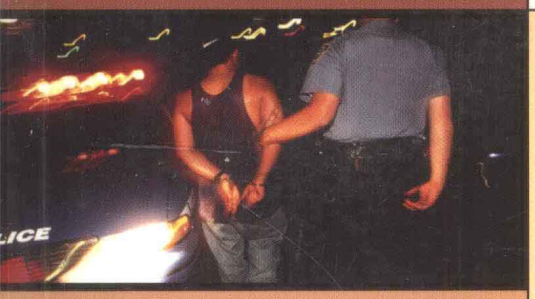
THIRD EDITION

CRIMINAL PROCEDURE



JOHN M. SCHEB & JOHN M. SCHEB, II

THIRD EDITION

Criminal Procedure

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DISCLAIMER

In this textbook the authors have attempted to present the general principles of substantive and procedural criminal law. However, because of the variance in statutes and court decisions from state to state, it is recommended that students and officers conduct their own research or consult with their legal advisors and not assume that principles of law applicable in other states apply in their state.

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This Book Is Dedicated to
Amy Elizabeth Scheb

About the Authors

JOHN M. SCHEB was born in Orlando, Florida, in 1926. He entered the practice of law in 1950. He served as municipal judge in Sarasota, Florida, from 1957 to 1959. From 1959 to 1970, he served as City Attorney for the city of Sarasota. In 1974 he was appointed to the Florida District Court of Appeal, second district, a position he held until his retirement in 1992. Judge Scheb is now a Senior Judge for the Florida Court System and Distinguished Professorial Lecturer at Stetson University College of Law in St. Petersburg. He holds the B.A. from Florida Southern College, the J.D. from the University of Florida, and the LL.M. from the University of Virginia.

JOHN M. SCHEB II was born in Sarasota, Florida, in 1955. He attended the University of Florida from 1974 to 1982, receiving the B.A., M.A., and Ph.D. in political science. He is now Professor of Political Science at the University of Tennessee, where he teaches courses in criminal law, constitutional law, administrative law, judicial process, and law in society. Professor Scheb has authored numerous articles in professional journals and is coauthor, with Otis H. Stephens Jr., of *American Constitutional Law*, Third Edition (West/Wadsworth, 2003).

Preface to the Third Edition

This textbook is intended to furnish students in criminology, criminal justice, pre-law, political science, and paralegal studies a concise yet comprehensive introduction to substantive and procedural criminal law. The book is also an appropriate reference for the criminal justice professional who needs to better understand the legal environment in which he or she must function. Of course, laws vary substantially across jurisdictions, and this text is not intended to be a substitute for independent legal research or competent legal advice.

Criminal law is among the most dynamic fields of American law. In this Third Edition of *Criminal Procedure,* we have tried to capture some of the important developments that have taken place in the three years since the Second Edition was completed. All of the chapters have been thoroughly updated, and several new excerpts from judicial decisions have been added. Some chapters have been substantially reorganized to make them more coherent and reader-friendly.

To enhance the book's pedagogical utility, we have expanded the use of examples and the "Case-in-Point" feature, which has proved popular in previous editions. We have also incorporated a new feature, "Supreme Court Perspective," that appears in a number of chapters and highlights recent decisions of the U.S. Supreme Court dealing with issues of criminal law and procedure.

Recognizing the increasing importance of the Internet in legal research, we have expanded our treatment of web-based research in our appendix on legal research methods. We have also incorporated "web-based research activities" into each of the chapters. We hope these changes make this book even more useful to students, instructors, and professionals.

Acknowledgments

We would like to thank Donna Buchholz, Esq., who recently received her J.D. degree from Stetson University College of Law; David Grammar Jr., Esq., who has retired from a successful practice of law in Albuquerque, New Mexico; and Sarah Palmer, Esq., staff attorney, Second District Court of Appeal, Lakeland, Florida. Each has contributed by reviewing manuscripts of various chapters. Sally G. Waters, Esq., research librarian at Stetson University College of Law, St. Petersburg, Florida,

reviewed our appendix on legal research and added up-to-date information on computerized legal research and use of the Internet.

We also wish to express our gratitude to Keith Clement and John Barbrey, political science graduate students at the University of Tennessee, who provided helpful research assistance in the area of sentencing laws.

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Finally, we thank our wives, Mary Burns Scheb and Sherilyn Claytor Scheb, for their patience and support, without which the project could not have been undertaken, much less completed.

Naturally, we assume full responsibility for any errors contained herein. We welcome comments and suggestions from our readers.

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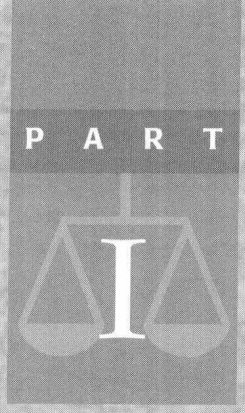
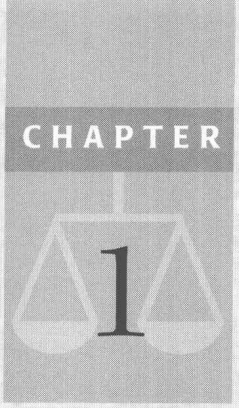


Legal Foundations of Criminal Justice

CHAPTER



1 Fundamentals of Criminal Law and Procedure

CHAPTER OUTLINE

Introduction

One of the fundamental problems facing any society is how to achieve social control—protecting people's lives and property and establishing socially desirable levels of order, harmony, safety, and decency. Societies have developed several informal means of achieving this control, including family structures, social norms, and religious precepts. In contrast, law is a formal means of social control. Law can be defined as a body of rules prescribed and enforced by government for the regulation and protection of society. Criminal law is that branch of the law prohibiting certain forms of conduct and imposing penalties on those who engage in prohibited behavior.

All modern societies have developed systems for administering criminal justice. In democratic societies such as ours, a person cannot be convicted of a crime unless he or she has committed a specific offense against a law that provides for a penalty. This principle is expressed in the maxim ***nullen crimen, nulla poena, sine lege,*** a Latin saying that means "there is no crime, there is no punishment, without law." In the United States, formal law governs every aspect of criminal justice, from the enactment of criminal prohibitions to the enforcement of those prohibitions and the imposition of punishment.

Our criminal law prescribes both substantive and procedural rules governing the everyday operation of the criminal justice system. **Substantive criminal law** prohibits certain forms of conduct by defining crimes and establishing the parameters of penalties. **Procedural criminal law** regulates the enforcement of the substantive law, the determination of guilt, and the punishment of those found guilty of crimes. For example, although substantive law makes the possession of heroin a crime, the procedural law regulates the police search and seizure that produce the incriminating evidence. The substantive law makes premeditated murder a crime; the procedural law determines the procedures to be observed at trial and, if a conviction ensues, at sentencing.

Figure 1.1 provides an overview of the system of criminal law and procedure that exists in this country. The figure suggests three fundamental principles at work:

1. **Constitutional supremacy.** In keeping with the ideal of the **rule of law,** the entire system of criminal law and procedure is subordinate to the principles and provisions of the United States Constitution. The Constitution sets forth the powers of government, the limits of those powers, and the rights of individuals. The Constitution thus limits government's power to make and enforce criminal sanctions in several important ways. These limitations are enforced by **judicial review,** which is the power of courts of law to invalidate substantive laws and procedures that are determined to be contrary to the Constitution.
2. **Federalism.** There is a fundamental division of authority between the national government in Washington, D.C., and the fifty state governments. Although both levels of government have authority and responsibility in the realm of criminal justice, most of the day-to-day peacekeeping function is exercised by the states and their political subdivisions (primarily counties and cities). Each of the states has its own machinery of government as well as its own constitution that empowers and limits that government. Each state constitution imposes limits on the criminal justice system within that state. Of course, the provisions of the state constitutions, as well as the statutes adopted by the state legislatures, are subordinate to the provisions of the U.S. Constitution and the laws adopted by Congress.

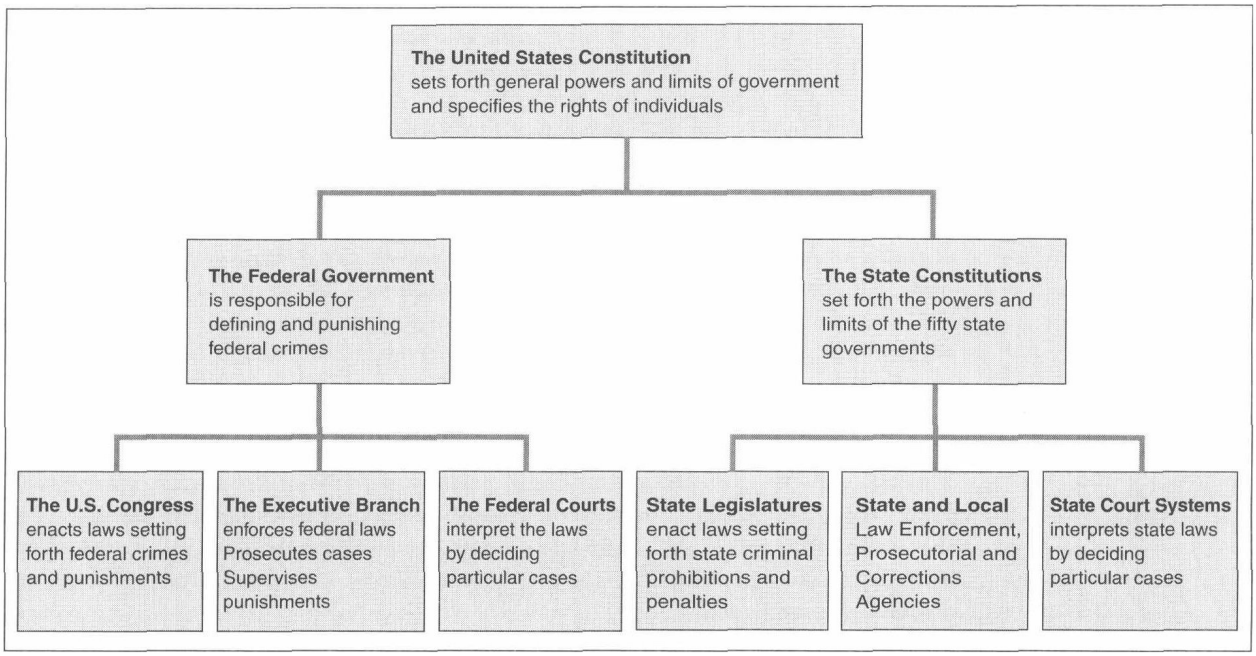


FIGURE 1.1 Overview of the American System of Criminal Law and Procedure

3. **Separation of powers.** The national government and each of the fifty state governments are constructed on the principle that legislative, executive, and judicial powers must be separated into independent branches of government. Thus, the federal government and the states have their own legislative branches, their own executive branches, and their own system of courts. The legislative branch is responsible for enacting laws that specify crimes and punishments. The executive branch is responsible for enforcing those prohibitions and for carrying out the punishments imposed by the judicial branch, but it is the judicial branch that interprets the laws and ensures that persons charged with crimes receive fair treatment by the criminal justice system.

What Is a Crime?

Every crime involves a wrongful act (***actus reus***) specifically prohibited by the criminal law. For example, in the crime of battery, the *actus reus* is the striking or offensive touching of another person. Even the failure to take action can be considered a wrongful act if the law imposes a duty to take action in a certain situation. For example, a person who fails to file a federal income tax return is guilty of a federal offense.

In most cases, the law requires that the wrongful act be accompanied by criminal intent (***mens rea***). Criminal intent does not refer to a person's motive or reason for acting, but merely to having formed a mental purpose to act. To convict a person of a crime, it is not necessary to know why a person committed a crime. It is only necessary to show that the individual intentionally committed a prohibited act. An unintentional act is usually not a crime although, as we will discover, there are exceptions to this principle. Moreover, in certain instances, one may be held

criminally responsible irrespective of intent. Crimes of this latter nature are classified as **strict liability offenses.** A good example of a strict liability offense is selling liquor to a minor.

Felonies and Misdemeanors

Criminal law distinguishes between serious crimes, known as **felonies,** and less serious offenses, called **misdemeanors.** Generally speaking, felonies are offenses for which the offender can be imprisoned for more than one year; misdemeanors carry jail terms of less than one year. Common examples of felonies include murder, rape, kidnapping, arson, assault with a deadly weapon, robbery, and grand larceny. Typical misdemeanors include petit theft, simple assault and battery, public drunkenness, disorderly conduct, prostitution, gambling, and various motor vehicle infractions.

Societal Interests Served by the Criminal Law

We can distinguish among types of crimes by the underlying societal interests that give rise to criminal prohibitions. Obviously, government has a duty to protect the lives and property of citizens—this is the essence of the social contract on which democratic government is based. But society also has an interest in protecting the public peace, order, and safety. Traditionally, the preservation of public morality has been regarded as an important function of the criminal law, although recently this notion has come under attack. Increasingly, the protection of the public health and the preservation of the natural environment are being recognized as societal interests that should be furthered by the criminal law. Finally, society has an interest in efficient and honest public administration and, in particular, the administration of justice.

Crime: An Injury Against Society

As suggested by the previous discussion of the societal interests served by the criminal law, our legal system regards crimes not merely as wrongs against particular victims but as offenses against the entire society. Indeed, there does not have to be an individual victim for there to be a crime. For example, it is a crime to possess cocaine, even though it is unlikely that a particular individual will claim to have been victimized by another person's use of the drug. This is a crime because society, through its governing institutions, has made a collective judgment that cocaine use is inimical to the public welfare. Similarly, certain consensual sexual acts (for example, sodomy) remain crimes in some jurisdictions because communities continue to regard such actions as contrary to public morality. Of course, as society evolves and its standards change, behaviors that were once defined as crimes (for example, fornication) are no longer subject to criminal sanction. Over time, the particular prohibitions of the criminal law more or less reflect an evolving social consensus about both what is right and wrong and what is public and private. When a particular criminal prohibition is no longer supported by societal consensus (for example, adultery), it is apt to be unenforced or be stricken from the laws.

Because crime is an injury against society, government, as society's legal representative, brings charges against persons accused of committing crimes. In the United States, we have a federal system—that is, a division of power and responsibility between the national and state governments. Both the national government

and the states enact their own criminal laws. Thus, both the national government and the state governments may prosecute persons accused of crimes. The national government initiates a prosecution when a federal (national) law has been violated; a state brings charges against someone who is believed to have violated one of its laws. (Chapter 2 discusses the organization of courts and the various actors in the criminal justice system.)

Criminal Responsibility

The criminal law, indeed our entire legal system, rests on the idea that individuals are responsible for their actions and must be accountable for them. This is the essential justification and rationale for imposing punishments on persons convicted of crimes. On the other hand, society recognizes that certain individuals (for example, young children) lack the capacity to appreciate the wrongfulness of their conduct. Similarly, factors beyond individuals' control can lead them to commit criminal acts. In such instances the law exempts individuals from responsibility. Moreover, there are situations in which acts that would otherwise be crimes might be justified. The best example of this is committing a homicide in self-defense. Individuals can invoke a host of defenses beyond a simple denial of guilt. Indeed, a substantial body of law is devoted to the topic of **criminal responsibility** and defenses.

The Role of the Crime Victim

Because the government prosecutes criminals on behalf of society, the **victim** of a crime is not a party to the criminal prosecution. By filing a complaint with a law enforcement agency, a victim initiates the process that leads to prosecution, but once the prosecution begins, the victim's participation is primarily that of being a witness. Quite often, victims feel lost in the shuffle of the criminal process. They sometimes feel that the system is insensitive or even hostile to their interests in seeing justice done. Some states are now taking steps to address victims' concerns. Despite some measures being proposed and others that have been adopted, crime victims remain secondary players in the criminal justice system. The principal parties in a criminal case are the prosecution (that is, the government) and the defendant (that is, the accused person). In some situations, however, the victim might have another remedy: a civil suit to recover damages for losses or injuries suffered.

Civil and Criminal Law

The criminal law is not the only body of law that regulates the conduct of persons. The civil law provides remedies for essentially private wrongs, offenses in which the state has a less direct interest. Most civil wrongs are classified as **breaches of contract** or **torts.** A breach of contract occurs when a party to a contract violates the terms of the agreement. A tort, on the other hand, is a wrongful act that does not violate any enforceable agreement but nevertheless violates a legal right of the injured party. Common examples of torts include wrongful death, intentional or negligent infliction of personal injury, wrongful destruction of property, trespass, and defamation of character. A crime normally entails intentional conduct; thus, a driver whose car accidentally hits and kills another person would not necessarily be

guilty of a crime, depending on the circumstances. If the accident resulted from the driver's negligence, the driver would have committed the tort of wrongful death and would be subject to a civil suit for damages.

The criminal law and the civil law often overlap. Conduct that constitutes a crime can also involve a tort. For example, suppose Randy Wrecker intentionally damages a house belonging to Harvey Homeowner. Wrecker's act might well result in both criminal and civil actions being brought against him. Wrecker may be prosecuted by the state for the crime of willful destruction of property and may also be sued by Homeowner for the tort of wrongful destruction of property. The state would be seeking to punish Wrecker for his antisocial conduct, whereas Homeowner would be seek-ing compensation for the damage to his property. The criminal case would be des-ignated *State v. Wrecker* (or *People v. Wrecker*, or even *Commonwealth v. Wrecker*, depending on the state); the civil suit would be styled *Homeowner v. Wrecker*.

The Origins and Sources of the Criminal Law

Many antisocial acts classified as crimes have their origin in the norms of primitive societies. Humanity has universally condemned certain types of behavior since ancient times. Acts such as murder, rape, robbery, and arson are considered ***mala in se,*** or inherent wrongs. Other acts that the modern criminal law regards as offenses are merely ***mala prohibita;*** they are offenses only because they are so defined by the law. Many so-called victimless crimes, such as gambling or possession of marijuana, are generally not regarded as offensive to universal principles of morality. Rather, they are wrong simply because the law declares them wrong. In the case of *mala prohibita* offenses, society has made a collective judgment that certain conduct, although not contrary to universal moral principles, is nevertheless incompatible with the public good.

Development of Law in the Western World

The general consensus is that law developed in Western civilization as leaders began formalizing and enforcing customs that had evolved among their peoples. Eventually, informal norms and customs came to be formalized as codes of law. The Code of Hammurabi regulated conduct in ancient Babylonia some two thousand years before Christ. In the seventh century B.C., Draco developed a very strict code of laws for the Athenian city-states. Even today, one hears strict rules or penalties characterized as being "Draconian." These developments influenced the Romans in their development of the Twelve Tables in the fifth century B.C. And, of course, long before the time of Jesus, the Hebrews had developed very elaborate substantive and procedural laws.

In the sixth century A.D., the Emperor Justinian presided over a codification of the Roman law that would prove to be very influential in the evolution of law on the European continent. The Napoleonic Code, promulgated under Napoleon Bonaparte in 1804 as a codification of all the civil and criminal laws of France, was based largely on the Code of Justinian. The Napoleonic Code became a model for a uniform system of law for Western European nations. This is why the legal systems of Western