Chapter 1
Criminal Law and Criminal Punishment:
An Overview

LEARNING OBJECTIVES

After studying this chapter, you will:

1. define and understand what behavior deserves criminal punishment.
2. understand and appreciate the relationship between the general and special parts of criminal law.
3. identify, describe, and understand the main sources of criminal law.
4. define criminal punishment, to know the difference between criminal and non criminal sanctions, and to understand the purposes of each.
5. define and appreciate the significance of the presumption of innocence and burden of proof as they relate to criminal liability.
6. understand the role of informal discretion and appreciate its relationship to formal criminal law.
7. understand the text-case method and how to apply it to the study of criminal law.

CHAPTER OUTLINE

I. Criminal law asks "Who's responsible for what?" Or, as lawyers ask, "Who's liable for what?"

II. Criminal liability is:

A. Conduct that
B. Unjustifiably *and* inexcusably
C. Inflicts *or* threatens *substantial* harm
D. To individual or public interests

III. The law classifies behaviors into one of five categories:

A. *Crime:* The degree of severity should reflect the amount of stigma that a criminal should suffer and the severity of "hard punishment."
B. *Non-criminal wrong (tort):* This reflects the price that the wrongdoer has to pay to another individual without labeling the behavior "criminal."
C. *Regulation:* Government places this burden on behaviors to discourage them; for example, an alcohol tax makes the user pay a high price, but drinking it isn't a criminal act.

D. *License:* This is a small user fee, which neither encourages nor discourages the behavior.

E. *Lawful:* There are no legal consequences for the act but it can still be deemed as a deviant behavior by peers and the community.

IV. Crimes vs. non-criminal (civil) wrongs

A. Non-criminal (civil) wrongs, called "torts," allow one party to sue another to recover monetary damages for the injuries they've suffered.

B. Crimes are actions brought by the government against individuals.

C. Conviction is the most important difference between torts and crimes. Conviction for a crime leads to punishment, which has two indispensable components: (1) condemnation and (2) "harsh treatment."

V. Crime classification

A. *Felony and misdemeanor:* Crimes are also classified by the penalty assessed. Felonies are punishable by death or confinement in a state prison for one year to life without parole; misdemeanors are punishable by a fine and/or confinement in the local jail for up to one year.

B. *Inherently evil and legally wrong:* Crimes can be classified by the moral character of the crime. Inherently evil (*malum in se*) crimes are immoral in nature and injurious in their consequences. Legally wrong (*malum prohibitum*) crimes aren't evil in nature but are crimes because there are statutes that say they're crimes.

C. The general and specific parts of criminal law divide criminal law between the general principles and doctrines of criminal law and the applications of the general information to the definitions of specific crimes.

D. The definitions of crimes are divided into four groups:
   1. Crimes against persons: murder and rape
   2. Crimes against property: stealing and trespass
   3. Crimes against public order and morals: aggressive panhandling and prostitution
   4. Crimes against the state: domestic and foreign terror

VI. Criminal punishment

A. Every criminal law has to define the crime *and* prescribe a punishment.

B. To qualify as *criminal* punishment, penalties have to meet four criteria:
   1. Inflict pain or other unpleasant consequences
   2. Be prescribed within the law defining the crime
   3. Be administered intentionally
   4. Be administered by the state as punishment

C. Punishment has two goals: retribution and prevention.
   1. Retribution looks back to past crimes and punishes individuals for committing them because it's right to hurt them.
   2. Prevention looks forward and inflicts pain not for its own sake but to prevent future crimes. There are four kinds of prevention:
      a. General deterrence aims to prevent the general population from committing crimes through the threat of punishment.

      b. Special deterrence aims to prevent convicted offenders from committing more crimes in the future.

      c. Incapacitation prevents convicted criminals from committing future crimes by locking them up.

      d. Rehabilitation aims to prevent future crimes from happening by changing individual offenders.

D. Trends in punishment

    1. Historically, societies have justified punishment on the grounds of retribution, deterrence, incapacitation, and rehabilitation.

    2. Retribution and rehabilitation have been in English criminal law for at least eight hundred years.

    3. Gradually, retribution came to dominate penal policy, until the 18th century, when deterrence and incapacitation were introduced to replace the "barbaric and ineffective" punishment form of retribution.

    4. Rehabilitation replaced deterrence in the late 20th century and remained the dominant form of punishment until 1960.

    5. In the 1960s a wave of public opinion that "nothing worked" to rehabilitate the offenders swept the nation.

    6. By the mid-1980s, reformers were heralding retribution and incapacitation as the primary criminal punishments.

VII. The principle of legality is also called the "rule of law." The belief is that law controls the power of government. From Aristotle in 350 B.C. to the Magna Carta in 1215, the principle of legality has been a mixture of four values:

A. Fairness

B. Liberty

C. Democracy

D. Equality

VIII. Retroactive criminal lawmaking

A. It's illegal to charge a culprit with a crime that's not on the books.

B. Judicial retroactive criminal lawmaking allows judges to exercise their judgment (discretionary decision making) in cases, but there are limits:

    1. Judges are bound by the U.S. and state constitutions.

    2. When applying a criminal statute to a defendant in a current case, judges have to follow the rule of lenity and stick "clearly within the letter of the statute."

    3. *Precedent*, courts' past decisions, restrains judicial discretion.

    4. *Stare decisis,* which is standing by the precedents set in past cases, is a judicial policy, not a constitutional command.

IX. Sources of criminal law

A. The original source of criminal law, common-law crimes, was created by judges. These crimes ranged from murder to disturbing the peace.

B. Although most states have abolished state common-law crimes, which were carried over from the English colonists into the New World, they still use the codes in common-law crimes.

C. Today, most criminal law is found in state criminal codes created by state legislatures and municipal codes created by city and town councils. The U.S. Congress also details laws in the U.S. Criminal Code.

D. The Model Penal Code focuses on the analysis of criminal liability, meaning, "Who's responsible for what?"

E. By beginning with the definition of criminal liability—which is, "conduct that unjustifiably and inexcusably inflicts or threatens substantial harm to individual or public interest"—we can break down the Model Penal Code into three main and two subsidiary questions:

    1. Is the conduct a crime?

       a. Does the conduct inflict or threaten?

       b. Does the conduct inflict or threaten substantial harm to the individual or public interests?

    2. If the conduct is a crime, is it wrong?

    3. If the conduct was unjustifiable, should we blame the actor for it?

F. Municipal ordinances often duplicate and overlap state criminal code provisions. However, when they're in conflict with state criminal codes, the state criminal codes trump municipal ordinances.

    1. Municipalities have the power to both create crimes and prescribe punishment for them.

    2. Municipalities can also enact forfeiture laws.

    3. Municipality ordinances aren't unlimited in their powers.

       a. They cannot create felonies.

       b. They cannot prescribe punishment for more than one year in jail.

G. Administrative agency crimes are written by administrative agencies who have been granted the authority from both the federal and state legislatures to create laws. They're a rapidly growing source of criminal law, but they often raise constitutional questions:

    1. Can legislatures authorize administrative agencies to create regulations when there's a criminal penalty for violating these regulations?

    2. Can legislatures go further and authorize agencies to prescribe penalties for violating regulations created by the agency?

    3. Can legislatures go even further and allow agencies to set up their own courts to decide cases involving violations of the regulations they've created?

X. Criminal law in a federal system

A. There are 52 criminal codes, one for each of the 50 states, one for the District of Columbia, and the U.S. Criminal Code, which overlays the other 51 codes.

B. Definitions, defenses, and punishment of crimes vary across state lines.

XI. The text-case method

    A. It's important to understand that you'll never read a case in which a defendant was acquitted, because an acquittal is final and can never be reviewed.

    B. The application of principle definitions and facts to specific cases is important, because it stimulates you to think critically and furthers your understanding of these definitions.

    C. Think of "not guilty" as "not legally guilty."

    D. Think of "guilty" as "legally guilty."

    E. All criminal cases start in trial courts with two levels of appeals courts:

        1. An intermediate court of appeals

        2. A supreme court (state or federal when a constitutional issue is involved)

CHAPTER SUMMARY

The criminal law is one form of social control. It asks the question, "Who is criminally responsible for what crime?" Criminal prosecutions are brought by the government and lead to criminal convictions—punishment. Punishment conveys the message that society condemns the criminal behavior.

Non-criminal wrongs are called "torts." They are private wrongs for which one party (plaintiff) can sue the party who wronged them (defendant) and recover money (damages).

Crimes can be classified or graded according to many schemes. The most common are felony or misdemeanor. Typically a crime is a felony if it is punishable by at least one year in a state prison. Misdemeanors are punishable by one year or less in a local jail. Some crimes cover behavior that is *malum in se*, which means bad in itself or inherently evil. Murder, rape, and robbery are examples. Other crimes cover behavior that is unlawful only because the law says it is. These are called *malum prohibitum*.

The criminal law itself can be divided into two parts. The special part of the criminal law provides the definitions of various crimes. The general part provides general principles that apply to all offenses. This would include *mens rea* provisions and accomplice liability provisions.

A criminal penalty can take many forms and must meet four criteria: it must inflict pain or other unpleasant consequences, be prescribed in the same law that defines the crime, be administered intentionally, and be administered by the state. Several rationales explain the purpose of punishment. Retribution looks to past crimes and punishes an offender because he or she deserves punishment. Offenders are thought to choose their criminal behavior and are considered culpable. Retribution assumes free will and individual autonomy. Prevention looks forward and uses punishment to deter crime in the future, either through general or specific deterrence. The English philosopher Jeremy Bentham formulated classical deterrence theory. Rehabilitation theorists rely on the medical model of the criminal law. Punishment is meant to "cure" the criminal patient. Supporters of rehabilitation theory believe that forces beyond offenders' control cause or contribute toward their criminal behavior. The trend today is support for the retribution theory of punishment.

The principle of legality (also called the rule law) is the general proposition that controls the power of government. An ancient principle, it rests of four values: fairness, liberty, democracy, and equality. Applied to criminal law, it refers to a ban on retroactive criminal lawmaking. "No crime without law; no punishment without law." Without the principle of legality, the government could punish people for behavior that had not been defined as criminal.

America is a constitutional democracy. The power of the majority or the government to criminalize and punish behavior is limited by the U.S. Constitution.

The U.S. Constitution is the supreme law of the land and is the ultimate source and limitation on criminal law. Each state also has a constitution that can limit that state's criminal law. Some states still allow courts to create common-law crimes in addition to state criminal statutes. These states are referred to as common-law jurisdictions. Around half of the states do not have common-law crimes. Crimes are created by the legislature in the form of statutes called code jurisdictions. The federal government passes criminal statues, and cities and counties can also create crimes. The final source of criminal law is court decisions either creating common-law crimes or interpreting statutes or constitutions.

America's legal system and its criminal law have their origins in British history prior to the American Revolution. The first crimes in England were common-law crimes such as rape and murder. The common law then was the judge-made law based on the common customs of the people of England. Over time, English common law was supplemented by statutes.

After the Revolution, America adopted much of English common law. However, over time, statutory criminal law has replaced common-law crimes. Judge-made law (common law) was criticized as being disorderly, incomplete, and anti-democratic. About half the states no longer permit courts to create new crimes. Such states have created Crimes/Criminal/Penal Codes.

The Constitution establishes a federal system for America. Power is shared and divided between the states and the federal government, meaning that both the states (and cities and counties) and the federal government can pass criminal laws. We thus have 50 sets of state criminal laws and separate federal criminal laws. Although there are some basic concepts in common, there are many differences among these 51 jurisdictions.

Development of these codes was facilitated by the work of the American Law Institute's Model Penal Code Committee. This committee studied, recommended, and published a Model Penal Code to guide legislators in updating their criminal law. The Model Penal Code has been very valuable for judges, legislators, scholars, and students. Many states have adopted parts of the Model Penal Code.

This textbook uses the text-case method. It includes explanatory text and excerpts from court cases/opinions. Generally, only appellate courts write opinions. The party who appeals is called the appellant. The party whose victory in the court below is being challenged is called the appellee.

When reading case opinions or excerpts, you need to be able to find the various parts of cases. Only the majority opinion establishes the law and the precedent. There may also be concurring and dissenting (disagreeing) opinions. Probably the two most important are the holding and the rationale. The holding is the legal rule announced by the court that decides the case. The reasoning is the reason underlying the holding. Both of these are utilized in the process of *stare decisis*.

Courts in America are generally expected to follow prior decisions called precedents and apply the doctrine of *stare decisis*. New cases should be decided in a fashion consistent with the prior cases or precedents. This helps provide predictability and stability in the law. However, *stare decisis* is just a general rule; there are exceptions. A possible precedent can be avoided by distinguishing it. It is argued that there is a significant difference between the prior case and the older case that makes the older case inappropriate as a precedent for the new case.

You should also be able to find court cases and opinions. This is usually done through the opinion citation system. An example of a citation would be U.S. v. Jones 453 U.S. 272 (1972). The names of the parties are given first. The first number (453) is the volume number. The abbreviation (U.S.) is the set of books or reporters. In this case, U.S. refers to United States Reports, which is the official U.S. Supreme Court publication. The second number (272) is the page in that volume where that opinion begins. Finally, the last number (1972) is the date the opinion was handed down. There are a variety of publications and reporters for different jurisdictions. Some citations will also indicate the particular court that handed down the opinion in the same parentheses as the date.