



Lady justice is blindfolded to symbolize fairness. Is criminal justice really fair?

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CRIMINAL LAW

When you think of the word *law*, what comes into your mind? Perhaps images of heavy, leather-bound books sitting on a dark wooden bookshelf. Perhaps the famous “Lady Justice” statue, standing blindfolded, holding a sword in one hand and a scale in the other. Maybe it’s a robed judge banging her¹ gavel surrounded by expensively dressed lawyers and court officers in an oak-lined room as some unfortunate defendant glumly looks on. Images of law are everywhere in our culture and, as an institution, the law has an exalted position: Being a lawyer is usually taken to be a prestigious career, and knowledge of the law is considered a powerful weapon. Of course, practicing law can also be a way to make a lot of money.

These pictures are not “the law,” of course. They are symbols of law—images crafted to convey the power it has over our lives. Many aspects of this image are cultivated by legal professionals to enhance the status of their work, making them seem important and deserving of a big paycheck. Some of these images are there to show that law deserves deference—the law is serious business, and those who work in the law must be treated with respect. In the modern computer age, there is little need for leather-bound law books, and most of them are purely decorative. Judicial robes serve no practical purpose either. Gavels are fun, but there are better ways to silence a room. The law is draped with ancient symbolism—much of which is irrelevant to modern society but nonetheless persists in order to convince the public that the law matters a great deal.

Given the obsession that our culture has with all things criminal, it is unsurprising that many people think of law first and foremost as criminal law and believe that most lawyers deal with criminals in one way or another. Criminal law is only one part of a much larger legal system, however. In fact, criminal law is a relatively small part of the legal profession, and among lawyers, it tends to be less prestigious than other fields. Students who go to law school will take courses in criminal law but will also take courses in corporate law, tax law, torts, constitutional law, and real estate law, among many others. In addition, there is a distinction between criminal law (sometimes called “*crim*” by law students) and criminal procedure (often referred to as “*crim pro*”). Criminal law, also known as *substantive criminal law*, deals with the legal definitions of crimes, while criminal procedure deals with things like the conduct of trials and the limitations on the police’s ability to search a person’s property, and so on, all of which will be discussed in later chapters. Substantive criminal law is only a small sliver of the legal world, but it is a very important one for many reasons.

¹ As of 2018, there are 5,947 women judges out of 17,840 total judges in state courts, composing 33% of all judges. In the federal courts, 428 out of 870 federal judges are women (National Association of Women Judges, 2018a).

THE RULE OF LAW

LEARNING OBJECTIVE

2.1 Describe the concept of the rule of law and its importance in American society.

One useful thing to understand about our legal system is that different parts of the law serve different functions. Constitutional law determines how the American people organize their government. Tort law deals with private injuries (when one person hurts another person, say in a car accident) and only allows for monetary compensation for victims. Family law determines issues such as marriage, divorce, and adoption. Criminal law, on the other hand, can be understood as a set of lines that, if you cross them, the state will intervene and punish you—usually by taking away freedoms. Only a few other domains of law authorize the government to hold an individual against her will (laws regarding the institutionalization of the mentally ill or laws regarding immigration are other examples), and criminal law is the only portion of the law that allows the government to kill its own citizens (through execution) when we're not at war. While criminal law is not the only part of the law, it is the one that can affect our lives most dramatically.

This unique power to deprive people of their freedom makes criminal law an important part, if not the most important part, of our government. Bad criminal laws can be easily abused by powerful individual or groups who want to crush dissent or target members of marginalized groups. Almost every dictatorship in the world uses its criminal laws as a weapon against its opponents, and the prisons of the world are full of people who were sent to prison for simply disagreeing with those in charge. China can arrest a person for “creating a disturbance” (Press, 2014), and countries like Egypt and Turkey use vague antiterrorism and public safety laws to arrest journalists and other people who criticize their governments. Criminal laws are necessary to ensure law and order in a society, but they are also very dangerous things to people who love their freedom.

Because criminal law is so dangerous, democratic societies place limits on it through the principles making up what we sometimes call *the rule of law*. The rule of law is an ideal meant to prevent criminal law from becoming a tool of would-be dictators. Some of these principles are a ban on *ex post facto* laws, a ban on unclear laws (“*void for vagueness*”), and *strict construction* in legal interpretation. *Ex post facto* laws are laws that attempt to criminalize behavior that occurred before the laws were passed. For example, a law that was passed on Tuesday criminalizing the wearing of baseball hats could not be used to punish a student who wore one on Monday. This sounds obvious, but some laws are so unclear that a new interpretation of a law can function in an *ex post facto* way. For example, in one California case, a man kicked his estranged, pregnant wife in the belly, causing her to miscarry (*Keeler v. Superior Court*, 1970). At the time, the California penal code said that it was murder to kill a “human being.” Whether or not you personally believe that an unborn child is a human being, there is probably no way that the defendant could have known with certainty that he was committing murder at the time of the attack. There was no clear determination as to whether a fetus was considered a “human being”

under the law at the time. (In this case, the court ruled that it wasn't.) Without clear guidance in a case like this, it's easy to see how *ex post facto* laws can exist and be problematic.

The *vagueness doctrine* asserts that valid laws must clearly describe which acts are prohibited. Of course, all criminal laws prohibit certain activities, but there is often an issue about how broad the law must be to be effective. They must use language broad enough to apply to a variety of different situations, but not so broad that you don't know when you've violated them. Think of all the different ways that you can "assault" somebody: with a rock, with your fists, with your car; all of these are captured under the term *assault*, but what about assaulting people by yelling at them with a loudspeaker turned up so high that it makes their ears bleed? Or flinging water at them in a way that is annoying? All laws must be somewhat general to cover a bunch of different situations, but the more general they get, the more they run the risk of being too vague. The most notorious of these are loitering and public morals laws, which try to regulate something like "standing around doing nothing," which is very hard to precisely define. People should have a fair warning about when they're about to break the law, so they can make a choice about what to do.

Vague laws invite themselves to be enforced selectively by police officers, who can pick which acts violate the law and which don't. To use one famous case, in *Papachristou v. City of Jacksonville* (1972), a group of defendants challenged a city ordinance banning "wandering or strolling around from place to place without any lawful purpose or object." While some of the defendants in the case *may* have been engaged in suspicious activity, what this means isn't really clear. It is interesting to note that four of the defendants who had been cited together were Black men in the company of white women. Other cases have produced similar results. Vague laws are used by officers selectively to target people they considered undesirable: A group of middle-class white people drinking wine in front of their house is having a pleasant conversation, but a group of black men drinking beer in front of their house is loitering (Roberts, 1998). Poorly written laws can easily be applied in an unfair or biased way.

The final element of the rule of law is *strict construction*. This rule means that judges should interpret criminal laws as narrowly as possible. Whenever there are two equally plausible interpretations of a law, judges should apply the one that is more limited in scope. This prevents judges or the police from unfairly prosecuting people for violating a law that they had every reason to believe they were obeying.

Criminal Law and Common Law

America is a "common law" country, and common law principles are used in federal law as well as in laws in all but one state.² **Common law** is a legal tradition that dates to medieval England. Many important features of common law distinguish it from the *civil law* tradition used in much of the rest of the world. Most important for now, however, is the role that judges play in interpreting the law. In common law countries, judges have a lot of power in telling us what the law means: They interpret the law, and sometimes in doing so effectively create new laws. For this reason, the common law system is sometimes described as "judge-made law." Judges create

² Louisiana is the only state to not use common law, because of its history as a French colony.

new laws by writing down the reasons that they give for their interpretation, and by doing so, the judges create a binding *precedent* that the next judge must follow. (Judges are very hesitant to break with existing precedent.) The legal term for this is *stare decisis*, which translates roughly as “to stand by things decided.” Therefore, when we talk about the law in America, we refer to cases like *Marbury v. Madison*, *Miranda v. Arizona*, or *Roe v. Wade*, rather than pieces of legislation or to legal codes. In these cases, judges made influential decisions that created precedents. Effectively, they made new laws. It is also one of the reasons why politicians fight so viciously about who gets to serve on the different courts, as judges have a huge role in shaping the law.

The common law tradition shapes many aspects of our criminal justice system beyond simply how the courts render their decisions. It shapes how crimes are organized under the law, how crimes are defined, and, most important, how trials are conducted. Almost all modern crimes were originally common law crimes, and how the common law defined crimes like rape, murder, and arson has shaped how we think of them now. The way our legal system is structured is in many ways an accident of history. Other societies have legal systems that are very different and, in some ways, much better.

Federalism and Law

As was already mentioned, there is not one American criminal law. There are (at least) 54 distinct legal systems in the United States and many more depending on how you count them. There is federal criminal law, a series of laws passed by Congress and signed into law by the president. Federal laws apply all over the country and can be found in Title 18 of the US Code. There are also the legal codes of the 50 individual states, each of which was drafted by its respective state legislature. If we want to count it, we can include the common law, which still functions as a body of law standing in the background, as it were, providing judges with guides on how to interpret state and federal laws when they face ambiguities. A 53rd legal system would be the Uniform Code of Military Justice (UCMJ), which technically is a part of federal law but doesn't apply to people outside of the military. (It is in Title 10 of the US Code.) There are also the legal codes of the various territories under the control of the US government, such as Eastern Samoa and the Mariana Islands.

Alongside these is the *Model Penal Code* (MPC). This is not law per se, but it has an important influence on criminal laws around the country. The MPC was created by a group of lawyers who were a part of an influential organization known as the American Law Institute (ALI), which sought to provide order and uniformity to American law. Essentially, these lawyers looked through the different legal systems around the United States and developed a legal code that they believed made more sense than the haphazard laws that existed in many states. These laws became the MPC. These rules have been used by the states to change or reform the existing legal codes so that they can be more rational and fairer. The MPC has never been adopted whole by the states, but it nonetheless has had a profound influence on American criminal law in many states, and judges sometimes refer to it in their decisions.

All of this means that there are different crimes in different states and that the same crime may be defined very differently in two different states. To make things more complicated, even if an offense is defined the same way in two different states, the courts in each one may interpret

the statute differently based on their own legal precedents. Because there are so many different sources for criminal law, it can be very difficult to determine what the law is in any given case. All of this makes American law a very complex set of rules that requires highly trained professionals to interpret and apply. This is one of the reasons why lawyers get paid so much money; the law is complex, and *nothing* is straightforward in it. It's also the reason why I cannot simply tell you what the law is in this chapter. It's simply too diverse, and there are too many different legal codes. We must account for these different factors when examining the law, and the law will look different depending on the state you're in and even depending on the judge you are assigned.

THE "INGREDIENTS" (ELEMENTS) OF CRIME

LEARNING OBJECTIVE

2.2 List and describe the three elements of crimes.

Despite the complications in American criminal law, the laws in every state have a similar structure, and (almost) all crimes have the same basic elements. With only a few exceptions, all criminal offenses have two fundamental components: an *actus reus* (a guilty act) and a *mens rea* (a guilty mind), and some crimes have a third factor: *causation*. Therefore, in most cases, we can break crime down, legally speaking, into a simple equation:

$$\text{ACTUS REUS} + \text{MENS REA} + (\text{CAUSATION}) = \text{CRIME}$$

As we will see, there are some important exceptions to this formula, but for the moment, we can stick with it. We will discuss each of these aspects of the legal construction of crime in turn.

Actus Reus

The first requirement of a crime is that there must be a "guilty act." A criminal must *do something* to commit a crime. Usually this means that a criminal must move her body of her own free will and do some sort of harm. If an individual passes out and is then moved onto private property, then she hasn't trespassed. Similarly, if I only contemplate killing a person but don't act on it, I haven't committed a crime. We don't punish somebody for doing something against her will, and we don't punish people who simply think about committing a crime. As silly as it sounds, to be a criminal, one must *act* in an unlawful way.

While it is obvious that one must do something to commit a crime, there are many crimes where the *actus reus* is more ambiguous, and pinning down the criminal act is a matter of interpretation. The *actus reus* of murder is usually easy to determine, as it is for other more straightforward sorts of offenses. **Inchoate crimes** are crimes where a person has not actually hurt somebody but will probably do so in the future. These crimes include solicitation, conspiracy, and attempt. For these offenses, the *actus reus* can be simply saying certain words to

another person, such as asking a prostitute to exchange money for sex. Making an agreement with somebody else to commit an offense with another person can be the *actus reus* of conspiracy. However, the acts that compose many other crimes are unclear. For example, when has one committed the crime of *attempted murder*? While aiming a gun at another, pulling the trigger, and missing your target (what is sometimes called a “completed attempt”) is clear, other acts that might be attempted murder are not so clear. For example, if I earnestly write in my diary that I want to kill another person, describing my plan in detail, have I attempted to murder somebody? What about if I buy a gun with the idea that I want to kill somebody but have yet to do anything else? Have I committed attempted murder? The lines of what constitutes a criminal act can sometimes be less clear than we imagine.

In the 2002 science fiction movie *Minority Report*, the police, aided by the power of psychics, are authorized to arrest somebody for “future crimes,” crimes that this person will carry out in the future. Inchoate crimes are reminiscent of this film. These criminals have yet to hurt anybody when they are arrested, but they are probably going to do so in the future. The *actus rei* of solicitation, attempt, and conspiracy are harmless on their own. After all, agreeing with another person to murder a third person is not the same as murdering her, and it’s possible that one or both conspirators will back out of their plan before anybody is hurt. A man who solicits a prostitute has not “done the deed,” though he probably will. A person who buys a gun and drives to her ex-lover’s house may kill the lover, or she may decide to go home instead. When the police are allowed to arrest an individual for an inchoate crime, they can stop a crime before anybody is hurt, but this also raises the likelihood that a person who is ultimately harmless will be punished.

The law punishes actions, not failures to act. That is, in most cases, we do *not* punish an individual for not helping another person in need, no matter how easy it might be to do so. The law doesn’t require that we help others, only that we don’t hurt them. In 1997, Jeremy Strohmeyer, a 20-year-old from Long Beach, California, murdered a 7-year-old girl, Sherrice Iverson, in the women’s restroom in a Nevada casino. His friend, David Cash Jr., observed the attack from the next stall but did nothing to stop it. Instead of rescuing the girl, Cash left the bathroom and went for a walk. After the body was discovered and Strohmeyer was arrested, Cash was unmoved. As he put it, “I’m not going to get upset over somebody else’s life. I just worry about myself first. I’m not going to lose sleep over somebody else’s problems” (Zamichow, 1998). Despite demands from Iverson’s family that Cash be prosecuted, there were no grounds for charging him, as the law did not criminalize doing nothing. Unless you have a legal duty to act, for example, if you were a cop or a lifeguard, a failure to act is not an *actus reus*. In response to cases like these, some states have passed “good Samaritan” laws (including Nevada, which passed a law after Iverson’s murder), which are meant to encourage people to help others if they can do it safely. But the general rule remains that it is not a crime to do nothing when one could have prevented a crime from happening (Dressler & Garvey, 2015).

Mens Rea

The other main element of a crime is the *mens rea* or culpable mental state. Most, though not all, criminal statutes spell out the required mental state that must accompany the *actus reus*. The most

common form of *mens rea* is intent (as in “intentional homicide”), but there are many others: recklessness, negligence, and so on. One thing to keep in mind, however, is that each of these terms has a special legal meaning that is often differs from the way we use these terms in everyday life.

There could be any number of different *mentes reae*, and some laws don’t even include an explicit *mens rea* when they define an offense. Some statutes are very specific, such as Texas’s kidnapping law, which states, “A person commits an offense if he intentionally or knowingly abducts another person,” while others are quite vague or use terms that we *never* use in our ordinary life. Massachusetts describes malicious damage in this way: “Whoever destroys or injures the personal property, dwelling house or building of another in any manner or by any means not particularly described or mentioned in this chapter shall, if such destruction or injury is willful and malicious,” be guilty of malicious damage.

The following are some of the most common ones, *mentes reae* that are found in American criminal law.

Intent

To do something intentionally is to knowingly and willingly do it. The criminal wants to produce a certain outcome and acts to bring that result. A person who sees another standing in front of her, pulls out a gun, aims it, and pulls the trigger is almost always acting intentionally, unless there are some very strange circumstances surrounding the shooting, such as a mistaken belief that the gun is only a toy. Unless the court has compelling reasons to think otherwise, we usually intend the normal consequences of our actions.

Recklessness

This second form of *mens rea* refers to a crime where an individual did not want to cause harm but acted so dangerously that she made it very likely that something bad would happen. The technical legal language describes reckless behavior as a “*gross deviation* from the standard of conduct that a law-abiding person would observe in the actor’s situation” (Hall, 2008, p. 63, italics added). An individual who fires her gun into the air in celebration is being reckless, as the bullet will eventually come down and could hurt someone. The shooter knew this was a possible result of her action—even if she did not wish to hurt anyone when she pulled the trigger. It is reckless to drive drunk, to speed, and to throw rocks from an overpass onto a busy freeway. While people who are reckless are not usually punished as severely as people who intentionally commit crimes, crimes of recklessness are usually considered serious.

Negligence

It is often difficult to distinguish negligence from recklessness, and it’s sometimes a bit of a guess as to which applies to a case. When a person has acted negligently, she did not know that she was doing something wrong or dangerous but *should have known* that she was. In fact, any reasonable person would have known that the actions were risky. As Oregon’s criminal code defines it, criminal negligence occurs when

a person fails to be aware of a substantial and unjustifiable risk that the result will occur or that the circumstance exists. The risk must be of such nature and degree that the

failure to be aware of it constitutes a gross deviation from the standard of care that a reasonable person would observe in the situation. (ORS § 161.085, 2017)

A person who *genuinely* believes that there is nobody below her window and drops a brick without looking is negligent. If she thought somebody could be there but did not check, she was reckless. It is perhaps fair to describe negligence as a form of “criminal stupidity”—negligent persons aren’t bad; they are simply behaving in a way that is so thoughtless and careless that they ought to be punished.

Often the difference between recklessness and negligence is unclear and hinges on the beliefs of the person who committed an offense at the time that she acts—something that is extremely difficult to know. To be reckless requires not only that the individual be aware of the risks in her behavior but also that she does not wish to hurt anybody, while to be negligent requires that she be unaware of the risk. A person who truly believes that the house is empty before setting it on fire is negligent if somebody is killed, but a person who suspects that there *may* be somebody in the house when she strikes the match is reckless when her victim perishes. This may sound like splitting hairs, but in cases where an accident causes another to be hurt or killed, the accused’s awareness can mean the difference between a lengthy prison term and a relatively short one. Moreover, if the prosecutor cannot prove in court that the defendant was aware of the dangers of her actions, the jury may elect to convict the defendant, but only for a lesser crime with a *mens rea* of negligence.

Other *Mentes Reae*

While intent, reckless, and negligence are the most common forms of *mens rea*, criminal statutes can specify any number of different *mentes reae* with greater or lesser specificity. For example, a statute can use the term *malicious* as a *mens rea*. Other legal codes might use antiquated terms like *wicked*, *fraudulently*, or *wantonly* for their offenses, leaving judges to figure out what they mean in a modern context. As a rough guide, the portion of the statute that refers to the mental state of the alleged person who committed an offense is usually the *mens rea* of the offense. Some *mens rea* terms may sound strange or use out-of-date language (such as depraved heart murder), and it is usually up to the courts to determine what they mean and how to apply them in a modern context.

Strict Liability

Most criminal offenses have an *actus reus* and a *mens rea* that are explicitly stated in the legal statute. However, this is not always the case. Some laws fail to mention a *mens rea* and leave it up to the courts to figure out what is appropriate for the crime. Others, however, do not require any *mens rea* for the individual to be prosecuted. To use one example from the South Carolina criminal code (“Carrying fire on lands of another without permit”),

It shall be unlawful for any person to carry a lighted torch, chunk or coals of fire in or under any mill or wooden building or over and across any of the enclosed or unenclosed lands of another person at any time without the special permit of the owner of such lands, mill or wooden building, whether any damage result therefrom or not. (SC Code § 16-11-160, 2012)

Notice that the law does not say anything about intent, negligence, and so on—all that matters is that you were carrying a lighted torch. Laws like this, laws without a *mens rea* component

to them create a different form of criminal liability, known as **strict liability**. Other examples of **strict liability offenses** are statutory rape laws (that is, the crime of having consensual sex with a minor) as well as many laws regulating the sale of alcohol to minors. Under strict liability, individuals can be punished for violating the law independent of whether they were reckless, negligent, or acting intentionally. All that matters is that they committed the *actus reus* of the crime.

The rationale behind strict liability offenses is that individuals who participate in risky sorts of activities accept a higher standard of responsibility for their conduct than those who don't. That is, if you want to sell alcohol, mess around with explosives, use torches, or engage in extramarital sex, you understand that the state won't accept any excuse for your behavior if you accidentally violate the law. The lawmakers believe that saying "I didn't know that the girl was underage, and she looked like a grownup to me" is a cop-out in these circumstances—and it gives the statutory rapist an easy excuse later when he gets caught. People who run liquor stores have an economic interest in not knowing the age of their customers and would probably consciously decide to remain ignorant about it if they thought that they could get away with it. While most strict liability offenses are misdemeanors, some, like statutory rape, are felonies, and those who committed an offense can end up being imprisoned for a long time independent of whether they knew they were breaking the law at the time.

Causation

The final element of a crime is *causation*. The individual's act must have caused actual harm. For example, an attacker's bullet must have caused the death of the victim for the suspect to be charged with murder. If the victim was already dead, then it is obviously not murder. Not every crime requires causation (for example, possession of a controlled substance does not), but for those that do require a specific result, such as homicide, there must be a causal link between the *actus reus* and the outcome. While this may sound obvious, determining the cause of death can be difficult, and despite what you may have seen on TV, forensic medicine is not an exact science.

Not only must the criminal act cause the outcome, but it must also have been the *proximate cause* of the outcome. If a man strikes another with a baseball bat, and the person he struck dies in the hospital a few days later, he caused the victim's death. However, if in fact the cause of death was gross malpractice on the part of the hospital staff, which failed to adequately treat the wound and left it open to infection, then it is not so clear that the attacker is truly responsible for his victim's death. In criminal law, proximate causes are those actions that make a person criminally responsible for the outcome, usually the death of a victim. In some cases, there are many different causes for a result, but the prosecutors must determine who is responsible. One helpful way to think about it is to say that every proximate cause is a cause, but not every cause is a proximate cause.

A good example of the difference between cause and proximate cause is to be found in *Kibbe v. Henderson* (1976). In this case, the two defendants met a third, named George Stafford, at a bar, and after getting him drunk, started to drive him home. Rather than taking him home, however, the two men robbed Stafford and left him by the side of a rural, two-lane highway. In his drunken state, Stafford wandered into the road and sat down. He was then hit by a driver going 10 miles per hour above the speed limit. While the two defendants caused Stafford's death, insofar as he would not have been by the side of the road if they had not robbed him, the

court ruled that the defendants were not the proximate cause of the victim's death and therefore they could not be prosecuted for killing him. There were too many other intervening factors—Stafford's own drunkenness, his decision to wander into the road, the driver's speeding—to hold the defendants responsible for his death. A person can cause a death without being legally responsible for it.

Homicide

One crime that has undergone a great deal of change in American legal history is criminal *homicide*. There is a big difference in how homicides are treated under the law, and homicide law varies a great deal from state to state. To use the example we discussed earlier, some states distinguish between first- and second-degree murder in their penal codes, but others don't. Some states distinguish between murder and manslaughter, while others don't. There is no single way to distinguish between different types of homicide, and the different legal approaches to murder in different states have a long history. They reflect broader changes in American law and politics, but they also reflect our views about the morality of human behavior: Which homicides are the worst, and which killings are a little more excusable—though still criminal?

Modern homicide law developed out of the common law—the laws created by English judges and passed on to America during the colonial period. Under the common law, murder was described as “the unlawful killing of another being with malice aforethought.” *Malice aforethought* (the *mens rea* of murder) meant many different things, but for simplicity's sake, we can say that the term was a lot like the modern notion of intent (Dressler & Garvey, 2015, p. 253). Thus, accidental killings were not considered murder, even if they were the result of negligence. In traditional common law, a person convicted of murder was automatically given the death penalty, unless there were extraordinary circumstances. Murder was not the only form of homicide that developed out of the common law, however. An exception was carved out for *manslaughter*, often described as intentionally killing “in the heat of passion.” While still intentional homicide, manslaughter was not considered as bad as traditional murder and did not merit the death penalty. Manslaughter referred to killings such as the murder of a cheating spouse or other situations where a person was presented with an immediate, highly emotional situation that caused her to kill another person. These killings weren't considered lawful but were not punished as severely as murder. Hence, the key distinction in homicide law under common law was between the killers who should be executed (murder) and those who should be allowed to live (manslaughter).

What we now know as degrees of murder, such as first- or second-degree murder, came later in the United States. In 1793, the Commonwealth of Pennsylvania resolved that all murder perpetrated by poison or by lying in wait, or by any kind of willful, premeditated and deliberate killings, shall be deemed murder in the first degree, and all other kinds of murder shall be murder in the second degree. (Keedy, 1949, p. 771)

A conviction for first-degree murder meant execution (Keedy, 1949). Neither second-degree murder nor manslaughter was considered a **capital offense**, that is, an offense that merited execution. This led to greater diversity in the law and restricted execution to the “worst” forms of homicide.

While many states followed Pennsylvania's lead in distinguishing between degrees of murder, not every state agreed with Pennsylvania's way of formulating this distinction. There are several different ways that states have sought to distinguish between degrees of murder. Some states distinguish between first-degree murder and second-degree murder by describing first-degree murder as intentional homicide and second-degree murder as reckless homicide. Others distinguish them in different ways based upon what sorts of killings they deem to be worse than others. The point is that first-degree and second-degree murder are legal terms with different meanings in different states. You can look up your own state's criminal code online and discover how it classifies different forms of homicide.

One final element of homicide law is the *felony-murder rule*. This rule, inherited from the common law, says that a person can be convicted of murder if, in the act of committing a felony, she kills another person. This killing does not need to be malicious, intentional, or reckless for it to be murder. For example, if, in the middle of a kidnapping, the victim has a heart attack and dies, the kidnapper could be convicted of murder, even though in many senses, she did not kill the victim. If a person commits a felony and somebody dies as a result, it's usually murder, regardless of whether or not killing the victim was a part of the original plan.

CRIMINAL (IN)JUSTICE

LIFE IN PRISON FOR LOANING KEYS

Ryan Holle, a Florida man, was sentenced to life in prison without parole as an accomplice to murder, because he loaned his keys to friends who used his car to commit a burglary in 2003. When a woman was killed in the burglary, Holle was charged as an accomplice. Since the victim was killed during the commission of the robbery, Holle was charged with first-degree murder under the felony-murder rule, despite being miles from the killing. The prosecutor argued that Holle knew his friends were using his car to commit the robbery, and thus he bore responsibility for the girl's death. (As the prosecutor put it, "No car, no crime") (Liptak, 2007a). Before his trial, Holle rejected a plea bargain that would have given him a 10-year sentence, because he did not believe he was guilty of any wrongdoing. Holle's sentence was reduced to 25 years, and he is scheduled to be released in 2024.

Do you believe that it is fair to punish Holle so severely? If not, how much punishment would be appropriate in this case? Why? If he thought that there could be trouble during the burglary but still loaned the keys, would that affect your decision?

DEFENSES

LEARNING OBJECTIVE

2.3 List the three major categories of criminal defenses and the five specific defenses.

A *defense* in the law is anything that the accused uses to either get herself acquitted or have her punishment reduced by the court. There are three general categories of defenses, and under these are several different specific defenses. The first form of defense is known as a *failure-of-proof* defense. This defense simply means that the prosecution has failed to prove that the defendant committed the crime—that she is not guilty. The second category of defense is called a *justification*. This defense acknowledges that the defendant committed the crime but argues that she shouldn't be punished, because it was the right thing to do at the time. This would include *self-defense* and *necessity*. A third category of defense, *excuses*, acknowledges that the defendant committed the crime, but she should not be punished because she is not really to blame for her actions. An example of this is *insanity*.

Failure of Proof

The failure-of-proof defense simply states that the defendant is not guilty because the prosecutor failed to show beyond a reasonable doubt that the defendant committed the crime. To be more specific, however, the defendant argues that the prosecution did not show that she committed the *actus reus* with the required *mens rea*. The burden of proof is on the prosecution in a criminal trial. That means that the defendant is considered innocent until the prosecution has proven that she is guilty beyond a reasonable doubt. The defendant does not need to prove that she is innocent, merely that the prosecution did not show that she is guilty—which is why an acquitted defendant is found “not guilty” rather than “innocent” at trial.

Justifications

A justification defense asserts that the individual committed the crime, technically speaking, but should not be punished for her actions because, given the circumstances, they were the right thing to do. The most common examples of this are *self-defense* and *necessity*.

Self-Defense. Though it is usually the government's job to protect the innocent and get the “bad guys,” the law understands that the police cannot protect everybody all the time, and people sometimes need to act on their own when their safety is threatened. Hence, the law allows for individuals to use force to protect themselves in certain situations.

However, just because an individual believes that she has been threatened by somebody, this does not mean that she may automatically resort to force: There are some strict limitations on our right to self-defense. We do not live in the Wild West, where anybody can take the law into her own hands. Like all laws, the laws of self-defense vary from state to state, but here are a few common limitations placed on our right to self-defense:

1. *Last resort.* In most cases, you cannot use force in self-defense unless you've tried every other option. This means retreating when necessary. In most cases, if someone acts aggressively against you, you do not have the right to stand up to her in self-defense. You are obliged to be a grown-up and walk away from the conflict if it is possible. Only if that doesn't work and all other options are exhausted (you have “retreated to the wall” as the saying goes) are you allowed to use force in self-defense.

The exception to this rule is the *castle doctrine*. This doctrine says that persons need not retreat from their own home or similar locations if they are threatened.

2. *Proportionality*. A second limitation on the use of force in self-defense law regards the amount of force a person may use in self-defense. Deadly force may only be used when there is a reasonable fear that an individual will either be killed or seriously harmed by an attacker. A fistfight, for example, does not usually justify using a gun in self-defense, unless the defender fears for her life.
3. *Reasonable belief*. Individuals must reasonably believe that they are in immediate danger when they act in self-defense. A mere suspicion or fear that a person could hurt them is insufficient for self-defense.
4. *Nonaggressor*. Individuals may not claim self-defense if they themselves were aggressors in the encounter. If an individual initiated the violent encounter of her own free will, for example, if she attacked another person or mutually agreed to fight (so-called mutual combat), she cannot then claim to have acted in self-defense if she used force to protect herself against another.

Many states, particularly states that are more politically conservative, have begun to expand the right of self-defense. **Stand-your-ground laws** are laws that have been created to make it easier for a defendant to claim that she acted in self-defense. The common element of stand-your-ground laws is that they expand the castle doctrine beyond the confines of your home to any place where a person is lawfully allowed to be. Essentially, individuals are no longer required to retreat from any public place if they are threatened. If you can be there lawfully and somebody confronts you, you are not required to retreat and may legally use force against an aggressor. Among the biggest proponents of these laws is the National Rifle Association, which aggressively seeks to expand the scope of gun rights in the United States (Dionne, 2012).

On one level, stand-your-ground laws make sense: It seems weird that a person can threaten you in public, and you have a legal obligation to flee. However, these laws also make conflicts much more likely to become violent—a refusal to back down means that the situation can easily escalate, particularly if either individual is armed. Critics charge that these laws are a recipe for unnecessarily violent confrontations under the guise of self-defense. Others point out that the culturally entrenched fear of Black Americans means that they are more likely to be killed by people acting in self-defense if the restrictions on it are relaxed—one study of stand-your-ground laws showed a “quantifiable racial bias” in these laws (Ackermann et al., 2015). Further, it is usually possible to call the police and ask for their assistance in exercising your rights rather than using force against a person who is threatening you, especially in an era of cell phones. Like many aspects of criminal law, your views about individual rights, politics, and gun ownership are likely to shape your views about the importance of stand-your-ground laws.

WHERE DO I FIT IN?

Armed Students

Along with laws making it easier to use lethal force in self-defense, gun rights groups have aggressively promoted laws allowing college students to be armed and even to carry concealed weapons on campus. Proponents of “campus carry” laws argue that armed students would be better able to protect themselves from attacks such as the 2007 Virginia Tech shooting, when senior Seung-Hui Cho murdered 32 people and wounded 17. Rather than relying on campus security, an armed student body could better protect itself in an immediate and dire emergency, they argue. Different states have different laws on the issue. Some have state laws allowing armed students, including students armed with concealed weapons, but many states have no laws on the subject. Many public and private universities have campus rules banning armed students.

Critics argue that more guns on campus will not make students any safer and may make violence more likely, as armed students may draw their guns in a fit of anger. Critics also argue that the presence of armed students in a classroom could intimidate their peers and instructors, disrupting the learning environment, particularly when discussing controversial subjects. As one professor put it, “Many of us entered the profession without knowing that we would have to consider whether a student who is upset about his grade, uncomfortable with a lecture on black queer sexuality, or disagrees with our placing slavery and white supremacy at the center of American history might have a gun holstered on his waist” (Makalani, 2016). They argue that guns have no place in a learning environment.

This will surely continue to be an issue, as campus shootings are on the rise in the United States. According to one report, the number of shootings in the 2015–2016 school year was 243% higher than in 2001–2002. Leaving out the massacres at Virginia Tech and a mass shooting in Northern Illinois University in 2008, there has been a consistent increase in campus shootings over the past 15 years (Cannon, 2016). While these shootings are largely centered on states in the South, surprisingly more than half of the shooters were not students or employees of the college or university where they attacked, though most of the victims were students.

Do you support allowing students to carry concealed weapons on campus? Do you think this will increase violence on campus or decrease it? Would you feel differently about your classroom if you knew that one or more of your peers was carrying a gun? If so, how do you think it would change the classroom dynamics?

Necessity. The second major form of justification is *necessity*. A necessity claim means that the defendant was forced to break the law in order to prevent something worse. For example, if an individual is lost in the woods during a snowstorm and must break into a locked cabin to survive the cold, she can use this defense against a charge of breaking and entering (Schwartz, 2008). The difference between self-defense and necessity is that only property is damaged or taken in a case of necessity, while in self-defense, individuals are using force against another person to protect themselves. Also, in necessity, the harm prevented by breaking the law must be greater than the harm done by breaking the law, whereas in self-defense, if we are legitimately acting in self-defense, we could kill many people to save ourselves.

WHAT WOULD YOU DO?

Self-Defense and Joe Horn

Joe Horn was a 61-year-old (white) retiree living with his daughter in Pasadena, Texas, when he spotted two men robbing the house next door in November 2007. His neighbors were on vacation at the time of the incident. Horn picked up the phone and called 911 to report the incident. Here is the transcript of his conversation with the 911 dispatcher (iyarah, 2007):

Horn: He's coming out the window right now, I gotta go, buddy. I'm sorry, but he's coming out the window.

Dispatcher: Don't, don't—don't go out the door.

Mr. Horn? Mr. Horn?

Horn: They just stole something. I'm going after them, I'm sorry.

Dispatcher: Don't go outside.

Horn: I ain't letting them get away with this shit. They stole something. They got a bag of something.

Dispatcher: Don't go outside the house.

Horn: I'm doing this.

Dispatcher: Mr. Horn, do not go outside the house.

Horn: I'm sorry. This ain't right, buddy.

Dispatcher: You're going to get yourself shot if you go outside that house with a gun, I don't care what you think.

Horn: You want to make a bet?

Dispatcher: OK? Stay in the house.

Horn: They're getting away!

Dispatcher: That's all right. Property's not worth killing someone over, OK?

Horn: [curses]

Dispatcher: Don't go out the house. Don't be shooting nobody. I know you're pissed and you're frustrated, but don't do it.

Horn: They got a bag of loot.

Dispatcher: OK. How big is the bag ... which way are they going?

Horn: I'm going outside. I'll find out.

Dispatcher: I don't want you going outside, Mr. Horn.

Horn: Well, here it goes, buddy. You hear the shotgun clicking and I'm going.

Dispatcher: Don't go outside.

Horn: [yelling] Move, you're dead! [Gunshots]

An officer arriving on the scene saw Horn shoot the burglars in Horn's own front yard and that both burglars "had received gunfire from the rear." Both burglars were undocumented aliens with criminal records, neither carried guns (though one apparently had a sharp metal tool in his pocket), and both had died from gunshots in the back delivered by Horn.

What would you do if you were in Horn's position? Would you use your weapon to protect your neighbor's property? Should there be limits regarding your ability to use lethal force in self-defense? What should these limits be?

Source: iyarah. [2007, December 11]. *The complete Joe Horn 9-11 call.* YouTube. <https://www.youtube.com/watch?v=LLtKCC7z0yc>.

Excuses

When she uses an excuse defense, a defendant is saying that her acts were wrong, but for some reason, she shouldn't be punished. Given her situation, she isn't really to blame for her actions, because she isn't responsible for her behavior. The most common excuse defenses are *insanity* and *duress*.

Insanity

Even though we associate *insanity* with mental illness, the term itself is not used by professional psychologists. Insanity is a legal concept designed for criminal trials, not a term used by mental health professionals. (If you use the word *insane* in your psychology class to describe a person, you will probably get dirty looks from your professor.) The terms *insanity* and *mental illness* are meant to do different things. A person who is mentally ill needs treatment for her condition, whatever that may be. A person who is declared insane by a court of law is determined to not be responsible for her actions. You can be both mentally ill and insane, but you can also be mentally ill, even severely mentally ill, but not be considered legally insane.

For the most part, courts and legal experts (not psychologists) have developed the insanity defense. There are several different versions of the defense in criminal law, and they vary state by state (and have changed over time). The most common version of the insanity defense is called the *M'Naghten rule*, which was the very first one used in a court. (It was formulated during the trial of Daniel M'Naghten, a British man who murdered a civil servant in 1843.) The M'Naghten rule states that a person is *not guilty by reason of insanity* (sometimes abbreviated as NGRI) if at the time of the committing of the act, the party accused was laboring under such a defect of reason, from disease of mind, and 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.

Thus, to be declared insane under the M'Naghten rule, a defendant must not know that she should not have committed the crime. A person who suffers delusions, believing that her roommate is in fact an alien monster and then attacks her, is probably insane under this definition. However, if a person who is mentally ill murders an ex-lover out of a paranoid and delusional jealousy and then flees the scene of the crime, she is most likely *not* insane under this definition, because she knew that her acts were wrong. (Otherwise, she would not have fled.) The fact that it requires the defendant to believe that she was right makes the M'Naghten rule the most difficult form of the insanity defense to prove in a court of law.

The M'Naghten rule is not the only version of the insanity defense in American criminal law. A second formulation, the so-called *irresistible impulse* test, states that, alongside the M'Naghten rule, a defendant can claim insanity if she is unable to control herself because of her mental illness. Thus, a person could *know* an act is wrong but nonetheless be unable to stop herself from acting out. Finally, the broadest definition of insanity is the so-called *Durham Test*, which says that a defendant is not guilty by reason of insanity if the defense can show that the defendant's actions were "a product of mental disease or defect" (Dressler & Garvey, 2015). Different versions of each of these rules appear in different state penal codes around the country, although with somewhat different language in each state.

The insanity defense is not the only way that a court can consider a defendant's mental health in a trial—it is just the only way that a defendant can be acquitted because of her mental illness. If a defendant's condition is bad enough, a court can conclude that she is not competent for trial, meaning that the trial cannot go forward because the defendant cannot understand the charges against her. Other times, the defendant can claim to suffer from *diminished capacity*, claiming that her mental illness was so severe that she could not formulate the *mens rea* of an offense. For example, if a defendant believed that a police officer was in fact an alien, she could not form the *mens rea* required for the crime of intentionally killing a police officer (*Clark v. Arizona*, 2006). In other cases, the trial can go forward, and the defendant is declared *guilty but mentally ill*, referred to as GBMI. This means that the defendant will undergo psychiatric treatment along with punishment but is still guilty of the crime. Finally, a mentally ill person can be civilly committed, meaning that she is placed in a mental hospital for mental health care without having been convicted of a crime. (See Chapter 12 for more on this.) While many consider these options to be easier or preferable to normal imprisonment, involuntary commitment can be more restricting and last longer than would a traditional prison sentence.

REALITY CHECK

The Insanity Defense

Several high-profile cases involving defendants who claimed such a defense have given the insanity defense a bad reputation. Perhaps the two most famous are John Hinckley Jr., who attempted to assassinate Ronald Reagan in 1981, and Dan White, a San Francisco politician who killed two colleagues in 1978. Both successfully used the insanity defense in their cases. White notoriously used his intake of sugary foods as evidence of his insanity, a defense that was widely mocked as “the Twinkie defense.” Because of these cases, there was a great deal of backlash against the insanity defense, and many states either abolished it outright or highly restricted its use.

However, both of these cases are more complicated than they might first appear. Hinckley had claimed that his obsession with the actress Jodie Foster led him to try to kill the president. While he was acquitted of the charges against him, he was not set free. He was institutionalized in a mental hospital for 35 years as he underwent treatment, probably a longer term than he would have served had he been convicted of attempted murder. He was finally let out on supervised release in 2016 but forbidden to have contact with any of his victims, including Foster.

White's Twinkie defense was harshly attacked in the media, and many reported a false story that he had claimed that the sugary snacks led him to kill. In truth, White's lawyers had argued that he suffered from mental illness, and as part of this illness, his diet had changed. They did not claim that junk food made him into a killer. White was not acquitted of the killings but was convicted of the lesser offense of manslaughter rather than murder on account of his mental health challenges. He spent five years in prison and committed suicide in 1985, two years after his release.

Our views about the insanity defense are closely connected to our beliefs about mental illness more generally. A person who is skeptical about mental illness claims are unlikely to take the defense seriously. However, the more seriously you take mental health issues,

the more likely you are to take the insanity defense seriously. Despite our attitudes toward mental health issues, legal barriers are high for the insanity defense, and it is only rarely used—it is a difficult case to make in court, and juries as well as the general public are often skeptical about it (Hans & Slater, 1983).

Duress

In December 2004, a gang invaded the homes of two executives of the Northern Bank in Belfast, Northern Ireland, and held their families hostage. The gangsters demanded that the executives assist them in robbing their employers, or they would kill their loved ones (Caollai, 2010). The men obliged their captors, walking into the bank, essentially filling duffel bags with cash and then presenting them to the gang. Then, after the bank closed, the executives held the doors open for the robbers and allowed them to ransack the bank, clearing out as much cash and other forms of currency as they could get their hands on. After the robbers took the money, they fled the area while their accomplices released the hostages. Later, members of the terrorist organization known as the Irish Republican Army (IRA) were arrested for what is now known as one of the biggest robberies in that region's history—with a take of over \$33 million.

The executives essentially robbed the bank, but they weren't prosecuted because they acted under *duress*. Provided that the threat is both real and serious, a person cannot be prosecuted for criminal acts committed under duress. The law does not expect you to risk your life or the lives of others to avoid breaking the law. When you act under duress, you commit a crime against your will—you have no realistic choice in the matter.

There is one important limitation to the defense of duress, however. A defendant cannot use it as a defense for murder. Were a gun put to an individual's head and she were ordered to kill an innocent person, she could not then claim that she was forced to do it. This means that, practically speaking, the law requires you to die or face prosecution for murder in these cases. The fear is that, were duress accepted in such cases, people would too easily give in and commit the most horrible of crimes, figuring that they would not pay any price for their unwillingness rather than trying to escape. In addition, in many killings committed under duress, the killer put herself in the situation, such as by joining a gang. As one judge put it,

If duress is recognized as a defense to the killing of innocents, then a street or prison gang need only create an internal reign of terror and murder can be justified, at least by the actual killer. Persons who know they can claim duress will be more likely to follow a gang order to kill instead of resisting than would those who know they must face the consequences of their acts. (*People v. Anderson*, Supreme Court of California, 28 Cal. 4th)

While most criminal laws don't expect people to be particularly heroic, in cases like these, it's up to the individual to find a way out, and no excuses will be accepted for failing to do so.

SOME STATISTICS . . .

MENTAL ILLNESS IN THE CRIMINAL JUSTICE SYSTEM

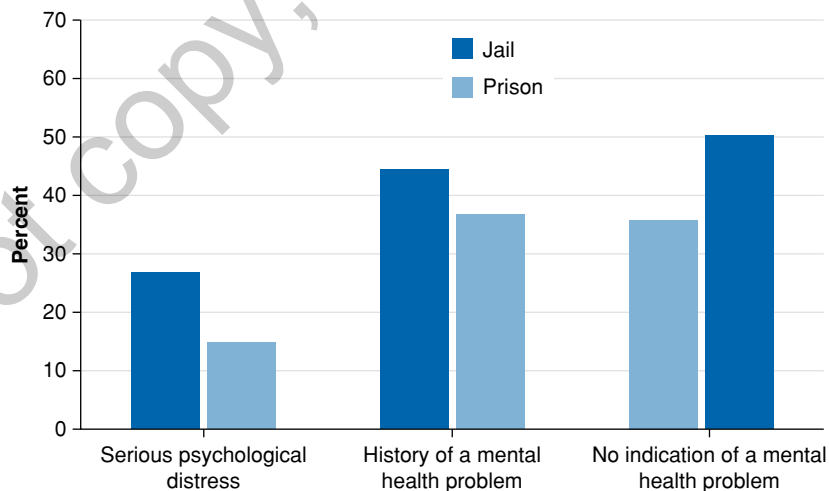
Very few defendants use the insanity defense, and even fewer use it successfully. The legal bar is just too high for many defendants to meet, even when they have serious mental illnesses. According to one study, *the insanity defense is invoked in less than 1% of all criminal cases and is only successful in about 26% of these cases* (Callahan et al., 1991). Research among the different insanity cases shows that those diagnosed with schizophrenia (60%) are most likely to get an insanity acquittal (Lymburner & Roesch, 1999). In one study of Georgia criminal courts, after the state created a “guilty but mentally ill” defense in 1981, there was an increase in the number of people convicted of crimes and a decrease in the number of people who committed an offense found not guilty by reason of insanity.

Georgia juries, when given the options of either finding a defendant “not guilty by reason of insanity” or “guilty but mentally ill,” were more likely to choose the latter, everything else being equal.

This low rate of insanity defense claims means that there are a *lot* of incarcerated people who have serious mental illnesses but not legally insane (see Figure 2.1). The Bureau of Justice Statistics points out that about half of all people incarcerated have some kind of mental health issue, either in their past or in recent history.

Some of these individuals receive counseling or medication while incarcerated, but many go undiagnosed and untreated. Mental health and criminal justice are often closely connected in the modern world, and imprisonment can often be an inadequate and expensive substitute for mental health care.

FIGURE 2.1 ■ Mental Health Status of People Incarcerated in Prison and Jail, 2011–2012



Source: Bronson and Berzofsky (2017).

CHAPTER SUMMARY

In this chapter, we have discussed various elements of substantive criminal law, but, except for the analysis of murder, we have largely stuck to its general features. We haven't gone into the details of what constitutes assault, robbery, possession of a controlled substance, and so on. Each of these offenses could have its own section in this chapter, as each type of crime has a history, shows a remarkable variation from state to state, and raises important questions about law, order, and justice. When looked at closely, each individual offense in modern criminal law is fascinating and raises unique questions about the contours of right and wrong.

Rather than going into these specific crimes, however, I have tried to give you the tools to look at these various laws and understand how to read them. That means that you should be able to examine a statute, separate its *actus reus* from the *mens rea*, and understand how to interpret these aspects of a statute. Because there is such a variety among the criminal laws in the different states, it would be too time-consuming to do more than this. If you want to know more about your own state's criminal code, you can probably find it online without much effort. But without understanding the broader legal context of these statutes, that is, the way that lawyers interpret and apply them, by themselves they are not very useful.

In this chapter, we have looked at the legal construction of crime: how law is seen by lawyers and legislatures. In the next chapter, we will begin to examine crime as it is seen by those who study it. There we will look at how biologists, psychologists, anthropologists, and sociologists examine criminal behavior, rather than lawyers. *Criminology* encompasses these scientific approaches to crime, though as we will see, criminology is a widely diverse field with many different perspectives on the nature and causes of criminal behavior.

REVIEW/DISCUSSION QUESTIONS

1. Go online and find your own state's criminal code. Pick one criminal offense and find the *mens rea* and *actus reus*. How did you know where they were in the law?
2. What are the main kinds of defenses? Do you think that each defense should be allowed in criminal law? Which ones might you want to get rid of?
3. Many Americans now question whether the law is applied fairly to different groups. How could the legal system be changed to give people more confidence in how it operates?

EXERCISE: ACTUS REUS AND MENS REA

Can you find the *actus reus* and *mens rea* of the crime?

Texas

§ 28.03. Criminal Mischief.

- (a) A person commits an offense if, without the effective consent of the owner:
- (1) he intentionally or knowingly damages or destroys the tangible property of the owner;
 - (2) he intentionally or knowingly tampers with the tangible property of the owner and causes pecuniary loss or substantial inconvenience to the owner or a third person; or
 - (3) he intentionally or knowingly makes markings, including inscriptions, slogans, drawings, or paintings, on the tangible property of the owner.

Vermont

§ 1101. Bribing public officers or employees

- (a) A person shall not, directly or indirectly, corruptly, give, offer or promise to an executive, legislative or judicial officer, or to any employee, appointee or designee of any executive, legislative or judicial officer, or to a person who is a candidate or applicant for an executive, legislative or judicial office, a gift or gratuity
- (1) with intent to influence his or her finding, decision, report or opinion in any matter within his or her official capacity or employment.

Alaska

§ 11.41.270. Stalking in the second degree.

- (a) A person commits the crime of stalking in the second degree if the person knowingly engages in a course of conduct that recklessly places another person in fear of death or physical injury, or in fear of the death or physical injury of a family member.

KEY TERMS

Actus reus (p. 45)

Capital offenses (p. 50)

Common law (p. 43)

Inchoate crimes (p. 45)

Mens rea (p. 48)

Stand-your-ground-laws (p. 53)

Strict liability offenses (p. 49)