

## 1.2: Defining Key Criminology Terms

A theory is an explanation to make sense of our observations about the world. We test hypotheses and create theories that help us understand and explain the phenomena. According to Paternoster and Bachman (2001), theories should attempt to portray the world accurately and must “fit the facts.” [1] Criminological theories focus on explaining the causes of crime. They explain why some people commit a crime, identify risk factors for committing a crime, and can focus on how and why certain laws are created and enforced. Sutherland (1934) has referred to criminology as the scientific study of breaking the law, making the law, and society’s reaction to those who break the law. [2] Besides making sense of our observations, theories also strive to make predictions. If we understand why crime is happening, we can formulate policies or programs to minimize it.

The building blocks of any theory are concepts. Crime, delinquency, and deviance are all concepts that need to be defined. We seek to explain these concepts with other concepts. For example, some theories may link crime with self-control. Self-control is another concept that needs to be defined. Once we define “crime” and “self-control”, we need to measure them. Operationalization is the process of determining how we will measure concepts, which are called variables. We could measure self-control in a number of different ways. For example, we could test a person’s ability to resist temptation.



Pin It! The Marshmallow Test

[The Marshmallow Test](#) tests children’s aptitude for self-control.

Once we test the relationship between two variables, we also need to make sure another variable is not affecting the results. Spuriousness is when a third variable is causing the other two. We know that ice cream sales and murder rates are positively correlated; when one goes up the other goes up. At first glance, someone may claim that ice cream is causing people to kill. However, what do you think might be a better explanation? Can you think of a third variable that might cause ice cream sales and murder rates to increase?

When we try to explain why crime occurs, we can look at it from many different perspectives. We can create macro-level explanations and micro-level explanations. Macro-level explanations focus on group rate differences. For example, why do some countries have more (or less) violent crime than others? Why do young people commit more crime than older people? Why do males commit more crime than females? Micro-level explanations center on differences among individuals. Macro-level explanations focus on societal structures while micro-level explanations focus on processual differences.



### Think About It... It's "Just" a Theory

Many laypeople will give their opinions on the relationship between phenomenon based on their hunches or observations; these are not theories. A theory explains and interprets the facts. A proper scientific theory must be falsifiable. Criminologists who create theories test their hypotheses. Many times, the theorist will modify his or her theory based on the research. Upon more investigation, those theories that have yet to be falsified become accepted as a valid description between the phenomena.

Darwin's theory of evolution has yet to be falsified. There are numerous unanswered questions, but as time goes by, scientists are discovering more and more evidence to support the theory.

When I was an undergraduate student, I majored in Psychology; I thought I was in control of everything about me. However, when I took my first criminology class, I realized the social environment also had an impact on who I was becoming. For example, I did not choose my parents, their income, how many siblings I had, or where I lived. Each of those had an impact on who I was and who I became friends with in my childhood. Most of my childhood friends, who are still my friends, may have been based solely on how far away they lived from my parents instead of their character, interests, or personality. What do you think?

## Components of the Criminal Justice System (CJS) <sup>[4]</sup>

### Learning Outcomes

- Understand the three branches of the U.S. criminal justice system

A criminal justice system is an organization that exists to enforce a legal code. There are three branches of the U.S. criminal justice system: the police, the courts, and the corrections system.

### Police

Police are a civil force in charge of enforcing laws and public order at a federal, state, or community level. No unified national police force exists in the United States, although there are federal law enforcement officers. Federal officers operate under specific government agencies such as the Federal Bureau of Investigation (FBI); the Bureau of Alcohol, Tobacco, Firearms, and Explosives (ATF); and the Department of Homeland Security (DHS). Federal officers can only deal with matters that are explicitly within the power of the federal government, and their field of expertise is usually narrow. A county police officer may spend time responding to emergency calls, working at the local jail, or patrolling areas as needed, whereas a federal officer would be more likely to investigate suspects in firearms trafficking or provide security for government officials.

State police have the authority to enforce statewide laws, including regulating traffic on highways. Local or county police, on the other hand, have a limited jurisdiction with authority only in the town or county in which they serve.



Figure 1.6 Afghan National Police Crisis Response Unit members train in Surobi, Afghanistan. <sup>[5]</sup>

## Courts

Once a crime has been committed and a violator has been identified by the police, the case goes to court. A court is a system that has the authority to make decisions based on law. The U.S. judicial system is divided into federal courts and state courts. As the name implies, federal courts (including the U.S. Supreme Court) deal with federal matters, including trade disputes, military justice, and government lawsuits. Judges who preside over federal courts are selected by the president with the consent of Congress.



Figure 1.7 This county courthouse in Kansas (left) is a typical setting for a state trial court. Compare this to the courtroom of the Michigan Supreme Court (right).<sup>[6]</sup>

State courts vary in their structure but generally include three levels: trial courts, appellate courts, and state supreme courts. In contrast to the large courtroom trials in TV shows, most noncriminal cases are decided by a judge without a jury present. Traffic court and small claims court are both types of trial courts that handle specific civil matters.

Criminal cases are heard by trial courts with general jurisdictions. Usually, a judge and jury are both present. It is the jury's responsibility to determine guilt and the judge's responsibility to determine the penalty, though in some states the jury may also decide the penalty. Unless a defendant is found "not guilty," any member of the prosecution or defense (whichever is the losing side) has the right to appeal the outcome if they believe they were wrongly convicted, or the sentence was too harsh. An appeal is not another trial, but an opportunity for the defendant to try to raise specific errors that might have occurred at trial. A common appeal is that a decision from the judge was incorrect – such as whether to suppress certain evidence or to impose a certain sentence. Appeals are complicated and sometimes result in the case going back to the trial court. A conviction can get reversed, a sentence altered, or a new trial may be ordered altogether if the Appeals Court decides that particular course of action. If a circuit court judge decides the appeal, then a defendant can try to appeal that decision to the United States Supreme Court in Washington, D.C. The United States Supreme Court is the highest appellate court in the American court system, and they make the final decision concerning a defendant's appeal. The Court is not required to hear an appeal in every case and takes only a small number of cases each year.



Figure 1.8 Brendan Dassey, featured in the Netflix documentary *The Making of a Murderer* in 2015, was charged with murder as a juvenile. Dassey's 2007 conviction was questionable because his videotaped confession with police was problematic. Dassey was 16 without a lawyer or parent present during his confession. He appeared scared and unaware of the gravity of his situation on camera, and his lawyers say he had a low IQ in the seventh percentile of children his age, making him susceptible to suggestion. Dassey was found guilty as an accessory to murder with his uncle Steven Avery in the 2005 murder of Teresa Halbach, a 25-year-old photographer in Manitowoc, Wisconsin. The United States Supreme Court declined to hear his case and did not provide a statement as to why.



### Think About It...Is the American Court System Just?

If an individual cannot afford a lawyer, under federal law, the government is required to provide them one. These lawyers are known as public defenders. But how effective is the public defender system? Watch [Why the Public Defender System is So Screwed Up](#) to discover some of the problems with the public defender system. Can these issues be improved? Should they be?

## Corrections

The corrections system, more commonly known as the prison system, is charged with supervising individuals who have been arrested, convicted, and sentenced for a criminal offense. At the end of 2010, approximately seven million U.S. men and women were behind bars (BJS 2011d); an estimated 6,613,500 persons were under the supervision of U.S. adult correctional systems in 2016 and the decline is due solely due to a declining probation population (the numbers of people in prison, jail, and on probation remain steady). [1].

The U.S. incarceration rate has grown considerably in the last hundred years. In 2008, more than 1 in 100 U.S. adults were in jail or prison, the highest benchmark in our nation's history. And while the United States accounts for 5 percent of the global population, we have 25 percent of the world's inmates, the largest number of prisoners in the world (Liptak 2008b).

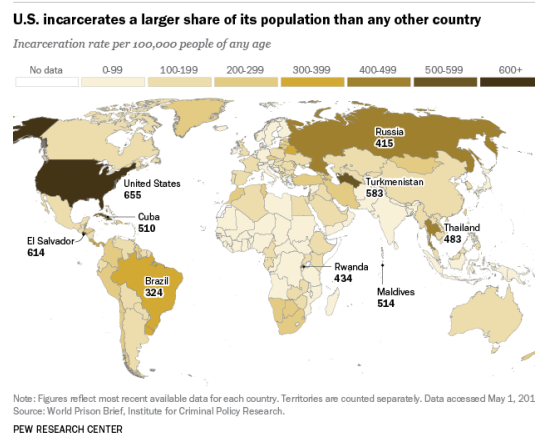


Figure 1.9 “America’s incarceration rate is at a two-decade low.” Pew Research Center, Washington, D.C. (May 2, 2018). “U.S. Incarcerates a Larger Share of Its Population than Any Other Country.” [7]

Prison is different from jail. A jail provides temporary confinement, usually while an individual awaits trial or parole. Prisons are facilities built for individuals serving sentences of more than a year, whereas jails are small and local, prisons are large and run by either the state or the federal government. Increasingly jails operate more like larger prisons, as institutions like Los Angeles County Jail have nearly 20,000 inmates (63 percent of which are non-violent offenders) in seven facilities over 4,000 square miles. Rikers Island in New York City, which sits on a 40-acre complex with ten different facilities (including a juvenile facility), house nearly 14,000 inmates [2].

Parole refers to a temporary release from prison or jail that requires supervision and the consent of officials. Parole is different from probation, which is supervised time used as an alternative to prison. Probation and parole can both follow a period of incarceration in prison, especially if the prison sentence is shortened.



### Think About It... Wrongful Incarceration

Read this [story about Kalief Browder, arrested at age 16 on a robbery charge](#), held at Rikers Island for more than 1,000 days, including two years in solitary confinement, and then released when his charges were dropped. His story has been documented in a six-part Netflix series titled The Kalief Browder Story .

## Glossary

- corrections system: the system tasked with supervising individuals who have been arrested for, convicted of, or sentenced for criminal offenses
- court: a system that has the authority to make decisions based on law
- crime: a behavior that violates official law and is punishable through formal sanctions
- criminal justice system: an organization that exists to enforce a legal code
- legal codes: codes that maintain formal social control through laws
- police: a civil force in charge of regulating laws and public order at a federal, state, or community level

## Types of Law <sup>[8]</sup>

### Criminal Law

It is a crime to make unauthorized and harmful physical contact with another person ( battery ). In fact, it is a crime even to threaten such contact ( assault ). Criminal law prohibits and punishes wrongful conduct, such as assault and battery, murder, robbery, extortion, and fraud. In criminal cases, the plaintiff—the party filing the complaint—is usually a government body acting as a representative of society. The defendant—the party charged in the complaint—may be an individual (such as your roommate) or an organization (such as a business). Criminal punishment includes fines, imprisonment, or both.

### Civil Law

Assault and battery may also be a matter of civil law—law governing disputes between private parties (again, individuals or organizations). In civil cases, the plaintiff sues the defendant to obtain compensation for some wrong that the defendant has allegedly done the plaintiff. Thus, your roommate may be sued for monetary damages by the homeowner’s neighbor, with whom he made unauthorized and harmful physical contact.

In civil litigation, contract and tort claims are by far the most numerous. The law attempts to adjust for harms done by awarding damages to a successful plaintiff who demonstrates that the defendant was the cause of the plaintiff’s losses. Torts can be intentional torts, negligent torts, or strict liability torts. Employers must be aware that in many circumstances, their employees may create liability in tort.

### Tort Law

The term tort is the French equivalent of the English word wrong . The word tort is also derived from the Latin word tortum , which means “twisted or crooked or wrong.” Thus, conduct that is twisted or crooked and not straight is a tort.

Long ago, tort was used in everyday speech; today it is left to the legal system. A judge will instruct a jury that a tort is usually defined as a wrong for which the law will provide a remedy, most often in the form of money damages. The law does not remedy all “wrongs.” The preceding definition of tort does not reveal the underlying principles that divide wrongs in the legal sphere from those in the moral sphere. Hurting someone’s feelings may be more devastating than saying something untrue about him behind his back; yet the law will not provide a remedy for saying something cruel to someone directly, while it may provide a remedy for “defaming” someone, orally or in writing, to others.

Although the word is no longer in general use, tort suits are the stuff of everyday headlines. More and more people injured by exposure to a variety of risks now seek redress (some sort of remedy through the courts). Headlines boast of multimillion-dollar jury awards against doctors who bungled operations, against newspapers that libeled subjects of stories, and against oil companies that devastate entire ecosystems. All are examples of tort suits.

The law of torts developed almost entirely in the common-law courts; that is, statutes passed by legislatures were not the source of law that plaintiffs usually relied on. Usually, plaintiffs would rely on the common law (judicial decisions). Through thousands of cases, the courts have fashioned a series of rules that govern the conduct of individuals in their noncontractual dealings with each other. Through contracts, individuals can craft their own rights and responsibilities toward each other. In the absence of contracts, tort law holds individuals legally accountable for the consequences of their actions. Those who suffer losses at the hands of others can be compensated.

Many acts (like homicide) are both criminal and tortious. But torts and crimes are different, and the difference is worth noting. A crime is an act against the people as a whole. Society punishes the murderer; it does not usually compensate the family of the victim. Tort law, on the other hand, views the death as a private wrong for which damages are owed. In a civil case, the tort victim or his family, not the state, brings the action. The judgment against a defendant in a civil tort suit is usually expressed in monetary terms, not in terms of prison times or fines, and is the legal system’s way of trying to make up for the victim’s loss.

## Kinds of Torts

There are three kinds of torts: intentional torts, negligent torts, and strict liability torts. Intentional torts arise from intentional acts, whereas unintentional torts often result from carelessness (e.g., when a surgical team fails to remove a clamp from a patient's abdomen when the operation is finished). Both intentional torts and negligent torts imply some fault on the part of the defendant. In strict liability torts, by contrast, there may be no fault at all, but tort law will sometimes require a defendant to make up for the victim's losses even where the defendant was not careless and did not intend to do harm.

## Dimensions of Tort Liability

There is a clear moral basis for recovery through the legal system where the defendant has been careless (negligent) or has intentionally caused harm. Using the concepts that we are free and autonomous beings with basic rights, we can see that when others interfere with either our freedom or our autonomy, we will usually react negatively. As the old saying goes, "Your right to swing your arm ends at the tip of my nose." The law takes this even one step further: under intentional tort law, if you frighten someone by swinging your arms toward the tip of her nose, you may have committed the tort of assault, even if there is no actual touching (battery).

Under a capitalistic market system, rational economic rules also call for no negative externalities. That is, actions of individuals, either alone or in concert with others, should not negatively impact third parties. The law will try to compensate third parties who are harmed by your actions, even as it knows that a money judgment cannot actually mend a badly injured victim.

## Fault

Tort principles can be viewed along different dimensions. One is the fault dimension. Like criminal law, tort law requires a wrongful act by a defendant for the plaintiff to recover. Unlike criminal law, however, there need not be a specific intent. Since tort law focuses on injury to the plaintiff, it is less concerned than criminal law about the reasons for the defendant's actions. An innocent act or a relatively innocent one may still provide the basis for liability. Nevertheless, tort law—except for strict liability—relies on standards of fault, or blameworthiness.

The most obvious standard is willful conduct. If the defendant (often called the tortfeasor—i.e., the one committing the tort) intentionally injures another, there is little argument about tort liability. Thus, all crimes resulting in injury to a person or property (murder, assault, arson, etc.) are also torts, and the plaintiff may bring a separate lawsuit to recover damages for injuries to his person, family, or property.

Most tort suits do not rely on intentional fault. They are based, rather, on negligent conduct that in the circumstances is careless or poses unreasonable risks of causing damage. Most automobile accident and medical malpractice suits are examples of negligence suits.

The fault dimension is a continuum. At one end is the deliberate desire to do injury. The middle ground is occupied by careless conduct. At the other end is conduct that most would consider entirely blameless, in the moral sense. The defendant may have observed all possible precautions and yet still be held liable. This is called strict liability. An example is that incurred by the manufacturer of a defective product that is placed on the market despite all possible precautions, including quality-control inspection. In many states, if the product causes injury, the manufacturer will be held liable.

## Nature of Injury

Tort liability varies by the type of injury caused. The most obvious type is physical harm to the person (assault, battery, infliction of emotional distress, negligent exposure to toxic pollutants, wrongful death) or property (trespass, nuisance, arson, interference with contract). Mental suffering can be redressed if it is a result of physical injury (e.g., shock and depression following an automobile accident). A few states now permit recovery for mental distress alone (a mother's shock at seeing her son injured by a car while both were crossing the street). Other protected interests include a person's reputation (injured by defamatory statements or writings), privacy (injured by those who divulge secrets of his personal life), and economic interests (misrepresentation to secure an economic advantage, certain forms of unfair competition).

## Excuses

A third element in the law of torts is the excuse for committing an apparent wrong. The law does not condemn every act that ultimately results in injury.

One common rule of exculpation is assumption of risk. A baseball fan who sits along the third base line close to the infield assumes the risk that a line drive foul ball may fly toward him and strike him. He will not be permitted to complain in court that the batter should have been more careful or that management should have either warned him or put up a protective barrier.



Another excuse is negligence of the plaintiff. If two drivers are careless and hit each other on the highway, some states will refuse to permit either to recover from the other. Yet another excuse is consent: two boxers in the ring consent to being struck with fists (but not to being bitten on the ear).

## Damages

Since the purpose of tort law is to compensate the victim for harm actually done, damages are usually measured by the extent of the injury. Expressed in money terms, these include replacement of property destroyed, compensation for lost wages, reimbursement for medical expenses, and dollars that are supposed to approximate the pain that is suffered. Damages for these injuries are called compensatory damages.

In certain instances, the courts will permit an award of punitive damages. As the word punitive implies, the purpose is to punish the defendant's actions. Because a punitive award (sometimes called exemplary damages) is at odds with the general purpose of tort law, it is allowable only in aggravated situations. The law in most states permits recovery of punitive damages only when the defendant has deliberately committed a wrong with malicious intent or has otherwise done something outrageous.

Punitive damages are rarely allowed in negligence cases for that reason. But if someone sets out intentionally and maliciously to hurt another person, punitive damages may well be appropriate. Punitive damages are intended not only to punish the wrongdoer, by exacting an additional and sometimes heavy payment (the exact amount is left to the discretion of jury and judge), but also to deter others from similar conduct. The punitive damage award has been subject to heavy criticism in recent years in cases in which it has been awarded against manufacturers. One fear is that huge damage awards on behalf of a multitude of victims could swiftly bankrupt the defendant. Unlike compensatory damages, punitive damages are taxable.

Table 1.1 below provides a more complete list of intentional torts, along with the types of compensatory damages normally awarded in each type of case.

Table 1.1 Categories of Intentional Torts <sup>[9]</sup>

Category	Type	Definition	Compensatory Usually Awarded	Damages
Against persons	Assault	Threatening immediate harm or offensive contact	For medical bills, lost wages, and pain and suffering	
	Battery	Making unauthorized harmful or offensive contact with another person		
	Defamation	Communicating to a third party information that's harmful to someone's reputation	For measurable financial losses	
	Invasion of privacy	Violating someone's right to live his or her life without unwarranted or undesired publicity	For resulting economic loss or pain and suffering	
	False imprisonment	Restraining or confining a person against his or her will and without justification	For treatment of physical injuries and lost time at work	
	Intentional infliction of emotional distress	Engaging in outrageous conduct that's likely to cause extreme emotional distress to the party toward whom the conduct is directed	For treatment of physical illness resulting from emotional stress	

Against property	Trespass to realty	Entering another person's land or placing an object on another person's land without the owner's permission	For harm caused to property and losses suffered by rightful owner
	Trespass to personality	Interfering with another person's use or enjoyment of personal property	For harm to property
	Conversion	Permanently removing property from the rightful owner's possession	For full value of converted item
Against economic interests	Disparagement	Making a false statement of material fact about a business product	For actual economic loss
	Intentional interference with a contract	Enticing someone to breach a valid contract	For loss of expected benefits from contract
	Unfair competition	Going into business for the sole purpose of taking business from another concern	For lost profits
	Misappropriation	Using an unsolicited idea for a product or marketing method without compensating the originator of the idea	For economic losses

As we indicated, your roommate may have committed assault and battery in violation of both criminal and civil statutes. Consequently, he may be in double trouble: not only may he be sued for a civil offense by the homeowner's neighbor, but he may also be prosecuted for a criminal offense by the proper authority in the state where the incident took place. It's also conceivable that he may be sued but not prosecuted, or vice versa. Everything is up to the discretion of the complaining parties—the homeowner's neighbor in the civil case and the prosecutor's office in the criminal case.

Why might one party decide to pursue a case while the other decides not to? A key factor might be the difference in the burden of proof placed on each potential plaintiff. Liability in civil cases may be established by a preponderance of the evidence—the weight of evidence necessary for a judge or jury to decide in favor of the plaintiff (or the defendant). Guilt in criminal cases, however, must be established by proof beyond a reasonable doubt—doubt based on reason and common sense after careful, deliberate consideration of all the pertinent evidence. Criminal guilt thus carries a tougher standard of proof than civil liability, and it's conceivable that even though the plaintiff in the civil case believes that he can win by a preponderance of the evidence, the prosecutor may feel that she can't prove criminal guilt beyond a reasonable doubt.

Finally, note that your roommate would be more likely to face criminal prosecution if he had committed assault and battery with criminal intent—with the intent, say, to kill or rob the homeowner's neighbor or to intimidate him from testifying about the accident with the paint bucket. In that case, in most jurisdictions, his action would be not only a crime but a felony—a serious or “inherently evil” crime punishable by imprisonment. Otherwise, if he's charged with criminal wrongdoing at all, it will probably be for a misdemeanor—a crime that's not “inherently evil” but that is nevertheless prohibited by society.

Table 1.2 below summarizes some of the key differences in the application of criminal and civil law.

Table 1.2 Civil versus Criminal Law <sup>[10]</sup>

Terms	Civil Law	Criminal Law
Parties	Individual or corporate plaintiff vs. individual or corporate defendant	Local, state, or federal prosecutor vs. individual or corporate defendant
Purpose	Compensation or deterrence	Punishment/deterrence/rehabilitation



Burden of proof	Preponderance of the evidence	Beyond a reasonable doubt
Trial by jury/jury vote	Yes (in most cases)/specific number of votes for judgment in favor of plaintiff	Yes/unanimous vote for conviction of defendant
Sanctions/penalties	Monetary damages/equitable remedies (e.g., injunction, specific performance)	Probation/fine/imprisonment/capital punishment

## Common Law

Common law consists of decisions by courts (judicial decisions) that do not involve interpretation of statutes, regulations, treaties, or the Constitution. Courts make such interpretations, but many cases are decided where there is no statutory or other codified law or regulation to be interpreted. For example, a state court deciding what kinds of witnesses are required for a valid will in the absence of a rule (from a statute) is making common law.

United States law comes primarily from the tradition of English common law. By the time England's American colonies revolted in 1776, English common-law traditions were well established in the colonial courts. English common law was a system that gave written judicial decisions the force of law throughout the country. Thus, if an English court delivered an opinion as to what constituted the common-law crime of burglary, other courts would stick to that decision, so that a common body of law developed throughout the country. Common law is essentially shorthand for the notion that a common body of law, based on past written decisions, is desirable and necessary.

In England and in the laws of the original thirteen states, common-law decisions defined crimes such as arson, burglary, homicide, and robbery. As time went on, US state legislatures either adopted or modified common-law definitions of most crimes by putting them in the form of codes or statutes. This legislative ability—to modify or change common law into judicial law—points to an important phenomenon: the priority of statutory law over common law.

## Statutory Law

Another source of law is statutory law. While the Constitution applies to government action, statutes apply to and regulate individual or private action. A statute is a written (and published) law that can be enacted in one of two ways. Most statutes are written and voted into law by the legislative branch of government. This is simply a group of individuals elected for this purpose. The US legislative branch is Congress, and Congress votes federal statutes into law. Every state has a legislative branch as well, called a state legislature, and a state legislature votes state statutes into law. Often, states codify their criminal statutes into a penal code.

State citizens can also vote state statutes into law. Although a state legislature adopts most state statutes, citizens voting on a ballot can enact some very important statutes. For example, a majority of California's citizens voted to enact California's medicinal marijuana law, California Compassionate Use Act of 1996, Cal. Health and Safety Code § 11362.5. In another example of statutory law, California's three-strikes law was voted into law by both the state legislature and California's citizens and actually appears in the California Penal Code in two separate places.

An important fact to note is that Statutory law is inferior to constitutional law, which means that a statute cannot conflict with or attempt to supersede constitutional rights. If a conflict exists between constitutional and statutory law, the courts must resolve the conflict. Courts can invalidate unconstitutional statutes pursuant to their power of judicial review.

### Key Takeaways

- The legal environment of business is the area in which business interacts with the legal system.
- Criminal law prohibits and punishes wrongful conduct. The plaintiff—the party filing the complaint—is usually a government body acting as a representative of society. The defendant—the party charged in the complaint—may be an individual or an organization. Criminal punishment includes fines, imprisonment, or both. Civil law refers to law governing disputes between private parties. In civil cases, the plaintiff sues the defendant to obtain compensation for some wrong that the defendant has allegedly done the plaintiff.
- Tort law covers torts, or civil wrongs—injuries done to someone’s person or property. The punishment in tort cases is the monetary compensation that the court orders the defendant to pay the plaintiff.
- An intentional tort is an intentional act that poses harm to the plaintiff. Intentional torts may be committed against a person, a person’s property, or a person’s economic interest. In addition to intentional torts, the law recognizes negligence torts and strict liability torts.
- Liability in civil cases may be established by a preponderance of the evidence—the weight of evidence necessary for a judge or jury to decide in favor of the plaintiff (or the defendant). Guilt in criminal cases must be established by proof beyond a reasonable doubt—doubt based on reason and common sense after careful, deliberate consideration of all the pertinent evidence.
- A crime may be a felony—a serious or “inherently evil” crime punishable by imprisonment—or a misdemeanor—a crime that’s not “inherently evil” but that is nevertheless prohibited by society.

## Criminal Law in Depth

### Substantive Criminal Law <sup>[11]</sup>

As previously discussed, the criminal law in its broadest sense encompasses both the substantive criminal law and criminal procedure. In a more limited sense, the term criminal law is used to denote the substantive criminal law, and criminal procedure is considered another category of law. (Most college criminal justice programs organize classes this way). Recall that the substantive law defines criminal acts that the legislature wishes to prohibit and specifies penalties for those that commit the prohibited acts. For example, murder is a substantive law because it prohibits the killing of another human being without justification.

#### No Crime without Law

It is fundamental to the American way of life that there can be no crime without law. This concept defines the idea of the Rule of Law. The rule of law is the principle that the law should govern a nation, not an individual. The importance of the rule of law in America stems from the colonial experience with the English monarchy. It follows that, in America, no one is above the law.

#### Constitutional Limits

Unlike the governments of other countries, the legislative assemblies of the United States do not have unlimited power. The power of Congress to enact criminal laws is circumscribed by the Constitution. These limits apply to state legislatures as well.

**Bills of Attainder and Ex Post Facto Laws.** A bill of attainder is an enactment by a legislature that declares a person (or a group of people) guilty of a crime and subject to punishment for committing that crime without the benefit of a trial. An ex post facto law is a law that makes an act done before the legislature enacted the law criminal and punishes that act. The prohibition also forbids the legislature from making the penalty for a crime more severe retroactively. Both of these types of laws are strictly prohibited by the Constitution.

**Fair Notice and Vagueness.** The due process clauses of the Fifth and Fourteenth Amendments mandate that the criminal law afford fair notice. The idea of fair notice is that people must be able to determine exactly what is prohibited by the law, so vague and ambiguous laws are prohibited. If a law is determined to be unclear by the Supreme Court, it will be struck down and declared void for vagueness. Such laws would allow for arbitrary and discriminatory enforcement if allowed to stand.

#### First Amendment

The First Amendment to the United States Constitution guarantees all Americans the “freedom of expression.” Among these “expressions” are the freedom of religion and the freedom of speech. In general, Americans can say pretty much whatever they like without fear of punishment. Any criminal law passed by the legislature that infringes on these rights would not withstand constitutional scrutiny. There are, however, some exceptions.

When the health and safety of the public are at issue, the government can curtail the freedom of speech. One of the most commonly cited limiting principles is what has been called the clear and present danger test. This test, established by the Supreme Court in *Schenck v. United States* (1919), prohibits inherently dangerous speech, such as falsely shouting “fire!” in a crowded theater.

Another prohibited type of speech has been referred to as fighting words . This means that the First Amendment does not protect speech calculated to incite a violent reaction. Other types of unprotected speech include hate speech, profanity, libelous utterances, and obscenity. These latter types of speech are very difficult to regulate by law because they are very hard to define and place limits on. The current trend has been to protect more speech that would have once been considered obscene or profane.

The freedom to worship as one sees fit is also enshrined in the Constitution. Appellate courts will strike down statutes that are designed to restrict this freedom of religion . The high court has protected door-to-door solicitations by religious groups and even ritualistic animal sacrifices. The Court, however, has not upheld all claims based on the free exercise of religion. Statutes criminalizing such things as snake handling, polygamy, and the use of hallucinogenic drugs have all been upheld.

The First Amendment protects the right of the people to assemble publicly, but as with the other freedoms previously discussed, it is not absolute. The courts have upheld restrictions on the time, place, and manner of public assemblies, so long as those restrictions were deemed reasonable. The reasonableness of such restrictions usually hinges on a compelling state interest . The freedom of assembly , then, does not protect conduct that jeopardizes the public health and safety.

## Second Amendment

The constitutionally guaranteed “right to keep and bear arms” in the Second Amendment is by no means absolute has been the source of much litigation and political debate in recent years. The Supreme Court has established that the second Amendment confers a right to the carrying of a firearm for self-defense, and that right is applicable via the Fourteenth Amendment to the states. Typical restrictions include background checks and waiting periods. Some jurisdictions highly regulate the concealing, carrying, and purchase of firearms, and many limit the type of firearms that can be purchased. Many criminal laws have enhanced penalties when they are committed with firearms. Most gun laws and concealed carry laws vary widely from jurisdiction to jurisdiction.

## Eighth Amendment

The Eighth Amendment to the United States Constitution prohibits the imposition of Cruel and Unusual Punishments . Both the terms cruel and unusual do not mean what they mean in everyday usage; they are both legal terms of art. The Supreme Court has incorporated the doctrine of proportionality into the Eighth Amendment. Recall that proportionality means that the punishment should fit the crime, or at least should not be grossly disproportionate to the offense. The idea of proportionality has appeared in cases that considered the grading of offenses, the validity of lengthy prison sentences, and whether the imposition of the death penalty is constitutional. (The legal controversies of three strikes laws and the death penalty will be discussed at greater length in a later section).

## The Right to Privacy

Most American’s view the right to privacy as a fundamental human right. It is shocking, then, to find that the Constitution never expressly mentions a right to privacy. The Supreme Court agrees that such a right is fundamental to due process and has established the right as being inferred from several other guaranteed rights. Among these are the right of free association, the prohibition against quartering soldiers in private homes, and the prohibition against unreasonable searches and seizures. The right to privacy has been used to protect many controversial practices that were (at least at the time) socially unacceptable to large groups of people. Early courts decided that laws prohibiting single people from purchasing contraceptives were unconstitutional based on privacy rights arguments. The right to an abortion established in *Roe v. Wade* (1973) hinged primarily on a privacy rights argument. More recently, in *Lawrence v. Texas* ( 2003), the court ruled that laws prohibiting private homosexual sexual activity were unconstitutional. In the *Lawrence* case, privacy rights were the deciding factor.

### Key Terms

Bill of Attainder, Clear and Present Danger Test, Compelling State Interest, Concealed Carry Law, Criminal Procedure, Cruel and Unusual Punishment, Eighth Amendment, Ex Post Facto Law, Fair Notice, Fighting Words, First Amendment, Freedom of Assembly, Freedom of Expression, Freedom of Religion, *Lawrence v. Texas* (2003), Right to Privacy, *Roe v. Wade* (1973), *Schenck v. United States* (1919), Second Amendment, Void for Vagueness

## Procedural Criminal Law <sup>[12]</sup>

procedural law governs the process used to investigate and prosecute an individual who commits a crime. Procedural law also governs the ways a person convicted of a crime may challenge their convictions. The source of procedural law includes the same sources of law you have just read about which govern substantive criminal law: the constitution, cases law or judicial opinions, statutes, and common law. Whereas most substantive criminal law is now statutory, most procedural law is found in judicial

opinions that interpret the Fourth, Fifth, Sixth, Eighth and Fourteenth Amendment to the U.S. Constitution, the U.S. Code, and the state constitutional and legislative counterparts. Generally, the federal and state constitutions set forth broad guarantees (for example, the right to a speedy trial), then statutes are enacted to provide more definite guidelines (for example, the Federal Speedy Trial Act) and then judges flesh out the meaning of those guarantees and statutes in their court opinions.

### Phases of the Criminal Justice Process

The processing of a case through the criminal justice system can be broken down into five phases: investigative phase, the pre-trial phase, the trial phase, the sentencing phase, and the appellate or post-conviction phase.

#### Investigative Phase

The investigative phase is governed by laws covering searches and seizures (searches of persons and places, arrests and stops of individuals, seizures of belongings), interrogations and confessions, identification procedures (for example, line ups, showups, and photo arrays). This phase mostly involves what the police are doing to investigate a crime. However, when police apply for a search, seizure or arrest warrant, “neutral and detached” magistrates (i.e., judges) must decide whether probable cause exists to issue search warrants, arrest warrants, and warrants for the seizure of property and whether the scope of the proposed warrant is supported by the officer’s affidavit (sworn statement). When an individual is arrested without a warrant, judges will need to promptly review whether there is probable cause exists to hold them in custody before trial.

#### Pre-trial Phase

The pretrial phase is governed by laws covering the initial appearance of the defendant before a judge or magistrate; the securing of defense counsel, the arraignment process (in which the defendant is informed of the charges which have been filed by the state); the process in which the court determines whether to release the defendant pre-trial either with some financial surety (posting bail) or on his or her own recognizance and with court-determined conditions imposed (for example, not having contact with the alleged victim); the selection and use of a grand jury or preliminary hearing processes (in which either a grand jury or a judge determines whether there is sufficient evidence that a felony has been committed); any pretrial motions such as motions to suppress evidence (for examples, asking the court not to let the government use evidence it may have obtained illegally through a search or getting a confession), motions to challenge a subpoena, motions to change venue (to move the trial), motions to join or sever cases (for example if two or more individuals are charged with the offense, should the trials be held together or separately). During the pretrial phase, prosecutors and defendants through their defense attorneys will engage in plea bargaining and will generally resolve the case before a trial is held.

#### Trial Phase

The trial phase is governed by laws covering speedy trial guarantees, the selection and use of petit jurors (trial jurors); the rules of evidence (statutory and common law rules governing the admissibility of certain types of evidence such as hearsay or character evidence, the competency and impeachment of witnesses, the existence of any privilege, and the exclusion of witnesses during the testimony of other witnesses); the right of the defendant compulsory process (to secure favorable testimony and evidence); the right of the defendant to cross-examine any witnesses or evidence presented by the government against him; fair trials free of prejudicial adverse pre-trial or trial publicity; fair trials which are open to the public; and the continued right of the defendant to have the assistance of counsel and be present during his or her trial.

#### Sentencing Phase

The sentencing phase is governed by rules and laws concerning the substantive criminal laws on punishment (discussed above); time period in which a defendant must be sentenced; the defendant’s right of allocution (right to make a statement to the court before the judge imposes sentence); any victims’ rights to appear and make statements at sentencing; the defendant’s rights to present mitigation evidence and witnesses; and the defendant’s continued rights to the assistance of counsel at sentencing. In capital cases in which the state is seeking the death penalty, the trial will be bifurcated (a trial split into the “guilt/innocence phase” and the “penalty phase”) and the sentencing hearing will be more like a mini trial.

#### Post-Conviction Phase (Appeals Phase)

The post-conviction phase is governed by rules and laws concerning the time period in which direct appeals must be taken; the defendant’s right to file an appeal of right (the initial appeal which must be reviewed by an appellate court) and right to file a discretionary appeal; the defendant’s right to have the assistance of counsel in helping to file either the appeal of right or a discretionary appeal. The post-conviction phase is also governed by rules and laws concerning the defendant’s ability to file a writ of habeas corpus (a civil suit against the entity who is currently holding the defendant in custody) or a post-conviction relief suit (a

civil suit similar to a habeas corpus suit but one which can be filed by the defendant regardless if he or she is in custody). The post-conviction phase would also include any probation and parole revocation hearings.

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