

Substantive Criminal Law: Principles and Working Vocabulary

Key Terms

Actual cause	Ecclesiastical courts	Positive law
<i>Actus reus</i>	Federalism	Precedent
Administrative law	Felony	Preponderance of the evidence
Attendant circumstances	General intent	Procedural law
Beyond a reasonable doubt	Gross misdemeanor	Property crime
Burden of proof	Injunctive relief	Proximate cause
But-for test	Intervening cause	Punitive damage
Canon law	Jurisdiction	Recklessness
Capital felony	Kings courts	Republic
Case law	Law courts	Social contract theory
Civil law	Least restrictive mechanism	Specific intent
Code of Hammurabi	Legal cause	<i>Stare decisis</i>
Common law	Lesser included offense	Statutory law
Compensatory damage	<i>Mala in se</i>	Strict liability
Constitutional law	<i>Mala prohibita</i>	Substantial factor test
Constructive intent	<i>Mens rea</i>	Substantive law
<i>Corpus delicti</i>	Misdemeanor	Tort
Courts of equity	Misprision of felony	Tortfeasor
Crime	Natural law	Transferred intent
Criminal law	Negligence	Uniform Crime Reports
Culpable	<i>Nulla poena sine lege</i>	Violation
Declaratory relief	Ordinance	Violent crime
Democracy	Ordinary misdemeanor	Wobblers
Deviance	Petty misdemeanor	

Introduction

From the genesis of time, human beings have sought to establish guidelines to govern human behavior. In ancient civilizations, rules were derived from morals, customs, and norms existing within society. Thus, in most societies, modern laws evolved from a loose set of guidelines into a formal system of written laws designed to maintain social order. Because each society—ancient or modern—possesses different moral values, customs and societal norms, laws and legal systems vary.

This chapter explores and describes the foundations of American criminal law. While progressing through its content, readers are informed of the extent to which serious crime occurs in America. Readers will also develop an appreciation for the Republic form of government used in this nation and how social contract theory guides the construction of criminal law. The chapter then explains the differences between civil and criminal law, with a focus on procedural and substantive law. Next, the evolutionary path of criminal law is chronicled by delving into its ancient, religious, and common law

heritage while concurrently demonstrating more modern sources (e.g., statutory, case) for regulating societal conduct. Finally, crime is broadly defined, classified (felonies, misdemeanors, violations), distinguished from deviant conduct, explained using an elements approach, and discussed along degrees of social harm.

The Republic for Which It Stands

The United States is known around the globe for its commitment to democratic values and as such has become regarded, even among its own citizens, as a Democracy. Most people use the term “Democracy” as a generic means to describe America’s popular tolerance for free elections and the voice of the people. The reality, however, is that the United States was founded as (and continues to support the goals of) a Republic form of government. A simple recitation of the pledge of allegiance highlights this simple truth: . . . *and the Republic for which it stands*.

Republic and democratic forms of government could not be more dissimilar. **Democracy** is a form of government whereby elected leaders make decisions for the populous with no legal safeguards (such as a constitution) to protect the nation (and rights of the people) against the manner in which that power is exercised—an unlimited power of sorts. **Republic**, on the other hand, defines a form of government comprised of elected leaders operating under the umbrella of a Constitution that safeguards the best interest of the nation and its people by limiting power. In this way, it is believed that the right decision, as opposed to the desires of the elite (“snob rule”) or majority (“mob rule”), will be achieved regardless of public sentiment or personal favoritism. Without a Republic form of government, our founding fathers were aware that the superfluous whims of the day would take precedent over what is best for the long-term health of the nation. James Madison, in the Federalist Papers, best summarized the dichotomy between these governmental forms:

Democracy, as a form of government, is utterly repugnant to—is the very antithesis of—the traditional American system: that of a Republic, and its underlying philosophy, as expressed in essence in the Declaration of Independence with primary emphasis upon the people’s forming their government so as to permit them to possess only “just powers” (limited powers) in order to make and keep secure the God-given, unalienable rights of each and every Individual and therefore of all groups of Individuals.

Social Construction of Law

One of the more fundamental tenets of American criminal law is that societal expectations be expressed in writing—through statutory code and/or judicial opinion. This rule is so sacred, in fact, that the American legal system follows the maxim ***nulla poena sine lege***, Latin for “no penalty without a law.” Essentially, this legal principle ensures that one accused of wrongdoing cannot be punished unless the behavior is clearly prohibited in written penal law. Given this well-established legal custom, it remains remarkable that social contract theory essentially functions as the fulcrum (hinge) for the American legal system. Although not a written document with contractual obligation, the social contract reflected a sacred trust between American colonists and government authority and continues to be the foundation for contemporary legal transactions. Without fulfillment of this oral agreement, it is safe to conclude that the American judicial process would become suspect in the eyes of its residents.

Social contract theory stipulates that American citizens, in certain well-defined circumstances, will voluntarily waive rights, privileges, and liberties guaranteed in the United States Constitution in exchange for government protection. For example, Americans give the government the authority to establish a judicial process that will detect (police), adjudicate (courts), and punish (corrections) persons who commit violations against the peace and dignity of our nation (or state). In exchange, the government agrees to support (through taxation and regulation of commerce) and protect (against foreign and domestic threats) us and vows to do so with tremendous caution. Known as the **least restrictive mechanism**, the agreement includes a binding promise that any government action against citizens, in addition to being necessary, will be implemented with every effort toward minimizing intrusion. For example, government has the right to restrict the freedom of societal members (through incarceration and other means) when violating laws but must do so with an eye toward the minimal incarceration essential to reasonably ensure that an individual, and society as a whole, is sufficiently deterred from committing future crimes. Do you believe that the government has made a good faith effort to abide by this social contract?

Origins of Law

Historically, law originated from three primary venues: ancient, natural, and common. Though these

origins are discussed as distinct, there is overlap among them. For example, much natural law existed within ancient times. Likewise, much common law consisted of natural law. This section will examine those legal origins.

Ancient

The **Code of Hammurabi** is routinely cited as the first set of written laws developed to govern a society. This code was developed by King Hammurabi of Babylon between 1792 and 1750 BC. In modern times, we think of austere sets of legal reporters and codes when we imagine the location of our laws. In contrast, the Code of Hammurabi was carved onto a black stone monument. The Code of Hammurabi included approximately 300 provisions and addressed both criminal and civil matters. These provisions were believed to have come from the gods. Matters addressed in the code included criminal offenses, punishments, and domestic relations matters such as marriage and divorce.

Other scholars note the existence of an earlier set of written laws discovered in Ur, an ancient city-state in Sumeria. These laws predate the Code of Hammurabi and appear to be approximately 5,000 years old. The existence of both the Code of Hammurabi and the Sumerian code reflects ancient efforts to develop principles through which governance and control of human behavior could occur. Other examples of ancient laws and legal systems can be found by examination of those which existed in ancient Hebrew, Greek, and Roman civilizations. Each system possessed its own unique attributes. Additionally, the development of laws and legal philosophy in these ancient societies significantly influenced the development of modern European and American legal systems.

Natural

Positive law is man-made law enacted into statutes for the protection of people as a whole. Historically, though, positive law was singularly concerned with human activities not addressed within religious circles. It has been argued, however, that one underlying rationale for distinguishing man-made law from religious law was to draw a clear and distinct line between its laws derived from logical, rational human decisions and the more ambiguous and irrational moral distinctions premised on **natural law** (or God's law). Natural law, as defined within Black's Law Dictionary, is based on "... necessary and obligatory rules of human conduct which have been

established by the author of human nature as essential to the divine purposes in the universe . . ." (Garner, 2009). It is important, then, to examine the influence of natural law in the construction of positive law.

Dating back to first-century Rome, natural law embodies the beliefs and values based on accepted moral principles derived from a higher power, nature, and/or reason. Religion is the premier natural law source in most world cultures, and without question, American lawmakers have (and still do to some extent) rely heavily on the religious principles of Judaism and Christianity. For example, religious prohibitions embedded in the Old Testament (especially the Ten Commandments) appear (or have appeared) in substantive criminal law. Crimes regarding adultery, murder, theft, and perjury (bearing false witness) are just a small sampling of modern laws grounded in natural law. The historical intertwining of positive and natural law, then, should be readily apparent; their degree of association does seem to be on the decline, however, as certain natural law prohibitions (such as adultery and homosexuality) have for all practical purposes been decriminalized across the nation.

Common

The origin of modern American law was largely derived from English common law. With the establishment of the American colonies, settlers brought with them existing law as developed in England. English common law developed in contrast to Roman civil law, which was the predominant influence throughout ancient Europe; however, after the fall of the Roman Empire, local communities were left to develop their own systems of justice.

In England, the legal system developed through the influence of monarchs and ecclesiastical authorities, the Catholic Church, and later, the Church of England. Before the Norman Conquest, local communities resolved most legal disputes through reliance on local customs and mores, with penalties for transgressions consisting of harsh physical violence. After the Norman Conquest, however, efforts to centralize power in the monarch provided a more uniform legal system throughout England. The Norman influence is reflected in the efforts of William the Conqueror to vest greater control over the development of law, operation of the legal system, and general business of government in the monarch. The formalization and centralization of the English legal system continued through the reigns of Henry II and Edward I. These efforts marked the transition from a

civil law system to the common law system in which judges traveled the countryside (or “rode the circuit”) to handle legal matters, a practice formally endorsed and enacted in the Statute of Westminster in 1285.

Common law is often referred to as “judge made law.” In other words, common law consists of the rulings of judges following the application and interpretation of existing laws, customs, or adherence to prior cases. These judicial decisions were maintained and relied on as precedent for future cases and followed a principle known as **stare decisis** (“let the decision stand”). In the English system, then, judges possessed significant authority to identify and define common law crimes and fashion remedies.

The transformed English system also possessed several types of courts distinguished by the nature of their jurisdiction. **Jurisdiction** refers to the authority of the court to hear and decide a case. Courts fell into two categories (law and equity), which essentially differentiate **kings courts** (law courts) from **ecclesiastical courts** (equity courts). Ecclesiastical courts, referred to as Chancery Courts, existed to enforce **canon law** (or the laws of the Catholic Church). The primary distinction between law courts and **courts of equity** was the nature of the remedy that could be ordered. **Law courts** were restricted to an award of monetary damages, whereas courts of equity were vested with much more discretion and flexibility. As such, a court of equity could award extraordinary relief with the goal of achieving a sense of fairness with the award. Although the historical distinction between courts of law and equity eventually disappeared in England and in most of America, a few American jurisdictions have retained the distinction. For example, Mississippi has retained the distinctions, with Chancery Courts possessing jurisdiction over cases involving domestic relations, divorce, child custody, probate matters, and minor’s business.

As discussed earlier, American settlers brought with them the influence of English common law; however, although English common law served as a foundation for the development of modern American law, inhabitants of the new world quickly modified this foundation to fit the needs of an emerging nation based on more democratic values. Although many common law legal definitions were retained, many were not. We therefore need to examine the sources of criminal law forming the primary basis from which modern law is derived.

Primary Sources of Criminal Law

Notwithstanding the three primary origins of law just discussed, criminal law can specifically be traced to five sources: common, statutory, case, constitutional, and administrative. With regard to substantive criminal law (the focus of this text), constitutional and administrative play a lesser role but are nonetheless important (and thus included within the forthcoming discussion).

Common

As previously discussed, a brief historical examination is sufficient to conclude that American colonists relied heavily on their English culture to form the basis for American criminal law. Without doubt, the laws common to the circuits of England were used to shape the substance of American criminal law. Following our nation’s independence campaign against the British, all 13 colonies initially anointed common law as the appropriate foundation for American jurisprudence. Although colonial Americans did not agree with a substantial portion of English practices (hence the American Revolution), they did recognize the logic of many common law prohibitions (such as murder, rape, kidnapping, and burglary). Once the United States was formed, however, states acquired the sovereign power to abolish common law (at its discretion) under a system of **federalism** (nationalized strong central government) negotiated within the U.S. Constitution. Accordingly, most states today have exercised that option, choosing instead to adopt a civil system permitting legislators (on behalf of the people) to declare through statute (**statutory law**) what laws should and will be constructed. It remains true, though, that even in the absence of a common law directive, common law continues to influence the construction of law, as legislative and judicial officials often depend on its heritage of judicial decisions for legal interpretation.

Statutory

Statutory law currently serves as the prominent source for the establishment of criminal law. The preference for statutory law has its basis in the fundamental nature of democratic values. Statutes are created and enacted by legislative representatives of the people after deliberation and debate, rather than by judges. Essentially, the process of statutory law allows elected legislators to regulate behavior of its constituents based on their beliefs, assuming those beliefs remain within the parameters of con-

stitutional guidelines, regarding what is best for the people within its jurisdiction. Thus, statutory law is thought to represent the will of the citizenry as opposed to what may be the isolated opinion of one individual. What emerged was a unique modern American legal system that was comprised of a vast and complex system of laws originating from a variety of sources. Many of these criminal regulations are new legal constructions designed to protect society from emerging problems (i.e., computer crime), but many have merely been adopted from the historical traditions of old England.

The American legal system today has abandoned the notions of omnipotent monarchs, replacing it with a government structure reliant on the power of its citizens. Respect for the sovereignty of states, limited government, and personal liberties is the hallmark of this new legal system. Because, however, the U.S. Constitution places few restrictions on what can be a crime and does not regulate in any meaningful way labels and definitions attached to crimes, the statutory codes of the 50 sovereign states differ significantly. As such, an attempt to discuss the codes of all states would prove mind boggling at best and monopolize years of time. It is, however, important to be familiar with the three major restrictions

regarding law creation. One, legislators must establish a compelling public need for adding to the body of criminal law. Two, the law passed must possess no constitutional infringements on the rights of the people (these constitutional protections are thoroughly discussed in Chapter 2). Three, the legislature must provide the people with fair and adequate notice regarding the passage and implementation of said new laws. The notification of new law is, in practice, fairly simple to accomplish, usually employing techniques associated with billboards and road signs and announcements in the newspaper and on radio and television, as well as other various techniques.

Because statutory codes of independent states vary widely, it is important to develop a familiarity with their respective structures. For this reason, a comparison of the Mississippi (conservative) and New York (liberal) grand larceny statutes is presented to illustrate the importance of common law as a baseline for understanding modern law. Exhibit 1–1 provides a comparison of two statutes from states differing with respect to (1) degrees of grand larceny (one in Mississippi and four in New York), (2) value placed on the property (less in Mississippi), and (3) penalties associated with their violations (greater punishment in Mississippi for the most basic larcenous offense).

Exhibit 1–1 Larceny Statutes

Mississippi

§ 97-17-41 Grand Larceny

(1) Every person who shall be convicted of taking and carrying away, feloniously, the personal property of another, of the value of Five Hundred Dollars (\$500.00) or more, shall be guilty of grand larceny, and shall be imprisoned in the Penitentiary for a term not exceeding ten (10) years; or shall be fined not more than Ten Thousand Dollars (\$10,000.00), or both. The total value of property taken and carried away by the person from a single victim shall be aggregated in determining the gravity of the offense. . . .

New York

§ 155.30 Grand Larceny—fourth degree

A person is guilty of grand larceny in the fourth degree when he steals property where (1): The value of the property exceeds one thousand dollars; or Grand larceny in the fourth degree is a class E felony; sentence shall not exceed four years.

§ 155.42 Grand larceny—first degree

A person is guilty of grand larceny in the first degree when he steals property and when the value of the property exceeds one million dollars. Grand larceny in the first degree is a class B felony; sentence shall not exceed twenty-five years.

Source: MS § 97-17-41; NY § 155.30 & § 155.42

Case

Federal and state constitutions, through a process of checks and balances, grant the judiciary authority to review and interpret decisions of legislative bodies, subsequently providing judicial officials with an equal opportunity (if not more) to inject belief systems into criminal law. At its core, then, the judiciary possesses the authority to greatly alter the development, growth, and direction of American criminal law through what is referred to as **case law**. Arguably the greatest tool at the disposal of the judiciary is the common law procedure known as *stare decisis*, meaning “let the decision stand.” Essentially a system of **precedent**, *stare decisis* requires inferior (lower) courts to abide by the decisions of higher courts and further demands that even higher courts examine all court decisions when addressing complex legal issues. Adherence to the value of precedent promotes stable and predictable court outcomes. Without such dependability, people would regard the legal system as unfair. Meaning? You guessed it—a loss of respect for the law and an increased likelihood of criminality.

Case law represents judicial opinions that impact the constitutionality of criminal laws, lower court rulings, and decisions of executive bodies. When appellate courts issue opinions, four options are at their disposal. First, the judicial decision is affirmed, meaning that the lower court’s ruling is supported. Second, the decision is reversed, meaning that the lower court’s ruling is overturned. Third, the decision is reversed but remanded back to the lower court with instructions on how to proceed; the case can then come back for a second review (if necessary). Fourth, the decision is reversed and rendered (meaning judgment is immediately proclaimed and entered into the record). One of the most publicly recognized pieces of case law, the U.S. Supreme Court in *Roe v. Wade* (1973), held that a woman’s right to an abortion fell within the right to privacy and as such gave women absolute autonomy over pregnancies during the first trimester. Exhibit 1–2 illustrates how case law appears in legal venues.

Constitutional

Constitutional law, though to a lesser degree, also pertains to substantive criminal law. The constitution of the United States and those of the independent states regulate what is required and prohibited in the process of legal enactments. There is little debate that the bulk of constitutional law addresses procedural law, but constitutional principles also protect society from potential abuse stemming from the construction and application of substantive criminal law.

Although discussed more thoroughly in Chapter 2, common examples of constitutional protections include the void-for-vagueness doctrine, *ex post facto* prohibition, due process, and equal protection.

Administrative

Even though criminal law is the most visible deterrent against societal rules violations, there are actually more administrative policies and regulations (thousands in fact), collectively referred to as **administrative law**, that restrict our behavior than contained within criminal codes. Violations of regulatory policies, such as those constructed by the Internal Revenue Service and Environmental Protection Agency, are ordinarily adjudicated in civil courts through fines, economic sanctions, and privilege restrictions. More recently, however, federal and state legislatures have begun to empower administrative agencies increasingly with the backing of criminal sanctions. As such, regulatory policy infractions, once only civil in nature, now carry more legal weight, as prospective violators must now increasingly take into consideration possible referral of said violations to judicial authorities for criminal sanction consideration.

With these understandings, Figure 1–1 outlines the major sources of criminal law.

Types of Legal Wrongs

There are two recognized forms of legal wrongs: public and private. The content of this book is substantive criminal law and its public focus, and therefore, private wrongs receive minimal attention. Please do not interpret this brevity of coverage as an indictment regarding its value though, for it is an invaluable mechanism for the resolution of dispute between societal members. As such, it greatly reduces the necessity for criminal law intervention in that, among other things, many crimes that likely would have been committed out of retribution or retaliation are not committed due to the availability of civil remedies.

Private

A private wrong is within the jurisdiction of **civil law** (not criminal law) and is referred to as a **tort** when there is a cause of action, with the person accused of causing the harm (whether intentional or negligent) being the **tortfeasor**. The process entails a complainant making a formal accusation of harm with a court possessing civil jurisdiction and seeks to attain one of three remedies (or combination thereof) for inflicted wrong: monetary award, injunc-

Exhibit 1–2 *Roe v. Wade*

SUPREME COURT OF THE UNITED STATES

410 U.S. 113

Roe v. Wade

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF TEXAS

No. 70-18 Argued: December 13, 1971—Decided: January 22, 1973

BLACKMUN, J., delivered the opinion of the Court, in which
BURGER, C.J., DOUGLAS, BRENNAN, STEWART, MARSHALL, and POWELL, JJ., joined.
WHITE, J. and REHNQUIST, J. filed dissenting opinions.

Issue:

A pregnant single woman (Roe) brought a class action challenging the constitutionality of the Texas criminal abortion laws, which proscribe procuring or attempting an abortion except on medical advice for the purpose of saving the mother's life. . . . A three-judge District Court . . . declared the abortion statutes void as vague and overbroadly infringing those plaintiffs' Ninth and Fourteenth Amendment rights.

Decision:

State criminal abortion laws, like those involved here, that except from criminality only a life-saving procedure on the mother's behalf without regard to the stage of her pregnancy and other interests involved violate the Due Process Clause of the Fourteenth Amendment, which protects against state action the right to privacy, including a woman's qualified right to terminate her pregnancy. Though the State cannot override that right, it has legitimate interests in protecting both the pregnant woman's health and the potentiality of human life, each of which interests grows and reaches a "compelling" point at various stages of the woman's approach to term.

Source: United States Supreme Court

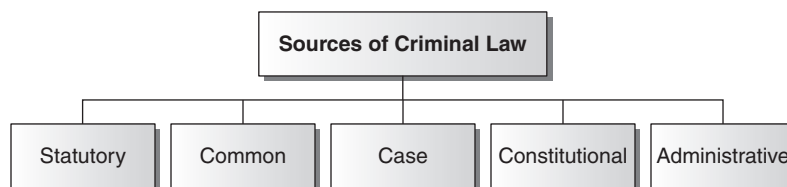


Figure 1–1 Sources of criminal law.

tive relief, or declaratory relief. Monetary damage is the most common remedy for private harm. There are two forms of monetary damage: compensatory and punitive. **Compensatory damage** seeks reimbursement of actual expenses associated with wrongful conduct. For example, an employee wrongfully fired may sue and receive actual losses stemming from their dismissal, such as back wages, withheld benefits, and emotional distress. **Punitive damage**, on the other hand, aims to deter and punish individ-

ual wrongdoers from committing the same act(s) in the future. In essence, the goal of punitive damages is to teach wrongdoers a lesson that will not be forgotten, while concurrently deterring others from contemplating future similar acts. For example, a sexual harassment victim may sue and receive compensatory damages, but punitive damages (sometimes in the millions of dollars) may also be assessed by the court to send a deterrent message. Although securing money from tortfeasors is often the goal,

wronged individuals often turn to civil courts for assistance with operational problems, namely in the form of injunctive or declaratory relief. **Injunctive relief** occurs when a court issues an injunction (or order) for someone (or group of persons) to do or stop doing something that is (or may) bring about harm. For example, a building scheduled for demolition may be protected, at least for a period of time, through the securing of a court injunction. **Declaratory relief** describes a judge's determination (called a "declaratory judgment") of parties' rights under a contract or a statute often requested in a lawsuit.

Public

A public wrong is addressed within the body of **criminal law**: substantive and procedural. **Procedural law** encompasses numerous procedures required of those empowered to carry out the duties of the criminal justice system. The purpose of procedural law is to protect the due process rights of citizens (and illegal aliens) and therefore essentially defines the *do's* and *don'ts* of criminal justice professionals. Fourth amendment search and seizure guidelines and sixth amendment trial rights are but two of a plethora of procedural restrictions. Turning attention to our more fundamental interest, **substantive law** is comprised of the behavioral dictates placed on the people who live within our great nation. The essence of substantive law ensures that members of society are afforded fair notice of what is expected and therefore can be defined as a prescription regarding the *do's* and *don'ts* of societal members. The elements constituting murder, rape, assault, and robbery are just a few examples of what constitutes substantive law. Figure 1–2 summarizes the divergent paths of these two forms of legal wrongs.

Crime Defined

Generally speaking, a **crime** is a public wrong that causes social harm. On its face, such an ambiguous definition may appear to adequately define criminal behavior. After all, no one reading this text would ever behave in a manner that could be construed as adverse to the public welfare—right? If you believe crime is sufficiently defined in such a generic manner, consider for one moment the person who was adjudicated a criminal for doing little more than being what many regard as the most moral person ever to walk on Earth. You guessed it—Jesus of Nazareth! It should be obvious, then, that who determines what is criminal and how it is determined are of the utmost importance.

Through the years, many crime definitions have been formed within legal circles. For purposes of simplicity, however, we embrace one specific yet encompassing definition to assist our understanding of this legal concept. Crime broadly defined requires three distinct components: (1) the commission of an act prohibited by law or the omission of an act required by law, (2) without defense (excuse or justification), and (3) codified as a felony or misdemeanor.

Commissions and Omissions

The first component of this crime definition illustrates that criminal punishment is singularly reserved for behavioral conduct (not thoughts alone). The law is clear, however, that behavior consists of both what is done (commission) and not done (omission). In other words, even though most criminal regulation proscribes what an individual must refrain from doing (forging, robbing, etc.), it

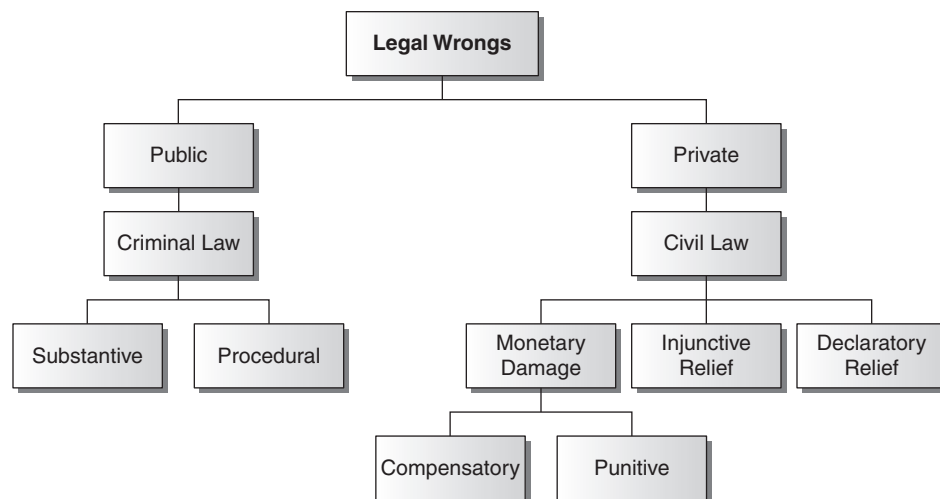


Figure 1–2 Legal wrongs.

also often demands action of a person (filing taxes, emergency assistance, etc.). Commissions come in a variety of forms (possession, procuring, attempt, etc.) as defined within differing jurisdictions, but omissions are much more narrowly defined. One historical example, although used today only on the federal level, provided that it was a criminal misdemeanor to conceal the commission of a felony committed by another person, an offense known as **misprision of felony**.

Without Legal Defense

Component two of this crime definition further clarifies that not all persons who consummate such behavioral conduct are criminally accountable. The law aims to punish only those who commit prohibited conducts or ignore (omit) required conduct with no reasonable defense (be it justification or excuse); therefore, an individual is not necessarily guilty of a crime when deviating from legally established behavioral guidelines.

Codified

The third component of this crime definition mandates that legal proscriptions be codified, meaning that the law must provide written advance notice of its behavioral expectations (referred to as an annotated code) and specifically outline available punishments. Figure 1–3 outlines these essential components to the definition of what a crime must constitute.

Crime Classifications

Crime is classified in reference to: (1) the degree of punishment and (2) moral turpitude. With respect to authorized punishment, crime is broadly classified as felonies, misdemeanors, and violations. Moral turpitude, on the other hand, is divided into *mala in se* and *mala prohibita* designations.

Felonies, Misdemeanors, and Violations

A felony at common law was a serious crime for which a person was required to forfeit property to the king as restitution for harm against the crown.

Common law felonies were subject to a punishment of death and included murder, manslaughter, rape, sodomy, assault, robbery, burglary, larceny, and arson. A common law crime not punishable by death was referred to as a misdemeanor (less serious crime). Although not required, most states today have abandoned the common law guidelines defining felonies and misdemeanors in favor of a quantified approach. Essentially, most states now define a **felony** as a crime for which the authorized punishment is 1 year or more in a federal or state prison, or a fine. Felonious crimes eligible for the punishment of death or life imprisonment without parole are also referred to as a **capital felony**.

A **misdemeanor** is a crime for which punishment is authorized up to, but not including, 1 year in a local (municipal or county) jail. Much like felonies, misdemeanor crimes have been dissected into multiple seriousness scales. Using this classification system, a crime for which punishment ranges from 6 to 12 months in jail is a **gross misdemeanor**. Continuing this logic, an **ordinary misdemeanor** becomes a crime for which punishment ranges from 3 to 6 months in jail. Lastly, a **petty misdemeanor** represents crimes punishable from 10 to 30 days in jail. Each sovereign state is free to penalize criminal offenses according to the needs and values of its jurisdiction, however, and hence uniformly referring to a particular crime as a felony or misdemeanor is not without risk. Further complicating the classification landscape, some states have even designated certain crimes as **wobblers**, meaning the accused can be charged with either a misdemeanor or felony, depending on the circumstances. Modern legal codes often also include a third classification known as a **violation**. These state-sanctioned crimes are punished with fines only and are not administratively recorded as criminal. Finally, a local **ordinance** is a regulation of problematic behavior at the county and municipal level; littering is one example of an ordinance infraction. Ordinances are not sanctioned at the federal or state level; thus, they are not considered a crime.

Mala in Se and *Mala Prohibita*

Crimes are also distinguished along lines of moral turpitude, which refers to immoral or depraved acts, namely behavior that deviates grossly from the accepted standards of a community. As such, crimes of moral turpitude in one community may be considered otherwise in adjacent communities. Moral turpitude crimes are referred to as ***mala in se***, meaning “wrong in itself,” or inherently evil or bad. All common law crimes were *mala in se*. Similarly, crimes thought to involve no moral turpitude and



Figure 1–3 Crime defined.

considered wrong merely because they are legally prohibited are referred to as ***mala prohibita***. Likely the most common *mala prohibita* offense is speeding; it is prohibited but not condemned as immoral in society. Figure 1–4 charts the path of these criminal classifications.

Crime and Deviance Distinguished

Colleges offer courses on crime and deviance spanning full academic terms (and still fail to provide full coverage); therefore, do not consider this section as anything more than a preliminary introduction to these concepts. With that said, it is important to understand that crime and deviance, although interchangeably used in societal circles, do possess separate and distinct qualities within formal criminal justice settings.

Crime (as previously defined) consists of conduct that society agrees to regulate for its own compelling purposes. **Deviance**, on the other hand, is a sociologi-

cal concept used to describe behavior that (1) breaches (deviates from) societal norms and values or (2) is a statistical anomaly. Vegetarianism, for example, is a statistical aberration from societal norms because it is practiced by a very small percentage of Americans (approximately 3%). Although classified as deviance, it should be commended—not punished—for its health benefits and commitment to values. Essentially, then, conduct may be “deviate” yet not classified as “criminal” when no compelling need to regulate its consequences exists. It remains true, however, that “crime” is often not regarded as “deviance.” Pause for Thought 1–1 illustrates the practical difference between a crime and a deviant act.

Essential Elements of Crime and Liability

The most fundamental of legal requirements pertaining to governmental regulation of criminal

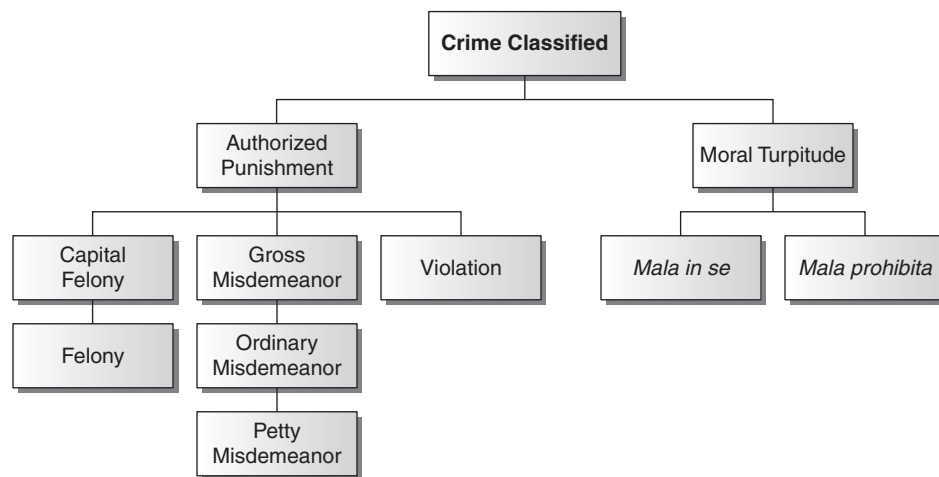


Figure 1–4 Crime classified.

Pause for Thought 1–1

Consider the following: Kelly is issued a citation for speeding while on her way to work. A colleague witnesses the incident and spreads the word throughout the office. When Kelly arrives, what do you believe the office response will be?

Scenario Solution

Speeding is a common practice among motorists. Even though most motorists regard themselves as safe drivers, it is undeniable that a large majority have exceeded the speed limit at one time; therefore, speeding is not a statistical anomaly. Speeding also does not qualify as a breach of societal values (or norms) because the practice is considered normal. It is nonetheless regulated as criminal because of the compelling need to protect motorists from each other and themselves.

conduct is that a sanctioned offense (crime or ordinance) must possess an element known as **actus reus**, translated as “guilty act.” Unlike most areas within criminal law, there simply are no exceptions to this legal principle. It is not sufficient, however, to demonstrate merely the likelihood a person committed a prohibited or required conduct; this would be routine in most cases. To hold one **culpable** (or blameworthy) for a legal wrong, the government must at least meet or exceed specified requirements collectively referred to as the **burden of proof**. In criminal cases, this burden is much greater than the **preponderance of the evidence** standard used in civil cases, whereby one need only establish a greater likelihood that harm occurred. With respect to the *actus reus* requirement of a criminal offense, the government must prove to a moral certainty—a standard referred to as **beyond a reasonable doubt**—the presence of *corpus delicti* and proximate cause.

Phase I of Actus Reus: Corpus Delicti

Corpus delicti is translated as “body of the crime” and is best understood when interpreted within the framework of the body of a letter. Essentially, it conveys to all persons engaged in the criminal process that substantial evidence, when examined in its totality, must demonstrate (1) good reason to believe that a crime was committed and (2) good reason to believe that the accused committed the crime. It should be clear that the second component is dependent on the first component, as it becomes impossible to demonstrate that a person likely committed a crime for which there is no good reason to believe was committed in the first place. After the prosecution has successfully established the *corpus delicti* of an offense, it then must address the issue of causation.

In 1959, a California appellate court became the first American court to rule that the *corpus delicti* of murder could be wholly satisfied with circumstantial evidence. In affirming the defendant’s murder conviction, the court outlined what they perceived to be the most convincing of the circumstantial evidence:

- The victim was in good physical and mental health before her disappearance and had numerous friends with whom she communicated on a regular basis.
- The victim would not have left home without her eyeglasses and dentures.
- If the victim intended to leave home she would have taken money, baggage, and a wardrobe.
- It would have been impossible for the victim to conceal herself for several years and find a way to live without drawing upon her bank accounts.

- The defendant had a motive for killing his wife to give himself a chance to steal her money through the forgery of her name on many documents.
- The defendant had previously persuaded his wife to convert her securities into cash to make it easier for him to obtain her property through forgeries.
- Every act and every statement of the defendant after the disappearance of his wife were consistent only with knowledge that his wife was dead.

Phase II of Actus Reus: Proximate Cause

The **proximate cause** requirement of a criminal offense demands that the government prove that illegal conduct in question actually caused the harm. For example, suppose one person slaps another in the face (assault) but without apparent harm. Later that night, however, the struck person dies from an apparent heart attack. It is obvious to most reasonable people that the death was not caused by the slap. For the sake of argument, however, it is possible, that a prosecutor could argue that the death was the culmination of a process started with the slap. Given the overzealousness of some prosecutors coupled with jurors unskilled in the rules of law, this person could be convicted of a criminal homicide without having caused the harm at all. It is for reasons such as this that the law aims to protect the criminally accused by requiring the prosecution to prove such a causal connection.

With this understanding, **actual cause** refers to the connection between the harm in question and the actual conduct of the criminally accused. There are two actual cause examination techniques: the but-for test and the substantial factor test. The **substantial factor test** is the preferred prosecutorial tool because it is an easier standard. Essentially, the test requires only that the government establish, without any direct proof, that the person’s actions contributed significantly, or were a substantial factor, in the resulting harm. Because of the generalities associated with this test, it is normally permitted by judges in cases in which it would be nearly impossible to establish causation with more certainty. For example, let us presume for one moment that

Actual Cause

Question 1: Would the harm have been avoided but-for the conduct of the accused?

Finding: Yes

Conclusion: The accused is the actual cause or cause-in-fact.

10 people simultaneously assault another person, resulting in serious bodily harm. Unless the person causing the serious injuries steps forward and accepts responsibility, it would be nearly impossible to determine which of the 10 people should be most accountable; therefore, the prosecution would only have to establish that an accused person was a substantial factor in the sustained injuries. The stricter and more judicially sanctioned approach, the **but-for test**, essentially begs the question: But for the conduct of the accused, would the harm have occurred? If harm to another would not have occurred but for the defendant's conduct, the defendant is said to be the actual cause of the harm.

It must be remembered that actual and proximate cause are not the same. The legal complexities associated with proximate cause often present unique challenges. Proximate cause is premised on **legal cause**, not just actual cause. It recognizes the unfairness of imposing criminal penalties on those who are the actual cause of harm to another, yet

should not be criminally accountable for the harm. Where it can be shown that the defendant intended the harm or should have been able to anticipate reasonably dangers associated with certain conduct, a legal cause determination is fairly straightforward. On the other hand, in cases in which the harm is beyond the foreseeable scope of the defendant or in which some independent **intervening cause** severs (or breaks) the connection between the defendant's conduct and its harmful consequence, the defendant's conduct may not be the actual or direct cause of the harm. Keep in mind, however, that the law requires assailants to take victims as they find them, meaning that a lack of awareness concerning victims' health conditions cannot be used to avoid criminal responsibility. Considering that a criminal conviction is prohibited without a proximate cause showing, this legal requirement is of monumental importance. The hypothetical example below illustrates a recipe of sorts for how a proximate cause determination is formulated. Moreover, Pause for Thought 1–2 illustrates the proper legal interpretation regarding proximate cause determinations.

Legal Cause

Question 1: Was the possibility of harm foreseeable?

Finding: Yes

Question 2: Was there an independent cause intervening between the act and harm?

Finding: No

Conclusion: Accused is the legal cause, and hence the proximate cause.

Role of *Mens Rea*

Most statutes require that prosecutors prove both the *actus reus* (guilty act) and ***mens rea*** (guilty mind) of a criminal offense to hold a person accountable (or culpable) for harmful conduct, a crime generically referred to as a true crime. Although rare, the law does, however, carve out occasional exemptions to this rule. Based on the principle of **strict liability**, the prosecution does not bear the burden of proof. In such a case, the law presumes that the accused is guilty

Pause for Thought 1–2

Consider the following: Driver A becomes enraged at Driver B's aggressive and dangerous maneuvers. Upon arriving at a store and in response to Driver B's callous and cavalier attitude, Driver A punches Driver B in the stomach with no intent to cause serious harm. As a result of a kidney condition unknown to Driver A, Driver B subsequently dies in the hospital from kidney-related complications. Can Driver A be charged with criminal homicide for Driver B's death?

Scenario Solution

Yes. Driver B would undoubtedly still be alive but for the defendant's conduct. Some might argue that the kidney condition could not reasonably be foreseen and should therefore eliminate the defendant's conduct as the proximate cause of death. Although that perspective makes for interesting debate, the legal requirement that we take victims as we find them makes the condition implicitly foreseeable. Concerning the final element, an intervening cause must be independent. A health condition is not independent, but rather is dependent on the harm. As such, unless Driver A had some lawful justification or excuse to strike Driver B, Driver A is criminally culpable for the death.

without having to prove any mental fault. Drug possession and statutory rape are two common examples of crimes designated as possessing strict liability. The general rule, however, supports the value of treating offenses as true crimes, and as such, forthcoming discussion focuses on those mental fault elements.

Degrees of *Mens Rea*

Legal codes recognize four forms of mental fault: specific intent, general intent, recklessness, and negligence. Some crimes require states to prove that a criminally accused person possessed **specific intent** to commit the harm in question. To prove this element, states must establish that the accused acted with a willful and intentional mental purpose. With specific intent crimes, a generic belief that the person is at fault, but with no evidence that specific harm was the objective, is not sufficient for a criminal conviction for that particular offense. For example, a first-degree murder conviction ordinarily requires proof of premeditation and deliberation; without evidence to that effect, however, a lesser included form of criminal homicide would be the only permissible prosecutorial avenue. Moving on, most crimes require, at most, proof of **general intent**, meaning some degree of malevolent or wrongful design but with no particularized objective.

Behaviors that possess no mental intent can nonetheless be regulated as criminal to coerce individuals to practice reasonable standards of care; therefore, people whose actions are reckless or negligent are said to have possessed the **constructive intent** to cause harm and thus can be criminally culpable for their harm(s). **Recklessness** is the failure to adhere to a standard of care that a reasonable person knows to exercise, basically behaving in a fashion in which the accused was cognizant of foreseeable danger. **Negligence**, on the other hand,

shares a common denominator with recklessness, as it also demonstrates a failure to adhere to a reasonable standard of care, but differs in that the accused was unaware of the anticipatory dangers. One must also keep in mind the doctrine of **transferred intent**, which seals legal loopholes with respect to unsuccessful criminal attempts. Essentially, the principle stipulates that when a person intends to cause harm to any person but instead erroneously inflicts harm on an unintended target, the law can transfer that general intent (but never specific intent) to the party actually harmed. Pause for Thought 1–3 illustrates how to apply the doctrine of transferred intent.

Attendant Circumstances

In most cases, a person's actions (*actus reus*) and accompanying mental fault (*mens rea*) serve as the essence of what substantive criminal law seeks to eliminate from our midst. With that said, however, it is imperative to keep in mind that many actions (even when mental fault exists) are nonetheless not criminal under laws requiring proof that certain circumstances surrounded the criminal conduct. Referred to as **attendant circumstances**, these legal proscriptions can often mean the difference between freedom and incarceration (or the period of incarceration). For example, the crime of incest, often based on the molestation of a child within the family, often receives greater punishment than the actual crime of child molestation because of its trespass against the sanctity of the family unit—a breach of trust. Statutory rape is another example of the importance of attendant circumstances, in that a female's age can define the difference between criminal sexual intercourse and healthy, adult sexual relationships. Figure 1–5 provides a flow chart to assist with this legal reasoning.

Pause for Thought 1–3

Consider the following: Joe becomes angry with Nicholas. In a moment of rage, Joe throws a knife in the general direction of Nicholas. The knife hits and seriously injures an innocent bystander. Is Joe criminally liable for the unanticipated harm?

Scenario Solution

Yes, under the doctrine of transferred intent, Joe can legally be viewed as having the general intent to harm the bystander, and as such, the state would be entitled to charge him with a crime, even though Joe held no willful or purposeful intent toward the bystander. Furthermore, it should be obvious that Joe committed his act (at a minimum) with recklessness because he chose not to exercise a standard of care expected of reasonably prudent persons.

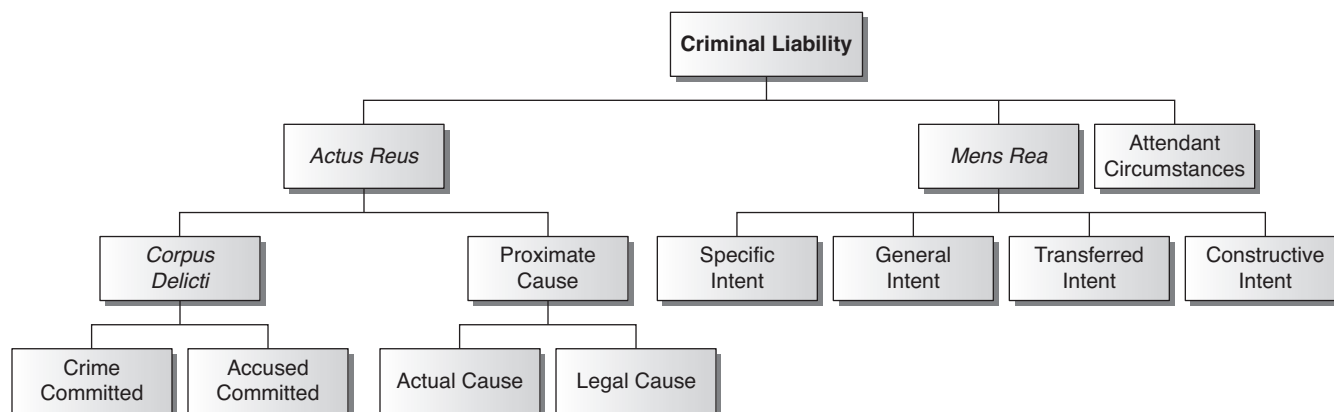


Figure 1–5 Criminal liability.

Crime in America

Few people would dispute that human behavior in the United States is highly regulated—some even argue overregulated. The volume of legislation designed to curtail harmful consequences is so great, in fact, that an attempt to organize and discuss all crimes would produce thousands of head-spinning legal pages. For this reason, this book adheres to a blueprint designed to expose students to the most encountered and problematic crimes within criminal justice professions. The logical starting point for the identification of such crimes is with the Federal Bureau of Investigation's (FBI) annual publication *Crime in the United States*. A statistical portrait of crime in America assembled from approximately 17,000 participating law enforcement agencies (representing approximately 95% of the total population), the **Uniform Crime Reports** (UCR) embedded within the annual compilation divide the eight crimes most plaguing the welfare of this nation into two fundamental crime categories: violent crime and property crime. Although the severity of a crime is a major factor in the designation of those crimes included in the publication, frequency, geographic impact, and economic consequences of an offense also serve as major considerations to the selection process.

Murder, forcible rape, aggravated assault, and robbery comprise the **violent crime** grouping. In 2007, law enforcement agencies reported more than 1.4 million such criminal commissions. Aggravated assault was the most frequent violent criminal act (60.8%), with robbery (31.6%), forcible rape (6.4%), and murder (1.2%) representing a decreasing presence. Turning attention to **property crime**, burglary (22.1%), larceny (66.7%), motor vehicle theft (11.1%), and arson (0.65%) were committed more

than 9.8 million times in 2007, resulting in estimated economic losses approaching 18 billion dollars (FBI, 2008).

If there is a silver lining, it would be that violent (–0.7%) and property (–1.4%) crime both decreased from the previous year (2006). In addition to the eight offenses comprising violent and property crime, however, their lesser included crimes (or cousins, so to speak) also are discussed throughout the text. A **lesser included offense** is a crime possessing the fundamental elements required of a greater, more serious crime but missing a key component. For example, murder is the most serious form of criminal homicide; manslaughter, however, is a lesser included offense of murder because you cannot commit murder without meeting or exceeding the *actus reus* (guilty act) and *mens rea* (guilty mind) requirements of manslaughter.

Summary

This chapter sought to outline the principles and working vocabulary (legalese) essential for developing a fundamental understanding of substantive criminal law in the Republic known as the United States. From the formation of social contract theory to the application of law in contemporary society, this chapter aimed to provide students with a comprehensive understanding of the historical evolution and practical application of the rules of substantive criminal law. Students should now have little trouble citing the sources from which law is derived (common, statutory, case, constitutional, administrative) and how crime traditionally is defined and classified (felonies, misdemeanors). Against this backdrop, students now should be armed with the legal tools with which to decipher whether an accused is liable for conduct outlined in substantive codes: *mens rea*, *actus reus*, and attendant circumstances.

Practice Test

1. The _____ is routinely cited as the first set of written laws to govern society.
 - a. Code of Hammurabi
 - b. Ten Commandments
 - c. Dead Sea scroll
 - d. Babylonian Sacrament
 - e. Assyrian Statutory Code
2. _____ law refers to the historical laws of the Catholic Church.
 - a. Ash
 - b. Positive
 - c. Canon
 - d. Common
 - e. Papal
3. The FBI annually compiles the _____ to provide data regarding the extent of violent and property crime in America.
 - a. National Crime Survey
 - b. American Crime Statistics
 - c. Federal Crime Report
 - d. Criminal Activity Survey
 - e. Uniform Crime Reports
4. _____ defines a government of elected leaders operating under the umbrella of a Constitution which safeguards the interest of the nation through limiting power.
 - a. Constitutionalism
 - b. Republic
 - c. Sovereignty
 - d. Socialism
 - e. Democracy
5. _____ stipulates that citizens will voluntarily waive rights, privileges, and liberties guaranteed in the U.S. Constitution in exchange for government protection.
 - a. Due Process
 - b. *Stare decisis*
 - c. Equal Protection
 - d. Social contract theory
 - e. Natural law
6. _____ law originates with legislative bodies and serves as the prominent source for the establishment of substantive criminal law.
 - a. Common
 - b. Statutory
 - c. Administrative
 - d. Constitutional
 - e. Case
7. _____ law is defined as judicial decisions manifesting the customs and traditions practiced throughout the circuits of England.
 - a. Criminal
 - b. Positive
 - c. Ecclesiastical
 - d. Common
 - e. Canon
8. _____ means “let the decision stand.”
 - a. *Mala prohibita*
 - b. *Actus reus*
 - c. *Mala in se*
 - d. *Mens rea*
 - e. *Stare decisis*
9. A(n) _____ is defined as a crime punishable from 3 to 6 months in jail.
 - a. ordinary misdemeanor
 - b. strict liability crime
 - c. gross misdemeanor
 - d. petty misdemeanor
 - e. true crime
10. A(n) _____ represents the legislative efforts of local government (county and/or municipal) to regulate problem behaviors within its jurisdictional boundaries.
 - a. misdemeanor
 - b. crime
 - c. felony
 - d. administrative policy
 - e. ordinance
11. Moral turpitude crimes are referred to as _____, meaning wrong in itself.
 - a. *mala prohibita*
 - b. *actus reus*
 - c. *mala in se*
 - d. *corpus delicti*
 - e. *mens rea*
12. _____ is translated as “guilty act.”
 - a. *Actus reus*
 - b. *Mala prohibita*
 - c. *Corpus delicti*
 - d. *Mala in se*
 - e. *Mens rea*
13. The _____ standard is used in civil cases, whereby one need only establish a greater likelihood that harm occurred.
 - a. beyond a reasonable doubt
 - b. civil scale
 - c. civil injury
 - d. preponderance of the evidence
 - e. incurred harm rule

14. _____ is translated as “body of the crime.”
- Mens rea*
 - Mala prohibita*
 - Corpus delicti*
 - La cosa de criminal*
 - Actus reus*
15. In order to hold an accused person liable for harm, the _____ for a criminal offense must be sufficiently proven.
- burden of proof
 - actual cause standard
 - but-for test
 - substantial factor test
 - proximate cause standard
16. _____ refers to the connection between harm in question and the actual conduct of the criminally accused.
- Uniform Determination
 - Actual cause
 - Contractual relation
 - Legal cause
 - Proximate cause
17. Drug possession and statutory rape are two examples of crimes often exempt from the *mens rea* requirement, meaning that they possess _____.
- injunctive relief
 - declaratory relief
 - strict liability
 - general intent
 - specific intent
18. _____ is defined as having some degree of malevolent or wrongful design but with no particularized objective.
- General intent
 - Aimless intent
 - Specific intent
 - Malicious design
 - Criminal design
19. The doctrine of _____ stipulates that when a person intends to cause harm but instead erroneously inflicts harm on an unintended target, the law can presume general intent was present with respect to the party actually harmed.
- actual cause
 - transferred intent
 - federalism
 - legal cause
 - proximation
20. Referred to as _____, these legal elements must accompany *actus reus* and *mens rea* for most crimes to be punished.
- corpus delicti*
 - incarceration factors
 - substantial components
 - attendant circumstances
 - extenuating circumstances

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- Federal Bureau of Investigation. (2008). *Crime in the United States, 2007: Uniform Crime Reports*. Retrieved July 14, 2009, from <http://www.fbi.gov/ucr/cius2007/index.html>
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