III.A Criminal Law in the United States

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1. Introduction

The criminal laws of the United States consist primarily of fifty separate **criminal codes** enacted by each state, sometimes called **penal codes**. These separate statutory frameworks are created by each state's legislature and generally interpreted by each state's court system. The federal government also enforces its own criminal code that is primarily found at Title 18 of the United States Code (hereafter U.S.C.). Federal criminal laws are enforced by the national government in its separate and independent court system that is spread throughout the fifty states.

The criminal laws in the United States have their roots in English **common law**. The common law is based on the decisions and principles created by judges in England over centuries of deciding cases brought to them by private parties or the government (the Crown). During the American colonial period, from the early seventeenth to late eighteenth centuries, the English colonists incorporated their Mother Country's common law principles (both civil and criminal) into their own legal systems. After the American Revolution, the English common law system was continued and adapted to the new American realities, including the federal system of government adopted in the United States **Constitution**. Over time, the criminal laws of the several states became **codified** in statutes passed by each **state legislature**; and most of the common law principles were eventually incorporated into specific **statutory provisions**. The federal criminal laws have always been statutorily based, though many of the principles and rules found in federal criminal statutes can trace their roots to the English common law. Each of the state and federal statutory schemes, of course, must not violate the provisions of the United States Constitution.

As a consequence of this history, and the number of **jurisdictions** developing and enforcing their respective criminal laws, the subject matter of this chapter is enormous and not easily summarized. This chapter, therefore, is not intended to cover all of the possible facets of the **substantive criminal laws** in the United States; that would be impossible in the few pages allotted. It is, however, designed to serve as an introduction to the important concepts necessary to a basic understanding of how the criminal law in this country has developed and now operates.

In this updated edition, we highlight how federal and state jurisdictions continue to refine and extend the scope of their substantive criminal law to meet the needs of a dynamic modern society. Illustrative examples of how these laws continue to evolve will be presented.

2. Federal and State Criminal Jurisdiction

Under the U.S. federal system, each state has the power to both create and **enforce** its criminal laws within its borders. This general criminal jurisdiction, or **police power**, is limited only by certain federal constitutional protections and principles that have been made applicable to the

states. For the most part, **state criminal statutes** address the whole range of common law crimes that have been **incorporated** and expanded in a state's criminal code. Each state enforces its criminal laws against all persons present within its borders. For the most part, a given state's criminal laws will not be enforced in another state, though it is common for one state to deliver (**extradite**) a person found within its borders to another state in which that person is wanted for **violation** of the latter state's criminal laws.

Federal criminal jurisdiction, on the other hand, is considered "limited." Though federal criminal laws are enforced throughout the nation, the federal criminal statutes are "limited" in the sense they must be based on powers that are expressly, or impliedly, granted by the so-called **"necessary and proper" clause** of the U.S. Constitution. These powers are based on the federal government's right to regulate **interstate commerce** among the several states (the Commerce Clause), the power to tax, and to make war, among others. Notwithstanding the "limited" nature of federal criminal jurisdiction, the scope of federal criminal laws, often based on the Commerce Clause, have expanded greatly over the years to now encompass vast areas of **conduct**, from common law crimes, to genocide, to partial birth abortions, to slavery, to theft of trade secrets, and sexual abuse, to name only a few (see 18 U.S.C., Part I-Crimes).

3. Preemption

Sometimes, conduct within a state violates both state and federal criminal laws. For example, the **armed robbery** of a bank certainly violates every state's criminal law **proscribing** such conduct (armed robbery). But that same conduct also violates federal law if the bank is a federally chartered (licensed) bank. Either jurisdiction (state or federal) has the power to **prosecute** that conduct, though generally speaking, only one jurisdiction will do so. However, because federal criminal laws are focused on matters that are in some way limited to specific federal interests, it can also happen that when state and federal criminal laws proscribe the same conduct or actually conflict with one another, the federal law must be enforced to the exclusion of a state's law. When this happens, the federal law is said to have **"preempted"** the state's law if it is determined (usually by a federal court) that Congress, by passing the federal law, intended to "occupy the field" of conduct proscribed by the laws. In that case, only the federal law will be enforced. For example, a state law making it a **crime** to **advocate** the violent **overthrow of the** United States **government** was struck down as being preempted by federal law covering the same subject.

4. Model Penal Code

As can be seen, one cannot refer to a single "American Criminal Code." The fifty states have been allowed to develop their own criminal laws to meet local concerns, situations, and experiences. Accordingly, there are many differences among the various state criminal codes, though as noted, being rooted in the English common law, and as ultimately governed by the U.S. Constitution (the "supreme law of the land"), there is a great deal of similarity. Another source of **commonality** in the fifty separate criminal codes of the states is the *American Law Institute's Model Penal Code*, first promulgated in 1962. (The Institute is a private organization made up of judges, lawyers and law professors throughout the United States.) While this Code

does not have the **force of law**, some of its more innovative provisions have either been incorporated into various state penal codes or have influenced the penal codes of many states. Since its **promulgation**, the Model Penal Code has influenced the **recodification** of the criminal statutes of a majority of the states and helped bring more consistency and uniformity to the various state criminal codes in the United States.

5. Necessary Elements of a Crime

In both the state and federal criminal systems, in order to be **convicted** of virtually any crime, there must be a unity of two essential **elements**: 1) an act (**"actus reus"**) and 2) a state of mind deemed **culpable** (**"mens rea"**). The act (or sometimes a failure to act when there is a legal duty to do so) must be done with a state of mind, or intent, that makes the act **punishable.**

An act, to be criminal, must usually be **voluntary.** It is beyond the scope of this chapter to explore all the theoretical applications of this simple concept of **"action"** as to what can constitute a crime. For example, can **"unconscious"** actions or reflexive muscle actions be voluntary? Sometimes, criminal statutes punish a **failure to act** when there is a **duty to act** imposed by law. Obvious examples include the failure to file income tax returns upon the generation of sufficient income. Other duties to act include parents taking action to protect the health of their children, or the statutorily imposed duty of a driver involved in a car accident to stay and render assistance to others who may have been injured. Failures to perform these acts, again coupled with the necessary state of mind or intent, can render one **criminally liable.**

Beyond an "act" there must also generally be a **"bad state of mind"** coupled with that act in order to commit a crime. The criminal laws in the United States are not designed to punish someone for simply thinking bad thoughts. For example, if A and B are standing on a high cliff, and A is fervently hoping B will slip and fall to her death, even if B accidently slips and falls to her death, without more, A has **committed** no **crime.** A's thoughts, no matter how **reprehensible,** are not **criminal.** But if A acts on his intent (state of mind) and simply reaches out and gives B a gentle, but sufficient nudge, causing B's fatal fall, A has committed murder. There is a combination of a state of mind (intent to kill), coupled with an act (a push) that together combine in the consequential fall and death of B. This rather obvious example of a combination of act and intent (or state of mind) with a necessary consequence the public deems worthy of punishment, however, is not always so easily analyzed.

Sometimes the mens rea of a particular crime is expressed in terms of a **perpetrator** knowingly engaging in a voluntary act deemed criminal such that his general intent to so act **completes the crime.** In other situations the **intent** element is expressed in terms of the actor doing not just the act, but doing the acting with an intent focused on bringing about a particular consequence flowing from the act. This can be referred to as **"specific intent."** Other criminal statutes involve doing some intentional act, but without a specific wish for the exact consequences that result from that act. Sometimes this kind of intent is referred to as **criminal negligence** or **recklessness.** There are even times when an actor's mens rea does not matter at all. Here someone can be punished for simply performing the prohibited act without regard to his or her mental state or intent. Such **strict liability crimes** (e.g., **statutory rape**) are usually found in regulatory criminal statutes where the legislature fails to proscribe the

mens rea necessary to violate that statute and it is up to the courts to determine what kind of intent, if any, is necessary to commit that particular crime.

In a recent federal case, a defendant in a regulatory offense case (unlawful storing of hazardous waste) raised a so-called "diminished capacity" defense, arguing a debilitating mental condition. Such prosecutions increased in recent years as environmental dangers became a public concern. In this example, the defendant argued that his mental capacity was so diminished he did not know what he was doing was unlawful, and he thus lacked the necessary intent (see Section 8.3, infra). Such defences are common in many specific intent crime, but the court here, relying in part on the Model Penal Code (see Section 4, supra), rejected the defense and held the defendant need only know that he was storing the material, not that he knew it was unlawful.

These different mental states of the **actor** applicable to any given crime can, as just noted, create many layers of analysis and complexity in determining whether and to what extent an actor is **guilty** of some **criminal conduct.** These states of mind can be described as **"knowingly"**; **"intentionally"**; **"fraudulently"**; **"willfully"**; **"corruptly"**; "with the intent to..."; and many others. These different and varying descriptors of mental states make generalizations difficult and require a focused analysis on a crime-by-crime basis. Fortunately, many statutes specify the type of intent necessary to commit a given crime, making what was a sometimes convoluted and confusing analysis under the common law a little more straightforward.

As will be seen in the discussion of particular types of crimes, sometimes the combination of the act and state of mind do not produce the consequence intended. This failure of the intended consequence may help the actor avoid one type of crime, but still subject him to another. In our example above, if A pushes B with the intent to kill B, but B lands on a ledge a few feet down and survives, A obviously is not guilty of murder (what he intended) but can be prosecuted for **attempted murder.** He can also be guilty of **assault** with intent to cause **grave bodily harm,** a consequence he did not specifically intend, but one that was clearly within the range of his state of mind when he committed the act.

6. Types of Crimes

The common law, and the criminal statutes in the United States, proscribe a wide range of conduct. Though classifications can vary, crimes can generally be classified as follows:

1. Crimes against the person
2. Crimes against property
3. Crimes against the State/Government
4. Crimes against Community Standards
5. Crimes against Community Safety and Welfare
6. Inchoate Crimes

Representative examples of these kinds of crimes are briefly reviewed below. There are other crimes, state and federal, far too numerous to set out here, based either in the common law, or created by statute, that are enforced in the United States.