

Criminal Law

Summary

The origins and purposes of criminal law consist of an examination of the manner in which a civilized society governs the conduct and interrelationships of its inhabitants. It involves the powers of and restraints upon the authority of government to establish, prohibit, and punish crime in varying degrees from offense to offense, based upon legislative determinations of the gravity of the offenses and the appropriate punishment which should be imposed for violations. There are four primary sources of criminal law:

1. **Common Law Crimes** refer to crimes that were historically created and enforced by the courts in the absence of statutes defining the offense. There are no federal common law crimes, as all federal crimes are set forth by statute.
2. **Statutory Crimes** are those crimes that are established in law by legislation set forth in state and federal statutes. Each statutory crime states what conduct is prohibited and the punishment for violation.
3. **Constitutional Crimes** refer to those crimes actually set forth in the Constitution, such as treason.
4. **Administrative Crimes** are crimes enacted by administrative agencies, based upon legislative powers delegated to the agency by a legislative body, which also stipulated the criminal sanctions for violation.

Crimes are generally categorized as

- a) **Serious** = Felonies
- b) **Less Serious** = Misdemeanors
- c) **Minor Infractions** = Petty Offenses / Traffic Matters

The general purposes of punishment involve social and/or public (not individual) retribution, crime deterrence and crime prevention, focusing on incapacitation and rehabilitation of the criminal or combination of all.

Crimes are generally classified as:

- a) **Crimes against persons** - Examples include murder, manslaughter, battery, assault and kidnapping
- b) **Crimes against property** - Examples include larceny, malicious mischief, receipt of stolen property, & burglary
- c) **Incomplete or inchoate Crimes** - Examples included attempt, solicitation and conspiracy to commit crime

Crimes are defined in terms of required acts and a required state of mind, known as "intent". These requirements are known as elements, each of which the prosecution must prove beyond a reasonable doubt. All crimes, except for strict liability crimes, have two primary features:

- a) **actus reus**, which is a criminal act or a failure to act when under a duty to act. Actus reus is required for all crimes, as mere thoughts or words alone are insufficient and constitutionally protected. The act must be a voluntary physical act. Exception – In limited instances, certain uses of words under specific circumstances may constitute "verbal acts", such as inciting to riot.

- b) **mens rea**, which is Latin for “guilty mind”, is the mental act/intent or the willful, intentional action of the accused that makes them morally blameworthy. Since the only direct proof of mens rea is the admissions or confessions of the defendant, this aspect of a crime is usually implied from the actus reus and other circumstances in the case. If prosecutors can offer a motive, a reason behind breaking the law, jurors are more likely to believe that the defendant had “mens rea”.

All elements of a crime, including intent, may be proven by circumstances or circumstantial evidence, as well as by direct evidence. People who unintentionally commit a crime are morally innocent. This is known as “mistake of fact.” Someone who honestly misperceives reality lacks “mens rea” and should not be charged.

Mental State

Intent is the legally required mental state of the perpetrator in committing the offense. Crimes have various forms of intent or mens rea. They are:

- A. **General Intent (Knowingly)** – Requires proof the accused acted with a general awareness of the factors constituting the crime and knew s/he was acting in a certain way. Motive is irrelevant. Example – Battery, Kidnapping
- B. **Specific Intent (Purposefully)** - Requires proof the accused committed the act and did so with the specific intent to cause a particular result. This includes any theft crime, any crime attempted, and burglary. Example – Forgery
- C. **Malice (Recklessly)** – Reckless disregard of a known or apparent danger. Example – Arson
- D. **Strict Liability or No Intent (Negligently)** – Crimes that do not require a general awareness of the factors constituting a crime, thus removing the mens rea requirement. The accused can be convicted solely based on proof that s/he violated the acts prohibited by statute. Example – Serving alcoholic beverages to a minor or traffic offenses
- E. **Transferred Intent** – If a person intends to commit a crime to one person, but actually ends up accidentally or otherwise harming another unintended person, the accused can be found guilty of the crime against the unintended victim, as well as an attempted crime against the intended victim. For example, if Jack throws a rock at John’s car, intending to hit John’s car, but instead hits Jill’s car, Jack’s intent to hit John’s car is transferred to Jill and Jack can be charged with the crime against Jill and attempted crime against John.
- F. **Constructive Intent** – Exists in situations where the accused did not intend any particular harm to occur, but if through their actions a high risk of injury existed, s/he can be held criminally responsible for the consequences. For example, if a woman is recklessly driving drunk and accidentally kills a pedestrian on a sidewalk, she is criminally liable for the death of the pedestrian.

Physical Act

- 1. **Acts of Omission** – Law does not require you to act if you witness someone being injured unless:
 - a. by statute (ex. tax return)
 - b. under contract (ex. lifeguard/nurse)
 - c. relationship (ex. spouses; parent/child)
 - d. voluntarily assumed duty (cannot stop and change mind) Reason: may inhibit someone else from responding (ex. someone drowning)
 - e. you created the danger (ex. you pushed someone into the pool)

Self-Defense

Self-defense is a defense that is available to a person. A person has the right to stand his ground and defend himself when he is faced with the threat of bodily injury. A fear of bodily injury is not enough to justify using force in self-defense. To justify acting in self-defense, the circumstances must be enough that a reasonable person placed in a similar situation would be afraid of being physically harmed. A person must be acting in response to that reasonable fear, and not in the spirit of revenge.

The right to act in self-defense exists only as long as the threatened danger continues to exist. A person is not justified in using physical force in self-defense once the immediate threat of suffering bodily harm is gone. A person acting in self-defense may only use such force as is necessary to prevent injury. Any use of force beyond that limit is excessive and not allowed under the law. Words alone, no matter how threatening or outrageous, are never enough to justify acting in self-defense. There must be some physical act accompanying the words that would cause a reasonable person to fear for their safety, before acting in self-defense can be justified. If evidence of self-defense is present, the state has the burden to prove beyond a reasonable doubt that a defendant did not act in self-defense. A defendant must be found not guilty if the state fails to prove it.

Constructive Possession

The law recognizes two kinds of possession: actual possession and constructive possession. A person who knowingly has direct physical control over a thing is in actual possession of it. The element of "knowledge" is present if an act or a failure to act is done voluntarily and intentionally. A mistake, accident, or innocent reason does not indicate "knowledge". A person who is not in actual possession of a thing, but who has both the ability and the intention to exercise control over that thing is in constructive possession of it. A person in constructive possession of an item is equally responsible and equally criminally liable as a person in actual possession of the item. The law also recognizes that possession may be sole or joint. If one person alone has actual or constructive possession of a thing, that is sole possession. If two or more people share actual or constructive control of a thing, that is joint possession. All people in joint possession of a thing are equally responsible and equally criminally liable.

Criminal Procedure

Summary

Criminal Procedure refers to the methods used when a person is accused of illegal actions. This includes but not limited to when evidence can be seized, when a person can be searched, and when eyewitnesses can be investigated. This purpose of criminal procedure is to assure constitutional standards of fairness ("due process") and instill confidence that the result is fair and just. Society places a high value on freedom. Thus, the state and federal constitutions make it hard to take that freedom away. Thus, this results in the appearance that the courts protect the criminals instead of the victims. Yet, if this was not the case, society would risk punishing an innocent person.

Constitutional Rights

Under the United States criminal justice system, there are two fundamental aspects. The first one is the defendant is innocent until proven guilty. The second one is the burden of proof falls on the prosecution. In criminal cases, the prosecution must prove beyond a reasonable doubt of the defendant's guilt. Defendants are granted other rights under the Constitution. These include the defendant's right to remain silent, the right to confront witnesses, right to a public trial, right to a jury trial, right to be represented by an attorney, right to adequate representation, right to a speedy trial, and the right not to be placed in double jeopardy. The following illustrates where these rights originate:

1. **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.
 - a) unreasonable searches and seizures
 - b) probable cause
2. **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 offence 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.
 - a) double jeopardy
 - b) remain silent
3. **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.
 - a) speedy trial
 - b) public trial
 - c) jury trial
 - d) be informed of the nature and cause of the charges against oneself
 - e) confront witnesses
 - f) compulsory process for obtaining witnesses
 - g) adequate represented by attorney

Important Terms

Discovery - Discovery is the formal procedures to obtain information held by opposing parties before trial. It is an attempt to “discover” pertinent facts such as the other side’s version of facts, what witnesses know, and any other evidence. Information obtained through discovery is broad and is not limited to what can be used in trial. Federal courts and most state courts allow any information that is ‘reasonably calculated to lead to the discovery of admissible evidence’.

Exclusionary Rule - Exclusionary rule excludes evidence obtained in violation of the Fourth Amendment from being admitted when the evidence was obtained in violation of the defendant’s constitutional rights. The exclusionary rule is also appropriate when agents, who have obtained search warrants have disregarded the terms and conditions.

Exculpatory Evidence - Evidence that clears a defendant from guilt

Miranda Rights - The rights an officer must advise a person being arrested. This includes the right to remain silent, the right to speak to an attorney, the right to have an attorney present during questioning, the right to have an attorney appointed if indigent, and a warning that anything said could be used as evidence.

- It is not necessary for an officer to give the Miranda Warning in order to arrest a person. Officers will give it if they are going to ask that person interrogating questions.
- Miranda warnings only protect a person against self-incrimination.
- Police are allowed to ask routine questions in order to establish identity without reading the Miranda warning.
- Police can give a breathalyzer without giving the Miranda warning.

Who was Ernesto Miranda? - In 1963, Ernesto Miranda, was detained by the Phoenix Police Department for allegedly raping and kidnapping an 18 year old girl. Miranda signed a written confession, after two hours of interrogation. Apparently, he was not told that he did not have to talk and that he could have an attorney present. The confession was allowed during his trial and Miranda was convicted and sentenced up to 20 years in prison. Miranda's appeal went to the Supreme Court and in a landmark ruling the court decided defendants had the right to stay silent and that statements by defendants in police custody could not be used in court without defendants being advised of their rights. Miranda was retried without the confession. Additional evidence surfaced and he was convicted again. He served 11 years and was paroled in 1972. He was arrested and sent to prison several times after that. In 1976, Miranda was stabbed during an argument at a bar and died. The suspect in Miranda's death chose to exercise his right of remaining silent. The suspect was released and no one was ever charged in the murder of Ernesto Miranda.

Case Strategy

1. Look up the **statute** (law passed by legislature) or the **ordinance** (same thing as a
2. Meet with your Senior Attorney. Advise them on what you found out during your witness interviews. Together, determine a strategy for court. Basically, this is a plan on how you are going to prove your case. If you are prosecution, you want to have the strongest possible case that will prove beyond a reasonable doubt that the defendant did, in fact, commit the crime in question. If you are defense, you want to be able to cast a doubt on the prosecution's case. You want to be able to poke enough holes in their story to not meet the burden of proof. Remember, as defense, you do not have to prove your client's innocence. Defense does not have to prove anything.
3. Contact any witnesses with any follow up questions.
4. Contact opposing council. Defense, find out what evidence the prosecution may have. Remember, if your case is weak, you may want to negotiate.
5. Arrange to meet with your client and/or any witnesses prior to court. Court starts promptly at 5:30 p.m. Allow plenty of time to talk with witnesses so you will be finished in time. Court will not be held up.

Please Note: other than Trial by Peers court peer counselors may only meet their clients in person at the Trial by Peers office or at their Senior Attorneys office.

Defense Strategy

The defense strategy becomes apparent once the defense council finds out what evidence the prosecution may have and the defendant's version of what happened. The strategy itself is not the version of the story the defendant. There may be numerous versions of the "truth" that exist. The defense strategy is fitting together the version of events that best benefit the defense. This does not mean making up false stories. For example: a victim's version of an assault may be similar to the defendant's except for who initiated the confrontation. Self-defense may be an explanation for striking the victim. The strategy should:

1. be consistent with objective explanations for evidence (for example, why the defendant's fingerprints were found at the scene of a crime).
2. have the potential to gain sympathy of the jury (for example, the victim had been bullying the defendant for weeks prior to the incident in question).
3. should give an explanation for events that took place

Coaching the Defendant

Defense counselors are obligated to provide the strongest defense as possible. This includes preparing the defendant for court. This does not mean to tell them what to say. Instead, it means properly readying the defendant for trial by letting them know what to expect. This can include:

1. using interviewing techniques that will stimulate their memory
2. have defendants relate to events in chronological order
3. fully explain to the defendant the charge/s against him/her
4. letting them aware of the evidence the prosecution has against them
5. advising them what questions you are going to ask them on the stand
6. explaining the importance of not straying from what is asked of them

Common Defenses

1. Presumption of Innocence – A defendant is innocent until proven guilty. It is the prosecutor's job to convince the jury of their guilt. If they cannot prove this, then the defendant goes free. The defendant does not have to say or do anything on his/her behalf.
2. Proving Guilt Beyond a Reasonable Doubt – This is a hard standard to meet. All defense has to do is argue that doubt exists. The prosecutor did not do a good enough job in proving the defendant's guilt.
3. Self-Defense – The underlying belief that a person has a right to protect oneself. The defendant admits to the crime but is justified because of they were threatened by the other person's actions. When considering this defense, you must think about who was the aggressor, if the force used by the defendant was reasonable, and if the defendant's belief that self-defense was necessary a reasonable one.

Handouts:

1. Common Offenses in TBP

NRS 200.481 Battery

"Battery" means any willful and unlawful use of force or violence upon the person of another.

NRS 200.571 Harassment

A person is guilty of harassment if:

(a) Without lawful authority, the person knowingly threatens:

- (1) To cause bodily injury in the future to the person threatened or to any other person;
 - (2) To cause physical damage to the property of another person;
 - (3) To subject the person threatened or any other person to physical confinement or restraint;
- or

(4) To do any act which is intended to substantially harm the person threatened or any other person with respect to his physical or mental health or safety; and

(b) The person by words or conduct places the person receiving the threat in reasonable fear that the threat will be carried out.

NRS 202.020 Purchase, consumption or possession of alcoholic beverage by minor

1. Any person under 21 years of age who purchases any alcoholic beverage or any such person who consumes any alcoholic beverage in any saloon, resort or premises where spirituous, malt or fermented liquors or wines are sold is guilty of a misdemeanor.

NRS 202.280 Discharging firearm in or upon public streets or in places of public resort; throwing deadly missiles.

1. Unless a greater penalty is provided in [NRS 202.287](#), a person, whether under the influence of liquor, a controlled substance or otherwise, who maliciously, wantonly or negligently discharges or causes to be discharged any pistol, gun or any other kind of firearm, in or upon any public street or thoroughfare, or in any theater, hall, store, hotel, saloon or any other place of public resort, or throws any deadly missile in a public place or in any place where any person might be endangered thereby, although no injury results, is guilty of a misdemeanor.

NRS 202.350 Manufacture or importation of dangerous weapon; possession or use of silencer or dangerous weapon; carrying concealed weapon without permit; penalties; exceptions.

1. Except as otherwise provided in this section and [NRS 202.3653](#) to [202.369](#), inclusive, it is unlawful for a person within this state to:

(a) Manufacture or cause to be manufactured, or import into the state, or keep, offer or expose for sale, or give, lend or possess any knife which is made an integral part of a belt buckle or any instrument or weapon of the kind commonly known as a switchblade knife, blackjack, slung shot, billy, sand-club, sandbag or metal knuckles; or

(b) Carry concealed upon his person any:

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(1) Explosive substance, other than ammunition or any components thereof;

(2) Dirk, dagger or machete;

(3) Pistol, revolver or other firearm, or other dangerous or deadly weapon; or

(4) Knife which is made an integral part of a belt buckle.

2. Except as otherwise provided in this section, it is unlawful for a person to possess or use a:

(a) Nunchaku or trefoil with the intent to inflict harm upon the person of another; or

(b) Machine gun or a silencer.

NRS 203.050 Affray

If two or more persons shall, by agreement, fight in a public place, to the terror of the citizens of this state, the persons so offending commit an affray and are guilty of a misdemeanor.

[1911 C&P § 329; RL § 6594; NCL § 10277]-(NRS A 1967, 489)

NRS 205.240 Petit larceny

1. Except as otherwise provided in [NRS 205.220](#), [205.226](#), [205.228](#) and [475.105](#), a person commits petit larceny if the person:

(a) Intentionally steals, takes and carries away, leads away or drives away:

(1) Personal goods or property, with a value of less than \$250, owned by another person;

(2) Bedding, furniture or other property, with a value of less than \$250, which the person, as a lodger, is to use in or with his lodging and which is owned by another person; or

(3) Real property, with a value of less than \$250, that the person has converted into personal property by severing it from real property owned by another person.

(b) Intentionally steals, takes and carries away, leads away, drives away or entices away one or more domesticated animals or domesticated birds, with an aggregate value of less than \$250, owned by another person.

NRS 205.275 Offense involving stolen property

1. A person commits an offense involving stolen property if the person, for his own gain or to prevent the owner from again possessing his property, buys, receives, possesses or withholds property:

(a) Knowing that it is stolen property; or

(b) Under such circumstances as should have caused a reasonable person to know that it is stolen property.

NRS 206.010 Destruction or damage of property by unlawful assembly

Whenever any persons unlawfully assembled pull down, damage or destroy any dwelling house or other building, or any shop, steamboat, vessel or other property, they severally are guilty of a public offense proportionate to the value of the property damaged or destroyed.

NRS 244.3691 "Graffiti" defined

As used in this section and [NRS 244.3693](#) and [244.3695](#), "graffiti" means any unauthorized inscription, word, figure or design that is marked, etched, scratched, drawn or painted on the public or private property, real or personal, of another, which defaces such property.

NRS 392.480 Disturbance of school; threatening or assaulting pupil or school employee; interference with persons peaceably assembled within school for school district purposes

1. It is unlawful for any person to disturb the peace of any public school by using vile or indecent language within the building or grounds of the school.

2. It is unlawful for any person to threaten or assault any pupil or school employee:

(a) Within the building or grounds of the school;

(b) On a bus, van or any other motor vehicle owned, leased or chartered by a school district to transport pupils or school employees; or

(c) At a location where the pupil or school employee is involved in an activity sponsored by a public school.

3. It is unlawful for any person maliciously and purposely in any manner to interfere with or disturb any persons peaceably assembled within a building of a public school for school district purposes.

NRS 453.336 Unlawful possession not for purpose of sale

1. A person shall not knowingly or intentionally possess a controlled substance, unless the substance was obtained directly from, or pursuant to, a prescription or order of a physician, physician's assistant, dentist, podiatric physician, optometrist or veterinarian while acting in the course of his professional practice, or except as otherwise authorized by the provisions of [NRS 453.011](#) to [453.552](#), inclusive.

NRS 453.566 Unlawful use or possession.

Any person who uses, or possesses with intent to use, drug paraphernalia to plant, propagate, cultivate, grow, harvest, manufacture, compound, convert, produce, prepare, test, analyze, pack, repack, store, contain, conceal, inject, ingest, inhale or otherwise introduce into the human body a controlled substance in violation of this chapter is guilty of a misdemeanor.

(Added to NRS by 1981, 407)

WITNESSES

PROSECUTOR

Who do you contact first?

Victim

Who else do you contact?

All witnesses listed in police report.

Arresting police officer.

All others named by any witness you speak with.

Who can't you contact?

Defendant

What do I do when I first contact a witness?

Your initial contact will be by telephone so make sure you introduce yourself and explain to the witness why you are calling them.

Be prepared to explain what the trial by peers program is, most of the witnesses will not know at this point that the case has been referred to our program.

Start by asking very open ended questions

- What happened?
- Where were you?
- What did you do/see?
- Who was present?
- Why did you do what you did?

Use follow up questions to flush out the details, identify issues and other witnesses.

DEFENSE

Defendant

All witnesses listed in police report.

Arresting police officer. All others named by any witness you speak with.

No one, all witness can be contacted.

Your initial contact will be by telephone so make sure you introduce yourself and explain to the defendant that you are their attorney.

Start by asking very open ended questions

- What happened?
- Where were you?
- What did you do/see?
- Who was present?
- Why did you do what you did?

Use follow up questions to flush out the details and identify issues, other witnesses and defenses.

Set an appointment to meet with your client in person at least once before trial.

PROSECUTOR

If this is a key witness attempt to set an appointment to meet with them in person so you can better evaluate them as a witness.

Contact other persons who are potential witnesses and use the same procedure.

What kind of issues might need follow up?

Re-contact any witness who provided you with information that conflicts with that of another witness.

Consider meeting them in person so you can better evaluate credibility.

What should I do right before trial?

- Contact all witnesses before trial to confirm they will be appearing.
- Verify that they know where the court house is and what time court is.
- Answer any questions they may have as to what will be involved in court (procedure, what is expected of them, etc. . .)
- Inform them as to what they should wear and how they should act.

Contact TBP Staff and make sure your witnesses have all been subpoenaed.

What do I do if a witness doesn't show up for trial?

As long as you served them with a subpoena you can request a continuance from the court, if they were not subpoenaed, the court will probably deny the continuance.

DEFENSE

Contact other persons who are potential witnesses and use the same procedure.

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As long as you served them with a subpoena you can request a continuance from the court, if they were not subpoenaed, the court will probably deny the continuance.

PROSECUTOR

What do I do if the witness changes their testimony on the stand?

You can then impeach the witness by using a prior inconsistent statement.

What do I do if the witness does not remember?

Attempt to refresh their recollection. You can do this by offering to let them see a prior statement that they wrote immediately after the incident.

DEFENSE

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