

# CRIMINAL LAW: SUBSTANTIVE CRIMINAL LAW AND CRIMINAL PROCEDURE

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## Summary

Criminal law sets the parameters of the relationship between individual liberty, on the one hand, and, the state's power to identify norms of social conduct and impose punishment on those who violate them, on the other. The evolving doctrine that governs this relationship respects the state's broad power to proscribe conduct and punish criminals while limiting the exercise of that power to situations in which the state meets very exacting standards that ensure the utmost fairness to individual defendants.

## 1. Introduction

Criminal law doctrine governs the investigation, apprehension, trial, and punishment of persons who violate statutes defining conduct that transgresses social norms to such an

extent that the conduct may be deemed criminal. Criminal law violations enable the government to deprive individuals of property (through the imposition of fines and the seizure of assets), liberty (through sentences of imprisonment), and even life (in jurisdictions where the death penalty remains in use). For this reason, criminal law doctrine is subject to unique scrutiny and is continually reassessed to guard against unjust punishment.

Criminal law doctrine is divided into two broad categories: (a) substantive criminal law, which defines criminal offenses and potential defenses as well as permissible forms, and severity, of punishment for particular offenses, and (b) criminal procedure, which governs the rules that apply to the investigation and apprehension of suspects and pre-trial, trial, and post-trial criminal proceedings.

Section 2 of this article describes the substantive criminal law. For the most part, this section does not distinguish among common law systems, civil law systems, and international treaties concerning criminal law. With some notable exceptions, substantive criminal law does not vary in significant ways among systems. Section 3 discusses criminal procedure, identifying the distinct theoretical and practical differences among systems.

## **2. Substantive Criminal Law**

The substantive criminal law can be divided into three sub-categories: (a) the definition of criminal offenses; (b) affirmative defenses that may permit the accused to avoid a criminal conviction even if she committed the criminal offense; and (c) limitations on permissible types of punishments or on the severity of punishments for particular crimes.

### **2.1 The Criminal Offense**

Criminal offenses are defined in statutes enacted by legislatures. An executive arm of the government—usually referred to as the prosecution, but sometimes the state, the people, or the crown—is responsible for enforcing the criminal laws by proving that a particular defendant has violated a particular criminal statute. Even in common law countries, criminal offenses must be set out in statutes that define crimes with sufficient particularity to provide notice of the conduct deemed by the society to be criminal and the range of available punishment. This requirement is known as the principle of legality, *nullum crimen sine lege*, or *nulla poena sine lege*. And a state is prohibited from prosecuting a defendant for violating a criminal statute that had not been enacted at the time of the challenged conduct. In the US, this principle is embodied in the *Ex Post Facto* clause of Article I, Section 9 of the Federal Constitution.

A criminal offense consists of elements that must be proven by the prosecution. The defendant is presumed innocent until proven guilty, typically with the prosecution bearing the burden of proof beyond a reasonable doubt. This standard of proof is significantly higher than the preponderance-of-the-evidence standard or the clear-and-convincing-evidence standard that are more common in non-criminal (civil) cases. In the US, the beyond-a-reasonable-doubt standard for all elements of the offense is

compelled as a constitutional principle derived from the Due Process Clauses of the Fifth and Fourteenth Amendments. Legislatures are thus prohibited from deviating from it.

## 2.2 The Elements of the Criminal Offense

The elements of a crime may be of three types: (a) conduct in which the accused must engage; (b) results of the accused's conduct; and (c) circumstances that must exist. For example, a criminal statute may define a crime applicable to individuals who murder a police officer as "the killing of a law enforcement officer." To convict an accused of violating this statute, the prosecution must prove beyond a reasonable doubt that the accused satisfied each of the three types of elements. First, the conduct element would be the act—shooting, stabbing, poisoning—that caused another person to die. Second, the result element would be that person's death. Third, the circumstance element would be that the victim was a police officer. Not all criminal statutes include all three types of elements. But every criminal statute must require the commission of at least one criminal act or *actus reus*, i.e., an act by the defendant suggesting that he or she made a conscious choice to engage in behavior that violated a criminal statute.

The legislature may not enact a criminal statute to punish individuals for thinking certain thoughts. While one can choose whether to *act on* certain thoughts, criminal law doctrine assumes that an individual lacks the *ability to control* one's thoughts. Similarly, statutes may not define criminal conduct in terms so vague that individuals cannot determine which conduct is lawful and which is not. Criminal statutes also may not punish individuals for having a certain status (e.g., mental retardation) or for involuntary acts (e.g., violent behavior in the course of a seizure). In cases where a defendant acted involuntarily, however, substantive criminal law doctrine may examine the defendant's earlier conduct, which may include a sufficiently criminal act. For example, if a defendant engages in conduct that he knows may lead him to suffer from a violent seizure—such as taking certain drugs—that earlier conduct may constitute a criminal act even though the defendant's conduct during the seizure was involuntary.

Ordinarily, a failure to act—an omission—may not constitute a criminal act. In limited circumstances, however, criminal liability may be imposed on one who fails to take steps to prevent harm from occurring. These special circumstances are generally limited to situations in which the defendant had a legal duty to act. Examples include duties created by a statute, a contract, a status relationship, or by voluntarily assuming the duty to care for another and then so secluding that person, that no one else could supply care.

In addition to requiring a criminal act, criminal statutes also specify the level of culpability a defendant must possess. This culpability determination is known as the mental state requirement or *mens rea*. Historically, the substantive criminal law was divided into two categories: (a) general intent crimes and (b) specific intent crimes. A general intent crime is a crime like arson in which the prosecution can prove the required mental state simply by showing that the defendant knowingly committed the acts that constitute the crime (i.e., setting fire to a building). To prove a specific intent crime the prosecution must show more than the defendant's knowing commission of certain acts. The prosecution must further show that the defendant's acts were

accompanied by a purpose to commit another crime. For example, burglary—which is defined as entering a building without permission and with the intent to commit another crime—is a specific intent crime, because the prosecution must show both that the defendant knowingly entered the building *and* that he did so in order to commit a crime while inside.

The promulgation of the American Law Institute’s Model Penal Code in 1962 significantly influenced mental state analysis in two ways. First, the Code proposed more specific gradations in mental states beyond the general/specific intent categories. It defined possible mental states from most blameworthy to least blameworthy as follows:

- (a) Purpose—acting with the hope or desire to bring about a certain result;
- (b) Knowledge—acting with knowledge to a virtual certainty that one’s conduct will bring about a certain result;
- (c) Recklessness—acting after consciously advertent to a substantial and unjustifiable risk that one’s conduct will bring about a certain result;
- (d) Negligence—acting in the face of a subjectively unrecognized substantial and unjustifiable risk that one’s conduct will bring about a certain result that an objectively reasonable person in one’s circumstances would have recognized;
- (e) Strict liability—acting in a way that contributes to a harmful result where one did not recognize the risk and an objectively reasonable person in similar circumstances would not have recognized the risk.

While many jurisdictions have revised their criminal codes to use the Model Penal Code’s terminology, many statutes continue to refer to intent, willfulness, gross negligence, and the like to establish particular mental states. For ease of analysis, courts will often try to fit the statutory term within the Model Code’s hierarchy. For example, *intent to kill* can be thought of as killing with a Model Code mental state of purpose or knowledge. Gross negligence can be thought of as a failure to recognize an extremely high risk that an objectively reasonable person would have recognized.

Second, the Model Penal Code specified that each element in a criminal statute should have a requisite mental state requirement. Each of the above descriptions apply to result elements. But with a slight modification of the definition, they could be applied to conduct or circumstance elements as well. For example, a statute might prohibit “knowingly killing a police officer being at least reckless with respect to the officer’s identity.” To prove a defendant guilty of violating such a statute, the prosecution would need to prove beyond a reasonable doubt that the defendant knew to a virtual certainty that his conduct would result in a person’s death, and that the defendant adverted to a substantial and unjustifiable risk that the person he was killing was a police officer. Statutes often fail to specify a particular mental state for each element, and courts must therefore develop and employ rules of statutory interpretation to supply mental states where necessary.

### **2.3 Inchoate Criminal Offenses**

Modern criminal law reaches conduct that threatens harm as well as conduct that

actually causes harm. Crimes punishing conduct that does not actually cause harm are called inchoate crimes and fall into two general categories: (a) conspiracy and (b) attempt.

The elements of the crime of conspiracy are an agreement between two or more persons to engage in an unlawful activity and the commission by at least one of the co-conspirators of an overt act in furtherance of the crime. Any act, no matter how minor, meets this requirement as long as it furthers the object of the conspiracy.

Crimes committed by co-conspirators are thought to justify more punishment than crimes committed by individuals, because (a) the division of labor allows groups to commit more harm than individuals and (b) groups reinforce each member's criminal purpose, making abandonment of unlawful activity less likely. As a result, co-conspirators may be punished for both agreeing to commit a crime and actually committing it. A co-conspirator may also be found guilty of the crime of conspiracy even if he withdraws from the conspiracy before its unlawful object is obtained, so long as some co-conspirator committed an overt act before the withdrawal. The Model Penal Code proposed permitting a defendant to escape a conviction for the crime of conspiracy only if he actually thwarted the conspiracy's unlawful object.

The scope of the crime of conspiracy varies across jurisdictions depending upon the unlawful activity that the co-conspirators agree to commit. In some jurisdictions, a conspiracy to violate any law—civil or criminal—can give rise to criminal liability as a conspiracy. In other jurisdictions, the co-conspirators must agree to violate a criminal statute or, in some jurisdictions, a felony criminal statute in order to commit the crime of conspiracy.

The elements of attempt are the intent to commit a crime and the commission of sufficient acts to confirm the accused's intent to commit that crime. The definition of what constitutes sufficient acts to confirm intent varies widely across jurisdictions. The Model Penal Code defines the test as a substantial step toward the commission of the crime that strongly corroborates the accused's criminal intent. Many jurisdictions require acts closer to the actual commission of the completed crime in order to establish liability for the crime of attempt.

Unlike conspiracy, the crime of attempt is said to merge with the completed crime. A defendant may thus be punished for attempting to commit a crime, or for actually committing it, but not both. Like conspiracy, however, a defendant cannot escape liability for the crime of attempt once he commits sufficient acts to cross the line that separates mere preparation for an unlawful enterprise from the actual attempt. A defendant who abandons his criminal enterprise before the final act is nonetheless guilty of a criminal attempt.

The Model Penal Code, however, proposed a standard that would permit a defendant to escape liability if he completely and voluntarily abandoned the criminal enterprise in one of two ways: completely, in the sense that the crime was not merely postponed until a more opportune time; and, voluntarily, in the sense that the abandonment was not triggered by new information not available when the enterprise started, such as a more sophisticated alarm system.

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