1.0 Introduction

The need for law lies in the history of the human race. In early times, when the first humans appeared on Earth, laws were not needed, because there were few conflicts. However, when people began to live in groups, communities, and societies, laws became necessary. People are individuals, and their desires, needs, and wants differ from those of others. These differences cause conflict. Law became necessary as a means of social control, either to alleviate conflicts or to settle them in a manner most advantageous to the group.

As a means of social control, the enforcement of law in early rural societies was usually handled informally by friends, family, and neighbors who could criticize, correct, and ostracize those who violated the folkways and mores. In more urban areas, where interpersonal relationships were not close and people living next door to each other were strangers, disputes between people and violations of the rules of society had to be handled by more formalized law, law enforcement, and courts.

1.1 THE NATURE OF LAW

What is law? It is a question that invites a multiplicity of answers, because law is a broad concept with many definitions. For purposes of this book, law is defined as a group of rules governing interaction. Law is a set of regulations governing the relationships among people and between people and their government.
CHAPTER 1 Historical Background of Criminal Law

Law is nothing more than language. Just as a carpenter uses a hammer and saw, a lawyer’s tool is the ability to communicate. Communication is defined not merely as the conveyance of words but, more properly, as the conveyance of words with the ability to make oneself understood to the listener or reader. The more one studies the complexities of the law, the more one realizes the truth of the statement that language is the essence of law. The importance of being able to communicate in terms that mean the same thing to the parties on both the sending and receiving ends of a communication cannot be overemphasized. What the law strives for is uniformity of interpretation. The question then arises of why laws are not so pointedly written that everyone knows exactly what they mean. This question is answered relatively easily when the problem is seen from the proper perspective. Laws must be stable yet flexible enough to be interpreted so that they may be molded to fit the problems of a complex and changing society. If every law were written to cover only one specific situation, two major problems would arise. First, the number of laws would increase many times over, because each law covers too specific a subject, a weakness seen in the civil law systems in France and Germany. Second, many of these laws would become obsolete so quickly that legislatures would spend most of their time repealing them. However, when laws can be interpreted flexibly, they can be read to include new and unexpected situations as they arise.

The U.S. Constitution operates on the same principle, and we use that document to illustrate this point. The framers of the Constitution could not foresee the problems of the twenty-first century. If the Constitution had been prepared only for the problems of 1789, it would have collapsed many years ago. It could not function today, because the problems of society in the twenty-first century are not the same as the problems encountered by those who framed the Constitution in the eighteenth century. Thus, the Constitution was purposely drafted to be stable and yet flexible in the sense that it might be capable of interpretation in light of contemporary problems.

Any number of contemporary problems can be used to illustrate this point. Let us consider a few. At one time, the federal government’s right to regulate commerce between the states was limited to prohibiting the erection of such barriers as tariffs. Georgia could not prevent Florida from shipping chickens to Georgia merely to protect Georgia chicken farmers. However, certain related commerce problems arose. States were unwilling to prevent certain abuses to members of the labor force; as a result, our federal labor laws came into being. Congress cited the commerce clause of the Constitution as authority for these acts. The U.S. Supreme Court upheld the labor laws so that today wages, working conditions, and hours are regulated. This problem could not have been foreseen by the framers of the Constitution.

Years ago, segregation was believed to be supported by the Constitution. However, as a result of the changing times and attitudes of the people, in 1954, segregation was found to be in opposition to the Constitution. Finally, before 1963, the right to counsel, found in the Bill of Rights, was believed to apply only to federal courts and federal cases. However, in the now-famous Gideon case, the right to counsel applies to state courts and state criminal cases as well. The same document was used; it was the times that had changed.
1.2 DEFINITION OF CRIME

Criminal law is only a small part of the entire legal field. If a state statute requires two witnesses for a valid will, having only one witness renders the will invalid, but does not result in criminal charges. A crime may be defined as a public wrong. It is an act or omission forbidden by law for which the state prescribes a punishment in its own name. What this means is that a crime must be a wrong against the public, not merely a wrong against a particular individual. There are many laws, in many jurisdictions, governing the rights and duties of people in their relationships to others. However, only those violations that wrong the public are considered criminal and make up the body of the substantive criminal law.

The determination as to whether a particular act is criminal or merely civil in nature is a function of the lawmaking body of each jurisdiction. In tribal times, this decision was made by the people. They considered “criminal” those acts that they believed injured the welfare of the entire community. Today, this function rests with the legislatures of the states.

Crimes differ from civil wrongs in many respects, but the primary reason is that the legislature says they differ. In other words, only a fine line distinguishes crimes from civil wrongs, and that line is drawn by the legislature, where and when that body so desires and within the limits of what the public will tolerate.

Crimes are prosecuted by the state in its own name. In a civil case, the action is instituted by the wronged individual. Persons convicted of crimes are punished by fines, imprisonment, or death, whereas defendants who lose civil cases are usually ordered to pay the injured party. A crime is a public wrong, whereas a civil wrong is private in nature, not involving the state as a party. Punishment is prescribed and must be prescribed for convictions of criminal acts, but there is no set amount of damages to which a wronged person is entitled in a civil suit. These are only a few of the major differences between crimes and civil wrongs (Table 1–1), differences that exist solely because of the legislature’s having attached the label crime to one act and not the other. This is not to say that the legislature has an either/or choice. The lawgivers may choose to declare a particular act both a crime and a civil wrong, as in the case of assault and battery. An act of this nature may be both criminally and civilly wrong, in which case the state may prosecute and the victim may proceed civilly. Both avenues are open, and the outcome in one does not determine the outcome of the proceedings in the other.

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<th>TABLE 1–1 Distinction Between Crimes and Civil Wrongs</th>
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<td><strong>Crimes</strong></td>
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<td>Public Wrong</td>
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<td>Prosecuted by the state in its own name</td>
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<td>Punished by fine, imprisonment, or death</td>
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<td>Punishment prescribed</td>
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Although this explanation is factually correct, it is somewhat mechanical and simplistic. Many other social and political, as well as legal, considerations affect legislative prescriptions of criminal and noncriminal wrongs. For example, the trier of fact (jury or judge in a nonjury trial) can consider a criminal conviction in a civil case against the same defendant. However, an acquittal in a criminal case may not be used by the defendant for his or her own benefit in a subsequent civil case. For example, on October 3, 1995, following a highly publicized and lengthy criminal trial, former football star O.J. Simpson was found not guilty of killing his ex-wife Nicole Brown Simpson and her friend, Ronald Goldman. The jury concluded the State of California had failed to prove his guilt beyond a reasonable doubt. The verdicts in the criminal case were neither admissible nor controlling in a subsequent civil trial, where a separate jury found Simpson “liable” for the deaths of Brown Simpson and Goldman and awarded damages of $8.5 million to Goldman's estate. The Brown family did not seek damages.

Likewise, if a civil case against a defendant ends before the criminal case begins, the outcome of the civil case may not be considered in the criminal case, regardless of who wins or loses in the civil case.

The purpose of the criminal law is twofold. First, it attempts to control human behavior. Failing this, the criminal law seeks to sanction uncontrolled behavior by punishing the law violator. Within the framework of criminal law, punishment may take one of three forms: fine, imprisonment, or death. The advantages, disadvantages, and effectiveness of imprisonment and death involve some of the most controversial social problems in society today. However, an in-depth study of these problems is beyond the scope of this book.

### 1.3 EARLY DEVELOPMENT OF CRIMINAL LAW

Criminal law is an offspring of personal vendetta. At some time in the development of each society, when one person injured another, it became the responsibility of the victim or the victim’s family to seek redress. The community in no way became involved. This led to the theory of retributive justice. The Code of Hammurabi, circa 2100 B.C., codified the rules that called for punishment to fit the crime: “An eye for an eye.” Eventually, despite the setback of the Dark Ages, societies began treating certain offenses as crimes against the sovereign, and the government began punishing individuals who committed offenses against the public. This practice became the keystone of modern criminal law.

During this developmental period, the law did not take the responsibility of the accused into consideration. That is, the law did not ask why a person had committed a crime or whether such individual was accountable for his or her actions. Defenses such as insanity, justification, excuse, intoxication, and infancy were not considered. The mere doing of the act was all that was required to show the commission of a crime. Today, of course, this is no longer true in most instances. The fact that a person commits a wrongfull act does not make that act criminal until the perpetrator is convicted because of the defenses that may bar conviction. These defenses are discussed in Chapter 6.

The key to the doctrine of responsibility is the legal approach to human psychology. The law is based on the assumption that people act of their own free will. Their
fate is not predetermined or predestined. Therefore, the law may hold people accountable for their actions. If the law accepted the concept of determinism, it would hold that people are not responsible for their conduct; everything that they do would be predestined, determined by their early environment and their genetic history. Individuals should not be on trial for their criminal acts, but rather fate should be on trial. This theory, for obvious reasons, would be completely unacceptable in any society as a legal theory. Many deterministic theories have been propounded throughout the history of criminal law; some have been either wholly or partially rejected. The great Italian sociologist Lombroso felt that he could predict criminality and guilt by measuring the accused's head, ears, nose, or some other area. Fortunately, this theory was rejected. In 1968, an Australian court acquitted a man charged with murder on the theory that he was born with imbalanced chromosomes and, as a consequence of this physiological deficiency, was destined to commit crimes for which he could not be held legally accountable. The defendant in this case had the support of several medical professionals. Shortly after the decision of this court, a commission was appointed in the United States to research the feasibility of applying this theory. Their conclusion was that there was no correlation between the existence of XYY chromosomes and criminality.

1.4 LEGAL SYSTEMS AND THE BEGINNING OF COMMON LAW

Two major legal systems prevail in nine-tenths of the civilized world: the common law and the civil law systems. The common law system is prevalent in England, its dominions, and North America; the civil law system is the predominant legal system of the civilized world. These systems had their beginnings in completely different ways.

The common law began as a result of the habits of individuals and the customs of groups. These habits and customs were so entrenched in society that they became the acceptable norms of behavior. When courts developed, violations of these customs produced the cases heard. The courts began recording their decisions, and judges looking for assistance started following previous court decisions when confronted with new cases. This procedure became known as stare decisis—the following of precedents. Thus, the customs of the common people became the source of the common law, the law of the common people.

The remainder of the world grew under a different system of law, the civil law. We can trace this system back at least as far as the Roman Empire, where laws were written and codified by the rulers of the "state" and imposed on the people. As seen later in this book, the law of the United States is a combination of common law and civil law. The two systems of law began at opposite ends of the legal spectrum. The common law was developed by the common people and was imposed on the rulers of the country. The civil law was developed by the rulers and imposed on the people. Of course, this is a highly simplified explanation of the development of the legal systems, but it serves as a useful frame of reference.
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1.5 COMMON LAW IN THE UNITED STATES

The English colonists who settled America brought with them a large part of the body of law to which they were accustomed—the English common law. As a consequence of this and their political dominance, this system predominated in the colonies with certain modifications—modifications caused by the feeling that certain English laws were oppressive and that it was these laws the colonists had come to America to escape.

Under the federal–state relationship established by our Constitution, each state in the United States is sovereign under a federal government. Consequently, each state is free to decide whether to select the common law system or the civil law system as the basis for its criminal law. The basic difference between the ways these systems operate is that under the common law, any act that was criminal under the old common law remains criminal today, even though it is not found in statutory form. Under the civil law, all crimes are statutory. In the absence of a statute, there can be no crime.

All American states have codified some or all of their criminal laws into legal codes. Today, such codes or statutes are the prevailing sources of criminal law, and they have, for the most part, replaced the common law. Although 38 states have abolished common law crimes, through legislative enactment of comprehensive new criminal codes, a few have enacted “reception” statutes, which provide that common law crimes continue to apply if a statute does not provide a punishment for the offense. Even in jurisdictions that have abolished the common law, reference is still made to the common law for definitional purposes. For example, the state of Georgia has abolished all common law offenses. The Georgia statutes make murder a crime, however, and explain the situations under which that crime may be charged. However, nowhere in Georgia statutes is the word murder defined. The Georgia statute reads, “A person commits the offense of murder when he unlawfully and with malice aforethought, either express or implied, causes the death of another human being.” Thus it is necessary to look to the common law for a definition of the term.

Today when most crimes are statutory, how significant is the distinction between the common law system and the civil or statutory law system? The common-law states have a distinct advantage in being able to reach back into the common law to find additional offenses that might not be covered by statute in their jurisdictions. Although this is a rare occurrence, these states have the power to look to the common law if an offensive act occurs that is not covered by statute. If the offense was punishable at common law, then it is punishable in those states today. One example of this occurred in Pennsylvania, when a defendant made numerous obscene telephone calls to the complainant, attempting to lure her into an adulterous relationship while suggesting “obscene” sex acts. Apparently, Pennsylvania had no statute governing this type of behavior, so the trial court looked to the common law and found a misdemeanor that in substance was defined as “contriving and intending to debauch and corrupt the morals of the citizens.” The court invoked this offense and convicted the defendant. The conviction was affirmed on appeal. Pennsylvania has
since enacted a statute criminalizing this behavior as harassment and stalking by communication or address. This conviction could not have been obtained in a jurisdiction that had abolished the common law offenses if there were no statute making this type of conduct criminal.

Any number of offenses that are the constant subject matter of law enforcement investigation today were unknown to the common law. The inventive genius of the criminal mind, accompanying the various stages of historical, industrial, informational, and sociological development, has created new antisocial conduct against which society needs protection. Legislatures, in response to these new pressures, established new offenses by statute. The list of legislatively established crimes could go on here for a number of pages, and we examine many of them in this book. For an example of legislative response, note that embezzlement, as discussed in Chapter 10, was created by statute and was not a common law crime.

The federal judiciary has no power to exercise common law jurisdiction. This comes about not by choice, but by mandate. The federal government has only certain enumerated powers. This means that it can exercise only those powers that have been granted to it by the people. The people have given Congress the power to enact laws but not to adopt the common law. Therefore, the federal judiciary can exercise authority only over crimes enacted by Congress. However, the federal judiciary, like the states, must look to the common law for definitions to aid in interpreting federal laws.

To illustrate, one of the elements of the common law crime of larceny (see Chapter 10) requires that the thief intend to deprive the rightful owner/possessor of the property (steal). Congress created a crime of larceny when property was taken from a federal installation. The statute made no mention of requiring an intent to steal. The defendant was hunting on a military reserve and came across large brass shell casings that he thought were abandoned and unwanted by the military. He put them in his truck and was later arrested for larceny. He argued that he had no intent to steal because he mistakenly believed the casings had already been abandoned and that no one else wanted possession. The U.S. Supreme Court said that when the word larceny is used in the federal statute and Congress did not specifically and forcefully eliminate a common-law element, the crime must be interpreted to include the common-law elements, including the intent to steal. The defendant’s conviction was reversed.

**DISCUSSION QUESTIONS**

1. John has committed an act that under the common law of England would be criminal. The same act is not made criminal by any statute of any state or by federal statute. Can such an offense be prosecuted successfully in the federal courts or in your state? Why or why not?
2. In the study of criminal law, why is it essential to understand the significance of the common law and its effect on the law of the United States?
3. What is meant by the following statement: “The Constitution must be stable yet flexible”?
4. Of what significance is the concept of responsibility with regard to the criminal law today?
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GLOSSARY

civil law system One of two major legal systems in the world. All laws are codified and originate with the government.
civil wrong Private suit between individuals, usually for money damages. This type of case does not involve the government.
common law One of two major legal systems in the world. It developed out of the customs and habits of the people and is the cornerstone of most of the law in the United States.
communication Essence of the language of the law. It is the ability and skill to ensure that the sender and receiver understand the same thing.
Constitution Basic governing document of the United States. It is the foundation for our federal legal system and for the relationship between the federal government and the states.
crime Public wrong, act, or omission forbidden by law for which the state prescribes a punishment in its own name.

ENDNOTES

1. For example, in State v. Dobbins, 167 N.E. 2d (Ohio 1960), the court noted that an “enlightened society” enacts laws in anticipation of new social ills, and in that case found an assault statute to apply to consensual but unacceptable sexual conduct between the defendant and a minor child.
4. In State v. Palendrano, 293 A.2d 747 (Superior Ct. of N.J. 1992), the court demonstrated this principle by holding there was no crime in New Jersey that equated with the common law offense of being a “common scold.”