OBJECTIVES

- Understand the origins and development of criminal law.
- Grasp the relationship between civil and criminal law, and describe how the law distinguishes different levels of seriousness.
- Outline the functions of criminal law, both within the criminal justice system and within society at large.
- Grasp the essential elements of a crime, including actus reus and mens rea.
- Know the meaning and uses of the various justifications, excuses, and exemptions that may bar legal liability.
- Highlight the Constitutional amendments that deal with due process, the rights of the accused, and the applicability of these principles.
Introduction

Throughout history, the creation and evolution of law have been instrumental in promoting and regulating social behavior. Aristotle, for example, believed that law is the essence of social order: Good social order can be built only on good law; bad law can also produce social order, but such order may not be desirable. Law, however, is not inherently good or bad, nor has it always accomplished its goals. Law is good to the extent that it is used or adhered to lawfully. If those individuals who are responsible for administering law fail to operate according to the accepted rules, law may become oppressive and a tool of manipulation.

Laws are formalized rules that prescribe or limit actions. Criminal law is one category of law, which consists of substantive criminal law and procedural criminal law. Substantive criminal law identifies behaviors considered harmful to society, labels those behaviors as crimes, and specifies their punishments. Procedural criminal law specifies how crimes are to be investigated and prosecuted. Together, substantive criminal law and procedural criminal law form the foundation of the U.S. system of criminal justice.

Exploring criminal law helps us to answer the following questions:

• Which behaviors are crimes?
• Under what circumstances do those behaviors constitute crimes?
• Which punishments may be imposed on people who commit crimes?
• How should those punishments be administered?
• Which rules govern the behavior of the police in the investigation, arrest, and processing of people accused of crimes?
• Which rules control the behavior of the state in criminal prosecutions?

The Origins of Criminal Law

Each year, the U.S. Congress and state legislatures create new laws and, sometimes, abolish old ones. In the process, they identify additional behaviors as crimes, establish appropriate punishments, and clarify rules of criminal procedure.

Most members of the public believe that laws are created through debate and compromise. The common perception is that various interest groups, struggling to identify wrongs and ways to deal with them, influence legislatures, which then hammer out new laws in response to their pleas. In reality, this is not
higher power or deity, reflected those binding rules and principles that guide behavior. Roman law allowed positive law and natural law to coexist and viewed neither as ultimately superior. Although many people view natural law as ultimately superior to positive law, criminologist Hermann Mannheim suggests that natural law has been open to a variety of interpretations:

While its underlying idea is the longing of mankind for an absolute yardstick to measure the goodness or badness of human actions and the law of the State and to define their relations to religion and morality, the final lesson is that no such yardstick can be found.3

Early Codification of Law

The Code of Hammurabi, which dates back to the eighteenth century B.C., is one of the earliest legal codes in Western culture. The laws contained in this code were attributed to divine guidance by the gods and made no distinction between secular and religious interests in controlling behavior. In addition, the notion that law should be fair in both substance and process was stressed, a concern clearly found in our own Bill of Rights. Of course, what the Babylonians considered fair may not be viewed as fair today; for example, the Code of Hammurabi considered the social position of the victim in determining the appropriate punishment for a crime.1

Mosaic law, or the Law of Moses (about 1250 B.C.), was also considered divine in origin and reflected both an interest in governing the religious life of the people and a desire to regulate social behavior (i.e., admonitions to not kill, steal, commit adultery, bear false witness, or work on the Sabbath). Present-day law in the United States retains many of the same regulations. Indeed, until recently, most states had so-called “blue laws,” which prohibited businesses from operating on Sunday, the Christian Sabbath.

Roman law was secular. It began with the Law of the Twelve Tables (about 450 B.C.), which codified the duties, rights, and expectations of citizens. After the fall of Rome in the fifth century, the Justinian Code—a comprehensive body of civil law to regulate behavior—was created. The Justinian Code defined civil and criminal wrongs and established the first legal defense of insanity.

The Romans, like the Greeks before them, also made a distinction between positive law and natural law. Positive law consisted of those legal codes governing citizens and foreigners, as agreed upon and formalized by the state and based on reason. Natural law, which was viewed as being created by a higher power or deity, reflected those binding rules and principles that guide behavior. Roman law allowed positive law and natural law to coexist and viewed neither as ultimately superior.

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Common Law and the Concept of Stare Decisis

Although the early legal codes laid a foundation for formalizing principles and customs into law, it was the emergence of English common law that held the greatest significance for the development of criminal law in the United States. During the reign of Henry II (1154–1189), who attempted to impose Norman values on the conquered Anglo-Saxons, a centralized system of courts was established, with judges being appointed by the king to represent the interests of the Crown. These judges traveled to the countryside, where they encountered diverse regional...
customs that often conflicted both with each other and with the king’s new laws. The tradition of common law allowed these judges to determine which behaviors constituted crimes and what appropriate punishment should be imposed when they were violated, thus establishing a body of law common to the entire nation.

One of the most important concepts operating in common law was the doctrine of precedent, or stare decisis (literally, “to stand by the decisions”). This doctrine allows courts to interpret and apply law based on previous court decisions. According to stare decisis, judges were required to decide new cases in a manner consistent with principles established in prior cases. To the extent that a new case was substantially similar to a previous one, the judge was required to interpret the law in the same way and follow the precedent. Judges were not supposed to create laws, but they could study past legal decisions, discover the principles embodied in them, and apply those principles to new situations.4

Common law, with its reliance on precedent, continued to evolve with little centralized planning or deliberation about what the law should contain. Consequently, the common law of England existed as an unsystematic compilation and recording of thousands of cases over the years.5 Although the signing of the Magna Carta by King John in 1215 established the first set of statutory laws (formal written enactments of a governing or legislative body), it was not until the sixteenth century that the English Parliament began enacting legislation, thereby shifting the country’s legal system from common law to codified statutory law.

**Contemporary Sources of Criminal Law**

Criminal law in the United States has largely grown out of English common law that was brought over to America during the colonial period. Although much of this common law eventually became part of the nation’s legal codes, many Americans viewed it as antiquated and inadequate to the task of maintaining order in their new nation. Many feared that if judges were the only source for determining which actions were criminal, citizens would be left ignorant of their duties and responsibilities and, consequently, would be subject to judicial arbitrariness. Instead, early colonists looked to a codified system of law to provide greater uniformity, standardization, and predictability. As a result, the states and the federal government began to formalize law by developing statutes and by drawing upon a number of other sources—case law, administrative rules, and the constitutions of the various states and the federal government.

**Statutes**

Criminal law is contained in written codes called statutes. According to the balance of powers established in the Constitution, the law-making function resides in the legislative branch rather than the judicial branch of government. Congress and state legislatures are responsible for enacting statutes that define crimes (substantive laws) and specify the applicable penalties for their violation as well as law governing legal procedures (procedural laws).

**Case Law**

Case law is a continuation of the common-law tradition in which judicial decision making in individual cases involves interpreting existing law, looking at relevant precedent decisions, and making judgments about the legitimacy of the law. Because gaps will inevitably exist between what a legislative body intends when it passes a law and what actually happens when that law is enforced, the practice of case law allows the courts to interpret the law as they apply it.6

For example, suppose a state legislature creates a statute defining assault with a dangerous weapon. The statute states that the definition of a dangerous weapon includes, but is not limited to, rifles, handguns, shotguns, and knives. In a current criminal trial, the defendant is charged with assault with a dangerous weapon, but the weapon used was a baseball bat—a device not specifically identified in the state statute. The prosecution searches through previous criminal cases tried in the state and finds a case in which the trial court held that a baseball bat was, indeed, a dangerous weapon. The court can then cite this precedent in applying the statute to the current case.

**Administrative Rules**

The rules, orders, decisions, and regulations established by state and federal administrative agencies are another source of law. The Federal Trade Commission, Internal Revenue Service, Food and Drug Administration, and Environmental Protection Agency, for example, have all established a multitude of rules and regulations that have the full force and effect of law. These agencies investigate and impose criminal sanctions for such violations as securities fraud, the willful failure to pay income tax, the intentional sale of contaminated food, and the dumping of toxic wastes.
Constitutions

The U.S. Constitution and each of the 50 state constitutions are the final arbiters of substantive and procedural law. A law enacted by a state legislature may be found to be in violation of either that state’s constitution or the U.S. Constitution. Federal laws, regulations, or administrative acts may be judged only against the U.S. Constitution. In addition, the Bill of Rights, which was added to the U.S. Constitution in 1791, includes protections afforded to citizens in criminal prosecutions (such as the right to counsel, prohibitions against illegal search and seizure, and the right to due process), reflecting the framers’ fear of a strong centralized government. Although most state constitutions include similar protections, the U.S. Supreme Court, in its interpretations in various decisions over the years, has required all the states to ensure that defendants in state prosecutions be granted the specific protections enumerated in the federal Constitution.

Conceptualizing Crime

The official definition of crime is an intentional act or omission in violation of criminal law, committed without defense or excuse, and sanctioned (i.e., punishable) by the state. In this way, crime is a legal construct, since the law narrowly defines the specific elements of the forbidden act and the conditions under which they occur. For example, intentionally taking of the life of another person may or may not constitute a crime. Although it would be a crime for a person to intentionally kill his or her spouse to collect life insurance, it would not be a criminal act for a police officer to intentionally kill an armed suspect in self-defense.

Crime is also a social construct; social thinking and interaction play an important role in determining which acts are defined as criminal. For example, before the U.S. Supreme Court’s 1973 decision in Roe v. Wade, the law in most states, which conformed to the thinking of many citizens, defined abortion as a crime. As social and legal views about the right of women to control their own reproductive systems shifted, the Court, in Roe, held that laws restricting abortion were unconstitutional. While many people agreed with the decision in Roe, some of those supporters—including current Supreme Court Justice Ruth Bader Ginsburg—disagreed with the unusual reasoning the Court used to arrive at its ruling.

Most of our current drug laws also reflect shifts in thinking about which kinds of drugs (both prescription and nonprescription) should be controlled and how violations of drug laws should be punished. Addictive dosages of opiates, including heroin, morphine, and powdered opium, were widely marketed in the United States in the nineteenth and early twentieth centuries. These “medicines” were sold to parents to quiet infants who were sickly, colicky, or teething. In 2005, cold medicines containing pseudoephedrine (a key ingredient in making methamphetamine) were taken off the shelves at retailers such as Target and Wal-Mart and sold only in limited quantities by their pharmacies. Today, at least 30 states and the federal government have legislation regulating the sale of pseudoephedrine, including requirements for the collection of personal information from purchasers, maintenance of logbooks, and daily sales limits and 30-day purchase limits.

The modern definition of crime is an act (armed robbery) or a failure to act (not paying income tax). At various times in history, a condition of being or status was included in definitions of crime. For example, during the seventeenth century, Massachusetts Bay Colony made it a crime to be a Quaker. Until 1962, in California it was illegal to “be addicted to the use of narcotics” (the statute was eventually declared unconstitutional by the U.S. Supreme Court).
Crime and Criminal Justice

and selling heroin is generally considered to be a more serious crime than selling marijuana. In the United States, people who engage in sexual relations before marriage may be breaking the law in some states, though there is little chance of prosecution. In China, however, they may be charged with prostitution (for the female) and rape (for the male).

**Mala in Se Crimes versus Mala Prohibita Crimes**

In the early development of criminal law, all crimes were considered wrong for one of two reasons: They were considered inherently wrong or evil (*mala in se*) or they were wrong merely because they were prohibited by a criminal statute (*mala prohibita*). Only nine common-law crimes were classified as *mala in se* offenses:

- Murder
- Manslaughter
- Rape
- Sodomy
- Robbery
- Larceny
- Arson
- Burglary
- Mayhem

These offenses were also the first group of crimes to be referred to as felonies. The *mala prohibita* crimes, by comparison, were considered less serious and consequently were classified as misdemeanors.

**Seriousness of the Crime**

Generally speaking, acts that are defined as crimes are considered more serious violations of norms (rules that regulate behavior) than are noncriminal acts. Nevertheless, perceptions of the seriousness of certain crimes may vary between different times, cultures, and societies. According to public opinion polls, most Americans agree that violent crimes are more serious than property crimes, but there are gradations—most people see a parent's assault on a child as more serious than a husband's assault on his wife.

Civil legal claims may arise in connection with criminal actions, and victims or their families may choose to pursue a civil suit following the outcome of a criminal trial. Because the required degrees of proof and the parties involved may differ between the two types of cases, an acquittal in a criminal trial does not preclude awarding damages to the victim in a civil suit. For example, in 1995, O. J. Simpson was charged with the murder of his estranged wife, Nicole, and her friend, Ron Goldman. Simpson was ultimately acquitted of the criminal charge, but two years later he was found liable for their deaths by a jury in a civil trial.

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**The significant historical distinction between these two categories of crimes reflects perceptions of the degree of public harm they present. Because *mala in se* crimes were believed to be inherently evil and to pose a major threat to the social order, it was understandable that they would be sanctioned by the law and more severely punished. **Mala prohibita** crimes, such as public drunkenness, loitering, prostitution, and gambling, did not carry the same broad moral condemnation.**

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control cybercrime, including theft of information, creation of computer viruses to cause mischief or damage data, copying software, downloading of copyright-protected music or movies, and identity theft.

U.S. criminal law distinguishes between felonies, misdemeanors, and infractions and assigns punishments accordingly.

The most serious crimes, called **felonies**, result in a more severe punishment. In most states, felonies carry maximum sentences of death or imprisonment for a term greater than one year in a state prison and typically carry higher fines than misdemeanors. A felony conviction also may result in the loss of certain rights, such as the loss of a person’s right to vote, hold public office, carry a gun, or be licensed in certain professions.

Crimes classified as **misdemeanors** carry less severe punishments than are meted out for felonies. Typically, the maximum incarceration sentence is one year or less in a local jail and a smaller fine than would be incurred in a felony.

The third category of crimes, called **infractions**, is composed of petty offenses. These involve violations of city or county ordinances and include such offenses as illegal parking, jaywalking, cruising, or violations of noise ordinances. Infractions are generally not punishable by incarceration; rather, fines or community service may be imposed.

Curiously, in a number of states, certain crimes may be charged by a prosecutor as either a felony or a misdemeanor, with the charging decision depending on the suspect’s prior record or the specific details of the case. In California, these cases are called “wobblers,” because the offense may “wobble” in either direction, and the same crime can lead to significantly different punishments. For example, a “wobbler” offense could end up being a misdemeanor that is punished by a probation sentence or the “third strike” that sends a person to prison for a term of 25 years to life.

The distinction between these categories of crimes is not always clear, especially with regard to felonies and misdemeanors. What may be a felony in one state may be a misdemeanor in another state. For example, in Texas, the possession of less than two ounces of marijuana is a misdemeanor punishable by a fine of up to $2000 and the possibility of six months in jail; in North Dakota, possession of one ounce or more of marijuana is a felony punishable by up to five years in prison and a $5000 fine.

One distinction between felonies and misdemeanors involves the authority of law enforcement officers to make arrests. When an officer has reasonable grounds to believe that a felony has been committed, even when he or she did not directly observe the act, the officer may arrest a suspect. By contrast, many states have an in-presence requirement, for misdemeanors, meaning that an arrest may not be made unless the criminal act was committed in the presence of the officer. However, if the victim of a misdemeanor files a formal complaint and the court issues an arrest warrant, the officer may then arrest the suspect.

### Functions of Criminal Law

Criminologists often hold differing views of the functions of law in society, but they agree that in complex, diverse societies such as the United States, law becomes increasingly necessary to regulate behavior. Three of the most commonly identified functions of criminal law are:

- **Defining serious forms of socially unacceptable behavior**
- **Controlling behavior and maintaining social order**
- **Regulating punishment**
Defining Socially Unacceptable Behavior

The law helps to establish the boundaries for social interactions. When people overstep the social boundaries, the law holds them accountable. This does not mean, however, that all members of society agree that a particular behavior is objectionable or intolerable. It simply means that a significant number of people—or a number of significant people—define some act as falling outside the bounds of acceptable behavior, decide that this behavior should be punished by law, and are able to get lawmakers to implement their concern.

Ideally, as public perceptions about inappropriate behavior change, so does the law. Unfortunately, the law often lags behind public opinion. For example, only recently have laws prohibiting fornication (sexual intercourse between unmarried persons) and...
seduction (the action of a man to entice a woman to engage in intercourse through persuasion or promise) been removed from the statute books in many states. In 2003, in Lawrence v. Texas, the Supreme Court held, in a 6 to 3 decision, that the Texas law prohibiting sodomy was unconstitutional.\(^{14}\) This decision effectively invalidated similar laws in other states that were designed to criminalize homosexual activity between consenting adults in private.\(^ {15}\)

### Controlling Behavior and Maintaining Social Order

Criminal law goes beyond only stating what will not be tolerated; through its enforcement, it also controls objectionable behaviors. Not all undesirable behaviors are defined as crimes, of course. Many are informally controlled by what sociologist Thorsten Sellin referred to as conduct norms, or norms that are specific to localized groups and that may or may not be consistent with crime norms (those found in the criminal law).\(^ {16}\) Conduct norms reflect the values, expectations, and behaviors of groups in everyday life. As such, they exert powerful control over the behaviors of members of the group. For example, many Mormon communities have only a few members who smoke, drink alcohol, or engage in extramarital affairs because the communities’ conduct norms strongly prohibit such behavior.

The law also functions to maintain the larger social order by settling disputes between individuals and mediating confrontations when the conduct norms of various groups come into conflict. In some countries, the law is used not only to maintain order, but also to ensure that the general population poses no threat to the absolute control by the government.

### Regulating the Punishment of Behavior

The law also specifies the punishments that should be imposed for criminal offenses, which helps prevent arbitrary or excessive punishments by the state—for example, imposing the death penalty for shoplifting. The law also regulates punishments to prevent unauthorized persons from imposing their own punishments. If people do not believe that the severity and certainty of the punishment mandated for a person accused of a particularly heinous crime are sufficient, they may be tempted to take the law into their own hands. Historically, this attitude often led to vigilante justice, although more often such instances have been carried out by individuals.

## Elements of a Crime

As a legal definition, crime also includes what is known as the corpus (literally, “body of the crime”), which refers to the facts, or foundation, of the crime that must be established in a court of law. These include actus reus (criminal act), mens rea (criminal intent), and the concurrence of these two concepts.

### Actus Reus

In his novel 1984, George Orwell described a society in which both thoughts and acts were restrained and regulated by the Think Pol, or thought police.\(^ {17}\) Through constant surveillance, the Think Pol were able to monitor any expression of prohibited thoughts. U.S. law, however, generally limits criminal responsibility to actus reus—an actual act, the planning or attempt to act in violation of the law, or the specific omission to act when the law requires action. The written or oral expression of certain thoughts, such as making threats or intimidating remarks to a witness, may also be viewed as actus reus and, therefore, may be prohibited by criminal law.

If a person does not fully complete a criminal act or does not directly participate in the act, he or she may have still committed a crime. The law defines such partial acts as inchoate crimes (pronounced “in-KO-ate”)—acts with the potential for harm, though they have not yet produced that harm. An inchoate crime may take one of the following forms:

- An attempt to act, which involves an intent to commit a crime and the taking of a substantial step toward its completion.
- A conspiracy to act, in which two or more people agree to commit a criminal act. In some states, at least one co-conspirator must commit an overt act toward accomplishing the crime for the act to qualify as a conspiracy.
- A solicitation of another to act, which includes asking, enticing, encouraging, or hiring another person to engage in a criminal act.
- Being an accomplice to an act, which does not require that the individual participate directly in the crime. Someone may serve as an accomplice by giving the perpetrator assistance or encouragement before or after the crime.
Mens Rea

According to an old Latin maxim, an act does not make a person guilty unless the mind is guilty. In other words, a defendant is not criminally liable for conduct unless mens rea (criminal intent) was present at the time of the act. For a crime to exist, the person must intend for his or her action to have a particular consequence that is a violation of the law. The mere fact that a person engages in conduct in violation of law is not sufficient to prove criminal liability; rather, the defendant must also intend to commit the crime. As former Supreme Court Justice Oliver Wendell Holmes once noted, “Even a dog distinguishes between being stumbled over and being kicked.”

Different degrees of criminal intent exist, and there are even some exceptions to the requirement that intent be present. In an attempt to create greater legal uniformity between the states, the American Law Institute wrote a Model Penal Code in 1962. It identifies levels of criminal responsibility, or culpability, reflecting differing degrees of intent to act: The person must have “acted (1) purposely, (2) knowingly, (3) recklessly, or (4) negligently, as the law may require, with respect to each material element of the offense.”

- Purposely means to act with conscious deliberation, planning, or anticipation to engage in some conduct that will result in specific harm.
A person acts ** knowingly** when he or she is aware that the conduct is prohibited or will produce a forbidden result.

- Acting ** recklessly** involves conscious disregard of a known risk, although there is no conscious intent to cause the harm (such as speeding and unintentionally causing an automobile accident).
- **Negligent** conduct creates a risk of harm when an individual is unaware, but should have been aware. In other words, to be negligent, a person must engage in conduct that a reasonable person would not engage in, or an individual must fail to act (an omission) in the manner in which a reasonable person would act under the same or similar circumstances.

Common law has historically distinguished between general intent and specific intent. **General intent** requires the willful commission of a criminal act or an omission of a legal duty to act; in other words, the person intends to violate criminal law. However, the prosecution need not prove that the defendant intended the precise harm that resulted. For example, if the defendant intended to harm but not kill a victim, but the victim’s death resulted as an unanticipated consequence of that harm, the offender may not be found guilty of murder because a lower level of culpability—specifically, recklessness—was present.

**Specific intent,** by contrast, involves the intent to engage in a precise act prohibited by law, such as assault with intent to rape. Specific intent is present when circumstances demonstrate that “the offender must have subjectively desired the prohibited result”; general intent exists when the circumstances show “the prohibited result may reasonably be expected to follow from the offender’s voluntary act, irrespective of any subjective desire to have accomplished this result.”

Because specific intent carries a higher level of culpability than general intent, the seriousness of the offense—and consequently the punishment—is greater.

Some criminal laws do not require any particular criminal intent; that is, the person’s state of mind (**mens rea**) at the time of the act is not relevant. In these **strict liability laws,** there is liability without culpability. Strict liability laws provide for criminal liability without requiring the presence of either general or specific intent; in other words, a person may be held criminally responsible even though he or she had no intent to produce the harm. For example, bartenders have been held criminally liable for the intoxication of patrons and hosts of parties have been held criminally liable for the intoxication of their guests who are later involved in fatal accidents. The fact that neither the bartender nor the host had any intention to cause the intoxication or the subsequent accident is neither a required element of proof nor a valid defense. Penalties for strict liability violations typically involve fines rather than jail time.

**Concurrence of Actus Reus and Mens Rea**

For an act to be considered criminal, both the act (**actus reus**) prohibited by criminal law and the intent (**mens rea**) prohibited by the criminal law must be present before the crime is completed. It is not sufficient for an act to be defined as a crime if the person has only the guilty mind but commits no act. Nor is it sufficient for a person to have acted without criminal intent, with the exception noted earlier for strict liability offenses.

Concurrence may exist even if the act and the intent do not coincide as the offender intended. Suppose Jim aimed a gun at Terry and shot with the intent to kill him, but missed, hitting and killing John instead. Jim is still liable for murder under the doctrine of transferred intent. The intent to kill, in other words, is transferred from Jim to John. If the bullet missed both Terry and John but instead hit an electrical transformer and caused a fire, Jim would not be responsible for the crime of arson, since he did not intend to commit this specific act, though he may still be held responsible for reckless behavior.

**Defenses and Responsibility**

Society and criminal law have long recognized that certain actions may be justified or excused, such that the offender does not bear legal liability for the act. Sometimes these justifications and excuses, which are called defenses, are based on the mental state of the person at the time the act was committed. At other times, circumstances beyond the individual’s control may come into play that may negate criminal liability. Both justifications and excuses are affirmative defenses; that is, the defendant must prove that his or her act was justified or excused.

John Hinckley, Jr.’s shooting of President Ronald Reagan in 1981 was seen by millions of people as they watched the television news, and yet Hinckley’s defense of not guilty by reason of insanity prevented him from being convicted for the crime. In this case, the defendant did not deny engaging in the action:
Hinckley did shoot Reagan. Nevertheless, his defense of insanity successfully allowed him to avoid being held criminally responsible for the assault.

**Justifications**

Justifications are based on a defendant admitting responsibility but arguing that, under the circumstances, he or she did what was right.

**Self-Defense**

Defendants who raise the claim of self-defense as a justification for avoiding criminal responsibility argue that they acted in a lawful manner to defend themselves, others, or their property, or to prevent a crime. Most states permit a person to use as much force as is reasonably necessary for such protection. The individual must also have an honest and reasonable belief that he or she is in immediate danger from unlawful use of force by another person. The degree of force used in one's self-defense must be limited to a reasonable response to the threat: A person should meet force only with like force. Thus a person who is attacked by an unarmed assailant should not respond with a weapon.

According to the Model Penal Code, deadly force may be used only in response to a belief that there is imminent threat of death, serious bodily harm, kidnapping, or rape. It may not be used if the defendant provoked the offender to use force. Some jurisdictions also require that when there is a safe escape route from a house, a person must retreat instead of using deadly force. Thus, if a person has an opportunity to retreat safely from the person posing the threat, deadly force would not be justified as self-defense. This retreat rule has several exceptions, such as cases of battered woman syndrome (see “Focus on Criminal Justice”).

In the past, deadly force generally has not been accepted as a response intended solely to protect property, because owners could have taken steps to protect their property and prevent the criminal act from occurring. For example, it is illegal to set a deadly trap or device for intruders in a home or business, even if the home or business has previously been burglarized. Because our society has long believed that a human life is more valuable than property, the use of deadly force to protect property was viewed as unreasonable. In 2005 and 2006, however, at least 15 states expanded the right to use deadly force in self-defense and defense of property. These new laws—referred to as “stand your ground” laws by their supporters and “shoot first” laws by their opponents—permit people to use deadly force against intruders who have illegally and forcefully entered their homes. For example, Florida law states that citizens no longer need to prove that they feared for their safety before they responded with deadly force, only that the intruder illegally entered their home or vehicle. Moreover, according to the law, a person “has no duty to retreat and has the right to stand his or her ground and meet force with force, including deadly force.” The law also prohibits the arrest, detention, or prosecution of such a person and disallows the victim of such a shooting from bringing a civil suit against the shooter.20

**Necessity**

Necessity, as a defense, represents the dilemma of choosing between two evils. A person may violate the law out of necessity when he or she believes that the act, which is a violation of law, is required to avoid a greater evil. According to the Model Penal Code, conduct that a person “believes to be necessary to avoid a harm or evil to himself or to another is justifiable, provided that the harm or evil sought to be avoided by such conduct is greater than that sought to be prevented by the law defining the offense charged.”21 For example, breaking into a mountain cabin to secure shelter or food during a snowstorm or into a home to use the telephone to report an emergency may establish the defense of necessity and thereby negate the crime of breaking and entering. In either case, the individual must intend to avoid a greater harm than the crime charged to justify the act.
Consent

The defense of consent arises when a defendant claims the victim consented to the act. Certain common-law offenses, such as theft and rape, require a clear demonstration that the victim did not give consent. For example, if the owner of an automobile voluntarily consented to a neighbor taking her car, then the neighbor has not committed motor vehicle theft.

During the summer of 2003, professional basketball star Kobe Bryant was charged with raping a 19-year-old female hotel employee while he was staying at a Colorado resort. Bryant admitted he had sex with the woman but claimed that she had consented. Shortly after the charges were filed, Bryant stated, “Nothing that happened June 30 was against the will of the woman who now falsely accuses me.” The rape charge was eventually dismissed. Afterward, Bryant stated, “Although I truly believe this encounter between us was consensual, I recognize that she did not and does not view this incident the same way I did. After months of reviewing evidence submitted at discovery, listen-
Crime and Criminal Justice

According to her attorney, and even her testimony in person, I now understand how she feels that she did not consent to this encounter.” The woman then filed a civil law suit against Bryant; the suit was settled out of court, and terms of the settlement were not released.22

Many cases of consent reflect different interpretations of the situation, or simply come down to hearsay. Other claims of consent present additional dilemmas for the court, such as doctor-assisted suicide or the “mercy killing” of a terminally ill spouse who has been experiencing great pain. In 2006, the U.S. Supreme Court, in Gonzales v. Oregon, held that doctors who prescribed lethal doses of drugs to terminally ill patients under the Oregon Death with Dignity Act (sometimes known as the assisted-suicide act) were not acting in a criminal fashion because the patients had consented to the act.13

Excuses

Excuses are based on a defendant admitting that what he or she did was wrong but arguing that, under the circumstances, he or she was not responsible for the criminal act.

Insanity

Probably no other legal defense has resulted in more public scrutiny and debate than the insanity defense. In reality, insanity pleas are very rare. The insanity defense is raised in less than 1 percent of all criminal cases, and only in 25 percent of those cases is the person actually found not guilty because of insanity.24 Even so, many people are concerned when a clearly dangerous person avoids incarceration and punishment after being found legally insane at the time the crime was committed. It is important to recognize that people who are released from criminal charges owing to insanity do not go free, but instead are sent to mental hospitals until they are considered sane. Only then are they released back into the community.

The insanity defense is based on a legal concept, rather than a medical or psychiatric definition of insanity. Legally, “insanity” refers to a person’s state of mind at the time he or she committed the crime charged, though actual legal definitions of insanity have been—and continue to be—rather vague. In the past, concepts such as madness, irresistible impulse, states of unsound mind or weak-mindedness, and mental illness, disease, defect, or disorder have all been used to inform the law.25

It should not be surprising that the legal notion of insanity has varied greatly over time and across cultures. According to the Justinian Code (535 C.E.), “There are those who are not to be held accountable, such as a madman and a child, who are not capable of wrongful intention.”26 In 1723, an English judge established the “wild beast test” of insanity: “In order to avail himself of the defense of insanity, a man must be totally deprived of his understanding and memory so as not to know what he is doing, no more than an infant, a brute, or a wild beast.”27

The M’Naghten Rule

The M’Naghten rule, which is also known as the “right from wrong” test, is based on an English case that was decided in 1843. Until recently, it was the most widely accepted standard of insanity in the United States. Daniel M’Naghten, a Scottish woodcutter, believed that the English Prime Minister, Sir Robert Peel II, was persecuting him. In an attempt to assassinate Peel, M’Naghten mistakenly shot and killed Peel’s assistant. At the trial, the court instructed the jury that:
To establish a defense on the ground of insanity, it must be clearly proved that, at the time of the committing of the act, the party accused was labouring under such a defect of reason from disease of the mind as not to know the nature and quality of the act he was doing; or, if he did know it, that he did not know he was doing what was wrong.28

M’Naghten was tried and found not guilty by reason of insanity.

Under the M’Naghten rule, the defendant is presumed to be sane and must prove that he or she suffered from a “disease of the mind” and, therefore, lacked a sufficient degree of reason to distinguish between right and wrong. This test of insanity has been criticized on several grounds:

• “Disease of the mind” is not clearly defined.
• Too much stress is placed on the requirement of knowing.
• It is unclear how a person must know that an act is wrong.
• Some people may be insane but still able to distinguish right from wrong.

Subsequent rules have sought to overcome these weaknesses in the M’Naghten rule.

Irresistible Impulse Test In 1897, the U.S. federal courts and a number of the states added the irresistible impulse test to supplement the M’Naghten rule. According to this test, defendants may be found not guilty by reason of insanity if they can prove that a mental disease caused loss of self-control over their conduct. This test arose from an 1886 Alabama Supreme Court decision in Parsons v. State, which held that it may be possible for a person to know that the action was wrong but nevertheless be so overcome by emotion that he or she temporarily lost self-control or the ability to reason to a degree sufficient to prevent the act.29 In revising the M’Naghten rule, the irresistible impulse test allowed defendants to raise the insanity defense and plead that, although they knew that what they were doing was wrong, they were unable to control their behavior.

Durham Rule The Durham rule, which states that “an accused [person] is not criminally responsible if his unlawful act was the product of mental disease or mental defect,” was formulated in Durham v. United States in 1954.30 Judge David Bazelon, the presiding judge in the case, established new case law in his rejection of the M’Naghten rule, arguing that insanity is actually a product of many personality factors. According to the Durham rule, a mental condition may be either a disease (a condition capable of improving or deteriorating) or a defect (a condition not considered capable of improving or deteriorating). Further, the Durham rule states that a defect could be congenital, the result of injury, or the residual effect of either physical or mental disease. Under the Durham test, the prosecutor must prove beyond a reasonable doubt that the defendant was not acting as a result of mental illness, but the jury determines whether the act was a product of such disease or defect.

The Substantial Capacity Test The Durham rule, like its predecessors, was soon criticized. Specifically, critics argued that it provided no useful definition of “mental disease or defect.” In 1962, the American Law Institute offered a new test for insanity in its Model Penal Code. Known as the substantial capacity test or Model Penal Code Test, it includes the following provisions:

1. A person is not responsible for criminal conduct if, due to mental disease or defect, he or she lacks the substantial capacity to appreciate the criminality (wrongfulness) of his or her conduct or to conform to the requirements of law.

2. The terms “mental disease or defect” do not include an abnormality manifested only by repeated criminal or antisocial conduct.31

The substantial capacity test is broader than the M’Naghten rule because it substitutes the notion of “appreciate” for “know,” thereby eliminating the M’Naghten requirement that a person be able to fully distinguish right from wrong. In other words, a defendant may know the difference between right and wrong yet not be able to appreciate the significance of that difference. The substantial capacity test absolves from criminal responsibility a person who knows what he or she is doing, but is driven to act by delusions, fears, or compulsions.32 Like the Durham rule, the substantial capacity test places the burden of proof beyond a reasonable doubt on the prosecutor.

In 1972, in United States v. Brawner, the federal courts rejected the Durham rule and adopted a modified version of the substantial capacity test.33 By 1982, it was being used in 24 states, the District of Columbia, and the federal courts.

John Hinckley, Jr., shot and wounded President Reagan. At his trial, experts testified that Hinckley was psychotic and had been suffering from delusions. A little more than a year after the shooting, the jury returned a verdict of “not guilty by reason of insanity” for Hinckley.

As a result of widespread criticism over Hinckley’s acquittal, Congress restricted the use of the insanity defense in federal cases, and a number of states quickly followed suit. The Insanity Defense Reform Act of 1984, passed as part of the larger Comprehensive Crime Control Act of 1984, states:

It is an affirmative defense to a prosecution under any Federal statute that, at the time of the commission of the acts constituting the offense, the defendant, as a result of a severe mental disease or defect, was unable to appreciate the nature and quality of the wrongfulness of his [or her] acts . . . The defendant has the burden of proving the defense of insanity by clear and convincing evidence.34

A significant part of the Insanity Defense Reform Act is the shifting of the burden of proof from the prosecution to the defense and the limitations placed on the role of experts. The defense now has the burden to prove through clear and convincing evidence that the defendant lacked capacity. Furthermore, expert witnesses who testify about the mental state or condition of a defendant are prohibited from giving an opinion or drawing an inference as to whether the mental state of the defendant constituted an element of the crime. Rather, such conclusions are to be drawn solely by the judge or the jury.

The Hinckley verdict was a major force in the growing dissatisfaction with the use of insanity defenses. Five states—Idaho, Kansas, Montana, Nevada, and Utah—have since abolished the insanity defense altogether.

Guilty, But Mentally Ill At least 17 states have adopted statutes permitting a defense of guilty, but mentally ill (GBMI), or guilty, but insane (GBI)—a variation on GBMI. This verdict, which is a supplement to the traditional defense of insanity, allows a jury to find the accused guilty and impose a punishment of subsequent incarceration. It also requires the prison authorities to provide psychiatric treatment to the convicted offender during the specified period of confinement.

Supporters of GBMI and GBI statutes argue that these laws will reduce the number of determinations of not guilty by reason of insanity and, consequently, hold more people criminally responsible for their actions. In addition, they claim that such statutes will increase protection for the public by ensuring that offenders are subject to both incarceration and treatment.35

Jury decisions regarding insanity defenses continue to be mixed.

- In Arizona, 17-year-old Eric Clark was convicted and sentenced to 25 years to life for the murder of a police officer, even though he had been diagnosed with paranoid schizophrenia.
- In Texas, Andrea Yates’ insanity defense was rejected by a jury in her first trial in 2002, and she was sentenced to life in prison for murdering her five children by drowning them in a bathtub. The defense presented evidence that Yates thought she was possessed by Satan, had postpartum depression and a history of schizophrenia, and had previously attempted suicide. When the case was appealed, her conviction was overturned, and a second jury found her not guilty by reason of insanity.
- In another Texas case, the insanity defense led a jury to acquit Deanna Laney on charges that she...
### TABLE 2-2

<table>
<thead>
<tr>
<th>State</th>
<th>Insanity Defense Rule</th>
<th>Location of Burden of Proof</th>
<th>Allows GBMI and GBI Verdicts</th>
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<td>Defendant</td>
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(cont’d)
• In 2004, Kenneth Pierott was convicted of murder and sentenced to 60 years in a Texas prison after the jury deliberated only four hours before rejecting the defense claim of insanity. Pierott had smothered his girlfriend’s six-year-old child and stuffed him in an oven. Only eight years earlier, Pierott had been found not guilty by reason of insanity after beating his sister to death with a dumbbell, crushing her skull and displacing her eyeballs. He was sent to a state mental hospital, where he spent four months and was then released.36

**Intoxication**

The defense of intoxication is based on the claim that the defender had diminished control over himself or herself owing to the influence of alcohol, narcotics, or drugs and, therefore, lacked criminal intent. According to the Model Penal Code, the defense of intoxication should not be used unless it negates an element in the crime, such as criminal intent. The courts recognize a difference between involuntary intoxication and voluntary intoxication. Involuntary intoxication that results from mistake, deceit of others, or duress (for example, if a drug was unknowingly put in the person’s drink, or if liquor was forcibly poured down the person’s throat) will excuse the defendant from responsibility for criminal action that resulted from the intoxication. For example, Louisiana law states that “Where the production of the intoxicated or drugged condition has been involuntary, and the circumstances indicate this condition is the direct cause of the commission of the crime, the offender is exempt from criminal responsibility.”37

Voluntary intoxication is generally not a defense, but it may be presented in an effort to mitigate the seriousness of the crime. A person charged with committing premeditated murder while voluntarily intoxicated, for example, may be able to have the charge reduced to the less serious charge of homicide. In 2005 in Lawrence, Kansas, Jason Dillon, who was charged with murdering his girlfriend’s three-year-old daughter, cited “voluntary intoxication” as a factor in his crime. Dillon claimed that he had consumed 16 beers the night before he babysat the young girl and was incapable of acting intentionally. Dillon did not dispute that he struck the girl on the head more than a dozen times after she refused to help pick up laundry and told him she didn’t want him to be her daddy anymore. As a result of a plea bargain, Dillon was convicted of second-degree murder rather than first-degree murder as initially charged; he was sentenced to a reduced term of 16 1⁄2 years in prison.38

**Entrapment**

The defense of entrapment is an excuse for criminal actions based on the claim that the defendant was encouraged or enticed by agents of the state to engage in an act that he or she would not have committed otherwise. The courts have generally held that it is permissible for law enforcement agents to solicit information from informants, use undercover officers, and even place electronic monitoring devices on informants or officers to record conversations regarding criminal behavior. It is not, however, considered legitimate for police to encourage or coerce individuals to commit crimes when they had no previous predisposition to commit such acts. Government agents may not “originate a criminal design, implant in an innocent person’s mind the disposition to commit a criminal act, and then induce commission of the crime so that the Government may prosecute.”39

For an entrapment defense to be valid, two related elements must be present:

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<table>
<thead>
<tr>
<th>State</th>
<th>Insanity Defense Rule</th>
<th>Location of Burden of Proof</th>
<th>Allows GBMI and GBI Verdicts</th>
</tr>
</thead>
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<td>Wyoming</td>
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1. Government inducement of the crime
2. The defendant's lack of predisposition to engage in the criminal conduct

Predisposition is generally considered to be the more important of these two elements. Thus entrapment may not have occurred if the government induces a person who is predisposed to commit such an act.

In recent years, many state and federal law enforcement agencies have conducted “sting” operations that are designed to trap people who are engaged in crime or predisposed to commit crimes. Such operations often involve law enforcement agents posing as prostitutes, drug buyers, buyers of stolen auto parts, and people attempting to bribe government officials. Do such activities create an illegal inducement to commit crime? In *Sherman v. United States*, the U.S. Supreme Court held that “to determine whether entrapment has been established, a line must be drawn between the unwary innocent and the trap for the unwary criminal.” Entrapment occurs when government activity in the criminal enterprise crosses this line.

The line suggested by the Supreme Court, however, is often ambiguous. The use of deceit by the police to create a circumstance in which a person then commits a crime does not necessarily constitute entrapment. In *United States v. Russell*, the Court held that

> [T]here are circumstances when the use of deceit is the only practicable law enforcement technique available. It is only when the government's deception actually implants the criminal design in the mind of the defendant that the defense of entrapment comes into play.

In this case, the defendant, who had been convicted of unlawfully manufacturing and selling methamphetamine (speed) to an undercover agent, was viewed by the Court as “an active participant in an illegal drug manufacturing enterprise which had begun before the government agent appeared on the scene, and continued after the agent had left the scene.” According to the Court, the defendant was not an unwary innocent but rather an unwary criminal.

**Duress**

The defense of duress presents the claim that the defendant is actually a victim, rather than a criminal. For example, if someone holds a gun to a person’s head, threatening to shoot unless he or she steals money, the resulting theft would be considered an action under duress, and the thief should not be held criminally responsible for complying with the demand to steal. The Model Penal Code’s provision on duress states that

> [It] is an affirmative defense that the actor engaged in the conduct charged to constitute an offense because he was coerced to do so by the use of, or a threat to use, unlawful force against his person or the person of another, which a person of reasonable firmness in his situation would have been unable to resist.

This defense is not applicable to people who intentionally, recklessly, or negligently place themselves in situations in which it is probable that they will be subject to duress. For example, a person who, in the course of escaping from prison, commits a kidnapping to avoid being caught cannot claim duress as a defense against the charge of kidnapping.

**Mistake**

Everyone has probably heard the expression, “Ignorance of the law is no excuse.” But what does it mean? Although we may be familiar with many laws, must we be aware of all the laws? Must we know exactly what they prohibit and under what circumstances? When the federal and state criminal codes were first developed, they were fairly limited in scope; the relative homogeneity of the population meant that most laws were generally understood. More recently, given the increase in language and cultural differences among the general population as well as the vast proliferation of laws, it is fair to assume that many people today are ignorant of many laws.

Ignorance of what the law requires or prohibits generally does not excuse a person from committing a crime, but, under some circumstances, ignorance has been accepted as a defense. A federal court of appeals held in 1989 that “Under the proper circumstances...a good faith misunderstanding of the law may negate willfulness.” Mistake, as a criminal defense, takes two forms: mistake of law and mistake of fact.

**Mistake of law** occurs when the defendant does not know a law exists; only in rare cases is it a legitimate defense. Such a case might exist when a new law is passed but not published so as to give the public adequate notice of it. For example, in 1957 the Supreme Court, in *Lambert v. California*, reversed the conviction of a petitioner who had claimed ig-
On September 24, 1987, Keith Jacobson was indicted for violating a provision of the Child Protection Act of 1984, which criminalizes the knowing receipt through the mail of a “visual depiction [that] involves the use of a minor engaging in sexually explicit conduct.” Jacobson was found guilty after a jury trial.

In the same month that the Child Protection Act became law, postal inspectors found Jacobson’s name on a mailing list of a California bookstore from which he had ordered two magazines containing photographs of nude preteen and teenage boys. Over the next two and a half years, the government attempted—through the repeated efforts of two government agencies, five fictitious organizations, and a bogus pen pal—to explore Jacobson’s willingness to break the new law by ordering sexually explicit photographs of children through the mail. One of the bogus organizations created by the government, the Heartland Institute for a New Tomorrow (HINT), sent Jacobson materials proclaiming that sexual freedom and freedom of choice should be protected against government restrictions. Eventually, Jacobson ordered a pornographic magazine depicting young boys engaged in various sexual activities. He was arrested after a controlled delivery of a photocopy of the magazine.

After his conviction, Jacobson appealed to the U.S. Supreme Court, claiming that he did not know the magazines would depict minors and that he was a victim of police entrapment. The Court, in a 5 to 4 decision, overturned the earlier conviction. It held that Jacobson was predisposed to commit a criminal act. In the verdict, the court said that Jacobson’s responses to the many communications prior to ordering the last magazine were

At most indicative of certain personal inclinations, including a predisposition to view photographs of preteen sex . . . . Even so, petitioner’s responses hardly support an inference that he would commit the crime of receiving child pornography through the mails. Furthermore, a person’s inclinations and fantasies . . . are his own and beyond the reach of government . . .

More importantly, the Court argued that any indication that Jacobson was ready and willing to receive child pornography through the mail came only after two and a half years of the government’s attempts to convince him that he had or should have the right to receive such material. According to the Court, “Rational jurors could not say beyond a reasonable doubt that the petitioner possessed the requisite predisposition to the Government’s investigation and that it existed independent of the Government’s many and varied approaches to petitioner. . . .” Furthermore, the ruling declared that the government “played on the weaknesses of an innocent party and beguiled him into committing crimes which he otherwise would not have attempted”—which is the definition of entrapment.

before she remarried when, in fact, it was not. Mistake of fact is often raised as a defense by people who are charged with selling alcohol to a minor or with committing statutory rape. In such cases, defendants may have been led to believe that the minor was older than he or she claimed because the claim appeared consistent with the minor's appearance.

Exemptions
In some situations, a defendant may raise the defense that he or she is legally exempt from criminal responsibility. Unlike the defenses discussed earlier, legal exemptions are not based on the question of the defendant's mental capacity or culpability for committing the crime. Rather, they are seen as concessions to the defendant for the greater good of the public welfare.

Double Jeopardy
The Fifth Amendment to the Constitution states that “no person shall be subject for the same offense to be twice put in jeopardy of life or limb.” This protection against double jeopardy is not intended to provide protection for guilty defendants, but rather to prevent the state from repeatedly prosecuting a person for the same charge until a conviction is finally achieved.48 Jeopardy in a bench trial (a case tried to prevent the state from repeatedly prosecuting a person for the same charge until a conviction is finally achieved) becomes activated when the first witness is sworn in. In jury trials, some jurisdictions consider a defendant in jeopardy once the jury is selected, though a few define it at the point of indictment, when criminal charges are filed.

Double jeopardy does not apply when a case is ruled a mistrial on the motion of the defense or when a jury is unable to agree on a verdict and the judge declares a mistrial. In both circumstances, the prosecutor may retry the case. Also, if upon conviction a defendant appeals to a higher court and has the conviction reversed, he or she may be retried on the original charge.

Some exemptions to the double jeopardy rule also exist. For example, some crimes are violations of both state and federal law. In 1959, in Bartkus v. Illinois, the Supreme Court held that people may be prosecuted for the same criminal acts by both a state and the federal government because people are considered citizens of both a state and the United States.49 This was the basis for the federal case brought against the Los Angeles police officers in the Rodney King incident after they had been acquitted in the state court.

Statute of Limitations
Under common law, there was no limit to the amount of time that could pass between a criminal act and the state's prosecution of that crime. More recently, however, the states and the federal government have enacted statutes of limitations establishing the maximum time allowed between the act and its prosecution by the state for most crimes. Thus a defendant may raise the defense that the statute of limitations for the crime has expired, which requires a dismissal of the charges.

Statutes of limitations vary by jurisdiction and are generally longer for more serious offenses. For instance, murder has no statute of limitations, whereas in many states burglary carries a five-year limitation, and misdemeanors have a two-year limitation period in most jurisdictions. Although murder has no limits on when charges may be filed, some states limit the filing of charges for attempted murder to a period as short as three years. The statute of limitations may, however, be interrupted if the defendant leaves the state. For example, if a person who is charged with assault leaves the state for a period of two years, an additional two years would be added to the statutory limit of five years. In Missouri, criminal prosecutions for sexual offenses involving persons 18 years of age or younger must be initiated within 10 years after the victim reaches the age of 18.50 In Maine, by contrast, the statute of limitations for both criminal and civil claims of child sexual abuse have been abolished.51

Age
On March 8, 2000, six-year-old Kayla Rolland was shot in the neck in her first-grade classroom with a .32-caliber pistol and died a half hour later. Her killer, Dedrick Owens, was also six years old. He had gotten into a quarrel with Kayla on the playground the day before. Dedrick had found the loaded pistol in his home and brought it to school tucked in his pants.

After shooting Kayla, Dedrick ran into a nearby bathroom and tossed the gun into a trashcan. Because of his age, the court determined that Dedrick could not be held criminally responsible for Kayla's death.52 Although not considered either a justification or an excuse for a criminal act, a person's age may establish a defense against criminal prosecution. Under early English common law, children younger than 7 years of age were considered incapable of forming criminal intent and, therefore, could not be convicted of crimes. Children between the ages of 7 and 14 were considered to have limited criminal responsibility, and chil-
dren older than age 14 were presumed to have the capacity to form criminal intent and could be criminally prosecuted. With the creation of the juvenile court system in the United States at the end of the nineteenth century, most youths between ages 7 and 18 who were charged with crimes were processed through the more informal proceedings of that court. The minimum age for transfer to adult court today varies by state but is commonly set at age 14, 15, or 16. Consequently, a child of 12 who breaks into a neighbor’s home and steals a television set, for example, is younger than the minimum age for prosecution in criminal court and, therefore, may not be charged with a crime. Nevertheless, he or she may be petitioned by the juvenile court for having committed a delinquent act.

Due Process and the Rights of the Accused

Due process, which is established in procedural criminal law, ensures the constitutional guarantees of a fair application of the rules and procedures in criminal proceedings, from the investigation of crimes to an individual’s arrest, prosecution, and punishment. Unfortunately, there is not always agreement over the concept of due process, its specific applications,
or even who is eligible to claim the rights associated with the guarantees of due process.

**Headline Crime**

A Three-Year Limitation on Attempted Murder

On the night of June 22, 1977, only a few days into their cross-country bicycle trip along the Bicentennial Trail, two undergraduates at Yale University pitched their tent near a river at Cline Falls State Park in central Oregon. Not long after falling asleep, Terri Jentz heard the cries of her roommate and woke up to a crushing pain on her chest. A man had driven over their tent with his truck. The man got out, hatchet in hand, and wildly attacked the two young women. Miraculously, both women survived the attack, although Terri’s roommate lay unconscious with a severe wound to the back of her head, which later caused permanent loss of sight. Terri’s right lung had collapsed, her collarbone was fractured, her left forearm was broken, and the right side of her rib cage was crushed; she also received several hatchet blows to her head. The vicious attack was briefly investigated by the Oregon State Police, with some minor support from the Redmond Police Department and the Deschutes County Sheriff’s Office, but no suspect was apprehended.

Fifteen years after the attack, Terri returned to investigate the crime herself. Her investigation, which was aided by two dedicated Oregon victim advocates, Bob and Dee Dee Kouns, eventually led to the discovery of the man authorities believed to be the attacker. Because of Oregon’s three-year statute of limitations on attempted murder, however, he was immune from prosecution for the crime under state law. Only after involvement in another criminal incident did he finally serve time behind bars for an unrelated crime—five years for kidnapping, unlawful use of a dangerous weapon, and coercion.

It was not until 1997 that Oregon passed Bill 614, which changed the state’s statute of limitations for attempted murder. Under this legislation, “A prosecution for aggravated murder, attempted aggravated murder, murder or attempted murder or manslaughter may be commenced at any time after the attempt to kill.” Unfortunately for Terri and her roommate, the legislation was not retroactive.


Currently, there is intense debate over whether foreign citizens (and even U.S. citizens) who are charged with terrorist acts should be given all of the rights typically accorded people charged with crimes in the United States. Chapter 17 explores the debate over the due process rights of those accused of terrorism.

When a person is arrested, the immediate concern is typically focused on whether he or she committed the crime. How does a court of law make this determination? The police might threaten or coerce the suspect to extract a confession, and some people might confess to crimes they did not commit to avoid further mistreatment. Evidence might also be presented to establish the individual’s guilt even though that evidence was obtained by devious or unethical means (for example, searching a person’s private property without a search warrant). The accused might be held in jail without bail and denied access to an attorney while the government builds a convincing case. Although convictions might be obtained in such instances, such procedures would offend the public’s sense of fairness related to the criminal process.

The principles of procedural fairness in criminal cases are designed to reduce the likelihood of erroneous convictions. Criminal procedures that produce convictions of large numbers of innocent defendants would be patently unfair. The evolution of procedural safeguards against unfair prosecution is based on a relative assessment of the interests at stake in a criminal trial. According to law professor Thomas Grey, “While it is important as a matter of public policy (or even of abstract justice) to punish the guilty, it is a very great and concrete injustice to punish the innocent.” In U.S. criminal law, procedural safeguards have been established in the Fourth, Fifth, Sixth, Eighth, and Fourteenth Amendments to the U.S. Constitution to prevent that problem from occurring.
The Bill of Rights

The first 10 amendments, known as the **Bill of Rights**, were added to the Constitution on December 15, 1791—only three years after the Constitution had been ratified by the states. The framers of the Constitution had intended it to provide citizens with protections against a possible future dictatorship by establishing a clear separation of powers between the three branches of government (executive, legislative, and judicial). All too soon, they realized that the individual rights of citizens were not adequately protected against possible intrusions and violations by the newly formed federal government. To correct this deficiency, they added a series of amendments to the Constitution. Four of these amendments enumerate the rights of citizens in criminal proceedings.

**The Fourth Amendment**
The Fourth Amendment protects citizens against unreasonable governmental invasion of their privacy. As it has come to be interpreted by the courts, this amendment means that agents of the government may not arbitrarily or indiscriminately stop and search people on the street or in their vehicles, search their homes or other property, or confiscate materials without legal justification. Such justification must be based on sufficient probable cause to convince a judicial magistrate to issue a search warrant specifically describing who or what is to be searched and what is to be seized. Any evidence seized as a result of searches in violation of the Fourth Amendment cannot be used in a subsequent criminal prosecution.

**The Fifth Amendment**
The Fifth Amendment contains four separate procedural protections:

1. A person may not face criminal prosecution unless the government has first issued an indictment stating the charges against the person.
2. No person may be tried twice for the same offense (double jeopardy).
3. The government may not compel a defendant to testify against himself or herself (this provision includes protection against self-incrimination during questioning and the right to refuse to testify during a criminal trial).
4. No person may be deprived of due process, which means that people should be treated fairly by the government in criminal prosecutions.

**The Sixth Amendment**
The Sixth Amendment was designed to ensure a fair trial for defendants. Toward this end, it established six specific rights:

1. Speedy and public trial
2. Trial by an impartial jury (which has been interpreted by the courts to mean a jury of one's peers)
3. Notification of the nature and cause of the charges
4. Opportunity to confront witnesses called by the prosecution
5. Ability to obtain witnesses on the defendant's own behalf
6. Assistance of an attorney in presenting the defendant's defense

**The Eighth Amendment**
The Eighth Amendment simply states, “Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.” Although this amendment does not guarantee a defendant the constitutional right to be released on bail while awaiting trial, it does prohibit the imposition of excessive bail.

**The Fourteenth Amendment**
For nearly 80 years after the adoption of the Bill of Rights, the federal government and the various states interpreted the rights enumerated in these amendments to apply only to cases involving disputes between citizens and the federal government: The protections did not extend to citizens prosecuted by the states. (Actually, many state constitutions included these same rights, but if they were violated, the federal courts were not empowered to intervene.) States’ rights advocates believe in a strong separation of federal and state powers and the right of states to interpret and enforce particular laws. They base their arguments on the Tenth Amendment to the Constitution, which states that “The powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states respectively or to the people.” In the past, the states frequently cited this principle to nullify federal laws through their courts, such as when state courts refused to obey mandates from the U.S. Supreme Court. Not surprisingly, federal and state interests came into conflict over a variety of issues, such as South Carolina’s attempt to nullify the Tariff
of 1832, which had been passed by Congress; the refusal of the governors of Connecticut, Massachusetts, and Rhode Island to place their militia under federal command during the War of 1812; and, of course, slavery.\footnote{53}

Although the Thirteenth Amendment, which was ratified on December 18, 1865, at the end of the Civil War, abolished slavery, debate over the application of the Bill of Rights continued. Finally, on July 28, 1868, the Fourteenth Amendment to the Constitution was

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**FOCUS ON CRIMINAL JUSTICE**

**The Bill of Rights**

**First Amendment**
Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or of the right of the people peaceably to assemble, and to petition the government for a redress of grievances.

**Second Amendment**
A well-regulated militia, being necessary to the security of a free state, the right of the people to keep and bear arms, shall not be infringed.

**Third Amendment**
No soldier shall, in time of peace, be quartered in any house, without the consent of the owner, nor in time of war, but in a manner to be prescribed by law.

**Fourth Amendment**
The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

**Fifth Amendment**
No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

**Sixth Amendment**
In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

**Seventh Amendment**
In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined in any court of the United States, than according to the rules of the common law.

**Eighth Amendment**
Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

**Ninth Amendment**
The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.

**Tenth Amendment**
The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.
ratified. It was eventually interpreted to mean that the Bill of Rights did, indeed, apply to all citizens and that the states must ensure these rights.

Early court interpretations of the Fourteenth Amendment emphasized that its fundamental principle was “an impartial equality of rights” and that its “plain and manifest intention was to make all the citizens of the United States equal before the law.” These initial decisions did not interpret the amendment to necessarily apply the Bill of Rights to the states. For example, in 1884, in *Hurtado v. California*, the Supreme Court held that the Fifth Amendment’s guarantee of a grand jury indictment in criminal proceedings applied only to federal trials, not those conducted by the state.

It was not until the early decades of the twentieth century that the due process clause of the Fourteenth Amendment, which guaranteed that no state shall “deprive any person of life, liberty, or property, without due process of the law,” began to specifically incorporate the Bill of Rights. This move ultimately made the rights described in these amendments applicable to the states.

### Incorporation of the Bill of Rights

The process of incorporation of the Bill of Rights occurred only gradually and reflected a major split on the Supreme Court. In 1947, Associate Justice Hugo Black strongly called for total incorporation, arguing that the framers of the Fourteenth Amendment originally intended the Bill of Rights to place limits on state action. At the time, Black’s position was in the minority on the Court. The majority opinion, led by Justice Felix Frankfurter, held that, although the concept of due process incorporated fundamental values—one of which was fairness—it was left to judges to objectively and dispassionately discover and apply these values to any petitioner’s claim of injustice. Due process expressed local values arising from different historical and practical considerations.

Indeed, the suggestion that the Fourteenth Amendment incorporates the first eight Amendments as such is not unambiguously urged. Even the boldest innovator would shrink from suggesting to more than half the states that they may no longer initiate prosecutions without indictment by grand jury, or that thereafter all the states of the Union must furnish a jury of twelve for every case involving a claim above twenty dollars. There is suggested merely a selective incorporation of the first eight Amendments into the Fourteenth Amendment. Some are in and some are out...
In 1953, when Earl Warren was appointed Chief Justice of the Supreme Court, a liberal majority was formed on the Court. It rapidly expanded the application of the due process clause to the states. Over the next two decades, the Warren Court handed down numerous decisions establishing individual and civil rights, and clearly moved the Court from its fundamental fairness position to one of absolute compliance.

During the 1960s, Chief Justice Earl Warren presided over a great expansion of due process rights for those accused of crimes.

Were the decisions of the Warren Court beneficial for American society? How might crime control and due process enthusiasts debate this question?

The application of these due process guarantees are discussed in several chapters of this book. Chapter 7 describes the application of due process in police decisions to arrest, search, and interrogate suspects. Chapter 10 examines the prosecution of suspects and considers due process issues in the determination of probable cause, charging decisions, notification of defendant rights, and entering of pleas. Due process issues are also raised in Chapter 11 in the discussion of a defendant's right to a speedy, public, and fair trial. Chapter 12 examines the application of due process to sentencing. Guarantees of due process also apply to people who are incarcerated in state and federal correctional facilities; these issues are examined in a discussion of inmates' rights in Chapter 14. Chapter 16 explores the decision of whether juveniles arrested for crimes are tried in the juvenile or adult criminal justice systems and considers how their constitutionally protected due-process rights differ from those of adults. Finally, Chapter 17 examines due process issues arising from the war on terror.
Putting It All Together

Even though Goetz admitted to shooting the four youths in this case, he was acquitted of the most serious charges because, at times in the criminal justice system, there is a distance between the letter of the law and the spirit of the law. The “victims” in this case admitted that they planned to attack Goetz, and several of them had juvenile criminal records and went on to commit other serious violent crimes. The attackers were unsympathetic, and the defendant, who had previously been robbed and assaulted on the streets of New York, was acting in self-defense in a city in a time period in which crime was rampant. Given these facts, citizens and jurors alike held a certain degree of admiration for Goetz’s willingness to take action before he was victimized. These considerations were likely in the minds of the jurors who chose to acquit Goetz of the most serious charges.

Chapter Spotlight

- Laws are formalized rules that reflect a body of principles prescribing or limiting people’s actions. The laws collectively known as criminal law are generally divided into substantive law and procedural law. Together, they provide the framework for the criminal justice system.
- Most criminal law in the United States has its origins in English common law, although some basic precepts date back to early notions of natural and positive law found in Mosaic, Roman, and Greek codes. Probably the most important contribution from common law was stare decisis (the doctrine of precedent).
- Crimes have generally been conceptually divided between those considered to be mala in se (inherently wrong or evil acts) and those considered to be mala prohibita (acts that are wrong because they are prohibited by a criminal statute). Criminal codes further distinguish crimes as felonies, misdemeanors, and infractions.
- Criminal law functions in a variety of ways: It defines seriously socially unacceptable behavior, it provides for the control of behavior and maintenance of social order, and it regulates the punishment of behavior.
- For an act to be defined as a crime, a number of elements must be present: actus reus (criminal act), mens rea (criminal intent), and the concurrence of these two concepts.
- In certain circumstances, an individual might engage in an act defined as a crime yet not be held criminally responsible for that action. These circumstances involve legal justifications and excuses, or defenses that negate a person’s criminal responsibility.
- Although the insanity defense is successfully raised in less than 1 percent of all criminal cases, it is still very controversial. The federal government and many of the states have revised their insanity statutes in recent years, and several have developed “guilty, but mentally ill” statutes to supplement other insanity defenses.
- Procedural criminal law establishes protections for individuals against unfair prosecution. These safeguards are found in the Fourth, Fifth, Sixth, and Eighth Amendments contained in the Bill of Rights.
- The constitutional protections found in the Bill of Rights were initially interpreted to apply only in federal prosecutions. It was not until the adoption of the Bill of Rights that they began to be applied to the states as well.

1. Is it possible for natural law and positive law to coexist? Explain your answer.
2. Discuss the major functions of law in society. What alternatives to law might fulfill the same functions?
3. Identify four distinctions between criminal law and civil law. Do you think that it is reasonable for a crime victim to be able to file a civil suit against an offender? Why or why not?
4. Should the insanity defense be allowed? Should all states adopt “guilty, but mentally ill” or “guilty but insane” statutes? Why or why not?
5. Are the guarantees of due process for people accused of crimes reasonable? Do they make it more difficult to deal with the crime problem? Why are they so important to protect?
## Key Terms

**actus reus** Guilty act; a required material element of a crime.

**Bill of Rights** First 10 amendments to the U.S. Constitution.

**case law** Law that emerges when a court modifies a law in its application in a particular case.

**civil law** A body of private law that settles disputes between two or more parties to a dispute.

**common law** Case decisions by judges in England that established a body of law common to the entire nation.

**corpus** The body of the crime; the material elements of the crime that must be established in a court of law.

**crime** An intentional act or omission to act, neither justified nor excused, that is in violation of criminal law and punished by the state.

**double jeopardy** Trying a person for the same crime more than once; it is prohibited by the Fifth Amendment.

**Durham rule** An insanity test that determines whether a defendant's act was a product of a mental disease or defect.

**entrapment** The claim that a defendant was encouraged or enticed by agents of the state to engage in a criminal act.

**excuses** Claims based on a defendant admitting that what he or she did was wrong but arguing that, under the circumstances, he or she was not responsible for the criminal act.

**felony** A serious crime, such as robbery or embezzlement, that is punishable by a prison term of more than one year or by death.

**guilty, but mentally ill (GBMI)** A substitute for traditional insanity defenses, which allows the jury to find the defendant guilty and requires psychiatric treatment during confinement. Also called guilty but insane (GBI).

**Hurtado v. California** Supreme Court decision that the Fifth Amendment guarantee of a grand jury indictment applied only to federal—not state—trials, and that not all constitutional amendments were applicable to the states.

**incorporation** The legal interpretation by the Supreme Court in which the Fourteenth Amendment applied the Bill of Rights to the states.

**infraction** A violation of a city or county ordinance, such as cruising or noise violations.

**in-presence requirement** A misdemeanor arrest may not be made unless the criminal act was committed in the presence of the officer.

**irresistible impulse test** An insanity test that determines whether a defendant, as a result of a mental disease, temporarily lost self-control or the ability to reason sufficiently to prevent the crime.

**justification** Defense wherein a defendant admits responsibility but argues that, under the circumstances, what he or she did was right.

**laws** Formalized rules that prescribe or limit actions.

**mala in se** Behaviors, such as murder or rape, that are considered inherently wrong or evil.

**mala prohibita** Behaviors, such as prostitution and gambling, that are considered wrong because they have been prohibited by criminal statutes, rather than because they are evil in themselves.
**mens rea** Guilty mind, or having criminal intent; a required material element of a crime.

**misdemeanor** A crime that is less serious than a felony, such as petty theft or possession of a small amount of marijuana, and that is punishable by less than one year in prison.

**M’Naghten rule** Insanity defense claim that because of a defect of reason from a disease of the mind, the defendant was unable to distinguish right from wrong.

**procedural criminal law** A body of law that specifies how crimes are to be investigated and prosecuted.

**self-defense** Claim that a defendant acted in a lawful manner to defend himself or herself, others, or property, or to prevent a crime.

**stare decisis** Literally, “to stand by the decision”; a policy of the courts to interpret and apply law according to precedents set in earlier cases.

**statute** Legislation contained in written legal codes.

**statute of limitations** The maximum time period that can pass between a criminal act and its prosecution.

**strict liability laws** Laws that provide for criminal liability without requiring either general or specific intent.

**substantial capacity test** An insanity test that determines whether the defendant lacked sufficient capacity to appreciate the wrongfulness of his or her conduct.

**substantive criminal law** A body of law that identifies behaviors harmful to society and specifies their punishments.

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**Notes**

4. Thomas and Bishop, note 2, p. 25.
21. American Law Institute, note 18, Section 3.02. 1.
31. American Law Institute, note 18, Section 4.01.
37. Louisiana Revised Statutes, 14:15.