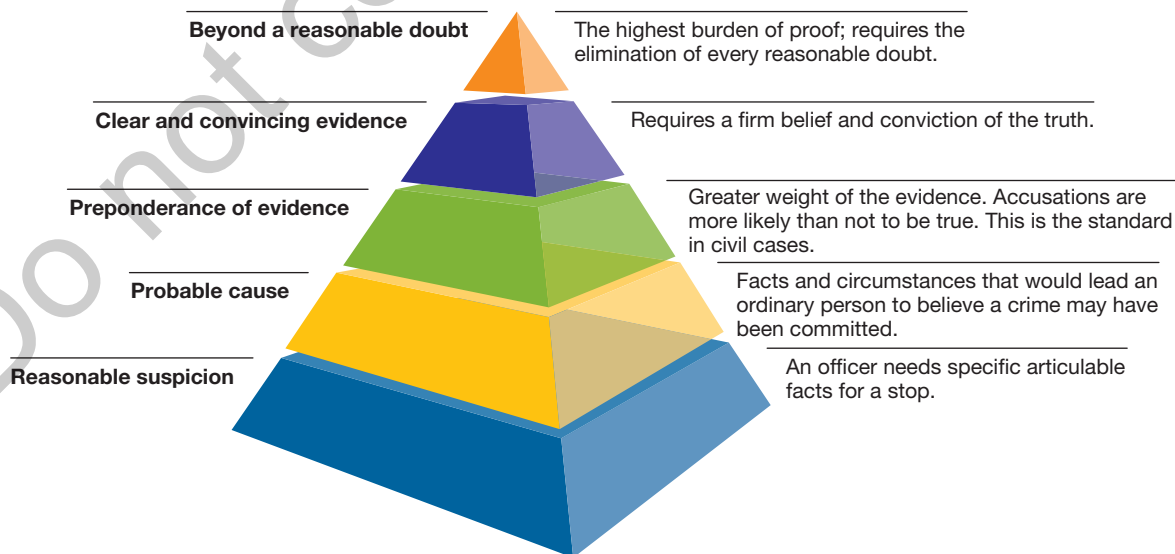
Federal Criminal Laws

Federal criminal laws are enacted by the legislative branch of the federal government. Federal law related to criminal justice includes the regulation of firearms, drugs, money laundering, fraud, and a variety of other criminal activities. Federal law also governs activities within federal government buildings, in national parks, and on tribal land. In addition, federal law violations can be triggered when crimes occur across state lines.

Beyond a reasonable doubt: In order to convict a defendant of a crime, the court must find that there is little doubt according to the reasonable person standard.

FIGURE 2.1

Burden of Proof



State Criminal Laws

States also have the power to make laws prohibiting behaviors under the Tenth Amendment. Unlike federal criminal law, which applies to all 50 states as well as the District of Columbia and U.S. territories, state law is limited to the specific geographic jurisdiction of that state. While criminal laws may have similar characteristics across the nation, there are also differences in the types of behaviors that are defined as criminal from state to state, as well as in the types of punishments that violators are subjected to. For example, several states, such as Washington, Colorado, and California, have legalized the recreational use of **marijuana**, but the majority of states continue to criminalize the behavior. Alabama's criminal law defines the personal possession of marijuana as a misdemeanor, but subsequent possessions can be charged as felonies. Meanwhile, several other states have decriminalized simple possession or limited its enforcement to a civil violation. Even in states that have decriminalized marijuana possession, several have created specific laws about the amount that one is permitted to possess. While Mississippi state law allows for someone to possess up to 30 grams of marijuana in a first offense, Maryland's law on the decriminalization of marijuana only allows for the possession of 10 grams or less. You'll learn more about this debate in Current Controversy 2.1 at the end of this chapter.



The Twelve Tables represented the codified customs of early Roman law. What influences of Roman law and English common law can we see in the American legal system today?

Public domain

Municipal Criminal Laws

A municipality can have its own body of law. In terms of jurisdiction, these laws are generally the most limited as they are only applied to a specific city or county. Municipal criminal law is limited to cases involving infractions and misdemeanors. An infraction is a violation that is punishable by a fine but does not carry a potential jail sentence. Unlike misdemeanors and felonies, cases involving infractions do not involve jury trials, nor is the accused provided an attorney if she or he cannot afford one (though defendants are permitted to hire an attorney if they wish). The most common type of infraction is a traffic violation, but infractions can also include jaywalking and disturbing the peace. Infractions are also unique in that they follow the burden of proof similar to a civil case—preponderance of the evidence. Cases that involve misdemeanor crimes at the municipal level are handled just like misdemeanors under state and federal law, and these cases are managed by the same due process protections.

Sources of Law

If we look throughout history, we see several references to law and legal systems. One of the earliest examples of law can be found in the code of Hammurabi, which dates back to 1754 BCE and contained references to 282 different laws. It is here that we find the first reference of **lex talionis**, which argued that the punishment should fit the nature of the crime. For example, the law against slander stated that “if anyone ‘point the finger’ at a sister of a god or the wife of any one, and can not prove it, this man shall be taken before the judges and his brow shall be marked.”⁹ In contrast, ancient Roman law developed through centuries of customs that were passed down from one generation to another. These customs later became codified in 449 BCE as the Twelve Tables and stood as the foundation of the Roman law. As the Roman Empire expanded, so did its legal system. During the third century BCE, we see the emergence of the first legal scholars. These trained jurists were tasked with interpreting the law, much like the U.S. Supreme Court does today. Indeed, Roman law significantly influenced much of Western law, including the English common-law system.¹⁰ English common law emerged during the Middle Ages. Henry II (1154–1189 CE) established a system whereby judges were sent out to

Marijuana: Drug derived from the cannabis plant.

Lex talionis: Latin term that refers to the theory that punishment should fit the crime. The concept derives from ancient law and is referenced in biblical texts as *eye for an eye*.

resolve disputes throughout the country. One of the key features that emerged under the common-law system was the doctrine of **stare decisis** (which means “to stand by things settled” in Latin). This refers to a system of **precedent** whereby future legal decisions are required to take into consideration previous rulings. This means that a court should issue a ruling that aligns with not only its own previous decisions but also the rulings of higher-level courts. This system is still in use today.

Both Roman law and English common law heavily influenced the American legal system. Today, we can find laws among four primary sources: constitutional law, statutory law, administrative law, and case law.

Constitutional Law

A constitution serves to establish and govern a government.¹¹ The U.S. Constitution stands as the highest law of our country and embodies the principles from which all other legal rules and processes are derived. It was written in 1787 in Philadelphia and was ratified by nine states on June 21, 1788. The first 10 amendments compose the Bill of Rights, and several of these amendments relate directly to criminal law. Table 2.1 highlights the **constitutional law** protections that the Bill of Rights provides. The framers of the Constitution were particularly concerned about preserving due process for individuals who are accused of a crime.

Most of the rights that we refer to as part of our criminal justice process come from the Fourth, Fifth, Sixth, and Eighth Amendments. The Fourth Amendment protects individuals against unreasonable searches and seizures. Perhaps the best understanding of this is that police officers are generally required to obtain a warrant before conducting a search of your home. You’ll learn about this rule of law as well as its exceptions in Chapter 8. The Fifth Amendment protects against double jeopardy and self-incrimination. **Double jeopardy** means that a person cannot be tried for a crime more than once. So if an individual is found not guilty by the court, she or he cannot be retried for the same case in the future. **Self-incrimination** means that a person has the right to remain silent and does not have to respond to questions that might implicate himself or herself in a criminal offense.

The Sixth Amendment provides for the right to a speedy trial by an impartial jury of one’s peers in the jurisdiction where the crime occurred. It also provides for the right to be informed of the nature of the charges, to confront any witnesses that will testify against you, and to present witnesses in your own defense. It also provides for the right to an attorney. In many ways, it is the provisions of the Sixth Amendment that have structured our criminal courts system. You’ll learn more about this structure and its processes in Chapter 9. Finally, the Eighth Amendment protects against cruel and unusual punishment. Perhaps the most commonly known argument involving the Eighth Amendment is the use of the death penalty, but this amendment has also been invoked

Stare decisis: Latin for “to stand by things settled.” Refers to the system of precedent.

Precedent: Refers to the legal standard whereby future decisions are required to take into consideration previous rulings.

Constitutional law: Law that is specified by either a state or the U.S. Constitution.

Double jeopardy: A person cannot be tried for a crime more than once.

Self-incrimination: A person has the right to remain silent and does not have to respond to questions that might implicate himself or herself in a criminal offense

TABLE 2.1

Constitutional Rights That Relate to Criminal Law

AMENDMENT	PROTECTION
First Amendment	Protects freedom of religion, freedom of speech, and freedom of the press as well as the right to assembly.
Second Amendment	Protects the right to bear arms.
Fourth Amendment	Protects against unreasonable searches and seizures.
Fifth Amendment	Protects against double jeopardy and self-incrimination. Provides due process protection in criminal cases.
Sixth Amendment	Provides for the right to a speedy trial by an impartial jury of one’s peers in the jurisdiction where the crime occurred. Provides the right to be informed of the nature of the charges, to confront witnesses against oneself, and present witnesses in one’s defense. Provides the right to an attorney.
Eighth Amendment	Protects against excessive bail and cruel and unusual punishments.
Fourteenth Amendment	Extends due process protections to the states.

to defend against other practices, such as the use of solitary confinement and mandatory sentencing schemes. It also protects against excessive bail.

Several of the amendments have been used to challenge various practices within the criminal justice system, such as the application of the Eighth Amendment to reduce prison overcrowding. You'll learn more about the rights of convicted individuals and the incarcerated in Chapters 11 and 12.

In addition to the U.S. Constitution, each state has its own constitution that serves as a binding document for all laws at the state level. However, these laws bind only that specific state. This means that state laws must abide by the rules set forth in not only that state's constitution but the U.S. Constitution as well. If a law is challenged, it is up to either the state supreme court or the U.S. Supreme Court to determine whether the law violates the relevant constitution. As you will see throughout this book, many of our policies and practices of criminal law have been established through the constitutional review process.

Statutory Law

Federal Statutory Law

Statutory law refers to laws that are established by governments. Federal law is created by members of Congress, who first introduce a bill in either the House or the Senate (wherever their seat is held). These bills are then debated by a committee (and in some cases a subcommittee, which comprises a small number of congressional members). Once the bill is approved by committee, it is returned to the House or the Senate for general debate. At this stage, members can reject the bill, propose amendments to the bill, or pass the bill. The bill is then sent to the president, who either signs the bill and allows it to become a law or vetoes the bill. However, Congress can override the presidential veto with a two-thirds vote by each of its chambers.¹²

State Statutory Law

At the state level, statutory law is proposed by a member of the state legislature and is debated in a fashion similar to the federal process. Once a majority of the members of the state legislature approve the measure, it is sent to the state's governor for approval. State law exists in partnership with federal law. In cases where there is a conflict between state and federal law, it is up to the federal court system to resolve these disputes. Since each state has its own set of laws for its jurisdiction, you may often find differing and contradictory approaches to issues.

In addition to legislators, citizens of several states can create laws as a result of direct democracy. Twenty-four states allow for laws to be adopted via a ballot initiative process. Under a direct initiative, signatures are gathered by registered voters to place an initiative on the election ballot. If the measure passes by a majority vote, then the initiative is enacted into law. This method of direct democracy is particularly popular in California, which has used this practice to enact a number of state laws, including several related to criminal justice. For example, Proposition 83 (otherwise known as Jessica's Law) was passed by a vote of 70.5% of Californian voters in 2006 and was designed to increase the punishment for individuals who are convicted of sex crimes against adults and children. The law also increased the postincarceration restrictions on convicted sex offenders through residency requirements and requiring offenders to wear GPS tracking devices. The law was challenged on the grounds that the residency requirements, which prohibited convicted sex offenders from living within 2,000 feet of a school or park, were too strict. Since many offenders were forced to live on the streets (which could be viewed as a violation of their parole), the court held that these provisions were a violation of the liberty and privacy interests of the individuals. The court also held that restricting the residency of convicted offenders did little to protect the community. In its decision, the California supreme court determined that while such restrictions could be upheld in certain types of cases (like those involving victims under the age of 14), a blanket restriction was unconstitutional.¹³

Statutory law: Laws that are established by governments.

Administrative Law

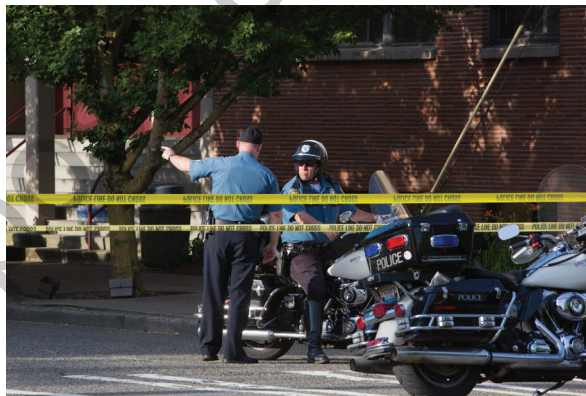
Administrative law refers to the body of law that governs the creation and function of state and federal government agencies. Administrative law focuses on the powers that are granted to these agencies, the types of rules that they make, and how these agencies are linked to other areas of the government as well as the general public. Administrative law spans across virtually every topic, including intelligence, security, banking, finance, food, education, and communications—if there is a governmental agency involved in its regulation, then administrative law is at the center of this discussion. The primary source for administrative law is the Federal Administrative Procedure Act (APA). The APA has four primary purposes: (1) to mandate that government agencies inform the public of the nature, procedures, and rules of their organization; (2) to provide a process whereby the public can participate in making such rules; (3) to establish and implement a uniform process by which rules are made and violations are adjudicated; and (4) to define the scope of judicial review.¹⁴ Current administrative law is published daily in the *Federal Register* and is reorganized on an annual basis into the *Code of Federal Regulations*.

Administrative law: Body of law that governs the creation and function of state and federal government agencies.

SPOTLIGHT

Concealed Weapons on College Campuses

The issue of allowing concealed weapons on college campuses has seen significant debate in recent years. While some states have passed laws permitting the practice, others have moved in the opposite direction to oppose it. While all 50 states have laws that allow citizens to carry concealed weapons in certain circumstances, only 19 states permit individuals to carry a concealed weapon on a college campus. An additional 23 states allow individual campuses to determine their own policies on the practice.^a In June 2015, Texas governor Greg Abbott signed Senate Bill 11, which permits individuals with a concealed handgun license to legally carry on college campuses. The sponsor of the bill, Allen Fletcher, argued that since Texas law already permits individuals with a concealed weapons permit to carry in public, it was likely that many students already carried in class unbeknownst to university faculty and staff.^b As in other states, Texas state colleges and universities must create policies for their individual campuses that determine where concealed weapons can be carried. While the law does provide the creation of gun-free zones, it is unclear as to how these zones can be defined.^c Texas already allows teachers in public elementary and secondary schools to carry a concealed weapon in the classroom if they have permission from their school district superintendent.^d Meanwhile, other universities are



Local police arrive on scene at Seattle Pacific University on June 5, 2014, after Aaron Ybarra opened fire in the university library, killing one student and injuring two others. Should concealed weapons be allowed on college campuses?
Mat Hayward/Stringer/Getty Images News/Getty Images

purchasing bulletproof whiteboards for professors to help protect in the case of an active shooter.^e California governor Jerry Brown signed a bill in October 2015 banning concealed guns from all California schools, including universities.^f In addition, states such as Michigan and Montana have vetoed bills that would permit the expansion of concealed weapon carry laws on college campuses.^g

CRITICAL THINKING QUESTIONS

1. Do you think that allowing concealed weapons on college campuses will increase or decrease student safety?
2. What are the laws for concealed weapons carry for your state? What do these laws mean for the schools in your community?

Administrative law is often involved in criminal justice matters. For example, the Department of Agriculture was one of the first agencies involved in the investigation of Michael Vick. While Vick was ultimately convicted of federal crimes related to his involvement in dog-fighting events, it was administrative law that granted the Department of Agriculture the necessary jurisdiction to initiate the investigation in conjunction with the Department of Justice. Vick was ultimately sentenced to 23 months in prison. While his conviction did not prohibit him from being reinstated by the NFL, the case did result in new federal laws, such as the Animal Fighting Prohibition Enforcement Act of 2007. This new law amended the Animal Welfare Act and increased the penalties in cases of animal fighting ventures.¹⁵ In addition, dog fighting is now a felony in all 50 states.¹⁶

Case Law

Unlike statutory law, which is typically created by legislatures (and, in some cases, the initiative process), **case law** is created as a result of legal decisions by courts. These new interpretations of the law are called *precedent*. You learned earlier in this chapter that the origins of precedent lie in English common law, which served as a significant influence on the American judicial system. Case law involves a judge or panel of judges who provide a written explanation of their decision in a court case. These explanations are called **opinions**. Opinions are generally written in appellate cases, so they focus on issues of law rather than the facts of the case. These opinions lay out the reasoning used by the justices to make their decision. These written opinions often build upon—or in some cases even overturn—previous decisions. Case law is directly linked to statutory law. Most legal challenges that create case law arise out of a conflict of statutory law. Generally speaking, in order to challenge statutory law, there needs to be an allegation that the law or its application is in violation of the governing constitution (such as a state constitution or the U.S. Constitution).

An example of case law is the recent U.S. Supreme Court decision in *Rodriguez v. United States*. Dennys Rodriguez was stopped by the Nebraska Highway Patrol for driving on the shoulder of the highway. The stop was legal as such conduct is prohibited by state law. The officer requested and received the license of Mr. Rodriguez and his passenger and subsequently issued a traffic citation for the conduct. The officer then asked if Mr. Rodriguez would consent to a perimeter search of his vehicle by a K-9 dog that was in the patrol car. When Mr. Rodriguez denied the request, the officer detained him until a second officer arrived. Upon the arrival of the backup officer, the K-9 dog performed a perimeter search of the vehicle and detected an illegal substance. A subsequent content search of the vehicle found methamphetamine. The length of time between the issuing of the traffic citation and the alert by the dog was seven to eight minutes. While Mr. Rodriguez's attorney argued that the evidence from the traffic stop should not be admissible, the objection was overruled by the trial court. Mr. Rodriguez was subsequently convicted on federal drug charges. Mr. Rodriguez appealed his conviction. The case ultimately appeared before the justices of the U.S. Supreme Court (*Rodriguez v. United States*, 2015), who agreed with Mr. Rodriguez. In its opinion, the Court stated that the extension of a traffic stop in order to conduct a dog sniff is a violation of the Fourth Amendment's protection against illegal search and seizure.¹⁷

Criminal Law

Each crime is defined under various different bodies of law—municipal law, state law, federal law, and even international law. In order to define an act as a crime, there must be a law that identifies this behavior as wrong. Laws are designed to represent the interests of the citizens. Laws about crime generally fall into one of two categories: *mala in se* and *mala prohibita*. Crimes that are **mala in se** are acts that are considered to be inherently illegal. Murder is an example of a crime that is *mala in se*. In comparison, acts that are **mala prohibita** are only crimes because they have been defined under the law as illegal. Examples of crimes that are *mala prohibita* are drug use, prostitution, and gambling.¹⁸

Components of a Criminal Act

Under criminal law, there are four components of a criminal act (Figure 2.2). The first is **actus reus**. Actus reus is Latin and means “evil act.” In order for a crime to exist, there must be an act that is defined by society as bad or wrong. The second component is

Case law: Law that is created as a result of legal decisions by the court.

Opinions: Written decisions of the court. Focus on issues of law that can be used as precedents in future cases.

Mala in se: Latin for crimes that are considered to be inherently wrong and therefore illegal.

Mala prohibita: Latin for crimes that are illegal only because they have been defined as such under the law.

Actus reus: Latin for “evil act.” One of the four required components of a criminal act.

International Law

Each government has its own body of law to govern its citizens. International law focuses on regulations between nations. International law covers a number of different topics, including human rights, international crime, refugee and migration issues, and conditions of war. International law also provides guidance on global issues such as the environment, international waters, trade, and communications.



The United Nations Security Council is tasked with maintaining international peace and security. Here, members meet to discuss the current security concerns in the Republic of Mali, in West Africa. The region has been battling a civil war since 2012. How does international law differ from other forms of law?
HABIBOU KOUYATE/Stringer/AFP/Getty Images

The United Nations (UN) is the primary body tasked with supporting issues of international law. Founded in 1945, it is made up of 193 member states. According to the governing charter, the UN promotes discussion among the member nations to help address the needs of various countries and help solve problems that exist between countries. In

addition, the UN provides support for issues that impact the global community as a whole.^a To date, more than 500 treaties have been deposited with the UN. One example of such a treaty is the International Convention for the Suppression of the Financing of Terrorism. Passed in 1999, the treaty aims to criminalize the financial support of terrorist entities and acts. It has been ratified by 187 states, making it one of the most successful antiterrorism treaties.^b

The International Court of Justice (ICJ) is the judicial entity within the United Nations that is used to resolve disputes between states and violations of international law. The court can also provide advisory opinions on issues of law and policy. In addition to the ICJ, several UN tribunals have been established by the UN Security Council and used to resolve specific disputes.^c For example, the Special Court for Sierra Leone was established in 2002 to address significant war crimes that occurred during the country's civil war between 1991 and 2002.^d However, the legal authority of these courts and tribunals is often limited as they are often established to address specific issues. In 1998, the international community adopted the Rome Statute, which provided the legal basis to establish a permanent international court system. The International Criminal Court is involved in prosecuting cases of war crimes, genocide, and crimes against humanity. Since its creation, it has been involved in 23 cases stemming from nine international events.^e

While the other forms of law discussed in this chapter reflect the various sources of law that can be found in many different jurisdictions, international law is unique in that it represents the needs and interests of the international community as a whole.

CRITICAL THINKING QUESTIONS

1. What are the challenges of maintaining a system of international law?
2. How does international law influence the legal decision making of the United States?

Mens rea: One of the four required components of a criminal act. Latin for the "evil thought." Refers to the intent of an offender.

Intent: Refers to the conscious decision to engage in a criminal act.

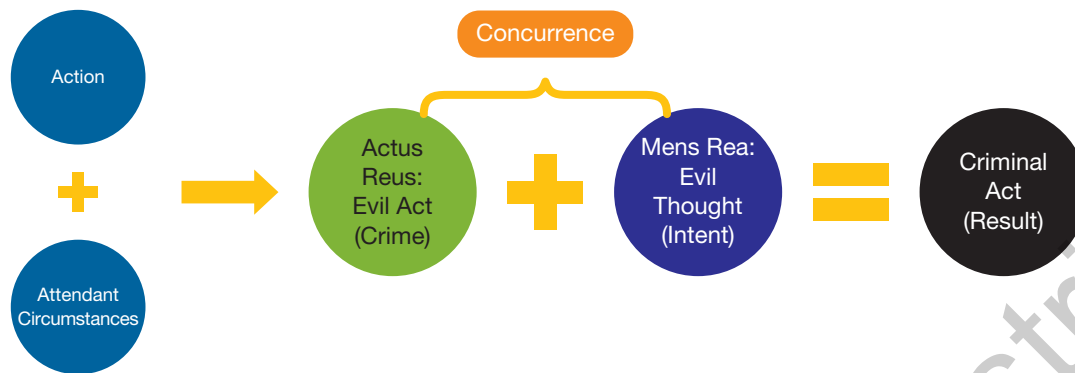
Concurrence: When the mens rea and actus reus join together in a crime.

Strict liability: Select cases where acts are crimes even if the individual lacked the mens rea or intent to commit a crime.

mens rea. While the actus reus is the act, mens rea is the "evil thought" that accompanies the crime. Thoughts alone are not considered to be criminal, but they contribute to the act of the crime by providing **intent**. In order for something to be considered a crime, there must be an evil act (or actus reus) and the bad intention to cause harm (or mens rea). When mens rea joins with actus reus, this is called **concurrence**. In a criminal case, both mens rea and actus reus must be proven beyond a reasonable doubt in order to convict someone of the crime. However, some crimes are defined as **strict liability** crimes. This means that mens rea does not need to be proven in order for an individual to be guilty of the criminal act. For example, if a man is found to be going over the speed limit, he can be charged with the violation even if he didn't realize he was speeding. Another example is that someone who drives drunk and subsequently kills another

FIGURE 2.2

Components of a Criminal Act



person in an accident most likely did not intend to harm anyone when she or he got into the car. Yet we define this as a crime. In this case, the decision to consume alcohol and then get into a car to drive home is considered a **voluntary act**, while the decision to get into an accident that causes harm to another person is an **involuntary act**.

In many cases, there will also be attendant circumstances to a crime. **Attendant circumstances** refer to what happens within the context of the act that makes it a crime. It is the relationship between mens rea and actus reus. For example, in the crime of rape, the act of sexual intercourse is not, in and of itself, a crime. However, in order for sex to be a lawful behavior, you must have consent from the parties involved in the act. Failure to obtain consent is an example of an attendant circumstance and is what defines the act as a crime. Finally, there is the **result**, or the harm, that is experienced as a result of the act and the intent joining together.

Substantive Criminal Law

Defining what makes something a crime is a part of **substantive criminal law**. Substantive criminal law is another way to describe statutory law because it refers to what acts we define as criminal. For example, substantive criminal law in many states defines the possession of marijuana as an illegal act. You'll learn more about the criminalization of this act in the debate at the end of this chapter. Substantive criminal law also defines the potential punishment for someone who is convicted of a crime. For example, Title 21 of the United States Code, otherwise known as the Controlled Substance Act, states that it is against the law to intentionally purchase over a 30-day period more than nine grams of certain controlled substances that are typically used in the creation of methamphetamine. The law further states that violators are subject to a minimum fine of \$1,000 as well as an imprisonment sentence of no more than one year. If, however, the individual has a prior conviction for a drug-related charge, the sentence increases to a \$2,500 fine and the potential for up to two years in prison. The potential sentence increases even further for those offenders with two or more prior convictions.¹⁹

Procedural Criminal Law

While substantive criminal law tells us what is a crime and how such crimes should be punished, **procedural criminal law** provides the structure by which such cases should move through the system. In Chapter 1, you were introduced to the criminal process and learned about how a case moves through the criminal justice system. It is procedural criminal law that provides the rules and regulations for how a case will proceed. It dictates the roles and responsibilities for each of the courtroom participants. It also provides guidance on how to ensure that a defendant's constitutional rights are protected. For example, procedural criminal law provides the time line by which the accused must

Voluntary act: A crime that is the product of a conscious choice.

Involuntary act: A crime that is performed with constraint or under duress.

Attendant circumstances: The relationship between mens rea and actus reus. Refers to what happens within the context of the act that makes it a crime.

Result: Component of a crime that refers to the harm that is experienced as a result of the mens rea and actus reus joining together.

Substantive criminal law: Defines what makes behavior a criminal act under the law.

Procedural criminal law: Provides the legal structure and rules by which cases should move through the system.

receive a probable cause hearing or provides details as to how a defendant can waive her or his right to a speedy trial. Procedural criminal law also requires that police officers inform someone of his or her constitutional right to remain silent if placed under arrest for a crime. The Miranda warning also informs the accused of his or her right to an attorney and that one will be provided if he or she is indigent. Informing suspects of their rights and ensuring that those rights are upheld is an important feature of procedural criminal law.

The Federal Rules of Criminal Procedure guide the federal criminal court system. They also provide the procedures that investigators must follow when building their case. This includes the rules for questioning a suspect as well as how searches are conducted. Each state also has its own code of procedural law. For example, Colorado procedural criminal law can be found within several different volumes, including the Colorado Rules of Criminal Procedure and the Colorado Rules of Evidence.

Criminal Defenses

When someone is accused of a crime, it is up to the prosecutor to prove that the defendant is guilty. In order to prevent a guilty verdict, offenders or their legal counsel will present their own evidence to refute or challenge the facts of the prosecution's case. This is called a **defense**. In this section, you'll learn about several common types of criminal defenses. You'll also learn about insanity defenses, which are far less common in real life compared with their representation on television series.

Necessity, Duress, and Entrapment

In some cases, defendants will admit that they broke the law but claim that their actions were justifiable. Cases of **necessity** suggest that the individual had to break the law in order to prevent a more significant harm from occurring. In these cases, the original violation is considered moot. Consider a case in which an individual walking by an abandoned building hears someone scream. The building is locked, and "Do Not Trespass" signs are displayed prominently. However, the individual ignores these signs and breaks a window to gain illegal entry into the building where he or she finds a young woman being assaulted. The second offender runs away, and the young woman is spared additional harm. In this case, the courts would view the case of trespass and destruction of property as necessary and justified in order to prevent the assault of the woman. In comparison, someone who engages in a criminal act under **duress** is forced to violate the law out of fear for her or his own safety. In order for duress to be seen as a viable justification, the threat must be serious (generally involving serious bodily injury to oneself or loved ones). In addition, the threat must be immediate, meaning that there is no option to escape.

Entrapment is different from duress and necessity in that it involves the actions of government officials. Entrapment occurs when an individual is deceived by an official (such as a police officer) into engaging in an illegal act. While the police are allowed to use techniques to gain information on a suspect, it is against the law to encourage or persuade someone to break the law in order to make an arrest. The involvement of the defendant must be of his or her own free will and not the result of any pressure or promises made by law enforcement.

Self-Defense

In some cases, individuals may engage in criminal acts in **self-defense**, meaning they feared for their own safety. Cases of self-defense require that the use of force is justified based on the nature of the intrusion. For example, many states have provisions for castle law (otherwise known as "make my day" laws), which allows citizens to protect their homes (and in some cases, their property and workplace). These allow individuals to defend themselves with force, including, in some cases, deadly force, if they feel that their home or the individuals inside the home are under attack. One of the most liberal rules is found in Texas, which allows for the use of lethal force in cases where an intruder has either unlawfully entered or attempted to enter another individual's home for any purpose. Other states restrict the use of force to cases in which a person believes that he or she is in physical danger.

Defense: A strategy to justify, explain, or excuse criminal behavior.

Necessity: Refers to cases in which an individual had to break the law in order to prevent a more significant harm from occurring.

Duress: A defense strategy that describes people who are forced to violate the law out of fear for their own safety or the safety of others around them.

Entrapment: A defense strategy that describes when an individual is deceived by a government official to engage in an act that is against the law.

Self-defense: A defense strategy that allows for the use of force to defend oneself against an attacker.

CAREERS IN CRIMINAL JUSTICE



So You Want to Be a Defense Attorney?

When someone is accused of either a misdemeanor or a felony crime, the U.S. Constitution guarantees the right to an attorney under the Sixth Amendment. In its interpretation of the Constitution, the U.S. Supreme Court has held that if a defendant cannot afford an attorney, the state or federal government is required to provide one. This right was first upheld in the case *Powell v. Alabama* (1932).¹⁹ In *Powell*, the Court reversed the convictions of nine young Black men who had been convicted and sentenced to death for the rape of two White women on a train traveling through Scottsboro, Alabama. The ruling stated that the right to an attorney is necessary in order to ensure that a defendant receives a fair trial. While the ruling initially applied only to death-eligible cases, the right to an attorney for the indigent was extended to all felony cases in *Gideon v. Wainwright* (1963).²⁰ You'll learn more about these cases in Chapter 9.

The job of a defense attorney is to ensure that the defendant's rights are upheld and to defend him or her in a criminal case. Defense attorneys can be either retained privately by the defendant or employed by the government as a public defender. As a defense attorney, it is your job to ensure that your client's rights are upheld at every stage of the criminal justice system—from arrest, to the trial, and beyond.

Those who are interested in working as defense counsel attend law school following their undergraduate studies. During law school, students who are interested in careers in this field might intern with a local public defender's office or private office. They must pass the bar exam in the state that they wish to practice law in.

In order to prove that a person acted in self-defense, the courts generally look at four criteria. First, the individual must show that the attack was unprovoked, meaning that he or she did not do anything to encourage the attack. Second, the threat of injury or death must be imminent or immediate. Third, the individual must prove that he or she used reasonable force in his or her defense. Finally, the individual must demonstrate that he or she reasonably felt that he or she would be severely injured or killed if not for the use of self-defense.²⁰ There are examples that do not fit within this model, such as cases where an individual kills a past or present intimate partner following a history of abuse. The battered woman syndrome has been introduced as evidence to explain the actions of women on trial for killing their batterers.²¹ The goal of introducing evidence of abuse is to provide an understanding to juries regarding why women in these extreme cases of intimate partner abuse believed that their lives were in danger and that violence was the only option to ensure their safety. However, juries and judges have generally shown little sympathy for women who kill their abusers, and many of these women have received either long-term or life sentences for these crimes.²²

Intoxication

While being under the influence of drugs and/or alcohol is often used as a justification for offending, it is rarely a successful defense strategy. Under this strategy, defendants argue that they were unable to appreciate the wrongfulness of their actions due to their intoxicated state. The **intoxication defense** hinges on the argument that a person who is under the influence lacks the mens rea to commit a criminal act. Alas, most state laws do not require the prosecution to prove *specific intent*—meaning that the individual intentionally caused the act and intended for that act to lead to a specific result. Rather, most crimes require only *general intent*, which states that the defendant intended to engage in the criminal act, regardless of the outcome of the crime. While involuntary intoxication (meaning that the person did not consent to intoxication) is more likely to be presented as a reasonable defense strategy, success in even these cases is rare.

Insanity

While the depiction of insanity as a criminal defense is present in a number of films and television episodes, the use of it as a defense strategy is rare in the real world.

Intoxication defense: A criminal defense that uses being under the influence of drugs or alcohol as a justification for offending.

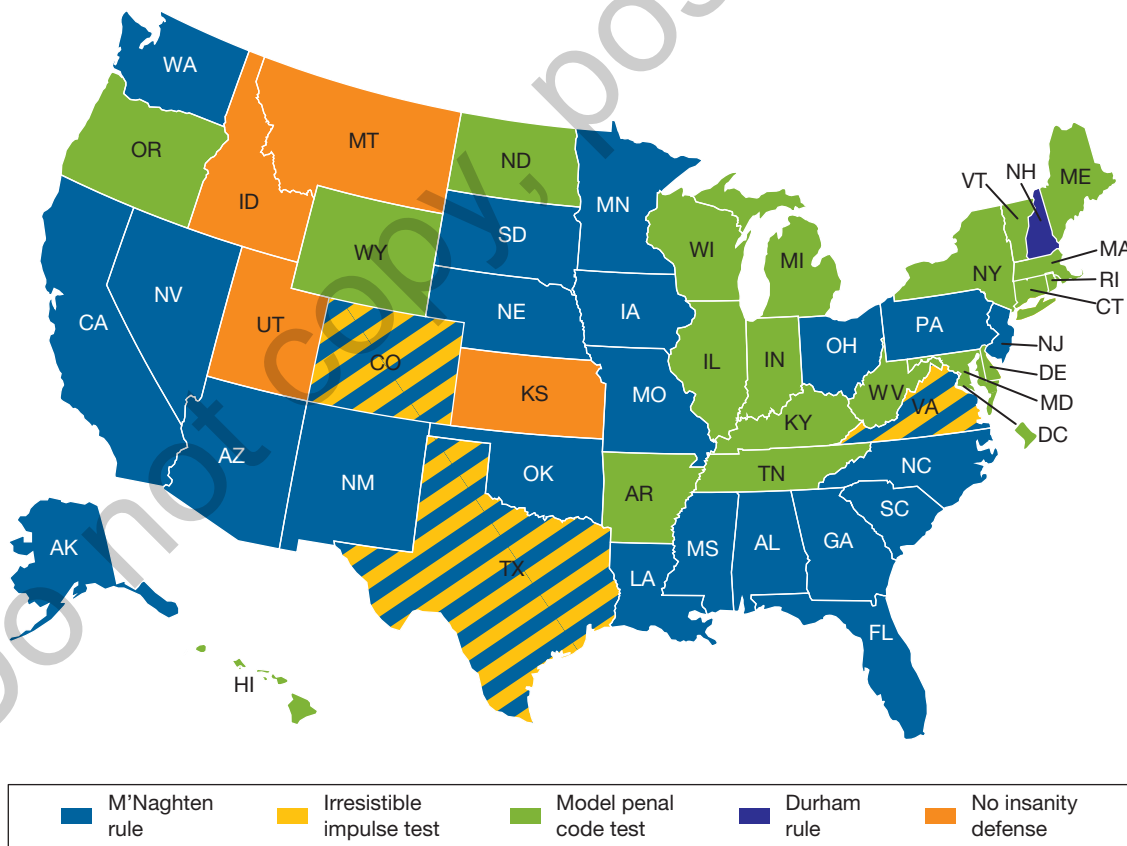
Less than 1% (.85%) of all criminal cases involve an insanity plea, and only one out of every four of these cases is successful.²³ The concept of **insanity** means that an individual is not held responsible for her or his criminal actions as the result of a mental condition. One of the most famous insanity trials in the twentieth century was that of John Hinckley. Hinckley became infatuated with Jodi Foster when she first appeared as a child prostitute in the film *Taxi Driver*. Hinckley’s obsession with Foster continued while she was a student at Yale, but he failed to gain her attention after numerous letters and phone calls. In 1981, Hinckley attempted to assassinate President Ronald Reagan in an effort to impress Foster. He was found not guilty by reason of insanity (NGI) for his crimes and was committed to St. Elizabeths Hospital in Washington, D.C., for treatment. Today, he is allowed extended overnight visits outside of the hospital with his family, though he remains in the custody of the facility. In 2016, Hinkley was allowed to leave the facility and live full-time with his mother. In 2018, the court granted him the right to live on his own, though he is still subjected to several residential and lifestyle restrictions.²⁴

The concept of not guilty by reason of insanity has been a feature of law throughout history. The argument has been that someone who is insane lacks the mens rea to understand his or her actions and to punish that person would not deter the rest of society.²⁵ Throughout the twentieth century, the American criminal justice system developed several different standards to determine whether a defendant is insane. There are four states that do not allow for an insanity defense—Kansas, Montana, Idaho, and Utah. The remaining states use one of four different legal standards: The M’Naghten rule, the irresistible impulse test, the model penal code test, or the Durham rule. Figure 2.3 highlights the status of the insanity defense for each state.

Insanity: An individual is not held responsible for his or her criminal actions as a result of his or her mental state.

FIGURE 2.3

Legal Standards of the Insanity Defense



Source: FindLaw, “The Insanity Defense Among the States,” 2018. <https://criminal.findlaw.com/criminal-procedure/the-insanity-defense-among-the-states.html>.

The M’Naghten Rule

The first standard is the M’Naghten rule, which is the foundation for most state definitions of insanity. The **M’Naghten rule** comes from the 1843 acquittal by the British courts of Daniel M’Naghten for the murder of Edward Drummond. M’Naghten suffered from delusions. The court held that this condition made it such that the defendant was unable to understand the difference between right and wrong. Following the trial, M’Naghten was sent to a local asylum for two decades until his death. Today, a court that finds a defendant insane under the M’Naghten rule must answer two questions: (1) Did the defendant know what he or she was doing at the time of the crime? And (2) did the defendant understand that these actions were wrong? If the answer to both of these questions is no, the defendant is found not guilty by reason of insanity. Based on this criterion, the M’Naghten Rule is often referred to as the “right-wrong” test.



Andrea Yates appears before a Texas court after admitting to drowning her five children in a bathtub at the family home. Her life sentence was overturned on appeal, and she was sent to a mental hospital instead of prison.

© AP Photo/David J. Phillip, Pool

The Irresistible Impulse Test

While the M’Naghten rule is still used by many jurisdictions, several states have adopted alternative measures. The **irresistible impulse test** expands the M’Naghten rule to include the issue of control—even though offenders may know that their actions are wrong, are they unable to stop themselves from engaging in the act? The irresistible impulse test was first adopted in 1887 in Alabama. One of the challenges of this test is how a court can determine whether an individual is able to control her or his behavior. The court needs to hear from medical experts to determine whether the defendant was unable to control his or her behavior as the result of a mental disease or defect.

The Model Penal Code

The **American Law Institute (ALI) standard** (also referred to as the **model penal code test**) combines the features of the M’Naghten rule and the irresistible impulse test to establish that defendants can be found criminally insane if due to a mental disease or defect they are unable to understand the difference between right and wrong or to control their behavior.²⁶ Texas is one state that uses the model penal code as its definition of insanity. Andrea Yates, for example, was initially found guilty for drowning her five children in 2001 in Texas. Her conviction was overturned on appeal due to false and misleading evidence that was used against her. She was retried in 2006 and was found not guilty by reason of insanity.

Guilty but Mentally Ill

Finally there is the distinction of **guilty but mentally ill (GBMI)**. This standard was developed to provide an alternative to the NGI verdicts. However, some scholars have questioned whether the GBMI distinction does more harm than good. In particular, does the GBMI classification result in a longer punishment than a traditional guilty plea would give?²⁷ Unlike NGI cases, GBMI defendants are still sentenced to prison. To date, there have been several high-profile cases involving a ruling of GBMI. In 1997, John E. du Pont, an heir to the du Pont fortune, was found guilty but mentally ill for the death of Dave Schultz, who trained and supported several Olympic athletes on du Pont’s estate in Pennsylvania.²⁸ The film *Foxcatcher* (2014), starring Steve Carell, Channing Tatum, and Mark Ruffalo, is based on the story of du Pont and Mark and Dave Schultz.²⁹

M’Naghten rule: One of the standards of insanity. Refers to situations when the defendant is unable to understand the difference between right and wrong at the time of the crime.

Irresistible impulse test: One of the tests of the insanity defense. Expands the M’Naghten rule with the issue of control. Describes the condition that even though an offender may know that an action is wrong, she or he is unable to refrain from engaging in the criminal act.

Model penal code test: Combines the features of the M’Naghten rule and the irresistible impulse test to establish that a defendant can be found criminally insane if, as a result of a mental disease or defect, he or she is unable to understand the difference between right and wrong or to control his or her behavior. Also known as the **American Law Institute standard**.

Guilty but mentally ill: Legal ruling that allows courts to hold an offender guilty for a crime but acknowledges the issues of mental illness as a cause of the criminal behavior.

Conclusion

The sources of criminal law guide our systems not only on what acts constitute crimes but also on how the criminal justice system should respond to these violations. From the roots of *lex talionis* to *stare decisis*, modern criminal law has been influenced by historical legal traditions. It is important to remember that not only is the law derived from a variety of different sources—which can influence how a crime is defined and processed—but the role of jurisdiction determines which court is charged with responding to the violation. While many of the features of our criminal law have remained constant throughout history, it is also important to remember that it is always growing and changing in response to society's issues and challenges.

CURRENT CONTROVERSY 2.1

Should Marijuana Be Legalized?

—Clayton Mosher and Scott Akins—

Introduction

Globally, it is estimated that 183 million people used marijuana in the past year,³⁰ and in the United States, close to half of all residents are estimated to have used marijuana at least once in their lifetime. Between 1980 and 2017, several million people were arrested for marijuana offenses in the United States, the overwhelming majority for simple possession of the substance. While marijuana arrests have been declining in recent years (with legalization of the substance in nine states), in 2016 there were approximately 1.5 million people arrested for drug-related offenses in the United States, and 587,700 of these were for simple possession of marijuana.³¹ Marijuana possession arrests accounted for over 5% of all arrests in 2016, and there were more arrests for marijuana possession than for all crimes the Federal Bureau of Investigation classifies as violent. There is also tremendous racial disparity in marijuana arrests—even though Blacks and Whites are estimated to use marijuana at roughly equivalent rates, Blacks are almost 4 times more likely to be arrested for marijuana offenses than Whites.³²

CON

CON: Marijuana Should Not Be Legalized

Under the Controlled Substances Act, passed as part of the Comprehensive Drug Abuse Prevention and Control Act of 1970 (and still in effect today), marijuana is classified as a Schedule I drug (along with heroin, MDMA [ecstasy], and PCP, among other substances). A Schedule I substance is defined as a drug that has "a high potential for abuse, no medical use in the United States, and a lack of accepted safety for use under medical supervision."³³

Most states created legislation prohibiting marijuana use over the 1900–1930 period, and in 1937, marijuana was effectively banned at the federal level with the passage of the Marijuana Tax Act. This was largely in response to the efforts of Harry Anslinger and the Federal Bureau of Narcotics (FBN, essentially the precursor to the current Drug Enforcement Administration), who engaged in a concerted campaign to demonize marijuana to justify federal legislation banning the substance. Some may recall the movie *Reefer Madness* (produced with the influence of the FBN), in which the FBN emphasized several themes to demonize the substance: the notion that marijuana led to violence and involvement in aberrant sexual behaviors, that its primary users were members of minority groups (Blacks and Mexicans), that its use led to an array of adverse psychological effects, and that use of the drug was spreading to young people.

A 2012 publication by the Office of National Drug Control Policy (ONDCP), *What Americans Need to Know About Marijuana*, emphasized the theory that marijuana is a "gateway" to the use of harder drugs, such as heroin, cocaine, and methamphetamine, and that the THC (the primary psychoactive ingredient) in marijuana available to consumers today is considerably higher than in the past. The National Institute on Drug Abuse (NIDA) has expressed concern that the legalization of marijuana will be associated with increases in youth use of the drug. Some studies have also suggested that marijuana use among youth leads to decreased IQ, brain abnormalities, and mental diseases such as schizophrenia. In addition, the Food and

Drug Administration (FDA) requires that in order for drugs to be shown to be safe and effective, they must undergo clinical trials to provide scientific data on the efficacy of their treatment for medical conditions. To date, and largely due to marijuana's Schedule I status, no such trials have been approved by the FDA.

The legalization of marijuana brings additional concerns, such as increases in *drugged driving*. Driving under the influence of marijuana could result in slow reaction time, weaving between lanes, and lack of attention to road conditions. Related, some have also claimed that marijuana consumption leads to traffic fatalities—using as evidence the fact that in recent years, a higher proportion of those involved in traffic fatalities have been found to have marijuana in their systems.

Despite its legalization in several states, it is important to reiterate that marijuana remains a Schedule I drug under the Controlled Substances Act, and, as such, it is possible that federal government agencies will attempt to intervene in states that have legalized the substance. Given the conflict between federal and state laws, as well as the concerns for public health and safety, marijuana should remain an illegal drug.

PRO: Marijuana Should Be Legalized

Marijuana's classification as a Schedule I drug is curious, given that it has been used for medicinal purposes for possibly thousands of years, and more than 100 articles on its therapeutic uses were published in medical journals between 1840 and 1900. Cannabis was formally recognized as a medicine in the United States until 1942, and in some states, could be purchased at pharmacies. As the use of marijuana spread to middle-class youth in the 1960s and 1970s, 11 states removed criminal penalties for those found in possession of the drug. California legalized medicinal marijuana in 1996, and, as of 2018, 29 states and Washington, D.C., allowed use of the substance for medical purposes. Also as of 2018, nine states (Alaska, California, Colorado, Maine, Massachusetts, Oregon, Nevada, Washington State, Vermont) had legalized recreational marijuana.

Recent public opinion polls, including those by the Pew Research Center and Gallup, indicate that the majority of Americans (between 61% and 64%) support marijuana legalization, and it is likely that several other states will consider marijuana legalization soon. Support for legalization is at least partially driven by the fact that the baby boomers who consumed marijuana in their youth do not share previous generations' fear of the substance, and by state governments, which are seeking alternative sources of revenue (by taxing marijuana production and sales) in light of economic crises. In states that have already legalized marijuana, there has also been an emphasis on social and racial justice issues (i.e., the fact that even though Whites and members of minority groups use cannabis in roughly equal proportions, Blacks and Hispanics are significantly more likely to be arrested for the violation of marijuana laws.)

While some research has suggested that the legalization of marijuana may lead to increased harm in society, critics of these studies have pointed out that there are problems with respect to determining causal order—for example, does cannabis use increase the risk of schizophrenia, or are those with schizophrenia predisposed to using cannabis (perhaps for "self-medication")? Similarly, does marijuana consumption result in lower grades, or are young people with lower grades more likely to use marijuana?

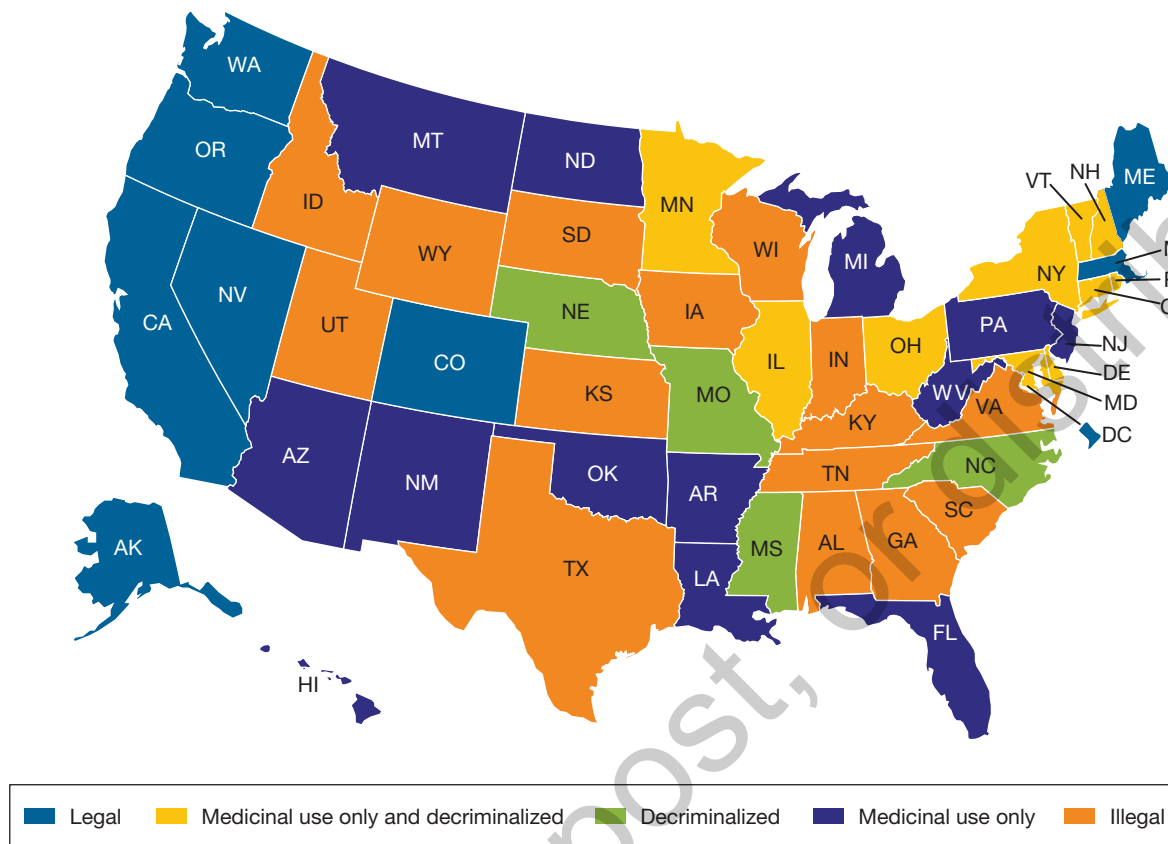
With respect to the relationship between marijuana use and traffic fatalities, a recent meta-analysis of studies on this relationship concluded that there was no statistically significant effect of driving under the influence of cannabis on vehicle collisions and traffic fatalities.³⁴ And even in cases of marijuana use and traffic fatalities, it is not clear that the marijuana use caused the collision that led to the fatality.

Research has indicated that adult marijuana use has been increasing in recent years and that the increases in use have been greater in states that have legalized the substance. However, several studies have indicated that for at least some users, marijuana may be a substitute for opioids (prescription and street), and states that have legalized medicinal marijuana have seen declines in opioid overdose deaths. With respect to youth use, a study of states that allow medical marijuana found no significant increase in adolescent marijuana use within two to three years following the passage of medical marijuana laws. While there are concerns that youth perceptions of risks/harms from using marijuana have declined, one could argue that youth are simply being rational—the fact is that marijuana is less harmful than other currently legal drugs (e.g., tobacco, alcohol, and some prescription drugs).

PRO

FIGURE 2.4

Marijuana Laws in 50 States as of 2018



Source: Norml, "State Laws," 2018, <http://norml.org/laws>.

Conclusion

While, as noted above, it is likely that several other states will consider marijuana legalization in coming years, it remains to be seen whether the federal government will intervene. Jefferson Sessions, the current attorney general in the Trump administration, believes that marijuana is a gateway drug, is skeptical regarding the utility of medical marijuana, does not support marijuana legalization, and has given some indications that the federal government will take action in states that have legalized the drug. In addition, even though nine states have legalized recreational marijuana, in 21 states more people were arrested for marijuana offenses in 2016 than in 2014.

Discussion Questions

1. What purposes are served by maintaining marijuana as an illegal substance?
2. If marijuana is legalized by states, what types of laws should be put in place to regulate its use?
3. What lessons can we learn from the legalization and decriminalization of marijuana in the United States and abroad?

CURRENT CONTROVERSY 2.2

Should Sexual Harassment Be Identified as a Form of Sexual Assault?

—Alissa Ackerman—

Introduction

The phrase "Me Too" was used by activist Tarana Burke in 2006 to elevate conversations around sexual violence. Actor Alyssa Milano then used the term in late 2017 when she tweeted that anyone who had been sexually assaulted or harassed should reply to the tweet with "Me Too." In a matter of moments, people from all over the world took to social media to share their experiences. For many, it was the first time they felt empowered to speak up about sexual misconduct in its many forms. Celebrating the fact that people have found solidarity with the #MeToo movement is important. However, there are questions we should be asking about whether the various forms of sexual misconduct are one issue or whether our conversations around sexual misconduct are more nuanced. I offer two points of view in this essay. The first considers all forms of sexual misconduct as one issue. The second argues that sexual misconduct varies in degrees of seriousness and that we should discuss each as its own separate issue.

PRO: Sexual Harassment Is a Form of Sexual Assault

The term *sexual misconduct* refers to sexual harassment, sexual assault, rape, and everything in between. The #MeToo movement did not define the various forms of sexual misconduct, nor should it have done so, as all forms of sexual misconduct are harmful and can have serious consequences for the person who experiences these acts. These consequences can present themselves at home, at school, in the workplace, and within interpersonal relationships.

Bringing attention to sexual misconduct allows any person affected by it to join the movement in solidarity. Indeed, after Alyssa Milano tweeted for her followers to use the hashtag "#MeToo," people who had never considered themselves a part of the movement now found a place. People who had minimized their experiences now found words for what had happened to them.

One of the most important aspects of healing from sexual misconduct is validation that what happened was unacceptable and harmful. Additionally, healing happens in community. As more people speak out about experiencing sexual misconduct, the less taboo it becomes. When a subject becomes less taboo it becomes easier for people to speak about it without shame. This is why we should consider sexual harassment and all other forms of sexual misconduct as sexual assault.

CON: Sexual Harassment Is Separate From Other Forms of Sexual Assault

Just as there are many forms of sexual harassment, there are varied individual responses to sexual harm. In some cases, the emotional, psychological, and behavioral responses to sexual trauma are pervasive, while in others they are almost nonexistent. As outsiders we cannot determine the impact of sexual misconduct. However, we can recognize that any and all forms of sexual misconduct bring an unacceptable risk of potential harm. We must also recognize that sexual harassment, sexual assault, and rape are not the same.

At the heart of the #MeToo movement were people who had experienced rape who felt that their lived experiences were diminished and devalued by the conflation of sexual harassment with other forms of sexual violence. Similarly, there were people who had experienced sexual harassment who felt that their experiences did not rise to the level of seriousness that other forms of sexual violence did. Herein lies the problem.

All forms of sexual violence have the propensity to cause pain. We can honor this pain and suffering while acknowledging the need for different, but equally important, conversations around each. The reasons why people engage in sexual harassment are often different from the reasons people engage in sexual abuse. Likewise, though the impacts of sexual harassment are harmful and painful, they are different from the impacts of rape. To conflate the

PRO

CON

two thwarts our ability to address important nuances that are integral to prevention. Making these distinctions is necessary if we are to have critical and meaningful dialogue moving forward.

Grouping all forms of sexual misconduct was never meant to minimize the trauma of some, but the unintentional consequences of this grouping does just that. This distinction between sexual assault and sexual harassment is not to discount the trauma of sexual harassment, either. In fact, the distinction is to honor the unique experiences and consequences of each type of sexual trauma, while acknowledging that they are fundamentally different. Creating a cultural shift where sexual misconduct of all forms disappears requires nuance. Broad sweeping generalizations cause more harm than good.

Discussion Questions

1. What are the pros and cons of lumping all forms of sexual misconduct into one category?
2. How does the #MeToo movement affect people who have experienced sexual misconduct?
3. How did social media aid survivors in speaking out for the first time?

KEY TERMS

Review key terms with eFlashcards
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Actus reus 29	Mala in se 29
Administrative law 28	Mala prohibita 29
American Law Institute standard 35	Marijuana 25
Attendant circumstances 31	Mens rea 30
Beyond a reasonable doubt 24	M’Naghten rule 35
Case law 29	Model penal code test 35
Civil law 23	Necessity 32
Concurrence 30	Opinions 29
Constitutional law 26	Plaintiff 23
Defense 32	Precedent 26
Double jeopardy 26	Preponderance of the evidence 23
Duress 32	Procedural criminal law 31
Entrapment 32	Result 31
Guilty but mentally ill 35	Self-defense 32
Insanity 34	Self-incrimination 26
Intent 30	Stare decisis 26
Intoxication defense 33	Statutory law 27
Involuntary act 31	Strict liability 30
Irresistible impulse test 35	Substantive criminal law 31
Lex talionis 25	Voluntary act 31

DISCUSSION QUESTIONS

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1. What are the key differences between civil and criminal cases?
2. How do statutory law, case law, and constitutional law all work together?
3. What are the components of a criminal act?
4. How is substantive law related to procedural law?
5. What is the difference between being declared innocent and being declared not guilty?
6. Why is it so difficult to find someone not guilty by reason of insanity?

LEARNING ACTIVITIES

1. Review the criminal code in your state. Identify a particular crime, and determine the four components of the criminal act under the law.
2. Identify a U.S. Supreme Court decision related to a criminal justice issue from the most recent term. How did the court reach its decision? What implications does this decision have for the system?
3. Select an article from the newspaper about a crime. What are the actus reus, mens rea, attendant circumstances, and result of this crime? Is this crime mala in se or mala prohibita?

SUGGESTED WEBSITES

- **U.S. Supreme Court:** <http://www.supremecourt.gov>
- **U.S. Constitution:** <https://www.congress.gov/constitution-annotated>
- **U.S. Code Title 18, Crimes and Criminal Procedure:** <https://www.law.cornell.edu/uscode/text/18/part-I>

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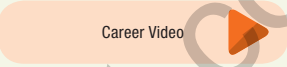


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	2.1 Jeffrey Mason: Attorney
	2.1 Criminal Intent and Defenses
	2.1 Martin Shkreli Pleads 5th Amendment at Hearing